No. 08-1977

United States Court of Appeals for the Fourth Circuit

The Real Truth About Obama, Inc., *Plaintiff-Appellant*

v.

Federal Election Commission and
United States Department of Justice, *Defendants-Appellees*

Appeal from the United States District Court for the
Eastern District of Virginia, Richmond Division

Petition for Rehearing En Banc

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I. Introduction: The Panel Decision Conflicts With Supreme Court and Fourth Circuit Decisions.

Under Federal Rule of Appellate Procedure 35(b)(1)(A), en banc reconsideration is required because the panel decision conflicts with decisions of the **United States Supreme Court**—*Winter v. Natural Resources Defense Counsel*, 129 S. Ct. 365 (2008) (preliminary injunction standard); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (same); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL-II*") (campaign-finance law); *McConnell v. FEC*, 540 U.S. 93 (2003) (same); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*") (same); and *Buckley v. Valeo*, 424 U.S. 1 (1976) (same)—and decisions of **this Court**—*United States v. Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003) (overruling panel precedent); *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008) (campaign-finance law); *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*") (same); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (*"CAN-II*") (same)—so en banc consideration is necessary to secure and maintain uniformity of the Court's decisions. *See infra*.[1]

[1] RTAO challenged the following as unconstitutional under *Leake*, *WRTL-II*, and other listed precedents: (**1**) 11 C.F.R. § 100.22(b) (defining non-"magic words" communications as "express advocacy"); (**2**) 11 C.F.R. § 100.57 (converting donation into regulable "contributions" where made in response to solicitations to "support or oppose" candidates); (**3**) FEC PAC-status policy; and (**4**) 11 C.F.R. § 114.15 (redefining *WRTL-II*'s "appeal to vote" test, 127 S. Ct. at 2667).

II. Introduction: The Panel Decision Conflicts with Other Circuits' Decisions on Exceptionally Important Issues.

Under Federal Rule of Appellate Procedure 35(b)(1)(B), en banc reconsideration is required because the panel decision involves the following questions of exceptional importance in which the panel decision conflicts with (indicated) authoritative decisions of other United States Courts of Appeals that have addressed the issues:

(**1**) Whether "express advocacy" requires "magic words," *McConnell*, 540 U.S. at 126, 216-19 (equating "express advocacy" with "magic words"), i.e., "express words of advocacy of election or defeat, such as 'vote for,'" *Buckley*, 424 U.S. at 44 n.52. *See Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 664-65 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651, 664 (6th Cir. 2004);

(**2**) Whether post-*McConnell*, 540 U.S. 93, the express-advocacy construction must still be imposed on vague and overbroad campaign-finance regulations (that are readily susceptible to such a construction) to save them from unconstitutionality. *See Carmouche*, 449 F.3d at 662-65; *ACLU of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004); *Anderson*, 356 F.3d at 663;

(**3**) Whether the "unambiguously campaign related" principle recognized and employed in *Buckley*, 424 U.S. at 43-48, 76-81, and *Leake*, 525 F.3d at 281-83, 287-88, is (a) a threshold requirement that campaign-finance regulations defining

regulable communications and contributions must meet prior to application of the appropriate level of scrutiny and therefore (b) the basis for recognized implementing tests for determining the "regulable, election-related speech" considered in determining "major purpose" for "political committee" status, *id.* at 287. *See FEC v. Furgatch,* 807 F.2d 857, 860 (9th Cir. 1987); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 & n.10 (11th Cir. 1982); *FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380, 391 & n.23 (D.C. Cir. 1981). *See infra*.

III. This Decision Conflicts With U.S. Supreme Court Decisions on Preliminary-Injunction Standards.

This appeal is about an issue-advocacy group ("RTAO"),[2] seeking to engage in highly-protected issue advocacy, being captured by FEC regulations that are clearly unconstitutional under binding precedents, especially *Leake*, 525 F.3d 274, and *WRTL-II*, 127 S. Ct. 2652. *See infra*. RTAO needed a preliminary injunction to vindicate its rights. In issue-advocacy cases, *WRTL-II* mandated speedy, low-burden, speech-friendly resolution,[3] which means that preliminary injunctions

[2] The panel's labeling of RTAO as an "'issue-*adversary*'" group is erroneous. *See* Slip op. at 3 (emphasis added).

[3] This requires an "objective" test as to a communication's content, not any intent-and-effect test, with "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation," and with "the benefit of any doubt [going] to protecting rather than stifling speech." *WRTL-II*, 127 S. Ct. at 2666 (Roberts, C.J., joined by Alito, J.). This opinion ("*WRTL-II*"), states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

should be available. Even the *WRTL-II* dissent said that preliminary injunctions were the necessary solution to keep "the as-applied remedy . . . [from] prov[ing] . . . '[i]nadequate' because such challenges cannot be litigated quickly enough to avoid being mooted," and so being "unworkable." *See* 127 S. Ct. at 2704.

That means that preliminary injunctions must be realistically available under standards that favor free speech. Although RTAO devoted considerable briefing to the mandatory speech-protective standards to be applied in issue-advocacy cases,[4] the panel decision ignored the First Amendment context entirely, actually creating a *heightened* standard for RTAO to meet instead of the speech-protective one required. *See infra*. In doing so, the panel decision conflicts not only with *WRTL-II*, but also with the preliminary-injunction standards established in *Winter*, 129 S. Ct. 365, and *Gonzales*, 546 U.S. 418. *See infra*. This Court should grant a rehearing en banc to clearly establish that its speech-protective precedents (and the First Amendment) mandate speech-protective preliminary injunction standards.

While the panel recited *Winter*'s "likely" test,[5] it created an enhanced burden

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[4] RTAO devoted Part II of its *Reply Brief* to asking the panel to "clarify that where issue advocacy is involved preliminary injunction standards must be speech-protective," and it set out ten ways in which free-speech cases were unique in this context and entitled to special protections, along with controlling authority.

[5] "'A plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the merits, that he is *likely* to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" Slip op. at 5 (*quoting*, *Winter*, 129 S. Ct. at 374)

based on the panel assertion of the *complexity of campaign-finance law*:

> Notwithstanding the numerous Supreme Court opinions on the subject, the regulation of speech related to political campaigns remains a difficult and complicated area of law that is still developing. And *for that reason*, as well as the *stringent* preliminary injunction standard, [RTAO] bears a heavy burden in showing its likelihood of success.

Slip op. at 10 (emphasis added).[6]

The notion that RTAO had a "heavy burden" of persuasion because of the panel's perception that the law is complex was erroneous on multiple levels. First, the law is *not* complex. If the panel had simply followed *Leake*, it would have found the law simple and clearly establishing that RTAO had likely merits success and irreparable harm and should have received the injunction. *See infra*.

Second, no speaker may be penalized because the law is (or a panel perceives it to be) complex. There is no authority for such a notion, and the panel cites none. The notion that free speech may be denied because *courts* have obscured the simple mandate that "Congress shall make no law . . . abridging the freedom of

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(emphasis added).

[6] The burden here is less "stringent" than the panel asserts. The panel relies heavily on the requirement of a "*clear showing*," *id.* (emphasis added), to make the "likely" requirement more stringent. But "clear showing" applies *only* to whether there is "*likely*" merits success and irreparable harm. It does not elevate "likely." And in issue-advocacy cases, burdens are lowered, not raised. *See*, *e.g.*, *WRTL-II*, 127 S. Ct. at 2667 ("give the benefit of any doubt to protecting rather than stifling speech"), 2667 (defining issue advocacy as providing information about candidate without inviting vote), 2669 n.7 ("in a debatable case, the tie is resolved in favor of protecting speech"), 2674 ("benefit of the doubt to speech, not censorship").

speech" is contrary to the First Amendment.

Third, even if applicable law *were* complex, any doubts about its constitutionality work to the advantage of the *speaker*, not the censor. *See supra* at note 6. "Complexity" would be an argument for a *lowered*, not heightened, preliminary injunction burden on speakers in First Amendment cases.

Fourth, any heightened burden, even if it were appropriate, ultimately falls on the FEC, not RTAO, because in free-speech cases "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzalez*, 546 U.S. at 428. When *Winter* spoke of a "clear showing," 129 S. Ct. at 376, it cited *Mazureck v. Armstrong*, 520 U.S. 968 (1997), which held that the "clear showing" applies to "the burden of persuasion," *id.* at 972. That burden of persuasion, *in a First Amendment case*, requires the *government*, even at the preliminary injunction stage, to prove that it has a compelling interest to justify its regulation, that any regulation is narrowly tailored, and that any proferred less-restrictive means are inadequate to serve a compelling interest. *See Gonzalez*, 546 U.S. at 428.[7] *See also WRTL-II*, 127 S. Ct. at 2664 (government bears burden of proving constitutionality of all applications of campaign-finance law); *United States v. Playboy Entm't Group, Inc.*, 529 U.S.

[7] Under *Leake*, the government *could not* have met its strict-scrutiny burdens because, inter-alia, the government has no compelling interest in regulating activity that is not unambiguously campaign related and *Leake* has already set out the narrowly tailored means of regulation in this area. *See infra*.

803, 816 (2000) (First Amendment cases require government to demonstrate constitutionality); *Colorado Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1145 (10th Cir. 2007) (where election laws affect free speech, government bears the burden of proving them constitutional as applied to speakers). The panel erroneously ignored the First Amendment context in placing a heightened burden on RTAO.

Also, in a First Amendment case, irreparable harm is "'inseparably linked'" to the likelihood of success on the merits, *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002) (citation omitted), so the irreparable harm determination cannot be made until it has been determined whether the plaintiff has a likelihood of success on the merits. *Id. Bason*'s holding on this point is unchanged by *Winter*, which was not a First Amendment case. The panel decision again failed to take notice of this First Amendment requirement in setting out its standards. As shall be shown, RTAO had likely success on the merits and so irreparable harm automatically followed.

IV. This Decision Conflicts With Fourth Circuit and U.S. Supreme Court Decisions.

The panel decision conflicts with *United States v. Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003), *Leake*, 525 F.3d 274, *VSHL*, 263 F.3d 379, and *CAN-II*, 110 F.3d 1049. These are considered seriatim.

Prince-Oyibo. The panel decision conflicts with circuit precedent forbidding a later panel from overruling (explicitly or implicitly) the decision of a prior panel—only the en banc court or the Supreme Court can overrule a panel's precedent. *See*, *e.g.*, *Prince-Oyibo*, 320 F.3d at 497-98; *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 n. 2 (4th Cir. 2002); *United States v. Chong*, 285 F.3d 343, 346 (4th Cir. 2002); *Potomac Elec. Power Co. v. Electric Motor & Supply, Inc.*, 262 F.3d 260, 264 n. 2 (4th Cir. 2001), *Mentavalos v. Anderson*, 249 F.3d 301, 312 n.4 (4th Cir. 2001).[8]

Yet the panel decision implicitly overruled *Leake*, *VSHL*, and *CAN-II* as to whether "express advocacy" requires "magic words," and it implicitly overruled *Leake*'s holdings as to the controlling unambiguously-campaign-related principle and its implementing tests controlling which communications are regulable (only magic-words, express-advocacy "independent expenditures" and appeal-to-vote "electioneering communications") and which groups are subject to imposed PAC status (only those who primarily engage in regulable, election-related speech). *See infra.* Since *Leake* was decided *after McConnell*, 540 U.S. 93, and *WRTL-II*, 127 S. Ct. 2652, no intervening Supreme Court decision overruled *Leake*.

[8] When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc or the Supreme Court. *United States v. Simms*, 441 F.3d 313, 318 (4th Cir. 2006); *Booth v. Maryland*, 327 F.3d 377, 383 (4th Cir. 2003); *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004).

***Leake*.** *Leake* showed the simplicity of what the present panel considered "a difficult and complicated area of the law." Slip op. at 10. The panel acknowledged that Appellant ("RTAO") "relied heavily on" *Leake*, slip op. at 8, but ignored the following uncomplicated First Amendment analysis from *Leake*.

First, *Leake* held that *Buckley*, 424 U.S. 1, "cabin[ed]" campaign-finance law with the unambiguously-campaign-related principle:

> The *Buckley* Court therefore recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by demarcating a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley,* campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular . . . candidate." *Id.* at 80. This is because only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable. *Id.*

Leake, 525 F.3d at 281.[9]

Second, *Leake* held that any "corruption" interest applies to "only those actions that are 'unambiguously related to the campaign of a particular . . . candidate.'" *Id.* (citation omitted).

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[9] *See also New Mexico Youth Organized v. Herrera*, No. 08-1156, slip. op. (D. N.M. Aug. 3, 2009) (following *Leake* in holding that "unambiguously campaign related" requirement is threshold test); *Center for Individual Freedom v. Ireland*, 613 F. Supp. 2d 777 (S.D. W. Va. 2009) (same); *Broward Coal. of Condos., Homeowners Ass'ns. and Cmty Orgs. v. Browning*, No. 08-445, 2009 WL 1457972 (N.D. Fla.) (same); *National Right to Work Legal Defense and Education Fund v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah, 2008) (same).

Third, *Leake* held that only two types of communications are "unambiguously campaign related" (and so regulable), (1) magic-words express advocacy and (2) appeal-to-vote "electioneering communications":

> The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that uses specific election-related words. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Id. at 283 (*quoting WRTL-II*, 127 S. Ct. at 2667).[10]

Fourth, *Leake* held that *Buckley* employed the unambiguously-campaign-related principle to limit the scope of groups on which "political committee" ("PAC") status may be imposed to those having "the major purpose" of nominating or electing candidates, with "major purpose" determined as an "empirical judgment" based solely on "*regulable*, election-related speech":

> *Buckley* applied this "unambiguously campaign related" requirement when analyzing the permissible scope of political committee regulation. Since designation as a political committee often entails a significant regulatory burden—as evidenced by the requirements imposed by North Carolina—the Court held that only entities "under the control of a candidate or *the* major purpose of which is the nomination or election of a candidate" can be so designated. *Id.* at 79 (emphasis added). . . . *Buckley*'s articulation of the permissible scope of political committee regulation is best understood as an *empirical judgment as to whether an organization primarily engages in regulable, election-related speech*.

[10] Only these two types are regulable because they strike the right "balance between the legislature's authority to regulate elections and the public's fundamental First Amendment right to engage in political speech." 525 F.3d at 284.

Leake, 525 F.3d at 287 (emphasis added).

Applying *Leake*'s precepts to the present case is simple. The FEC regulations and policy at issue are all unconstitutional for regulating First Amendment activity that is *not* unambiguously campaign related. They are unconstitutional because they lack a compelling interest (being beyond those unambiguously-campaign-related activities to which a corruption interest may attach).

The FEC's alternate express-advocacy definition (11 C.F.R. § 100.22(b))[11] is unconstitutional because it is *not* one of the only two types of communications that *Leake* said may be regulated, *supra*, and because *Leake* held that express advocacy *requires* magic words (such as "vote for"), 525 F.3d at 282. The present panel upheld § 100.22(b) because its "language corresponds to the definition of the functional equivalent of express advocacy given in [*WRTL-II*]." Slip. op. at 11. This analysis is fundamentally flawed as inconsistent with U.S. Supreme Court prece-

[11] While 11 C.F.R. § 100.22(a) is a proper magic-words, express-advocacy test, the challenged provision at § 100.22(b) provides this alternate definition:

> Expressly advocating means any communication that . . . (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

dent. *WRTL-II*'s appeal-to-vote test, 127 S. Ct. at 2667, applies *only* to communications that already meet the federal definition of "electioneering communications." *See Leake*, 525 F.3d at 282. Ignoring this clear statement, the panel tried to distinguish *Leake* as dealing with a statute subject to "*multiple interpretations*" and uphold § 100.22(b) for requiring that there be "*only*" one. Slip. op. at 12. This ignores *WRTL-II*'s clear holding that the appeal-to-vote test is inapplicable beyond the electioneering-communication context. *See WRTL-II*, 127 S. Ct. at 2669 n.7 ("[T]est is only triggered if the speech meets the brightline requirements of [the "electioneering communication" definition] in the first place."). In fact, *WRTL-II* acknowledged that the test would be "impermissibly vague" if *not* cabined by the electioneering-communication definition. *Id.* And a non-magic words express-advocacy definition conflicts with the clear statements in *McConnell* and *Buckley* that, where the "express advocacy" test applies, it is a "magic words" test.[12]

And the constitutional flaw of *both* the FEC's alternate express-advocacy defi-

[12] In *McConnell*, the Court expressly and repeatedly equated "express advocacy" with "magic words" (such as "vote for"). *See*, *e.g.*, 540 U.S. at 126, 191-93 217-19. *McConnell*'s "functionally meaningless" statement about the express-advocacy line, *id.* at 193, did not *eliminate* "express advocacy" as a category of regulated speech requiring "magic words," but rather *McConnell* used that analysis to *add* regulation of "electioneering communications" to regulation of magic-words express advocacy. In *WRTL-II*, the Justices *unanimously* equated "express advocacy" with "magic words." *See* 127 S. Ct. at 2669 n.7 (Alito, C.J., joined by Alito, J.), 2681 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in judgment), 2692 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

nition (11 C.F.R. § 100.22(b)) and its rule (11 C.F.R. § 114.15) purporting to implement *WRTL-II*'s appeal-to-vote test, 127 S. Ct. at 2667, is starkly illustrated in this case by the fact that the FEC and district court differed as to the interpretation of an ad at issue. The FEC said that "Change" contained no "appeal to vote" under *WRTL-II* and so was not a prohibited "electioneering communication" under § 114.15 (and so also was not "express advocacy"). The district court disagreed, leapfrogging whether it was a prohibited "electioneering communication" under § 114.15 to declare it prohibited *express advocacy* under § 100.22(b). *See* JA–112 n.15.[13]

The FEC's PAC-status enforcement policy does not follow *Leake*'s formula for determining major purpose (being instead a forbidden we-know-it-when-we-see-it test). Further development of the merits is impossible here,[14] but the forego-

[13] The panel decision's statement that "the district court recognized also that [RTAO] had not made a showing that its proposed communications would violate the regulations as written," slip op. at 15, is erroneous in light of the district court's holding that both communications contained express advocacy. The district court and panel both rejected all of the FEC's similar standing arguments as to lack of harm. And what the district court actually said was that RTAO was "free" to speak so long as it complied with challenged regulations, JA–126, which it considered constitutional and so posing no harm.

[14] While space precludes development here, 11 C.F.R. § 100.57 conflicts with *Buckley*'s application of its unambiguously-campaign-related principle to narrow the definition of what constitutionally may be considered a regulable "contribution" in a way that precludes the FEC's rule permitting mere donations to be converted to "contributions" based on vague criteria inconsistent with *Buckley*'s and *Leake*'s unambiguously-campaign-related principle.

ing is sufficient to prove (1) that the FEC could not have met its burden of proving that these provisions are constitutional as applied to RTAO (2) and that the panel decision clearly conflicts with *Leake*.

***VSHL & CAN-II*.** The panel decision also conflicts with *VSHL,* 263 F.3d 379, which held that the express-advocacy test allows regulating only "'spending that is unambiguously related to the campaign of a particular . . . candidate' and not regulating 'issue discussion and advocacy of a political result,'" *id.* at 383 (*quoting Buckley,* 424 U.S. at 79-80). And *VSHL* expressly recognized that the express-advocacy test, where it applies, requires magic words, and it held 11 C.F.R. § 100.22(b) unconstitutional. *Id.* at 329. Nothing in *McConnell* affected this holding, and *Leake* confirmed it. The panel decision also conflicts with *CAN-II*, which held that express advocacy requires magic words. 110 F.3d at 1062.

V. This Decision Conflicts With Other Circuits' Decisions.

As outlined in Part II, the panel decision conflicts with other Circuit decisions that understand that "express advocacy" requires "magic words" and that the express-advocacy construction must still be imposed on provisions that are vague and overbroad for reaching beyond activities that are unambiguously campaign related). *See infra*. In addition, 11 C.F.R. § 100.22(b) ("expressly advocating") *itself* is inconsistent with the decision on which it is purportedly based, i.e., *Furgatch*, 807 F.2d 857, as interpreted by this Court. In *CAN-II*, this Court con-

strued *Furgatch*'s alternate "express advocacy" test as requiring "*an explicit directive to voters to take some course of action*," 110 F.3d at 1054,[15] which is absent from the FEC's express-advocacy definition, dooming § 100.22(b) (and it also dooms § 114.15 because *WRTL-II*'s appeal-to-vote test requires an explicit "appeal" that urges the hearer "to vote," which is absent from § 114.15).

VI. En Banc Reconsideration Is Required to Repair Created Confusion.

While *Leake* provided clarity to campaign-finance law, the panel decision saw the field as "difficult and complicated," slip. op. at 10, and introduced confusion. En banc review should be granted because "[p]articipants in the political process must be able to rely on firmly established legal standards. . . . The very least courts owe . . . is a clear understanding of the ground rules . . . . [And they] must not create uncertainty." *Miller v. Cunningham*, 512 F.3d 98, 99 (4th Cir. 2007) (Wilkinson, J., dissenting from denial of rehearing en banc).

Respectfully submitted,

/s/ James Bopp, Jr.

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[15] The Ninth Circuit now agrees. *See California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("we presumed express advocacy must contain some explicit *words* of advocacy").

Certificate of Service

I hereby certify that on August 17, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE REAL TRUTH ABOUT OBAMA, INC.,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION; UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

CAMPAIGN LEGAL CENTER; DEMOCRACY 21,

Amici Supporting Appellees.

No. 08-1977

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, Chief District Judge.
(3:08-cv-00483-JRS)

Argued: May 13, 2009

Decided: August 5, 2009

Before NIEMEYER, Circuit Judge, C. Arlen BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation, and Joseph F. ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Senior Judge Beam and Judge Anderson joined.

COUNSEL

ARGUED: James Bopp, Jr., BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellant. Harry Jacobs Summers, FEDERAL ELECTION COMMISSION, Washington, D.C., for Appellees. **ON BRIEF:** Michael Boos, LAW OFFICE OF MICHAEL BOOS, Fairfax, Virginia; Richard E. Coleson, Clayton J. Callen, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellant. Thomasenia P. Duncan, General Counsel, David Kolker, Associate General Counsel, Adav Noti, FEDERAL ELECTION COMMISSION, Washington, D.C.; Gregory G. Katsas, Assistant Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Dana J. Boente, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Michael S. Raab, Eric Fleisig-Greene, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, Washington, D.C., for Appellees. Donald J. Simon, SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP, Washington, D.C., Fred Wertheimer, DEMOCRACY 21, Washington, D.C., for Democracy 21, Amicus Supporting Appellees; J. Gerald Hebert, Paul S. Ryan, Tara Malloy, THE CAMPAIGN LEGAL CENTER, Washington, D.C., for Campaign Legal Center, Amicus Supporting Appellees.

OPINION

NIEMEYER, Circuit Judge:

The Real Truth About Obama, Inc. ("Real Truth") commenced this action against the Federal Election Commission

and the Department of Justice, challenging the constitutionality of three Federal Election Commission regulations—11 C.F.R. §§ 100.22(b), 100.57(a), and 114.15—and a Federal Election Commission enforcement policy under the First and Fifth Amendments. Real Truth alleged that these regulations chilled its right to disseminate information about presidential candidate Senator Obama's position on abortion. Real Truth seeks, among other things, a preliminary injunction prohibiting enforcement of these provisions.

The district court denied Real Truth's motion for a preliminary injunction, finding that (1) Real Truth did not show that it was likely to succeed on the merits as to any of its challenges; (2) Real Truth would not be irreparably harmed if the preliminary injunction were not granted; and (3) issuing the injunction would be against public policy.

On appeal, we apply the Supreme Court's standard for preliminary injunctions stated in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374-76 (2008), and conclude that the district court did not abuse its discretion in denying the motion for a preliminary injunction. Accordingly, we affirm.

I

Real Truth, a Virginia nonprofit corporation organized on July 24, 2008, as an "issue-adversary '527' organization" under § 527 of the Internal Revenue Code, commenced this action six days after its incorporation to challenge three Federal Election Commission regulations—11 C.F.R. § 100.22(b) (defining when a communication *expressly advocates* the election or defeat of a clearly identified candidate); 11 C.F.R. § 100.57(a) (defining campaign contributions to include funds "*to support or oppose* the election of a clearly identified Federal candidate" (emphasis added)); 11 C.F.R. § 114.15 (regulating corporate and labor organization funds expended for electioneering communications)—and a Federal Election

Commission enforcement policy issued for determining Political Action Committee ("PAC") status using "the major-purpose test." Real Truth alleged that these provisions are "unconstitutionally overbroad" and "void for vagueness" in violation of the First and Fifth Amendments.

In its complaint, Real Truth asserted that it intends to publish audio advertisements stating candidate Obama's position on abortion and to circulate a fundraising letter to raise money to publish the "well-documented facts about Obama's views on abortion." While Real Truth asserted in its complaint that it is not a PAC and did not advocate the election or defeat of Senator Obama, it alleged that it

> is chilled from proceeding with these activities because it reasonably believes that it will be subject to an FEC and DOJ investigation and possible enforcement action potentially resulting in civil and criminal penalties, based on the fact that the FEC has deemed 527s to be PACs, based on [the challenged regulations].

Included in the relief that Real Truth seeks is a preliminary injunction enjoining the enforcement of the challenged provisions against Real Truth's "intended activities" and against others similarly situated.

The district court denied Real Truth's motion for preliminary injunction by order dated September 11, 2008, and Real Truth filed this interlocutory appeal, contending that the district court abused its discretion in denying its motion for a preliminary injunction.

II

A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief *pendente lite* of the type available after the trial.

See In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 524-26 (4th Cir. 2003); *see also De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220-21 (1945). Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by "a clear showing" that, among other things, it is likely to succeed on the merits at trial. *Winter*, 129 S. Ct. at 376; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). We review the grant or denial of a preliminary injunction for abuse of discretion. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (2006); *In re Microsoft Litig.*, 333 F.3d at 524-25.

In its recent opinion in *Winter*, the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction, stating that the plaintiff must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter*, 129 S. Ct. at 374. And all four requirements must be satisfied. *Id.* Indeed, the Court in *Winter* rejected a standard that allowed the plaintiff to demonstrate only a "possibility" of irreparable harm because that standard was "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-76.

Before the Supreme Court's decision in *Winter*, the standard articulated in *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), governed the grant or denial of preliminary injunctions in the Fourth Circuit. *See also, e.g., Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811-14 (4th Cir. 1991); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359-60 (4th Cir. 1991). In *Blackwelder* we adopted "the balance-of-hardship test," which begins with balancing the hardships

of the parties. 550 F.2d at 196. We stated, "the first step in a Rule 65(a) preliminary injunction situation is for the court to balance the 'likelihood' of irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant." *Id.* at 195. If that balancing results in an imbalance in the plaintiff's favor, we then determine whether the plaintiff "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Id.* In *Blackwelder*, we specifically held that the district court erred when it demanded that the plaintiff "first show 'likelihood of success' in order to be entitled to preliminary relief." *Id.*

Similarly, in *Rum Creek Coal*, we reiterated that the "hardship balancing test applies to determine the granting or denial of a preliminary injunction." 926 F.2d at 359. We held that only after the district court concluded that the balance of the likelihood of the irreparable harm to the parties tilted in favor of the plaintiff was it to turn to the merits of the case to determine whether the plaintiff "show[ed] grave or serious questions for litigation." *Id.* at 363 (internal quotation marks omitted).

Our *Blackwelder* standard in several respects now stands in fatal tension with the Supreme Court's 2008 decision in *Winter*.

First, the Supreme Court in *Winter*, recognizing that a preliminary injunction affords relief before trial, requires that the plaintiff make a clear showing that it will likely succeed on the merits at trial. 129 S. Ct. at 374, 376. Yet in *Blackwelder*, we instructed that the likelihood-of-success requirement be considered, if at all, only *after* a balancing of hardships is conducted and then only under the relaxed standard of showing that "grave or serious *questions* are presented" for litigation. 550 F.2d at 195-96 (emphasis added); *see also Rum Creek Coal*, 926 F.2d at 363. The *Winter* requirement that the plaintiff clearly demonstrate that it will *likely succeed* on the

merits is far stricter than the *Blackwelder* requirement that the plaintiff demonstrate only a grave or serious *question* for litigation.

Second, *Winter* requires that the plaintiff make a clear showing that it is likely to be irreparably harmed absent preliminary relief. 129 S. Ct. at 374-76. *Blackwelder*, on the other hand, requires that the court *balance* the irreparable harm to the respective parties, requiring only that the harm to the plaintiff outweigh the harm to the defendant. 550 F.2d at 196. Moreover, *Blackwelder* allows that upon a strong showing on the probability of success, the moving party may demonstrate only a *possibility* of irreparable injury, *id.* at 195 –- a standard explicitly rejected in *Winter*, 129 S. Ct. at 375-76.

Third, in *Winter*, the Supreme Court emphasized the public interest requirement, stating, "In exercising their sound discretion, courts of equity should pay *particular regard* for the public consequences in employing the extraordinary remedy of injunction." 129 S. Ct. at 376-77 (emphasis added) (internal quotations marks and citation omitted). Yet, under the *Blackwelder* standard, the public interest requirement "does not appear always to be considered at length in preliminary injunction analyses," even though it must always be considered. *Rum Creek Coal*, 926 F.2d at 366-67; *see also Blackwelder*, 550 F.2d at 196.

Fourth, while *Winter* articulates four requirements, each of which must be satisfied as articulated, *Blackwelder* allows requirements to be conditionally redefined as other requirements are more fully satisfied so that "grant[ing] or deny[ing] a preliminary injunction depends upon a 'flexible interplay' among all the factors considered . . . for all four [factors] are intertwined and each affects in degree all the others." 550 F.2d at 196. Thus, as an example, the court in *Blackwelder* observed:

> The two more important factors are those of probable irreparable injury to plaintiff without a decree

> and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; *and plaintiff need not show a likelihood of success*.

550 F.2d at 196 (emphasis added).

Because of its differences with the *Winter* test, the *Blackwelder* balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.

Thus, we review the district court's denial of the preliminary injunction under the *Winter* standard, considering in light of the stated requirements the district court's findings and holdings (1) that Real Truth is not likely to succeed on the merits; (2) that Real Truth will not be irreparably harmed if the injunction is denied; and (3) that the injunction requested would not be in the public interest.

III

In its complaint, Real Truth sought, as part of the relief requested, a preliminary injunction prohibiting the enforcement of 11 C.F.R. § 100.22(b) (defining the statutory term "expressly advocating"); 11 C.F.R. § 100.57(a) (regulating campaign contributions received in response to solicitations); 11 C.F.R. § 114.15 (regulating corporation or labor organization-funded "electioneering communications"); and the Federal Election Commission's policy statement regarding the analysis of PAC status. To support its position, Real Truth relied heavily on our recent decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008). In denying Real Truth's motion for a preliminary injunction, the district court found that Real Truth was unlikely to succeed on the merits because the statutory provisions that Real Truth

challenges are justified by *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny.

The district court concluded (1) that § 100.22(b) "is virtually the same test stated by Chief Justice Roberts in the majority opinion of [*FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007)]"; (2) that the "support or oppose" language in § 100.57 is not unconstitutionally vague because "these words have even been suggested by the Fourth Circuit as a proper standard to use, *see Leake*, 525 F.3d at 301"; (3) that § 114.15, regulating the permissible use of corporate and labor organization funds, "simply adopted the test enumerated in [*Wisconsin Right to Life*]" and therefore was not unconstitutionally overbroad or vague; and (4) that the "major purpose" test in the Federal Election Commission's policy statement draws its essence from court cases that determine whether an organization can be regulated by the Federal Election Commission as a PAC.

In determining whether the district court erred in concluding that Real Truth did not make a clear showing that it was likely to succeed, we begin by recognizing that some regulation of speech and political contributions related to campaigns for election is constitutional. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 115-21 (2003) (reciting history of campaign finance regulation and acknowledging that some regulation is necessary to "protect[ ] the integrity of our system of representative democracy"). Supreme Court precedent allows for the regulation of contributions to and expenditures by PACs that are narrowly defined as having "the major purpose" of expressly advocating "the election or defeat of a clearly identified candidate [for federal office]." *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976); *cf. Leake*, 525 F.3d at 287 (holding that a state campaign finance statute that defined PACs as those having "*a* major purpose," as distinct from "*the* major purpose," to expressly advocate was unconstitutionally overbroad). These opinions also allow for the regulation of corporations and labor unions' communications, prohibiting

them from using general funds to "expressly advocate" for or against the election of a candidate. *See, e.g.*, *Buckley*, 424 U.S. at 28 n.31; *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253 (1986). Although magic words such as "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat [and] reject" are sufficient to qualify such communications as express advocacy of a particular named official, *Buckley*, 424 U.S. at 44 n.52 (internal quotation marks omitted), a communication without the magic words may still be sufficient as the functional equivalent of the magic words and therefore may be regulated, but "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisconsin Right to Life*, 127 S. Ct. at 2667; *cf. Leake*, 525 F.3d at 283-84 (holding a North Carolina campaign finance statute unconstitutional where "[t]he very terms of [the] statute—including, but not limited to, 'essential nature,' 'the language of the communication as a whole,' [and] 'the timing of the communication in relation to events of the day' . . .— are clearly 'susceptible' to multiple interpretations").

Notwithstanding the numerous Supreme Court opinions on the subject, the regulation of speech related to political campaigns remains a difficult and complicated area of law that is still developing. And for that reason, as well as the stringent preliminary injunction standard, Real Truth bears a heavy burden in showing its likelihood of success. Any relaxation of its burden, for example to require that Real Truth show only a *possibility* that it will eventually prevail, would be inadequate. *See Winter*, 129 S. Ct. at 375-76.

When we compare the challenged provisions with those upheld by the Supreme Court, we reach the same conclusion reached by the district court that Real Truth has not, at this preliminary stage in the litigation, made a *clear showing* that it is likely to succeed on the merits at trial, even though we do not decide the merits nor intend to foreclose any outcome on the merits.

First, considering the definition of "expressly advocating" in 11 C.F.R. § 100.22(b), which describes the functional equivalent of the "magic words" specified in § 100.22(a), we cannot conclude that it is *likely* unconstitutional because the definition is facially consistent with the language in *Wisconsin Right to Life*. Section 100.22(b) provides:

> Expressly advocating means any communication that —
>
> * * *
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because —
>
> > (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> >
> > (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b). This language corresponds to the definition of the functional equivalent of express advocacy given in *Wisconsin Right to Life*. *See* 127 S. Ct. at 2667. In *Wisconsin Right to Life*, the Court stated that where an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," it can be regulated in the same manner as express advocacy. 127 S. Ct. at 2267; *cf. Leake*, 525 F.3d at 283-84 (holding a North Carolina campaign finance statute unconstitutional where the terms of the

statute that defined express advocacy were "clearly susceptible to *multiple interpretations*" (emphasis added) (internal quotation marks omitted)). And consistent with *Wisconsin Right to Life* and unlike the statute considered in *Leake*, § 100.22(b) cabins the application of the regulation to communications that "could *only* be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" (emphasis added) and where "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." By limiting its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*, § 100.22(b) is likely constitutional.

With respect to 11 C.F.R. § 100.57, Real Truth challenges as unconstitutionally vague the words "*support or oppose* the election of a clearly identified Federal candidate" (emphasis added) when used to identify regulated campaign funds. Section 100.57 defines as follows those monies that will be treated as contributions subject to regulations:

> (a) *Treatment as contributions*. A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received *will be used to support or oppose* the election of a clearly identified Federal candidate.

11 C.F.R. § 100.57(a) (emphasis added). Contrary to Real Truth's argument, however, we have expressly sanctioned the challenged language. In *Leake*, we noted that North Carolina "remains free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of one or more clearly identified candidates.'" 525 F.3d at 301. Accordingly, we conclude that Real Truth is not

likely to prevail on its challenge to § 100.57(a), although again we do not decide the ultimate merits of that issue here.

Real Truth also challenges as unconstitutionally vague 11 C.F.R. § 114.15, regulating corporate and labor organization funds expended for certain electioneering communications. That regulation provides:

> Corporations and labor organizations may make an electioneering communication . . . to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

11 C.F.R. § 114.15(a). The regulation also provides that "any doubt [concerning whether a communication is an appeal to vote for or against a clearly identified Federal candidate] will be resolved in favor of permitting the communication." 11 C.F.R. § 114.15(c)(3). Again, as with § 100.22(b), § 114.15(a) mirrors the language of *Wisconsin Right to Life* by limiting its application to communications that cannot be interpreted reasonably in any way other than as an appeal to vote for or against a clearly identified federal candidate. *See* 127 S. Ct. at 2667. In view of the fact that § 114.15(a) mirrors the language of *Wisconsin Right to Life*, we cannot conclude that Real Truth is *likely* to succeed on the merits in challenging this provision as unconstitutional.

Finally, Real Truth challenges the Federal Election Commission's failure to announce a specific major purpose test in its policy statements for enforcement contained at 69 Fed. Reg. 68056 (Nov. 23, 2004) and 72 Fed. Reg. 5595 (Feb. 7, 2007). The major purpose doctrine, as noted by the Federal Election Commission in its policy statements, "operates to limit the reach of the [Federal Election] statute in certain circumstances." 72 Fed. Reg. 5595, 5602. Thus, an organization (corporation or labor union) with activities that center around

something other than electing or defeating a candidate will never have *the* major purpose required by the statute even if it is one of several of the organization's major purposes. The major purpose test is intended to exempt from regulation organizations that expend or contribute money for express advocacy but do not have as the major purpose of their existence the election or defeat of a particular candidate. The Commission explained that "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." *Id.* at 5601. It is this allowance of a case-by-case analysis that Real Truth challenges as unconstitutionally overbroad.

The approach taken by the Federal Election Commission in this regulation, however, appears simply to be adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose of a particular organization's contributions. For example, in *Massachusetts Citizens for Life*, 479 U.S. at 249-51, the Court examined *the entire record* to conclude that the plaintiff did not satisfy "the major purpose" test. *See also Akins v. FEC*, 101 F.3d 731, 743 (D.C. Cir. 1996) (holding that "it is the purpose of the organization's disbursements, not of the organization itself, that is relevant"), *vacated on other grounds*, *FEC v. Akins*, 524 U.S. 11 (1998); *Shays v. FEC*, 511 F. Supp. 2d 19, 26-31 (D.D.C. 2007) (holding that FEC's choice to regulate § 527 groups by determining whether they qualified as political action committees on a case-by-case basis was neither arbitrary nor capricious); *cf. Buckley*, 424 U.S. at 79-80 (announcing "the major purpose" test but not defining how to determine the major purpose of an organization).

In view of the similarity of the approach taken by the Federal Election Commission in its policy statements and the positions taken by the courts, we cannot conclude that Real Truth has carried its heavy burden at this stage of the case of

clearly showing that it is likely to succeed on the merits with regard to the Commission's enforcement strategy.

To justify an injunction before trial on the merits, it is incumbent upon Real Truth to make a *clear showing* that it is *likely* to succeed at trial on the merits. Because of the close relationship between the text of the provisions challenged and binding court decisions, we cannot conclude that the district court erred in finding that Real Truth failed to meet that burden.

IV

In addition to the requirement of making a clear showing that it will likely succeed on the merits at trial, Real Truth was also required to make a clear showing that it was likely to suffer irreparable harm in the absence of the preliminary injunction. *See Winter*, 129 S. Ct. at 374-76.

The district court recognized that chilling speech constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). But it also found that Real Truth was free to disseminate its message and make expenditures as it wished, and its only limitation was on "contributions based on constitutionally permitted restrictions," which the district court determined "[did] not amount to enough harm to constitute irreparable harm."

While the district court's ruling regarding harm was, in effect, an extension of its conclusion that the restrictions were likely constitutional, the district court recognized also that Real Truth had not made a showing that its proposed communications would violate the regulations as written.

Regardless of whether the district court was correct in this regard, we conclude that it acted within its discretion in deter-

mining that any harm created by Real Truth's doubt about the legality of its intended fundraising and advertising was outweighed by the public interest identified by the Supreme Court in the enforcement of narrow restrictions on contributions to political candidates. *See McConnell*, 540 U.S. at 115-23 (noting the importance of the public interest in "combating the appearance or perception of corruption engendered by large [unregulated] campaign contributions"); *Mass. Citizens for Life*, 479 U.S. at 264 (noting that the regulations prevent "corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace"); *Buckley*, 424 U.S. at 29 ("[T]he weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling"); *Leake*, 525 F.3d at 284 (noting that underpinning Supreme Court campaign finance jurisprudence is a desire to strike "a balance between the legislature's authority to regulate elections and the public's fundamental First Amendment right to engage in political speech"). The district court also recognized that overruling, on a preliminary basis, regulations that apparently serve these objectives would not be "in the public interest," as required by *Winter*, 129 S. Ct. at 374, and would create a "wild west" of electioneering fundraising and communications. We cannot conclude that it abused its discretion in this regard.

Accordingly, we affirm the district court's order denying a preliminary injunction.

AFFIRMED