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 Or Rehearing En Banc

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Appellant ("RTAO") petitions for rehearing or rehearing en banc of the *Order on Remand* (Dkt. 82) "reissu[ing] Parts I and II of . . . [*The Real Truth About Obama, Inc. v. FEC*,] 575 F.3d [342,] 345-347 [(4th Cir. 2009) ("*RTAO*")], stating the facts and articulating the standards for the issuance of preliminary injunctions," and remanding this preliminary-injunction appeal. Loc. R. 35(a).

Argument

I. Introduction: The Panel Decision Conflicts With a U.S. Supreme Court Order and Decisions, Involves Questions of Exceptional Importance, and Conflicts With Other Appellate Decisions.

The U.S. Supreme Court granted certiorari to review *RTAO*, vacated the judgment, and remanded for reconsideration.[1] The reasons for rehearing relate to (1) reissuing preliminary-injunction standards merely restating *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), without considering the appealed *application* of those standards and cognizable governmental interests in the *First Amendment* context and (2) *remanding* (under inadequately stated standards) when

[1] The order states:

> [T]he petition for writ of certiorari is granted. The judgment of the above court is vacated with costs, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Citizens United v. Federal Election Comm'n*, 558 U.S. ___ (2010) and the Solicitor General's suggestion of mootness.

Order List, 559 U.S. _____ (April 26, 2010).

Supreme Court precedent demands speedy resolution of such cases without expenditure of considerable time and resources. This Court should retain the case, order supplemental briefing addressing the non-moot remanded issues,[2] set out the applicable preliminary-injunction standards in the First Amendment context, and decide the remaining two issues of this appeal in RTAO's favor.

Rehearing is required because the panel decision conflicts with the Supreme Court's remand order, which clearly envisioned *this* Court reconsidering the appeal, *see infra*, and with the Supreme Court's holding that *government* bears the burden of demonstrating the constitutionality of speech restrictions, even in the preliminary-injunction context. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (government bears strict-scrutiny burden of justifying speech regulation)[3]; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (assigning preliminary-injunction burden to government in strict-scrutiny cases); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000)

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[2] The order to consider "the . . . suggestion of mootness" indicates no possible mootness of this *preliminary-injunction appeal*, which would not have received certiorari if moot (and is capable of repetition yet evading review). Rather, it addresses the Solicitor General's argument that *provisions held unconstitutional elsewhere* are moot: "With respect to . . . 11 C.F.R. 100.57 and 114.15, the petition . . . should be granted, the judgment . . . vacated, and the case . . . remanded . . . to dismiss these claims as moot." *Brief for the Respondents* at 25 (No. 09-724).

[3] This controlling opinion ("*WRTL-II*") by Chief Justice Roberts, joined by Justice Alito, states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

(First Amendment cases require government to demonstrate constitutionality). Fed. R. App. P. 35(b)(1)(A). This requirement was not imposed on the FEC by the district court. That failure was appealed to this Court, which also did not impose the required burden. These failures were set before the Supreme Court, which vacated this Court's judgment and remanded for reconsideration. This Court, by simply reasserting *Winter*'s standards without making the FEC bear its burden, may be viewed as not requiring what the Supreme Court requires. Rehearing is necessary to assert this requirement.

Rehearing is also required because remanding instead of deciding this *preliminary-injunction* appeal (in a case already appealed and having gone to the Supreme Court and back) violates the instructions of *WRTL-II*, 551 U.S. 449,[4] and *Citizens United v. FEC*, 130 S. Ct. 876 (2010),[5] that First Amendment cases are to be decided quickly without undue litigation burden. *See infra* Part III.

Rehearing is also required because this case involves questions of exceptional importance that have been decided differently by this and other appellate courts. Fed. R. App. P. 35(b)(1)(B). A first question is whether, in a First Amendment

[4] *WRTL-II* provided special rules for free-speech cases to prevent "litigation that constitutes a severe burden on political speech." 551 U.S. at 468 n.5.

[5] *Citizens United* expressly addressed the problems of "substantial time" and litigation "burden" in vindicating First Amendment rights as justifications for its decision to overrule *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990). *See Citizens*, 130 S. Ct. at 895-96.

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). By asserting solely the *Winter* language, this Court might be read to indicate that this preliminary-injunction standard is no longer viable.

A second question is whether "[d]eprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."). This Court's mere reassertion of *Winter* language in the First Amendment context might seem to indicate that such First Amendment preliminary-injunction holdings have no applicability in the Fourth Circuit.

A third question is whether First Amendment protections must be incorporated into the preliminary-injunction standards, not limited to merits consideration, so that, for example, the *government* bears the burden of justifying its speech regulations in preliminary injunctions. *Gonzales* requires this, *supra*, as do other states. *See Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1060, 1072-73 (10th Cir.

2001) (placing the burden on the government to justify its speech restrictions in a preliminary injunction hearing); *Pac. Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1231 (10th Cir. 2005) (in First Amendment challenge, government bears burden of establishing that content-based restriction will "more likely than not" survive strict scrutiny). By merely asserting the bare *Winter* factors, this Court might be read to imply that all other considerations don't matter in the Fourth Circuit, especially in light of the fact that this argument was a centerpiece of the appeal.

A fourth question is whether the enforcement efforts of agencies charged with regulating free speech require "extra-careful scrutiny from the court," *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981), because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," *id.* By merely restating the *Winter* factors, this Court neither addressed whether such agencies require special scrutiny nor applied it, though *Citizens United*, says that "[b]ecause the FEC's 'business is to censor, there inheres the danger that [it] may well be less responsive . . . to the constitutionally protected interests in free expression," 130 S. Ct. at 896.

II. The Supreme Court's Order and the Need for Clearly Articulated, Speech-Protective, Preliminary-Injunction Standards Require Reconsideration.

Central to the appeal and certiorari petition in this case has been the need for recognition and application of clearly-articulated, speech-protective preliminary-injunction standards. RTAO has consistently challenged *both* the applied preliminary-injunction *standards and cognizable interests in the First Amendment context* and the *denial* of preliminary injunction. The proper standards and cognizable interests in First Amendment preliminary-injunction decisions were raised in *Appellant's Brief* (Dkt. 22 at 15-19, 52-55), *Reply Brief* (Dkt. 53 at 6-17), and *Petition for Rehearing En Banc* (Dkt. 73 at 3-7) (denied). The issue of the proper standards for First Amendment preliminary injunctions was also presented squarely to the United States Supreme Court. In the Questions Presented in the *Petition for a Writ of Certiorari*, the first and second (of three Questions) addressed the inadequacy of the "standards" applied in both the district court and this Court. Only the third Question addressed whether RTAO had likely success on the merits and met the other preliminary-injunction standards. In RTAO's *Reply to Brief in Opposition*, RTAO devoted Part IV to the standards topic, with this heading: "Protective First Amendment Preliminary-Injunction Standards Are Required."

Thus, central to the Supreme Court's granting certiorari, vacating *RTAO*, 575

F.3d 342, and remanding this preliminary-injunction appeal for reconsideration was the need to consider both the application of proper *standards* in this First Amendment preliminary-injunction context and the preliminary-injunction denial. Merely reissuing Part II of the prior opinion, 575 F.3d at 345-347, stating the *Winter* standards without any hint of the heightened protections required in the First Amendment context does not address this need to state proper standards and what governmental interests are cognizable in such cases.

In its *Reply Brief* before this Court, RTAO devoted all of Part II to the topic "Speech-Protective Standards and Interests Must Govern." (Reply Br. 6-17.) While present space restrictions preclude reiterating all of that material, RTAO showed in ten ways how preliminary injunctions should be decided in First Amendment cases. That list is recalled here in truncated form.

It began with the requirement for a *presumption* in favor of free speech (Reply Br. 7), based on the mandate that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[6]

[6] This presumption clearly was not at work either in the district court or appellate opinions here where likelihood of success on the merits could not be found as to statutory provisions that have since been declared unconstitutional by other courts, *EMILY's List v. FEC*, 581 F.3d 1, 17-18 (D.C. Cir. 2009) (11 § C.F.R. 100.57 unconstitutional); *Citizens United*, 130 S. Ct. at 895 (11 C.F.R. § 114.15 an unconstitutional implementation of *WRTL-II*'s "appeal to vote" test, 551 U.S. at 469-70). The standard used by the district court and this court in failing to find any likelihood of success in challenging these provisions that, just a short time later, were held so blatantly unconstitutional that they are no longer enforced is clearly

Second, where the "status quo" is considered in a speech case, that status quo must be the state of the law *before* a speech restriction was put in place. (Reply Br. 8.)

Third, First Amendment protections must be incorporated into the preliminary-injunction standards, including the placing of the burden of persuasion on the government to justify its restriction, as described above. (Reply Br. 9-10.)

Fourth, where the unambiguously-campaign-related requirement recognized by *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), is at issue, the government must always meet this threshold burden before proceeding to the controlling level of scrutiny. (Reply Br. 10.)

Fifth, because strict scrutiny is the antithesis of deference or a presumption of constitutionality, no deference or favorable presumption must be afforded speech restrictions. (Reply Br. 11.) *Citizens United* undergirds this principle with its reaffirmation that the First Amendment is "[p]remised on mistrust of governmental power." 130 S. Ct. at 898.

Sixth, the necessary incorporation of First Amendment protections into prelim-

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inadequate. *See FEC Statement on the D.C. Circuit Court of Appeals Decision in* EMILY's List v. FEC (Jan. 12, 2010), http://www.fec.gov/press/press2010/20100112EmilyList.shtml, *Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (2010); *FEC Statement on the Supreme Court's Decision in* Citizens United v. FEC (Feb. 5, 2010), http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

inary injunction standards requires that, in determining the balance of harms and the public interest, courts must apply *WRTL-II*'s requirement that "'[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.'" *Center for Individual Freedom v. Ireland*, 613 F. Supp. 2d 777, 808 (S.D. W. Va. Feb. 12, 2009) (mem. op. granting prelim. inj.) (*quoting WRTL-II*, 551 U.S. at 474) (applying principle to consideration of public harm). (Reply Br. 12.)

Seventh, the "freedom of speech" presumption means that the FEC has no per se interest in restricting or regulating speech. "It is difficult to fathom any harm to Defendants [enforcement officials] as it is simply their responsibility to enforce the law, whatever it says." *Ireland*, 613 F. Supp. 2d at 808. (Reply Br. 12.)

Eighth, the fact that an issue-advocacy case may be filed near an election favors the plaintiff, not the defendant, in the preliminary injunction balancing because issue advocacy is most important when public interest in an issue is highest, which may fall near an election: "a group can certainly choose to run an issue ad to coincide with public interest," without proximity to an election meaning that it is "electioneering." *WRTL-II*, 551 U.S. at 473. Any delay in filing a challenge may not be held against the would-be speaker because it "could . . . have delayed because it did not arrive at a plan to exercise its rights to speak until relatively recently. *Ireland*, 613 F. Supp. 2d at 807. (Reply Br. 13-15.)

Ninth, where a law is unconstitutional or likely so, there is no authority for it

to exist or operate just because an election is near. In fact, proximity to a time of high public interest argues against allowing a law restricting issue advocacy to remain in effect. *See supra*. So the trial court was wrong in insisting that issuing the preliminary injunction "would likely" result in "a 'wild west'" with "confuse[d] political actors" and so on. J.A. 30. "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *Ireland*, 613 F. Supp. 2d at 807. (Reply Br. 15.)

Tenth, where an agency wants to argue that there will be a "wild west" scenario if a law of questionable constitutionality is preliminarily enjoined and "freedom of speech" prevails, the agency must provide proof. *Ireland*, 613 F. Supp. 2d at 807. Where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (internal citation omitted). Where an agency asserts voter confusion, it bears a heavy burden of proof. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 n.13 (1997) (re anti-fusion statute); *Eu v. San Francisco County Democratic Cent. Comm.*, 489

U.S. 214, 223 (1989) (paternalistic limiting of information highly suspect); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221 (1986) (closed primary law banning opening primary to independents not justified by preventing voter confusion). Against this need for proof that the sky will fall if a law of questionable constitutionality is preliminarily enjoined is the paramount fact that "the protection of First Amendment rights is very much in the public's interest." *Ireland*, 613 F. Supp. 2d at 807. (Reply Br. 15-16.)

Though these principles should govern this and other preliminary-injunction considerations in First Amendment contexts, and though these argument were central to the briefing before this Court and the Supreme Court, this Court was silent on such incorporation of First Amendment principles into the preliminary-injunction analysis, which might erroneously be viewed as meaning there is no such incorporation. The district court would not feel that it should or could develop the applications of the *Winter* standards in the First Amendment context if this Court declines the request to do so and simply remands with a plain statement of the *Winter* standards without regard to the First Amendment context. Rehearing is required to properly protect political speech and association in the First Amendment preliminary-injunction context by setting out with full detail and precision the First Amendment standards applicable.

III. The Supreme Court's Order and Rejection of Costly, Burdensome Litigation in *WRTL-II* and *Citizens United* Requires Rehearing.

Rehearing is required because both *WRTL-II* and *Citizens United* reject costly, burdensome, time-consuming litigation in political speech cases such as this. *See supra* notes 4 & 5. As *WRTL-II* instructed:

> [T]he proper standard for an as-applied challenge . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. . . . It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. . . . And it must eschew "the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." . . . In short, it must give the benefit of any doubt to protecting rather than stifling speech.

551 U.S. at 469 (citations omitted). *See also id.* at 468 n.5 ("Such litigation constitutes a severe burden on political speech.").

RTAO has already spent considerable time and resources trying to obtain a preliminary injunction (which it surely should have received as to the two challenged provisions that the government now concedes are unconstitutional, *see supra* notes 2 & 6) by appealing the denial to this Court and by taking this Court's decision to the Supreme Court and back. Asking RTAO to now go back to the district court, and without clear First Amendment preliminary injunction standards, asks to much of it in time and treasure and is contrary to both *WRTL-II* and *Citizens United* in this regard.

The Supreme Court's remand to this Court to reconsider its decision in light of *Citizens United* and the government's concession that two claims are unconstitutional surely envisioned that the matter would be quickly decided here after supplemental briefing on the effect of *Citizens United*. The only questions are legal, so there is no reason to return to the district court for factual development. All briefing but the supplemental briefing is already done here. Since the Supreme Court remanded the appeal of a *preliminary injunction*, there is the presupposition that *this* appeal (not a later one on the merits), which by its very *nature* implicates the need for speedy resolution, should be quickly resolved. That precludes remanding this appeal to the district court.

Conclusion

For the reasons stated, rehearing should be granted, a briefing schedule should be issued for supplemental briefing on the effect of *Citizens United* and the mootness of two claims, and this Court should decide this appeal as soon as possible.

Respectfully submitted,

/s/ James Bopp, Jr.

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Certificate of Service

I hereby certify that on June 22, 2010, 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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UNITED STATES COURT OF APPEALS
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THE REAL TRUTH ABOUT OBAMA, INC.,
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v.
FEDERAL ELECTION COMMISSION; UNITED STATES DEPARTMENT OF JUSTICE,
Defendants-Appellees.

CAMPAIGN LEGAL CENTER; DEMOCRACY 21,
Amici Supporting Appellees.

No. 08-1977

On Remand from the Supreme Court of the United States.
(S. Ct. No. 09-724)

Decided on Remand: June 8, 2010

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.

Published Order on Remand from the Supreme Court entered per curiam.

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ORDER

PER CURIAM:

In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court held that the government may not, under the First Amendment, suppress speech on the basis of the speaker's corporate identity and that a statutory prohibition of corporate spending for electioneering communications violated the First Amendment. Based on that holding, the Court granted the petition filed in this case for a writ of certiorari, vacated our judgment, reported in *The Real Truth About Obama, Inc. v. Federal Election Commission*,

575 F.3d 342 (4th Cir. 2009), and remanded this case for "further consideration in light of *Citizens United* . . . and the Solicitor General's suggestion of mootness." *The Real Truth About Obama, Inc. v. Federal Election Commission*, 78 U.S.L.W. 3627 (U.S. Apr. 26, 2010). On further consideration, we now reissue Parts I and II of our earlier opinion in this case, 575 F.3d at 345-347, stating the facts and articulating the standard for the issuance of preliminary injunctions. On the remaining issues, we remand the case to the district court for consideration of the intervening Supreme Court decision in *Citizens United* and the Solicitor General's new suggestion of mootness.

It is so ordered.