

The *McConnell* Corollary: Vague Laws Must Still Toe the *Buckley* Express Advocacy Line

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INTRODUCTION

In a recent decision, *McConnell v. Federal Election Commission*,² the Supreme Court of the United States held the Bipartisan Campaign Reform Act of 2002³ to be, in substance, constitutional. The new and stiffer regulations of the campaign finance bill are having sweeping effects in the erudite world of politics both in federal and state races. The depth and breadth of the *McConnell* decision is, as yet, unknown, but the contours are being defined constantly.

The famous *Buckley v. Valeo*⁴ decision, with its express advocacy standard, is the seed from which all future election law litigation, and discussion in this comment, is concerned. In the nearly thirty years after that decision, the *Buckley* express advocacy standard gave rise to divergent interpretations among the courts of appeals as to what exactly constituted express advocacy, thereby creating a circuit split. Justice Thomas, in his *McConnell* dissent, opined that “by concluding that the ‘express advocacy’ limitation derived by *Buckley* is not a constitutionally mandated line,” the majority effectively decided the circuit split in favor of one circuit and against the six other circuits that had addressed the same issue.⁵

However, one argument of this comment is that Justice Thomas’s assertion is incorrect, i.e. the circuit split still stands.⁶ This comment also argues that the *Buckley* express advocacy standard still lives. In addition, this comment will give special attention to *North Carolina Right to Life, Inc. v. Leake*,⁷ a likely target for the Supreme Court granting certiorari within the next two terms, which is currently winding its way back up

² *McConnell v. FEC*, 540 U.S. 93 (2003).

³ Bipartisan Campaign Reform Act of 2002 [hereinafter “BCRA”], 2 U.S.C.A. § 431 (West 2005). This piece of legislation is commonly referred to as the McCain-Feingold bill, after its primary proponents, Sen. John McCain (R-AZ) and Sen. Russ Feingold (D-WI).

⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵ *McConnell*, 540 U.S. at 278 n.11 (Thomas, J. dissenting).

⁶ *Id.* The majority never cited the pre-*McConnell* split and never addressed it in even the most implicit manner. The assertion by a dissenting justice, in a footnote, that the majority decided a circuit split it never formally addressed, and decided it in favor of the lone circuit against six other circuits, might give one pause to wonder at the validity of the Justice’s assertion and might make one wonder even more why an entire comment need be written on the subject. But Justice Thomas’s assertion might very well be true, and if so, then the circuits involved in this pre-*McConnell* split have a serious paradigm shift to accomplish. One of those circuits, the Fourth, is a fertile ground for determining whether Justice Thomas is correct about the split and just how paradigmatically changing *McConnell* is on the interpretation of express advocacy.

⁷ *N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003), *vacated by* 541 U.S. 1007 (2004), *remanded for reconsideration in light of* *McConnell v. FEC*, 540 U.S. 93 (2003).

from the district court in the Fourth Circuit. The Sixth Circuit⁸ is the only court of appeals to have addressed express advocacy post-*McConnell* and thus *North Carolina Right to Life*, once the Fourth Circuit addresses it, could be in direct conflict with the Sixth Circuit. In other words, a new split could be forming in the courts of appeals. With the pre-*McConnell* split still in effect and a possible post-*McConnell* split forming and perpetuating the first split, there is ample reason for the Supreme Court to weigh in on the matter.

Part I introduces the Federal Election Campaign Act of 1971⁹ and its significant 1974 amendments,¹⁰ gives special treatment to the seminal case of *Buckley v. Valeo* and briefly discusses *Buckley*'s effects. Part II focuses on the Bipartisan Campaign Reform Act of 2002 and the Supreme Court decision interpreting that act, *McConnell v. FEC*. Part III describes in detail what I have identified as the "pre-*McConnell*" split among the courts of appeals. Part IV addresses the post-*McConnell* developments by analyzing one case from the Court of Appeals for the Sixth Circuit as well as a Fourth Circuit case that is still pending. This part also presents a "corollary argument" regarding why *Buckley* still rules where *McConnell* is not implicated.

PART I: FEDERAL ELECTION LAWS INTERPRETED

A. FECA and Buckley

In 1971 Congress passed the Federal Election Campaign Act ("FECA"), followed by significant amendments in 1974. Those amendments became the subject of the landmark case *Buckley v. Valeo*. Senator Buckley and several other parties joined forces to challenge the Act's constitutionality arguing that its regulation of campaign financing "would do far more to suppress campaign money that was intended to further speech . . . than it would to suppress campaign money collected from organized economic interests."¹¹

One key provision on which the opinion focused involved a \$1,000 annual cap on "expenditure[s] . . . relative to a clearly identified candidate,"¹² known as the independent expenditure provision.

⁸ Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004).

⁹ Federal Election Campaign Act of 1971, 2 U.S.C.A. § 431 (West 1971) (amended 1974).

¹⁰ Federal Election Campaign Act Amendments of 1974, 2 U.S.C.A. § 431 (West 1974).

¹¹ Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J.L. POL'Y 93, 94 (1997).

¹² *Buckley v. Valeo*, 424 U.S. 1, 41 (1976).

Independent expenditures are monies spent by individuals or groups, not in coordination with a candidate, but with the intention of convincing voters to vote for a particular candidate.¹³ Arguably, such expenditures are the purest form of political advocacy, “functionally indistinguishable from the editorial endorsement . . . by organs of the media.”¹⁴

The plaintiffs argued that expenditure limits thus caused campaigns to be more media-oriented and thereby stymied grass-roots participation by individuals.¹⁵ The *Buckley* Court acknowledged the First Amendment implications and announced that provisions, such as those found in FECA, regulating speech must be precise so as “to avoid a chilling effect on speech.”¹⁶ The Court held that “relative to” must be construed narrowly to apply only to communication expenditures that “in express terms advocate the election or defeat of a clearly identified candidate.”¹⁷ This narrow construction was necessary to alleviate the otherwise constitutional infirmity based on vagueness grounds.¹⁸

The Court’s rephrasing of the Act’s provision is now known as the express advocacy standard. The Court’s holding has been interpreted to mean that FECA could comply with the First Amendment only if the Act’s regulatory reach was limited to those communication expenditures that “literally include words which in and of themselves advocate the election or defeat of a candidate.”¹⁹ The bright-line express advocacy standard was adopted, at least one court of appeals has found, “in order to protect our cherished right to political speech free from government censorship.”²⁰

The *Buckley* decision elucidated the express advocacy standard it had just created through its now-famous Footnote 52, where the Court listed several examples of what would definitely constitute express advocacy, such as “vote for,” “elect,” “support,” and “Smith for Congress,” to name merely a few.²¹ It has been argued that the famous footnote, and its so-called “magic words,” helped give rise to “soft

¹³ Winter, *supra* note 11, at 100.

¹⁴ *Id.* at 100-01.

¹⁵ *Id.*

¹⁶ Ryan Ellis, Note, “Electioneering Communication” Under the Bipartisan Campaign Reform Act of 2002: A Constitutional Reclassification of “Express Advocacy,” 54 CASE W. RES. L. REV. 187, 191 (2003).

¹⁷ *Buckley*, 424 U.S. at 44.

¹⁸ Citizens for Responsible Gov’t State Political Action Comm. v. Davidson, 236 F.3d 1174, 1187 (10th Cir. 2000).

¹⁹ FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1051 (4th Cir. 1997).

²⁰ *Id.*

²¹ *Buckley*, 424 U.S. at 44 n.52.

money” and “issue advocacy.”²² Considerable recent campaign finance litigation has centered on the footnote’s definition of express advocacy.²³ Professional campaign consultants have become increasingly sophisticated in their avoidance of the magic words so as to, seemingly, take their ads out of the reach of FECA.²⁴ Recent revelations from the justices’ interoffice memoranda from the time of the *Buckley* opinion’s drafting indicate that the justices “seemed unaware that the late-added footnote 52 would have such an impact on electoral politics.”²⁵ It has been argued that the Bipartisan Campaign Reform Act of 2002 (“BCRA”), also known as the McCain-Feingold bill, is a direct challenge to *Buckley*’s footnote 52 by regulating campaign speech with a different bright-line.²⁶

B. Massachusetts Citizens for Life, Inc.

In 1986, ten years after *Buckley*, the Supreme Court had its first opportunity to apply the express advocacy requirement in *FEC v. Massachusetts Citizens for Life, Inc.* (“MCFL”).²⁷ In MCFL, a non-profit corporation paid, out of its general treasury fund, for the publication and distribution of newsletters prior to a primary election. The newsletter explicitly encouraged voters to vote for pro-life candidates, but never said “vote for Smith” specifically, as footnote 52 of *Buckley* suggested. Instead, it simply showed the pictures of pro-life candidates and then encouraged voters to vote pro-life.

The specific challenge to this usage by the non-profit was based on § 441b of FECA which prohibits corporations from using treasury funds to make expenditures in connection with a federal election.²⁸ After observing that *Buckley*’s rationale was equally applicable to this corporation expenditure provision, the Court held that express advocacy also applies to § 441b.²⁹ As one court of appeals interpreted it, the Supreme Court, in MCFL, “unanimously engrafted onto [the corporation expenditure provision] *Buckley*’s ‘express advocacy’ limitation.”³⁰ The MCFL Court reasoned that the encouragement to vote pro-life in the same newsletter as named pro-life candidates was only slightly less

²² Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 242 (2003).

²³ *Id.* at 250.

²⁴ *Id.*

²⁵ *Id.* at 242.

²⁶ *Id.* at 250.

²⁷ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

²⁸ 2 U.S.C.A. § 441b (West 2005).

²⁹ *Mass. Citizens for Life, Inc.*, 479 U.S. at 249.

³⁰ *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997).

direct than ‘vote for Smith.’³¹ It therefore concluded that the nonprofit’s newsletter did violate the express advocacy prohibition of FECA, as articulated in *Buckley*.³² Thus, as the 5th Circuit interpreted *MCFL*, the Supreme Court “extended the ‘express advocacy’ inquiry to include consideration of the logical relationship between an express term advocating election or defeat and the names of specific candidates identified in the communication.”³³

PART II: MODERN FEDERAL ELECTION LAWS

A. The Bipartisan Campaign Reform Act of 2002

Since *Buckley* there have been nearly thirty years of litigation and application of the express advocacy standard in the lower courts. Some have said that the *Buckley* ‘magic words’ test is “ridiculously easy to evade and utterly fails to distinguish election-related from other political speech.”³⁴ The Supreme Court, in *McConnell v. FEC*, found that “*Buckley*’s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption.”³⁵ As a result of this undercurrent of belief that *Buckley* was somehow inadequate in combating corruption, Congress passed BCRA,³⁶ which made substantial amendments and changes to FECA. BCRA is an act focused primarily on contribution restrictions and contribution disclosure. It has been argued that no speech is banned by BCRA and that the only new requirements of the act “relate to the disclosure and sources of funding for television and radio ads close to an election that feature federal candidates and that are targeted to the races in which these candidates are running.”³⁷

Ostensibly, BCRA was premised on the idea, not that there was too much money in campaigns, but that there was too great a nexus between large donors, political parties and elected officials.³⁸ This nexus was broken up by Title I of BCRA, which essentially banned all forms of

³¹ *Mass. Citizens for Life, Inc.*, 479 U.S. at 249-50.

³² *Id.*

³³ *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 192-93 (5th Cir. 2002).

³⁴ Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 167 (2004). Vice Dean Briffault of Columbia Law School was coauthor of an amicus brief submitted on behalf of twenty-five House of Representatives members defending the constitutionality of BCRA. *Id.* at 147 n.a1.

³⁵ *McConnell v. FEC*, 540 U.S. 93, 193-94 (2003).

³⁶ BCRA, 2 U.S.C.A. § 431 (West 2005).

³⁷ Thomas E. Mann & Norman J. Ornstein, *Separating Myth From Reality in McConnell v. FEC*, 3 ELECTION L.J. 291, 296 (2004).

³⁸ *Id.* at 294.

‘soft money.’³⁹ Soft money was money that individuals and corporations could give to national parties that was not regulated by FECA or the Federal Election Commission.⁴⁰ Title II of BCRA helped break up the so-called nexus by creating and regulating a new category of federal campaign activity called ‘electioneering communication.’⁴¹ This new term was created to deal with the “problem of so-called issue advocacy advertising,”⁴² i.e. advertising that was the functional equivalent of advocating the election or defeat of a candidate, but did so just outside the reach of the *Buckley* express advocacy standard.

An advertisement is an electioneering communication if it is a broadcast, cable or satellite communication that refers to a clearly identified candidate for federal office, is broadcast within 60 days before a general election (or 30 days before a primary) and the broadcast can be received by more than 50,000 people in the candidate’s represented territory.⁴³ Congress excepted several communications and media from the definition of electioneering communication including any communication appearing through a news story, commentary or editorial; any debate or forum discussion among the candidates and any advertisement thereof by the sponsoring organization; and any communication which constitutes an independent expenditure.⁴⁴

Some argue that through BCRA, Congress banned broadcast advertising, which is “the most effective means of communicating to large numbers of citizens, on short notice, with maximal impact.”⁴⁵ By creating such a broadcasting ban, “Congress banned communications about public officials at the most crucial times, the month or two before elections.”⁴⁶ Proponents of BCRA argue that no such communications ban exists; instead the electioneering communication definition merely defines *when* federal disclosure regulation takes effect.⁴⁷ It is true, however, that if a communication is deemed an electioneering communication, then there is a ban on the use of corporate or union treasury funds to pay for such communications.⁴⁸ Defenders of BCRA would phrase the electioneering communication definition as providing

³⁹ See BCRA, 2 U.S.C. § 431.

⁴⁰ *McConnell*, 540 U.S. at 123.

⁴¹ BCRA, 2 U.S.C. § 434(f)(3)(A).

⁴² Briffault, *supra* note 34, at 155.

⁴³ BCRA, 2 U.S.C. §§ 434(f)(3)(A) & (C) (also known as the 60/30 rule, *see infra* text accompanying note 48).

⁴⁴ BCRA, 2 U.S.C. § 434(f)(3)(B).

⁴⁵ James Bopp, Jr. & Richard E. Coleson, *Electioneering Communication Versus Abortion*, 3 ELECTION L.J. 205, 207 (2004).

⁴⁶ *Id.* at 208.

⁴⁷ See Briffault, *supra* note 34.

⁴⁸ BCRA, 2 U.S.C. § 441b(b)(2).

regulators with two tests: (1) the 60/30 day rule to “remedy the evasion of disclosure requirements;” and (2) the public communication rule, by which only hard money can pay for ads that support or oppose federal candidates.⁴⁹ Supporting the BCRA defenders’ position is that there has been “no appreciable evidence that the political landscape is pocked with the debris of shattered parties, shackled and muted groups and individuals, or any other deleterious developments.”⁵⁰

The criticisms of BCRA continue and, for some, the Act “is a broadside attack on core political speech and the corresponding freedom to criticize the state.”⁵¹ Some view BCRA as essentially destroying the category of issue advocacy by interpreting the Act to say that *any* broadcast communication referring to a federal candidate and occurring within the window before the election is now subject to disclosure requirements and the ban on treasury spending, regardless of whether that communication contained express advocacy.⁵² Others, including BCRA proponents, however, contend that the world after BCRA merely “reflects modest adjustments in the campaign finance regime under *Buckley*, not a world in [which] the *Buckley* structure will become irrelevant or unrecognizable.”⁵³ Some go farther and pronounce that, under BCRA, the express advocacy test is alive and well, going to great lengths to show how the express advocacy test distinguishes between independent expenditures and electioneering communications and issue advocacy.⁵⁴

B. *McConnell v. FEC*

BCRA, much like FECA, was destined for the Supreme Court of the United States before it was ever enacted. The Court got its chance to speak to BCRA’s constitutionality and did so in the landmark case of *McConnell v. FEC*. By a narrow⁵⁵ 5-4 margin, the Supreme Court upheld the majority of challenged provisions in BCRA. The Court’s *McConnell* decision has been heralded, by Vice Dean Briffault, as “the single greatest legal victory for campaign finance regulation since . . . FECA [and] *Buckley*.”⁵⁶ The decision has even been described as answering

⁴⁹ Briffault, *supra* note 34, at 168.

⁵⁰ Mann & Ornstein, *supra* note 37, at 297.

⁵¹ Cecil C. Kuhne, III, *Restricting Political Campaign Speech: The Uneasy Legacy of McConnell v. FEC*, 32 CAP. U. L. REV. 839, 839 (2004).

⁵² *Id.* at 846.

⁵³ Mann & Ornstein, *supra* note 37, at 297.

⁵⁴ See Bopp & Coleson, *infra* note 81.

⁵⁵ See *infra* text accompanying notes 79-80 (discussing the relevance of this narrow margin).

⁵⁶ Briffault, *supra* note 34, at 147.

more questions than it opens, a rarity for the Court.⁵⁷ Another commentator, Thomas Mann, considers the opinion “notable for . . . its refreshingly pragmatic view of money and politics.”⁵⁸ Briffault notes that the opinion is considered remarkable, in part, for having devoted a mere paragraph, sans footnote, to the constitutionality of “electioneering communication.”⁵⁹ According to Mann, such an “abrupt affirmation . . . represents . . . a triumph of experience and pragmatism over rigid ideology and doctrine.”⁶⁰ James Bopp, a member of those less appreciative of the Court’s “abrupt affirmation,” caustically frames the decision as upholding the electioneering communication ban that forbids broadcast ads “even if an ad merely asks constituents to tell Congressman Intransigent to vote for the Bipartisan Fix-All-Problems Act during the busy legislative period before candidates rush home for campaigning preceding the election.”⁶¹

Briffault describes the central themes of *McConnell* as validating the notion that: campaign finance restrictions promote democratic values; competing constitutional concerns are inherent in campaign finance restrictions; and Congress is due considerable deference in such an area as campaign finance because its members have the greater understanding of its implications.⁶² Thus, *McConnell* can be viewed as not just an affirmation of BCRA, but of campaign finance reform generally.⁶³

The Court addressed the problem of distinguishing between issue and express advocacy and declared that while the distinction, as espoused in *Buckley*, “seemed neat in theory, the two categories of advertisements proved functionally identical in important respects.”⁶⁴ The Court relied upon campaign professionals who likened the most effective campaign ads to the most effective Coca-Cola ads in that they both avoid the use of magic words,⁶⁵ i.e. specifically telling the audience to go buy Coke or go vote for Smith. One particularly poignant footnote quotes an individual as declaring that “[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.”⁶⁶

Opponents of BCRA argued that Congress could not constitutionally require the disclosure of or regulate expenditures for

⁵⁷ *Id.* at 172.

⁵⁸ Mann & Ornstein, *supra* note 37, at 291.

⁵⁹ Briffault, *supra* note 34, at 169.

⁶⁰ Mann & Ornstein, *supra* note 37, at 292.

⁶¹ Bopp & Coleson, *supra* note 45, at 208.

⁶² Briffault, *supra* note 34, at 174.

⁶³ *Id.* at 149.

⁶⁴ *McConnell v. FEC*, 540 U.S. 93, 126 (2003).

⁶⁵ *Id.* at 127.

⁶⁶ *Id.* at 128 n.16.

electioneering communications without making a *Buckley* exception for those communications that do not meet the express advocacy standard. The Court dismissed those arguments by holding that the “express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.”⁶⁷ *McConnell* declares that the *Buckley* express advocacy limitation was a product of statutory interpretation,⁶⁸ in order to “avoid the shoals of vagueness,”⁶⁹ but that the Court “nowhere suggested [in *Buckley*] that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.”⁷⁰ Turning to the actual definition of electioneering communication, the Court found that the definition “raises none of the vagueness concerns that drove [the] analysis in *Buckley*” and thus “the constitutional objection that persuaded the Court in *Buckley*” to create the express advocacy standard was “simply inapposite” in *McConnell*.⁷¹

The *McConnell* Court’s wholesale endorsement of the constitutionality of the BCRA portions, which treat all ads referring to a clearly identified federal candidate and broadcast to the candidate’s constituency as electioneering communications has been viewed, even by BCRA defenders, as surprising, to say the least.⁷² The Court’s declaration that the *Buckley* holding was not a constitutional holding, but merely a statutory interpretation has been deemed “a little disingenuous.”⁷³ But in the same breath, the Court is praised by commentators for its well-advised abandonment of the express advocacy test due to the “powerful [and] uncontroverted evidence . . . that most issue advocacy advertising is functionally equivalent to magic words express advocacy.”⁷⁴

Legal scholars have dissected *McConnell* and found that the Court dismissed the significance of overbreadth problems in various ways. First, corporations and unions could continue to run issue ads so long as such ads avoid any reference to federal candidates.⁷⁵ Second, even if the new electioneering communication provision would touch upon some true issue ads, a corporation or union could continue to pay for such ads during the blackout period by creating and using its political action

⁶⁷ *Id.* at 190.

⁶⁸ *Id.* at 191.

⁶⁹ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 77-78 (1976)).

⁷⁰ *Id.* at 192.

⁷¹ *Id.* at 194.

⁷² Briffault, *supra* note 34, at 157.

⁷³ *Id.* at 168.

⁷⁴ *Id.*

⁷⁵ *McConnell v. FEC*, 540 U.S. 93, 206 (2004).

committee (PAC).⁷⁶ Thus, it has been advanced that, with regard to express advocacy, issue advocacy and the need for a constitutionally acceptable method of distinguishing between the two, the Supreme Court, in *McConnell*, “concluded that there was really no constitutional issue at all.”⁷⁷

Arguably, *McConnell* was a “sweeping victory for reform” in that it not only upheld nearly all of the challenged provisions, but also by the tone the opinion struck in support of campaign finance reform generally.⁷⁸ However, the decision was 5-4, narrow by anyone’s estimate, and the dissenters broke from the majority based upon their general approach to campaign finance regulation, as opposed to narrow points of law or the application of law to fact.⁷⁹ Thus, the *McConnell* decision could be short-lived were a make-up in the Court’s composition to change, even by one justice. As Vice Dean Briffault put it, the “long-term significance of *McConnell* is thus uncertain and ultimately hostage to future changes in the composition of the Court.”⁸⁰

Despite the arguments some make about what *McConnell* says regarding campaign finance regulation generally and about *Buckley* and the express advocacy standard specifically, other observers would interpret the Court’s opinion differently. One has argued that the very significance of *McConnell* is that it created a “*McConnell* exception” to the *Buckley* and *MCFL* express advocacy test that protects issue advocacy.⁸¹ Admitting that *McConnell* squarely addresses the express advocacy test as not constitutionally mandated, the decision still requires that there be a functional equivalent.⁸² Arguably, the Supreme Court analyzed ‘electioneering communication’ within the *Buckley* framework by concluding that the definition was not vague and that it targeted the “functional equivalent” of express advocacy.⁸³ The result of *McConnell* can be viewed as merely the third in a line of precedents going back through *MCFL* to *Buckley* in that statutes placing any significant burden on issue advocacy must avoid vagueness and overbreadth by employing the express advocacy test or a functional equivalent.⁸⁴ Despite these

⁷⁶ *Id.*

⁷⁷ Briffault, *supra* note 34, at 171.

⁷⁸ *Id.* at 176.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ James Bopp, Jr. & Richard E. Coleson, *The First Amendment is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy*, 31 N. KY. L. REV. 289 (2004).

⁸² *Id.* at 291.

⁸³ *Id.*

⁸⁴ *Id.*

glass-half-full analyses by those who disapproved of BCRA initially, the same opponents are offended by the decision in *McConnell* in that it “presumes that helping Congress inhibit circumvention is so important that the liberty of the people to speak and participate in democracy must be suppressed.”⁸⁵ By contrast, *Buckley* and *MCFL* are to be heralded in that they “presume that free speech [is such an important] part of American democracy, that even if some of it influences elections it must be permitted because of the greater good of liberty and participatory government.”⁸⁶

C. Justice Thomas’s McConnell Dissent: Footnote Eleven

Justice Thomas’s dissent provides important insight into the chasm that divides the Court regarding campaign finance regulation. Thomas takes the majority’s cursory assertion that the magic words of *Buckley* cannot meaningfully distinguish between electioneering and true issue ads and turns that assertion on its head. Thomas argues that “[s]peech containing the ‘magic words’ is ‘unambiguously campaign related,’ while speech without these words is not.”⁸⁷ Addressing the majority’s assertion that so many ads falling outside of the net of express advocacy are in reality express advocacy, Justice Thomas argues that it is a first principle of the First Amendment that fully protected speech not become regulated simply because it is difficult to differentiate in practice.⁸⁸ Quoting the Court’s decision in *Ashcroft v. Free Speech Coalition*, Thomas contends that “[t]he Government may not suppress lawful speech as the means to suppress unlawful speech.”⁸⁹ In response to the majority’s point that *Buckley*’s express advocacy line has not helped to combat corruption, Thomas takes an entirely different approach and asserts that “*Buckley* did not draw this line solely to aid in combating real or apparent corruption, but rather also to ensure the protection of speech unrelated to election campaigns.”⁹⁰

One of Justice Thomas’s disagreements with the majority opinion and BCRA is that the definition of electioneering communications covers “a significant number of communications that do not use words of express advocacy.”⁹¹ Appended to this concern about the definition is

⁸⁵ *Id.* at 339

⁸⁶ *Id.*

⁸⁷ *McConnell v. FEC*, 540 U.S. 93, 281 (2003) (Thomas, J. dissenting).

⁸⁸ *Id.* (Thomas, J. dissenting).

⁸⁹ *Id.* (Thomas, J. dissenting) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).

⁹⁰ *Id.* at 282 (Thomas, J. dissenting).

⁹¹ *Id.* at 278 (Thomas, J. dissenting).

footnote eleven, in which the Justice declares that “[t]he Court, in upholding most of [BCRA’s] provisions by concluding that the ‘express advocacy’ limitation derived in *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, one).”⁹² The footnote goes on to cite seven cases in different courts of appeals, six of which fall one way and one falling another.⁹³ In the next Part, this comment will carefully analyze every decision involved in this circuit split.

PART III: THE PRE-MCCONNELL CIRCUIT SPLIT

A. *FEC v. Furgatch*

The first decision to be rendered in what has become the pre-*McConnell* split, in 1987, is also the decision that became the lone minority as six other circuits spoke on the matter.⁹⁴ In late October 1980, a few days before the Presidential election, Harvey Furgatch, an individual not working in concert with any campaign or candidate, took out an advertisement in the *New York Times* and then, the day before the

⁹² *Id.* at 278 n.11 (Thomas, J. dissenting).

⁹³ *Id.* (Thomas, J. dissenting). The cases cited on one side of the ledger are *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002).

Also on that side of the ledger, Justice Thomas cited *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), but a careful analysis of the case reveals that while it is election law related, it is inapposite to the holdings of all the other cases. As such, for purposes of this discussion, it will be assumed that the Justice intended *FEC v. Maine Right to Life Comm., Inc.*, 98 F.3d 1 (1st Cir. 1996), which is a one page affirmation of *Maine Right to Life v. FEC*, 914 F. Supp. 8 (D. Me. 1996). This assumption is plausible because another party to *Clifton* was Maine Right to Life Committee, Inc. and the case was decided about the same time. This circuit split has been recognized elsewhere and so, arguably, the First Circuit case in the split could be *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1990). The lone case to which Justice Thomas referred, in opposition to all the other circuits which have spoken on the issue, was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

This circuit split, in sometimes slightly varied form, has also been recognized by other courts and commentators. See *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 426 (2004) and *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 187 n.5 (5th Cir. 2002), in which the Fifth Circuit ultimately became part of the split and declared that “[t]he sole departure from [the] bright-line approach among” the circuits came in *Furgatch*. See also Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 155 nn.54-55 (2004); Ryan Ellis, Note, “*Electioneering Communication*” Under the Bipartisan Campaign Reform Act of 2002: A Constitutional Reclassification of “Express Advocacy,” 54 CASE W. RES. L. REV. 187, 199-200 (2003).

⁹⁴ *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

election, took out the same advertisement in The Boston Globe, regarding his admonishment of President Carter.⁹⁵ The FEC brought suit against Furgatch for failing to report the \$25,000 he spent on the advertisements and for failing to include a disclaimer in The Boston Globe ad.⁹⁶ Furgatch won his motion to dismiss for failure to state a claim in the district court because the court concluded that the advertisement did not meet the express advocacy requirement of *Buckley*, which was subsequently incorporated into § 431(17) of FECA.⁹⁷ Upon appeal, the Ninth Circuit framed the issue before it as deciding whether Furgatch was indeed required to report his expenditures for the ads and if he was so required by the Act, then was the Act constitutional in its demand.⁹⁸ It was a question of first impression for the court of appeals.⁹⁹ Attempting to set the tone from the beginning and assure that the court understood the importance of the question, it declared that the appeal before it required the court to “resolve the conflict between a citizen’s right to speak without burden and society’s interest in ensuring a fair and representative forum of debate by identifying the financial sources of particular kinds of speech.”¹⁰⁰

Reviewing the history of FECA and the Supreme Court’s decision in *Buckley*, the Ninth Circuit analyzed the *Buckley* Court’s reasoning and posited that Congress’s restrictions on freedom of expression must be “minimal, and closely tailored to avoid overreaching or vagueness.”¹⁰¹ Turning towards the FEC’s argument against Furgatch, the court determined that the FEC viewed *Buckley*’s magic words as mere

⁹⁵ *Id.* at 858. The advertisement read in full:
DON’T LET HIM DO IT. The President of the United States continues degrading the electoral process and lessening the prestige of the office. It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent. *And we let him.* It continued when the President himself accused Ronald Reagan of being unpatriotic. *And we let him do it again.* In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others with public funds. *We are letting him do it.* He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between “peace and war,” “black or white,” “north or south,” and “Jew vs. Christian.” His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, “Why Not the Best?” It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON’T LET HIM DO IT.

⁹⁶ *Id.* at 859.

⁹⁷ *Id.*

⁹⁸ *Id.* at 858.

⁹⁹ *Id.* at 861.

¹⁰⁰ *Id.* at 858.

¹⁰¹ *Id.* at 860 (citing *Buckley v. Valeo*, 424 U.S. 1, 78-82 (1976)).

guidelines and not mandatory for inclusion in an ad to make it express advocacy.¹⁰² Instead, the FEC contended, the “test is whether or not the advertisement contains a message advocating the defeat of a political candidate.”¹⁰³

The Ninth Circuit summarized the FEC’s argument thus, but never addressed the glaring difference between *Buckley*’s express advocacy requirement and the FEC’s new interpretation, i.e. the incredibly important, but missing adverb before ‘advocating’: expressly. There is a considerable difference between “a message advocating the defeat of a political candidate” and one that *expressly* advocates such a defeat. The Ninth Circuit simply glossed over this omission. The court simplistically summarized Furgatch’s argument to say that if his ad had been express, there would be no debate in federal court over the matter and thus he is right and the FEC is wrong.¹⁰⁴ Furgatch also argued that “don’t let him do it” could merely be Furgatch’s warning to the public “that Carter will be re-elected if the public allow[ed] him to continue to use ‘low-level campaign tactics.’”¹⁰⁵

The Ninth Circuit chafed that neither party’s counsel provided the court “with an analysis of the standard to be used or even a thoughtful list of the factors which [the court] might consider in evaluating an ‘express advocacy’ dispute.”¹⁰⁶ The court warned that the federal courts were in danger of inconsistent analysis and application of ‘express advocacy’ without such a framework.¹⁰⁷ As though it were sufficient simply to state it, the court asserted that the express advocacy language of *Buckley*, and the subsequent statute, did not draw a “bright and unambiguous line.”¹⁰⁸ Interestingly, the Ninth Circuit’s difficulty with determining what constitutes express advocacy was not a difficulty for the other six courts of appeals, each of which understood the ‘express advocacy’ line to be quite bright and unambiguous.¹⁰⁹

The court delineated the importance of the disclosure provisions as being two-fold: keeping the electorate informed and deterring or exposing corruption.¹¹⁰ Setting up its decision to read out the ‘express’ in express advocacy, the court declared that even though freedom of speech

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 861.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See, *infra*, the remainder of Part III in which the other courts of appeals decisions are analyzed.

¹¹⁰ *Furgatch*, 807 F.2d at 862.

is important, it is also important that the purposes of the Act not be “cleverly circumvented, or thwarted by a rigid construction of the terms of the Act.”¹¹¹ Asserting that Furgatch wished the court to “reject intra-textual interpretation,” the court took the opposite tack and found that the “proper understanding of the speaker’s message can best be obtained by considering speech as a whole.”¹¹² The court also asserted that in the battle of importance, the effect of political speech won out over the intent.¹¹³ Such an assertion, were it to be the rule, would inevitably lead to that chilling effect on speech because every speaker would henceforth worry about how his message *could* be interpreted.

Referring to other kinds of speech such as subversive, ‘fighting words,’ libel and speech in the workplace, the court pointed out that context is one of the crucial factors in making those kinds of speech regulable.¹¹⁴ The Ninth Circuit then explained that the importance of context “declines considerably” when the standard is ‘express advocacy.’¹¹⁵ The declination of importance relegates ‘context’ to the periphery.¹¹⁶ Remarkably, however, the court, in the very next sentence, concluded that context is relevant,¹¹⁷ and then went on to impress its importance.

With its explanation of the necessity of a contextual approach, the court formulated a “standard for express advocacy that [would] preserve the efficacy of the Act without treading upon the freedom of political expression.”¹¹⁸ The standard declared that speech, “when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”¹¹⁹ The court then broke down its reasonable person standard into three main components: (1) the speech’s message must have *only one* plausible meaning; (2) the speech must make a “clear plea for action”; and (3) the action advocated must also be clear.¹²⁰ The court emphasized the importance of there being no reasonable alternative reading of the speech in order to make certain that ‘express advocacy’ is adhered to in practice.¹²¹

¹¹¹ *Id.*

¹¹² *Id.* at 863

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 863.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 864

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Next turning to the application of the facts of the instant case to the newly formulated standard of express advocacy, the court flatly rejected Furgatch's argument that the advertisement could be read as something other than asking voters to vote against Carter.¹²² Almost comically, the court pointed out that the district court focused, improperly, on the word 'it', when it should have focused on 'don't let him.'¹²³ After declaring that the action advocated must be clear, the court found that readers of Furgatch's ads were "presented with an express call to action, but no express indication of what action [was] appropriate."¹²⁴ Quite disturbingly however, the court then held "that this failure to state with specificity" does not prevent the court from finding express advocacy.¹²⁵ The court reasoned that Furgatch's ad directly attacked Carter and not any stand Carter took on an issue.¹²⁶ Thus, there was "vagueness in Furgatch's message, but no ambiguity."¹²⁷

Legislatures and courts should heed George F. Will's advice in his commencement address at Washington University in Saint Louis in 1998: "follow the simple microrules and you might avoid a lot of the macroproblems that will elicit ever more complex and coagulating rules, laws and regulations."¹²⁸ Will was talking about flossing and using sunscreen, but we can apply the same principle here. In this case the microrule is that, as Americans, we have the freedom of speech. By following this simple rule, the government could avoid a lot of the macroproblems that come from the increasingly difficult to follow election laws, namely BCRA.

Many will likely disagree with me that freedom of speech is a rule that can be useful in today's "modern" era. Many think that the complexities of today require great profundities expressed through elaborate laws, but it is the classic error of the pseudo-intellectual to assume that only the complex can be profound. But, if "freedom of speech" is too simplistic a rule, then we can assign the express advocacy standard as a slightly less, but still simple enough, microrule. That is, *express words* advocating the election or defeat of a clearly identified candidate can be subject to disclosure and contribution requirements, but nothing else, period. By expanding a simple microrule into something

¹²² *Id.*

¹²³ *Id.* (Furgatch's advertisement read, in part, "DON'T LET HIM DO IT." See *supra* note 95.).

¹²⁴ *Id.* at 865.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ GEORGE F. WILL, WITH A HAPPY EYE BUT . . . : AMERICA AND THE WORLD 1997-2002 198 (2002).

more, as the contextual approach in *Furgatch* did, you end up with potentially devastating macroproblems, such as a frightening erosion of the freedom to say what you want about a political issue or candidate within a few months of an election.

B. Maine Right to Life Committee, Inc. v. FEC

Nine years after *Furgatch*, the Court of Appeals for the First Circuit had the opportunity to interpret FEC regulations pertaining to what constitutes express advocacy.¹²⁹ The First Circuit opinion on the matter is but a one page affirmation of the district court's decision and reasoning and thus the district court opinion will be examined for purposes of this comment. The plaintiffs in *Maine Right to Life Committee, Inc. v. FEC* ("MRLC") were the Maine Right to Life Committee (the "Committee"), a nonprofit corporation, and an individual who was not a member of the pro-life organization, but read its publications.¹³⁰ The plaintiffs sought a declaratory judgment that the FEC's definition of express advocacy was "too broad, beyond the authority of the FEC and unconstitutionally vague."¹³¹ The court framed the issue as a question of whether the FEC acted beyond its power in the express advocacy definition it formulated, to which corporate financial support is prohibited.¹³² Citing to the then-recently promulgated FEC rules on the matter, the court declared that the instant case was the first opportunity for judicial review of the new FEC rules.¹³³ The court quoted the rule and found that it was obvious that the challenged subpart (b) came directly from the Ninth Circuit's decision in *Furgatch*.¹³⁴

¹²⁹ *FEC v. Me. Right to Life Comm., Inc.*, 98 F.3d 1 (1st Cir. 1996). As a threshold matter, I expect many people to have a natural aversion to the opinions of the majority of circuits discussed in this comment by the sheer virtue of the parties that are winning. As is undoubtedly recognized just from the case names, the majority comes from the challenges of pro-life organizations. Abortion being such a divisive issue, it is easy to see how a pro-choice individual would be far more inclined to agree with the Ninth Circuit in *Furgatch* in order to sweep in more speech, namely the pro-life movement's speech. But it cannot be ignored that if the Supreme Court overturns *Roe v. Wade*, as is certainly possible in the next few years, then it could just as easily be the "North Carolina Right to Choice Committee" that is worried that it will not be able to speak out about its issue. Regardless of your stance on abortion, we must all be in agreement that a rich debate in the public forum is far preferred to one that is increasingly stymied by governmental intervention into the first area that the Bill of Rights was designed to exclude the government: speech.

¹³⁰ *Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 9 (D. Me. 1996).

¹³¹ *Id.* at 9.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 11. The challenged FEC rule, 11 C.F.R. § 100.22(b) (2005), defined expressly advocating as any communication that:

The plaintiffs argued that *Furgatch* and the resulting FEC rule went further than *Buckley* and *MCFL* permitted.¹³⁵ The district court agreed and found that the Ninth Circuit had to “enlarge . . . *Buckley*’s definition of express advocacy” to reach the decision in favor of the FEC it did in *Furgatch*.¹³⁶ The district court recognized the importance of context in determining the meaning of words, but then found that the Supreme Court’s decisions in *Buckley* and *MCFL* were based upon a belief that the discussion of issues was something to be protected even if it meant that some advocacy would go unregulated.¹³⁷ The district court reasoned that “[i]n the stressful context of public discussion with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language.”¹³⁸ The court found that the communication at issue in *Furgatch* was “precisely the type of communication that *Buckley* [and] *Massachusetts Citizens for Life* . . . would permit and subpart (b) would prohibit.”¹³⁹ Following up this conclusion, the court gave several reasonable interpretations of the communication in *Furgatch* and found that *express* advocacy was not present.¹⁴⁰

Quoting from the FEC’s Explanation and Justification for its new rule, the court interpreted such reasoning by the FEC to mean that “what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must continually re-evaluate his or her words as the election approaches.”¹⁴¹ This was too much for the district court, which found that such a scenario would have too great a chilling effect on First Amendment freedom of expression and thus it granted plaintiffs’ requested declaratory judgment.¹⁴²

In the post-*McConnell* world, *MRLC* should turn out the same because the FEC rule contained none of the specificities of BCRA’s electioneering communication definition. If a rule fails to avoid the

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.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 11-12.

¹³⁸ *Id.* at 12.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 13.

¹⁴² *Id.* at 13.

“shoals of vagueness”¹⁴³ then it must submit to the *Buckley* express advocacy test and as the *MRLC* court concluded, such a vague rule fails *Buckley* and therefore it must be abolished in favor of core First Amendment concerns.

C. *FEC v. Christian Action Network, Inc.*

In *FEC v. Christian Action Network, Inc.* (“CAN II”),¹⁴⁴ the Court of Appeals for the Fourth Circuit found the position advanced by the FEC, with respect to what constituted express advocacy, “not substantially justified” in light of *Buckley* and *MCFL*.¹⁴⁵ *CAN II* was actually a suit brought by the Christian Action Network (the “Network”) requesting fees and costs after the FEC brought suit against the Network for violating FECA through corporate expenditures for an ad the FEC deemed as express advocacy.¹⁴⁶ The FEC lost that suit in the district court and the Fourth Circuit issued a one page affirmance of the opinion.¹⁴⁷ Thus, *CAN II* was really not so much a case about whether the FEC’s definition of express advocacy was constitutional according to the Fourth Circuit and more about how untenable the FEC’s position was deemed in that circuit.¹⁴⁸

In the underlying suit, the FEC conceded that the Network’s television commercial did not contain explicit words or language advocating the election or defeat of a particular candidate, but the Network violated FECA anyway because the ad expressly advocated “through the superimposition of selected imagery, film footage, and music, over the nonprescriptive background language.”¹⁴⁹ The FEC argued that the advertisement constituted express advocacy because it was delivered to viewers shortly before the election and the “message employ[ed] powerful symbolism and persuasive devices unique to the

¹⁴³ *Buckley v. Valeo*, 424 U.S. 1, 77-78 (1976) (“Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature’s purpose, to avoid the shoals of vagueness.”).

¹⁴⁴ *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1061 (4th Cir. 1997).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1050.

¹⁴⁷ *FEC v. Christian Action Network, Inc.*, 92 F.3d 1178 (4th Cir. 1996) (adopting district court opinion *FEC v. Christian Action Network, Inc.*, 894 F. Supp. 946, 959 (W.D. Va. 1995)).

¹⁴⁸ See *infra* Part IV, which discusses how the *CAN II* opinion came back to haunt the Fourth Circuit in some respects.

¹⁴⁹ *Christian Action Network, Inc.*, 110 F.3d at 1050. The Network’s advertisement contained the following words read by a narrator during the commercial: “Bill Clinton’s vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples’ adopting children and becoming foster parents. Is this your vision for a better America?”

medium of video.”¹⁵⁰ Remarkably, the FEC admitted that there was no literal phrase such as ‘Defeat Bill Clinton,’ but nonetheless argued that the ad “contain[ed] a special kind of charged rhetoric and symbolism that exhorted more forcefully and unambiguously than mere words.”¹⁵¹ The Fourth Circuit judiciously found that it “would bridle at the power over political speech that would reside in the FEC under such an interpretation.”¹⁵²

After an analysis of *Furgatch*, the Fourth Circuit concluded that the FEC’s position on what constituted express advocacy was based on a “misreading” of *Furgatch* and a “profound misreading” of *Buckley* and *MCFL*.¹⁵³ Interestingly, the Fourth Circuit did not disagree with *Furgatch*’s holding, but did find that the Ninth Circuit used “soft language when describing the framework within which the express advocacy determination is to be made.”¹⁵⁴ However, the Fourth Circuit considered the Ninth Circuit’s ‘soft’ language as mere dicta and that the central idea of *Furgatch* was not without validity.¹⁵⁵ In its attempt to distinguish the facts of *CAN II* and *Furgatch*, the court found that *Furgatch* contained a bold call to action, but no such call existed in the Network’s ad.¹⁵⁶ In fact, the court found that there were not “any words urging voters to take any action whatsoever.”¹⁵⁷

The Fourth Circuit then diverged into a lesson in the power of precedent, disguised as a lesson in brief writing, aimed at the FEC.¹⁵⁸ The court found that throughout the FEC’s 69 page brief on the merits of the case, “it never once quote[d] *any* of the numerous passages in *Buckley* and *MCFL* referring to ‘explicit words’ or ‘express words’ or ‘language’ of advocacy.”¹⁵⁹ The court found this particularly significant since every federal court to have addressed *Buckley*’s express advocacy standard has quoted one or more passages referring to the requirement of ‘words’ of advocacy.¹⁶⁰ After berating the FEC on its less-than-candid brief writing, the court rejected the FEC’s argument as disingenuous that “‘no words of advocacy are necessary to expressly advocate the election of a candidate’” and that such an argument could not be advanced in

¹⁵⁰ *Id.* at 1061.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1055 n.6.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1060.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1063.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

good faith.¹⁶¹ Similar to *MRLC*, the *CAN II* decision should likewise be identical if decided today. The same rule would still be just as offensive to First Amendment values and such a rule should still cause a court to “bridle at the power over political speech”¹⁶² such an enforcer would possess.

D. Iowa Right to Life Committee, Inc. v. Williams

The Eighth Circuit, in *Iowa Right to Life Committee, Inc. v. Williams* (“IRLC”), was the first, of what I have labeled the ‘pre-*McConnell*’ split, to deal with a state campaign regulation.¹⁶³ The IRLC challenged several Iowa state campaign and election statutes and related administrative regulations on First and Fourteenth Amendment grounds.¹⁶⁴ The court in *IRLC* found unconstitutional the state’s requirement that independent expenditures expressly advocating the election or defeat of a candidate must be noticed to the state and the candidate and thereafter the candidate must file a statement of “disavowal” of the ad or the independent expenditure will be deemed an expenditure by the candidate.¹⁶⁵ More importantly, for the purpose of this comment, the IRLC also challenged the state’s definition of express advocacy.¹⁶⁶

The court does not point it out, but the state’s definition of express advocacy is identical to the FEC’s definition developed after *Furgatch* and denounced by the First Circuit in *MRLC*. The IRLC argued that the definition was unconstitutionally overbroad and encompassed too much protected (issue advocacy) speech.¹⁶⁷ The Eighth Circuit, after discussing and quoting *Buckley* and citing *CAN II*, found that the “focus of the challenged definition [was] on what reasonable people or reasonable minds would understand by the communication” and Iowa’s definition of express advocacy did “not require express words of advocacy.”¹⁶⁸ The court reasoned that definitions that depend upon the meaning others may attribute to speech, results in lack of security for free expression. Ultimately, the court concluded that Iowa’s express advocacy definition created too much uncertainty and potentially chilled discussion of public issues and thus granted a preliminary injunction.¹⁶⁹

¹⁶¹ *Id.* at 1064 (citation omitted).

¹⁶² *Id.* at 1061.

¹⁶³ *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999).

¹⁶⁴ *Id.* at 966.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 968.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 969.

¹⁶⁹ *Id.* at 969-70.

Just as the First and Fourth Circuits did with the federal rule, the Eighth Circuit concluded that the First Amendment was too great a protector of speech to allow the state rule to squash such a cherished right. Also similar to the previous decisions discussed, *IRLC* would be decided the same today because *McConnell* would not prevent *Buckley*'s express advocacy test from being applied to the vague Iowa rule.

E. Vermont Right to Life Committee, Inc. v. Sorrell

The Court of Appeals for the Second Circuit addressed Vermont's definition of express advocacy in *Vermont Right to Life Committee, Inc. v. Sorrell* ("*VRLC*").¹⁷⁰ Remarkably, Vermont's expenditure disclosure requirements applied "to communications that 'expressly or implicitly advocate[] the success or defeat of a candidate.'"¹⁷¹ All the parties in *VRLC* agreed that the disclosure provisions must comport with *Buckley*'s express advocacy standard, but the disagreement came on what constituted express advocacy.¹⁷² The Second Circuit quickly found that a plain reading of the statutes revealed that the definition covered too much protected speech.¹⁷³ The question for the court then became whether it could apply a narrowing construction in order to save the provisions from facial invalidity.¹⁷⁴

The district court tried to construe the provisions narrowly and thus read the Vermont statute's language on 'implicitly' "to apply only to communications that without doubt or reservation" advocate success or defeat.¹⁷⁵ The Second Circuit disagreed with the district court's construction and found that 'implicitly,' when paired with 'express' could only mean 'tacit' or 'not explicit' and thus such a construction as the district court formulated could not be upheld.¹⁷⁶ The analysis today would not change. *McConnell* would not allow "or implicitly" to be part of the determination of what speech is regulable and *Buckley* definitely would not allow it.

¹⁷⁰ 221 F.3d 376 (2d Cir. 2000).

¹⁷¹ *Id.* at 386 (quoting §§ 2881 and 2882 of Vermont's equivalent of FECA). This is remarkable because the Vermont legislature, by adding "or implicitly" into the statute, took the *Buckley* express advocacy limitation imposed by the Supreme Court and broadened it back to the sweeping version in FECA that the Supreme Court said was too broad to be constitutional.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 388.

¹⁷⁶ *Id.*

F. Citizens for Responsible Government State Political Action Committee v. Davidson

In *Citizens for Responsible Government State Political Action Committee v. Davidson* (“CRG”), the Tenth Circuit reviewed Colorado’s independent expenditure provision for constitutionality and found that while it was facially unconstitutional, it was severable and only then subject to a narrowing construction.¹⁷⁷ The challenged language in CRG was actually the definition of ‘political message,’ which was incorporated into the definition of ‘independent expenditure.’¹⁷⁸ Specifically, a political message was a message “which advocate[d] the election or defeat of any candidate or which unambiguously refer[red] to such candidate.”¹⁷⁹ The Tenth Circuit rejected Colorado’s argument that the ‘or’ meant ‘and’ and thus the ‘unambiguously’ language was not a broadening, but a mere clarification.¹⁸⁰ According to the court, the proper interpretation of Colorado’s statute would read that a political message would be found if either it advocated the election or defeat of a candidate *or* it unambiguously referred to such candidate.¹⁸¹ The court ultimately severed the clause after ‘or’ and added the word ‘expressly’ before ‘advocates’ as its narrowing construction.¹⁸² Thereafter, a political message was a message which expressly advocated the election or defeat of any candidate. The court saved the statute by this narrowing construction, which took the ambiguity out of the “unambiguous” clause.

The severed clause would no doubt be severed all the same today. Nothing in *McConnell* changes *Buckley*’s application to such a vague and broadening clause. Again, the First Amendment would still establish a barrier in the middle of Colorado’s provision at the same place the CRG court recognized it.

G. Chamber of Commerce of the United States v. Moore

The most recent addition to the pre-*McConnell* split came in the Court of Appeals for the Fifth Circuit in *Chamber of Commerce of the U.S. v. Moore* (“COC”).¹⁸³ The Chamber sought a declaratory judgment that its own advertisements were not subject to Mississippi’s campaign

¹⁷⁷ Citizens for Responsible Gov’t State Political Action Comm. v. Davidson, 236 F.3d 1174 (10th Cir. 2000).

¹⁷⁸ *Id.* at 1188.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1190.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1196.

¹⁸³ 288 F.3d 187 (5th Cir. 2002).

expenditure disclosure law.¹⁸⁴ The ads at issue were run during the 2000 election for Mississippi's Supreme Court and none of the ads explicitly called for voters to vote for any of the identified candidates.¹⁸⁵ The district court, in language reminiscent of *Furgatch*, found that the Chamber's ads were subject to disclosure because "reasonable minds could not differ that the advertisements advocate[d] the election of the specified candidates."¹⁸⁶ Addressing the circuit conflict head on, the Fifth Circuit identified the district court's ruling as the *Furgatch* contextual test.¹⁸⁷

After actually identifying the circuit split in a footnote,¹⁸⁸ the Fifth Circuit boiled the Ninth Circuit's *Furgatch* approach down to its core.¹⁸⁹ The court found that the Ninth Circuit did not stray far from the more popular express advocacy standard, but that it did introduce two new elements: context and the reasonable person standard with respect to meaning.¹⁹⁰ Citing the Fourth and Eighth Circuits, the court declared that the *Furgatch* approach had essentially been rejected by other courts of appeals in favor of the bright-line rule requiring explicit words.¹⁹¹ In no uncertain terms, the Fifth Circuit rejected the Ninth Circuit's approach because it was "too vague and reache[d] too broad an array of speech to be consistent with the First Amendment as interpreted in *Buckley* and *MCFL*."¹⁹²

The Fifth Circuit fully recognized that its narrow interpretation, in contrast to *Furgatch*, undoubtedly would allow circumvention of electoral regulations by the simple omission of certain explicit words.¹⁹³ However, the court found solace in the Supreme Court's "overriding concern" in *Buckley* "that a statute with an ambiguous scope would chill political discourse"¹⁹⁴ and thus the narrower interpretation was the more prudent one in view of First Amendment interests.

¹⁸⁴ *Id.* at 190.

¹⁸⁵ *Id.* at 191 n.1. The narration of the commercials includes the following words: Lenore Prather. Chief Justice of Mississippi's Supreme Court. Lenore Prather. Using common sense principles to uphold the law. Lenore Prather. Putting victims' rights ahead of criminals and protecting our Supreme Court from the influence of special interests. The first woman appointed to Mississippi's Supreme Court, Lenore Prather has 35 years experience on the bench. Lenore Prather. A fair and independent voice for Mississippi.

¹⁸⁶ *Id.* at 190.

¹⁸⁷ *Id.* at 191.

¹⁸⁸ *Id.* at 193 n.5.

¹⁸⁹ *Id.* at 194.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 195.

¹⁹⁴ *Id.*

Applying the facts to the rule it just articulated, the Fifth Circuit rejected amici arguments that the Chamber's ads were "only 'marginally less direct' than 'Smith for Congress'" as listed in footnote 52 of *Buckley*.¹⁹⁵ The court found such an argument unpersuasive because the Chamber's ads merely connected a name to a positive character trait, while 'Smith for Congress' clearly connected a name to an elected office.¹⁹⁶ In an interesting articulation, the Fifth Circuit declared that "favorable statements about a candidate do not constitute express advocacy, even if the statements amount to an endorsement of the candidate."¹⁹⁷ The court acknowledged that its holding was "counterintuitive to a commonsense understanding of the message conveyed" by the ads, but declared that such a result was "compelled by the First Amendment."¹⁹⁸

The circuit decisions, whether or not they addressed *Furgatch* directly, all found the halls of First Amendment values to be too hallowed to allow ambiguous rules and statutes to run roughshod over political speech rights. More importantly, all of the decisions are still good law today. *McConnell* did nothing to overrule them, nor did it decide the split in favor of *Furgatch*, as Justice Thomas suggested. Instead, the split still exists with the weight of authority *against Furgatch*. In fact, that authority has grown *in light of McConnell* and could grow even more in the immediate future, as discussed in the next part of this comment.

PART IV: POST-McCONNELL

A. *Anderson v. Spear*

In determining whether Justice Thomas was correct in his assertion that the pre-*McConnell* split described above has really been decided in favor of the Ninth Circuit in *Furgatch*, it is important to look at the only court of appeals decision to interpret the effect *McConnell* has had on *Buckley*'s express advocacy distinction of issue advocacy and whether it has continued viability. That decision comes from the Sixth Circuit in *Anderson v. Spear*.¹⁹⁹

In *Anderson*, the Sixth Circuit was presented with a challenge to several election and campaign finance statutes by a gubernatorial write-

¹⁹⁵ *Id.* at 198.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 198-99.

¹⁹⁹ 356 F.3d 651 (6th Cir. 2004).

in candidate (Anderson) in Kentucky.²⁰⁰ One of the statutes banned ‘electioneering’ within 500 feet of a polling place.²⁰¹ Electioneering was defined as “the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling.”²⁰² The State Board of Elections informed Anderson that his plan to distribute instructions to voters on how to cast a write-in vote would be deemed to fall within the state’s definition of ‘electioneering.’²⁰³ Thus, Anderson challenged the statute as being overbroad, claiming that such a barrier around polls should apply only to express advocacy and not issue advocacy.²⁰⁴

The Sixth Circuit introduced *McConnell* as a revisit by the Supreme Court to the “express advocacy/issue advocacy line first drawn in *Buckley*.”²⁰⁵ In addressing how *McConnell* affects *Buckley*, the Sixth Circuit quoted *McConnell* as holding that “[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, [the Supreme Court] nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.”²⁰⁶ The Sixth Circuit also concluded that the *McConnell* Court found that the express advocacy distinction was unnecessary in that case for purposes of analysis.²⁰⁷ Taking the *McConnell* language head on, the *Anderson* court found that the Supreme Court “left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth.”²⁰⁸ The Sixth Circuit did not equivocate when it determined that “*McConnell* in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest.”²⁰⁹

Turning to the facts of its own case, the *Anderson* court distinguished Kentucky’s statute from BCRA in *McConnell* by declaring

²⁰⁰ *Id.* at 653-54.

²⁰¹ *Id.* at 663 (citing KY. REV. STAT. ANN. § 117.235(3)) (held unconstitutional by *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004)).

²⁰² *Id.* (quoting KY. REV. STAT. ANN. § 117.235(3)) (held unconstitutional by *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004)).

²⁰³ *Id.* at 663.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 664.

²⁰⁶ *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 192 (2003)).

²⁰⁷ *Id.* (citing *McConnell*, 540 U.S. at 194).

²⁰⁸ *Id.* at 664-65.

²⁰⁹ *Id.* at 665.

the state statute vague, sweeping in a variety of media.²¹⁰ The court acknowledged that the plain language of the statute could have been construed as pertaining to only express advocacy, but the State Board of Elections chose to classify Anderson's intended activity as falling within the statute's purview, and the court deemed such a definition of electioneering as overbroad.²¹¹ Continuing to distinguish its own facts from *McConnell*, the court found that "unlike *McConnell*, the record here is devoid of evidence that . . . an express advocacy line would be 'functionally meaningless' as applied to electioneering proximate to voting places."²¹² After finding the statute overbroad, the Sixth Circuit exercised its power to prevent the entire statute from being deemed unconstitutional and applied a narrowing construction such that electioneering may "apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure."²¹³

While the Supreme Court denied Kentucky's petition for a writ of certiorari,²¹⁴ the story of *Anderson* does not stop at the Eighth Circuit's ruling. The importance of *Anderson* can be seen in the amici arguments made on petition to the Supreme Court. Of particular note is the amicus brief by the Brennan Center for Justice at New York University School of Law and others (collectively "Brennan").²¹⁵

Brennan took umbrage with the Sixth Circuit's decision in *Anderson* as 'hobbling' the state's regulatory ability by "reinstating the express advocacy test" when it should have been clear that after *McConnell*, "no one could mistake express advocacy for a substantive constitutional boundary."²¹⁶ Remarkably, Brennan argued that the imposition of an express advocacy limitation in order to save the statute from complete unconstitutionality thereby let the "express advocacy genie back out of the bottle" and rendered that statute, and potentially others, "functionally meaningless."²¹⁷ Fearing the import of a decision such as *Anderson*, Brennan implored the Supreme Court to grant

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Stumbo v. Anderson*, 125 S. Ct. 453 (2004). Gregory D. Stumbo was elected to Attorney General of Kentucky in November 2003 and thus became the named party in the petition for certiorari. Lloyd E. Spear was the Attorney General at the time *Anderson* was originally filed.

²¹⁵ Br. of the Brennan Center for Justice at NYU School of Law, Common Cause of Ky., and the National Voting Rights Inst. as Amici Curiae Supporting Pet'rs [hereinafter "Br. of the Brennan Center"], 2004 WL 2157079, *Stumbo v. Anderson* 125 S. Ct. 453 (2004) (No. 04-103).

²¹⁶ *Id.* at *15-16.

²¹⁷ *Id.* at *16.

certiorari in order to “clarify the continued vitality (if any) of the express advocacy concept.”²¹⁸ Brennan even went so far as to invoke federalism concerns by arguing that the Sixth Circuit “construed an important Kentucky law out of existence” without even asking “the Commonwealth for its views on how *McConnell* might affect this question.”²¹⁹

The Respondents to the petition for certiorari simply quoted heavily from the *Anderson* opinion, their best piece of evidence.²²⁰ With respect to the Petitioners’ claim that *McConnell* abolished any distinction between express and issue advocacy, Respondents countered by clarifying that *McConnell* merely found that the distinction had become functionally meaningless when a statute was not vague²²¹ and, ostensibly, not overbroad. As a restatement, Respondents asserted that the “express/issue advocacy distinction remains valid in the context of a vague statute.”²²² But, arguably, the most important statement on *Anderson* came from Brennan’s amicus brief when it made a final plea to the Court because “[t]he *Anderson* opinion, if allowed to stand, will be a model . . . for using express advocacy as a default construction in election-law cases.”²²³

What Brennan, and others of its ilk, fails to understand (or acknowledge) is that *Anderson* is not novel or groundbreaking. Instead, it is merely one in a long line of precedents going back to at least *Buckley* to give proper protection to political speech. *Anderson* did not violate *McConnell*. Instead, *Anderson* placed *McConnell* in its proper light, acknowledged its relevance to the debate in a general sense, and then appropriately concluded that *Buckley* is still the proper barometer of a vague statute’s constitutionality.

²¹⁸ *Id.* at *17.

²¹⁹ *Id.* at *18. This argument regarding federalism is particularly interesting considering that James Bopp, counsel for *Anderson*, is consistently at the forefront of cases such as *Anderson*, including a majority of the cases in the pre-*McConnell* split discussed in this comment. He is also the author of an article, quoted briefly in Brennan’s amicus brief and extensively in this comment, that argues vociferously that *McConnell* did not destroy express advocacy, but instead created an exception. *See* Bopp & Coleson, *supra* note 81.

Mr. Bopp is also a well known member of the Federalist Society (at one time the Vice-Chairman of the Federalist Society’s Free Speech and Election Law Practice Group) and thus there is no small amount of irony in accusing his position, agreed with by the Sixth Circuit in *Anderson*, as violative of federalism principles.

²²⁰ *See* Br. in Opp. to Pet. for Writ of Cert., 2004 WL 2156861, *Stumbo v. Anderson* 125 S. Ct. 453 (2004) (No. 04-103).

²²¹ *Id.* at *9.

²²² *Id.*

²²³ Br. of the Brennan Center at *19.

B. North Carolina Right to Life, Inc. v. Leake: An Opportunity to Apply the “McConnell Corollary”

The Sixth Circuit’s *Anderson* decision is of considerable consequence because it is the first court of appeals decision to essentially refute Justice Thomas’s footnote eleven assertion about the reach of *McConnell* on express advocacy jurisprudence. As Brennan’s fear suggests, *Anderson* will likely become a model for other courts.²²⁴ And because the Supreme Court denied certiorari for *Anderson*, there is increased emphasis to be placed upon a case, *North Carolina Right to Life, Inc. v. Leake* (“*NCRL I*”), working its way back up to the Court of Appeals for the Fourth Circuit, and potentially the Supreme Court.²²⁵

NCRL I has a long procedural history, including a grant of writ of certiorari only to be vacated and remanded to the Fourth Circuit “for further consideration in light of *McConnell*.”²²⁶ The Fourth Circuit then sent it back down to the district court, where it currently resides, with the same instruction as the Supreme Court had given.

Undoubtedly, *NCRL I* will find its way back to the court of appeals. Because the Supreme Court already took notice of the case and denied certiorari regarding *Anderson*, there is reason to believe that it will be taken up by the Supreme Court again, with a proper evaluation of the Fourth Circuit’s yet-to-be-determined holding. If the Fourth Circuit’s reconsideration of *NCRL I* tracks *Anderson*, it will serve as further buoyancy for those disheartened at BCRA and *McConnell* in general and will help create the basis for a majority of courts of appeals to marginalize the sweep of *McConnell* by constraining it to merely the third in a line of precedents going back through *MCFL* to *Buckley*. *McConnell* will thus cease to be the panacea for all the election law ills of so-called “reformers.” Alternatively, if the Fourth Circuit reads the Supreme Court’s remand of *NCRL I* to be an implicit directive to change its holding, then the court of appeals could render a decision directly contradicting the Sixth Circuit in *Anderson*, thus creating a new post-*McConnell* split. And this is where the potential new split and the defined pre-*McConnell* split intersect.

²²⁴ But it should only be a model for placing *McConnell* and *Buckley* in the appropriate context. Express advocacy is still the standard against which all vague statutes should be measured.

²²⁵ *N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003). As will be explained in greater detail later, this case will likely be heard again and thus I am designating this version of it “*NCRL I*” to distinguish it from what inevitably will follow and likely be called “*NCRL II*.”

²²⁶ *Leake v. N.C. Right to Life, Inc.*, 541 U.S. 1007 (2004).

North Carolina Right to Life, Inc., along with its PAC and Fund for Independent Political Expenditures (FIPE), challenged the constitutionality of various North Carolina election law provisions.²²⁷ The first challenged provision, and the most important for purposes of this article, created a method to determine whether a communication supported or opposed a specific candidate.²²⁸ Specifically, the provision was challenged only on the second prong, which provided that “contextual factors” such as the language, timing, distribution and cost of the communication could be analyzed to make a reasonable person determination about whether the communication supported or opposed a specific candidate. This language was lifted straight out of *Furgatch* and the FEC’s rule, the same rule which was litigated in *Maine Right to Life Committee*, *Christian Action Network* and, via state statute, in *Iowa Right to Life*.²²⁹ The second prong utilized the ‘contextual’ method of determining whether a communication could “only be interpreted by a reasonable person” as express advocacy.²³⁰ The Fourth Circuit acknowledged that the first prong of North Carolina’s express advocacy test mirrored the one adopted in *Buckley*.²³¹ Quoting from the district court opinion, the court of appeals found that the contextual prong of the statute violated the *Buckley* express advocacy standard.²³²

The State of North Carolina argued that the Fourth Circuit approved the use of a contextual approach to the determination of express advocacy in communications by its opinion in *FEC v. Christian Action Network*. The court of appeals addressed this contention head on and declared that the *CAN II* court “was not tasked with determining the constitutionality of a particular regulation,” but instead was determining whether the FEC’s litigation position lacked substantial justification so

²²⁷ *N.C. Right to Life, Inc.*, 344 F.3d at 421.

²²⁸ *Id.*

²²⁹ *Id.* at 425. N.C. GEN. STAT. § 163-278.14A(a)(2) (2001):

Evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate’s election, and the cost of the communication may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

²³⁰ *N.C. Right to Life, Inc.*, 344 F.3d at 423.

²³¹ *Id.* at 424.

²³² *Id.* at 425.

as to award fees to the Christian Action Network.²³³ In no uncertain terms, the *NCRL I* court declared that *CAN II*'s reference to *Furgatch*'s contextual approach was neither an endorsement of *Furgatch* nor a pronouncement of the Fourth Circuit's express advocacy test.²³⁴ Instead, the *NCRL I* court announced that it viewed *Furgatch* as the broadest judicial description of the *Buckley* express advocacy test.²³⁵ The court used more explicit language later when it held that "the Ninth Circuit's formulation of the express advocacy standard is broader than the bright-line rule adopted" in the Fourth Circuit and the court thereby rejected it as "insufficiently protective of the First Amendment."²³⁶

The court recognized that "certain entities may be able to skirt just outside of the law's coverage," but that the Supreme Court drew a bright line and it should be adhered to in order to avoid, at all costs, restriction of issue discussion.²³⁷ The Fourth Circuit reasoned that not only did the contextual factors bear no relation to the words themselves, but that the context prong called for a reasonable person standard, which would invariably shift "the focus of the express advocacy determination away from the words themselves to the overall impression of the hypothetical reasonable listener or viewer."²³⁸ Ultimately, the Fourth Circuit upheld the district court's ruling that the context prong was unconstitutional and it also declined to apply the limiting construction suggested by the State because it found that the suggested construction was no different than the provision's language.²³⁹

In its petition for writ of certiorari, North Carolina argued that the Fourth Circuit's opinion should be vacated and remanded for reconsideration because *McConnell* upheld similar contextual factors in BCRA's 'electioneering communication' definition.²⁴⁰ Remarkably, the State also argued to the Supreme Court that the Fourth Circuit had already approved the use of a contextual approach in *CAN II*, despite the Fourth Circuit's express repudiation of this same argument by the State at the court of appeals.²⁴¹

²³³ *Id.* at 425-26.

²³⁴ *Id.* at 426.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 427

²³⁸ *Id.* (quoting *Va. Soc'y for Human Life, Inc. v FEC*, 263 F.3d 379, 391-92 (4th Cir. 2001)).

²³⁹ *Id.* at 428.

²⁴⁰ Pet. for Writ of Cert., 2003 WL 23099556 *9, *Leake v. N.C. Right to Life, Inc.*, 541 U.S. 1007 (2004) (No. 03-910).

²⁴¹ *Id.*

The North Carolina Right to Life Committee (“NCRL”), in its opposition brief, rebutted the State’s arguments regarding *McConnell*’s change to the interpretation of such statutes.²⁴² *McConnell*, NCRL argued, upheld the electioneering communication definition because it was “defined by an elaborate but clear series of standards” and served only “as a constitutionally acceptable alternative to *Buckley*’s express advocacy test” without altering *Buckley*’s approach to vagueness.²⁴³ NCRL’s clearest articulation declared that *Buckley* and *McConnell* provide state’s with two choices: 1) express advocacy; or 2) the functional equivalent of express advocacy through the use of “clearly defined requirements for timing, media, and audience.”²⁴⁴ NCRL quoted *McConnell* as upholding BCRA’s definition because the definition’s components were “both easily understood and objectively determinable” such that “the constitutional objection that persuaded the Court in *Buckley* to limit FECA’s reach to express advocacy is simply inapposite here.”²⁴⁵

The North Carolina statute imposes a reasonable person standard that allows for the assessment of “contextual factors” such as the language, timing, distribution and cost of the communication. BCRA’s electioneering communication definition allows for the assessment of such factors as well, but they are much more clearly delineated. Where BCRA regulates broadcast, cable or satellite (essentially television and radio) communications that refer to a clearly identified candidate, the North Carolina statute regulates “language.” Where BCRA regulates communications within 30 or 60 days of an election, North Carolina regulates “timing.” Where BCRA regulates broadcasts to more than 50,000 people, North Carolina regulates “distribution.”

Recall that the provision at issue in *Buckley* regulated “expenditure[s] . . . relative to a clearly identified candidate.” The Supreme Court rejected the ambiguity of “relative to” and thus imposed the express advocacy standard. The *McConnell* majority very pointedly declared that the ambiguity of the provision in *Buckley* that forced the Court to create the express advocacy standard was non-existent in BCRA and thus the *Buckley* analysis was inapposite. The corollary to that statement is that if the ambiguity does exist, then *Buckley* would clearly still apply. It is difficult to understand how the regulation of “expenditures relative to” and the regulation of communications whose

²⁴² Br. in Opp. to Pet. for Writ of Cert., 2004 WL 578405, *Leake v. N.C. Right to Life, Inc.*, 541 U.S. 1007 (2004) (No. 03-910).

²⁴³ *Id.* at *5.

²⁴⁴ *Id.* at *6-7.

²⁴⁵ *Id.* at *7.

language, timing, distribution and cost are factors for consideration are substantively different. It seems obvious that the First Amendment concerns that drove the *Buckley* Court to recoil from the ambiguity of “relative to” would cause the same aversion to North Carolina’s ambiguous contextual factors, no more clearly defined. The North Carolina statute indeed is laden with ambiguity and thus should be struck down under a *Buckley* analysis. Alternatively, the court can simply strike the contextual factor language and otherwise save the statute. Either way, the message must be sent that First Amendment concerns are too precious to be so easily trampled upon through the invocation of such a wide-sweeping statute as North Carolina’s.

The language of the North Carolina statute is taken directly from the FEC’s rule, which was taken directly from *Furgatch*. This contextual approach has been denounced by all the other circuits to have addressed it both through the federal rule and when implemented in state statutes. It should likewise be denounced (for the second time) by the Fourth Circuit upon remand. The analysis under *McConnell* does not change the outcome in this situation. The North Carolina statute has none of the particularities of ‘electioneering communication’ in *McConnell*.

Taking into account *McConnell*, a legislature can now broaden that restriction of speech so long as it does so in an explicit manner that is clearly the functional equivalent of express advocacy. That is, if North Carolina wants greater restrictions on speech, then it can obtain greater restrictions by identifying in a statute quite clearly what is and what is not restricted. The State’s (or any state’s) best guide is the electioneering communication definition of BCRA, which is considerably clearer and less ambiguous than North Carolina’s statute in what it does and does not cover. If a statute fails to adhere to such clarity and unambiguity, then courts should be immediately suspicious of the government’s attempt to restrict our most cherished right: the freedom of speech.

The Fourth Circuit has several persuasive authorities upon which it can rely for a decision striking down the North Carolina statute. First, it can look generally to the disapproval, by at least five other circuits, of *Furgatch*’s contextual language. The Fourth Circuit did just that in *NCRL I*. Second, the Fourth Circuit can look to the First and Eighth circuits specifically for examples of essentially the same language as the North Carolina provision at issue. In the First Circuit case an FEC ruling was struck down as unconstitutional and in the Eighth Circuit a state law was struck down for the same reasons. In direct refutation of footnote eleven of Justice Thomas’s *McConnell* dissent, I submit that the First and Eighth Circuit decisions could easily turn out the same way today, post *McConnell*.

CONCLUSION

In summary, it is fervently urged that the Fourth Circuit take up the torch in defense of our ability to speak freely by finding that the *Buckley* express advocacy standard still has much life left post *McConnell* and that, as a result, the North Carolina statute's blinding vagueness renders it unconstitutional. Such a rendering will paint a clearer picture for those passionate citizens actively engaged in the debate of prime issues of importance in our time. We cannot bemoan the average citizen's apathy to public issues if we continue to use vague (and thus overbroad) laws to squeeze his neck in hopes of allowing the escape of only what is deemed appropriate for political discourse. Such a decision by the Fourth Circuit would be in perfect accord with several other sister circuits, but it would be especially buttressed by the Sixth Circuit in *Anderson*.

In addition, a decision to strike down the North Carolina provision would add to the growing voice that *Furgatch* is still the wrong approach by being insufficiently protective of First Amendment values. It would also prove to be a direct refutation of Justice Thomas's assertion that the split was decided in favor of *Furgatch*. A loyal defender of the constitution, Justice Thomas would likely take great delight to know that his assertion in this regard was ill-founded on beliefs of what sweeping repercussions would result from the Court's disheartening decision in *McConnell*.

As a result, should *NCRL II* come before the Supreme Court, Justice Thomas and his brethren will have an opportunity to set the record straight regarding the continued viability²⁴⁶ of *Buckley* and, hopefully, the Court will also take the opportunity to once-and-for-all side with the majority of circuits in finding the *Furgatch* contextual approach an improper broadening of the *Buckley* standard. If a state wants to restrict more speech, it must do so through a BCRA electioneering communication-type definition that has some modicum of specificity. The Court would also be able to use the opportunity to speak

²⁴⁶ Arguably, Justice Thomas, along with other justices, has no desire to sustain *Buckley* any longer than absolutely necessary. Justice Thomas has made it clear that, given the opportunity, he would overrule *Buckley*. *McConnell v. FEC*, 540 U.S. 93, 277 (2003) (Thomas, J. dissenting) ("I have long maintained that *Buckley* was incorrectly decided and should be overturned."). However, my argument about the continued viability of *Buckley* is merely in reference to its greater protection of free speech, in the express advocacy context, from what FECA would have otherwise imposed. Presumably, Justice Thomas would agree that *Buckley* should be maintained so long as we cannot sweep away FECA altogether. If the Court were ever in a position to eliminate all election laws and give even greater First Amendment protections to those engaged in political debate, then, arguably, Justice Thomas would see no more need to rely on *Buckley*.

on the proper interpretation of *McConnell* in light of *Anderson*, and now *NCRL I* and *II*, an opportunity upon which I expressly advocate the Court capitalize.