UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CENTER FOR INDIVIDUAL FREEDOM, Plaintiff, v. CHARLES R. SCOTT, District Attorney, 1st Judicial District, *et al.*; Defendants.	)	Case No. 13-2715 Judge: _____

PLAINTIFF CENTER FOR INDIVIDUAL FREEDOM'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

Plaintiff Center for Individual Freedom ("CFIF") submits this memorandum in support of its emergency motion for a preliminary injunction to protect its First Amendment rights and to require that Defendants honor the narrowing construction imposed on Louisiana's Campaign Finance Disclosure Act ("CFDA") in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006). In the alternative, CFIF asks this Court to declare the phrase "for the purpose of supporting, opposing, or otherwise influencing" found in the CFDA to be unconstitutionally vague and void, and to enjoin its enforcement.

Defendants named in the present complaint are all successors to the public officers CFIF sued in the original *Carmouche* complaint, subject to automatic substitution as *Carmouche* parties pursuant to Fed. R. Civ. P. 25(d). All are responsible for enforcing the CFDA. The Defendants are bound by the *Carmouche* holding, both as a matter of issue preclusion and because it is binding precedent on the precise point raised by the present complaint and motion.

Defendants have disregarded the Fifth Circuit's holding in *Carmouche*, which is preventing CFIF from engaging in desired speech during the period before the October 19, 2013 open primary election. Accordingly, CFIF respectfully requests that its motion be considered and granted at the earliest possible time. Most Defendants are members of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance (the "Board"), whose counsel, Ms. Kathleen Allen, was provided a copy of the complaint and these motion papers. The remaining Defendant, Charles Scott, the district attorney for Louisiana's First Judicial District, also was given a copy of these materials.

I. Background: Defendants Have Violated a Fifth Circuit Holding Adopted to Protect Core First Amendment Rights.

In 2004, CFIF sued persons responsible for enforcing the CFDA, seeking to invalidate as unconstitutionally vague Louisiana's purpose-based test for identifying speech regulated by

Louisiana's campaign finance laws. *See Carmouche*, 449 F.3d at 663. CFIF invoked its First and Fourteenth Amendment rights to know confidently and in advance whether particular speech would subject it to regulation, compelled disclosures, and potential criminal penalties. *Id.* at 658, 663. CFIF alleged that the CFDA violated those rights, and chilled speech, by threatening burdensome regulation of speech "made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office," La. Rev. Stat. § 18:1483, terminology employed in Louisiana's definition of both a "contribution" and an "expenditure," *id.* § 18:1483(6)(a), (9)(a).

The Fifth Circuit held that the merits of CFIF's claim were properly presented and that the language of the challenged statute was vague, failing to provide the constitutionally required guidance to speakers, inviting arbitrary enforcement, and thus chilling speech. *Id.* at 663-64.[1] Ultimately, the Fifth Circuit held that the "only" way to save the statute from facial invalidity was to impose a narrow and precise limiting construction. *Id.* at 663 (the court avoids "facial unconstitutionality . . . only by imposing the . . . limiting construction"). That narrowing construction was the heart of the Fifth Circuit's merits ruling and essential to its judgment sustaining the statute.

The Fifth Circuit took its limiting construction verbatim from *Buckley v. Valeo*, 424 U.S. 1, 44, 80 & n.52 (1976) (per curiam). *Buckley* had preserved a similarly worded federal provision from facial invalidity by construing it narrowly to encompass only communications that "expressly advocate the election or defeat of a clearly identified candidate" using "explicit" words such as "vote for," "elect," "defeat," etc. *Id.* at 43, 44 & n.52. The Fifth Circuit discussed

[1] With respect to all threshold matters, such as standing, this Complaint presents the same circumstances as existed at the time of the original action in 2004. CFIF is entitled to a decision on the merits for the same reasons relied upon by this Court and by the Fifth Circuit in the earlier proceeding.

Buckley's standard at some length and held that "we adopt *Buckley*'s definition for what qualifies as such advocacy." 449 F.3d at 663-65.

The Fifth Circuit repeatedly emphasized that the narrowing construction it imposed required the "magic words" described in *Buckley*. *Id.* at 664-66 & n.7. The court noted that *Buckley*'s "magic words" standard had been described as so narrow as to be "functionally meaningless" in some contexts. *Id.* at 666 n.7 (quoting *McConnell v. FEC*, 540 U.S. 93, 193-94 (2003)). But the Fifth Circuit nevertheless ruled that, "[i]f the State of Louisiana agrees . . . that the magic words requirement is 'functionally meaningless,' then pursuant to *McConnell* it is free to amend the CFDA in the same way that Congress altered the [Federal Election Campaign Act of 1971]." *Id.* *See also id.* at 665 ("*legislatures* may employ [other standards] as long as they are precise") (emphasis by court).

Louisiana's legislature has not amended the provision construed by the Fifth Circuit. However, when CFIF began considering public speech in Louisiana just prior to the 2012 elections, it discovered that Defendants had begun enforcing the statute against speech that did not meet *Buckley*'s magic words definition of express advocacy. *See* Decl. of Jeffrey L. Mazzella ¶ 6. Time was too short to pursue a remedy then, so CFIF self-censored its desired Louisiana speech and remained silent. *See id.* Recently, CFIF began planning Louisiana communications that would refer to candidates in the state's October 19, 2013 elections. *See id.* ¶¶ 4, 12-13. But again CFIF was forced to stop by Defendants' uncorrected refusal to adhere to the Fifth Circuit's *Carmouche* construction of the statute. *Id.* ¶ 12. This time, CFIF is seeking judicial relief.

Exhibits A and B to the Declaration of Jeffrey L. Mazzella are documents created by the Louisiana Board of Elections, of which almost all Defendants are members, and are public

records. These documents show that Defendants have initiated enforcement actions based on communications that do not contain magic words of express advocacy as required by *Carmouche*.

Moreover, Defendants specifically argued that magic words of express advocacy are not required by the very provision that *Carmouche* construed to require magic words. Decl. of Jeffrey L. Mazzella Ex. A at 10 (arguing that ad met *Carmouche*'s magic words standard simply by virtue of content the Board deemed "inflammatory"); Decl. of Jeffrey L. Mazzella Ex. B at 7-8 (same). Defendants suggest that *McConnell* somehow undercut the magic words requirement, leaving Defendants free to enforce the statute against speech that is the "functional equivalent" of express advocacy. Yet they rely, not on the narrowing construction imposed by the Fifth Circuit, but on language the Supreme Court used with respect to a very different legislative scheme that regulates objectively defined "electioneering communications."[2] *See* Decl. of Jeffrey L. Mazzella Ex. A at 8-9 & Ex. B. at 6-7.

Defendants thus treat the Fifth Circuit's holding as merely advisory and ignore the court's clear directive to apply a specific and precise definition based on *Buckley* that would eliminate vagueness and avoid facial invalidation of the CFDA. By depriving CFIF of the right to rely on the statute's declared meaning and by asserting the right to attribute other supposed meanings to the statute, Defendants violate their adjudicated obligations and resurrect the statute's unconstitutional vagueness.

---

[2] Under federal law, an "electioneering communication" is speech by specified entities disseminated via broadcast, cable, or satellite – but not other forms of media – to at least 50,000 voters in the relevant constituency within 30 days before a primary or 60 days before a general election. *See* 2 U.S.C. § 434(f)(3)(A). "Express advocacy" is excluded from coverage as an electioneering communication. *See id.* § 434(f)(3)(B)(ii).

CFIF now seeks a preliminary injunction to ensure its ability to speak out before the October 19, 2013 election and thereafter until final judgment is entered in this case.

II. A Showing of Success on the Merits When First Amendment Injury Is Alleged Satisfies All Four Factors Governing Preliminary Relief.

A party seeking a preliminary injunction generally "must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant[s]; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012). Because CFIF seeks to vindicate First Amendment rights, a showing of likely success on the merits under factor one also will satisfy factors two, three, and four. *Id.* at 295, 297-98.

III. CFIF Is Likely to Prevail on the Merits.

Not only will CFIF establish a likelihood of success on the merits of its First Amendment claim in this case, but it has previously done so. CFIF prevailed on this precise point in *Carmouche*, a decision to which all Defendants are in privity, and merely seeks to preserve the benefit of that ruling.

A. Defendants Are Bound by *Carmouche*'s Construction of the CFDA.

"[P]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 574 (5th Cir. 2005) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)). A final ruling on a contested issue of law that was essential to a judgment binds both the parties and those in privity with those parties. *Duffie v. United States*, 600 F.3d 362, 372 (5th

Cir. 2010); *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1173-74 (5th Cir. 1992) (discussing privity).

All Defendants here are public officers who, pursuant to Fed. R. Civ. P. 25(d), automatically succeed the *Carmouche* defendants and, hence, are in privity with them. *See Lucy v. Adams*, 224 F. Supp. 79, 80-82 (N.D. Ala. 1963) (new dean of students bound by prior judgment against former dean), *aff'd sub nom. McCorvey v. Lucy*, 328 F.2d 892 (5th Cir. 1964); *Cornelius v. Hogan*, 663 F.2d 330, 333-35 (1st Cir. 1981) (successor officers are bound); *Hernandez v. O'Malley*, 98 F.3d 293, 294 (7th Cir. 1996) ("successors in office" are bound); *Acheson v. Albert*, 195 F.2d 573, 576 n.9 (D.C. Cir. 1952) (judgment is "res judicata on the law and facts as against the Secretary's successors in office"); *Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (explaining that "Fed. R. Civ. P. 25(d) [provides] for automatic substitution of public officer's successor when officer ceases to hold office").

Moreover, it "is axiomatic that a district court may not overturn or disregard binding [Fifth Circuit] precedent." *Halliburton Energy Serv., Inc. v. NL Indus.*, Civ. A. No. 4-05-cv-04160, 2008 WL 3165687, at *4 (S.D. Tex. Aug. 4, 2008). Indeed, a Fifth Circuit panel decision binds even other panels of the Fifth Circuit. *See Taylor v. Johnson*, 257 F.3d 470, 472 (5th Cir. 2001). For this reason as well, the present Defendants cannot ask this Court to disregard the rule of law established by *Carmouche.*

The narrowing construction *Carmouche* imposed on the CFDA was essential to the judgment. The Fifth Circuit said it could hold the statute "not facially unconstitutional . . . only by imposing" the narrowing construction. 449 F.3d at 663 (emphasis added). In the opinion's

concluding paragraph, the court held that "we adopt *Buckley*'s definition . . . . As so limited, the challenged provisions . . . are facially constitutional." *Id.* at 665-66 (emphasis added).

Thus, the narrowing construction declared by the Fifth Circuit was an essential and carefully considered element of its holding. In this action, Defendants are precluded from relitigating the legal meaning of the Louisiana statute and certainly cannot ask this Court to give it a different meaning than was declared by the Fifth Circuit.

B. *Carmouche* Limits the CFDA Exclusively to Express Advocacy As Defined in *Buckley*, Including *Buckley*'s Magic Words Requirement.

The Fifth Circuit did not simply hold that the CFDA should be construed on the basis of the general principles relied upon in *Buckley*. Instead, it imposed a specific and precise definition. *Carmouche* is crystal clear that CFDA language regulating activity "for the purpose of supporting, opposing, or otherwise influencing" was defined to have the same precise meaning as the similar federal provision interpreted in *Buckley*. 449 F.3d at 663-66 & n.7. The court said it was imposing "the same limiting construction . . . that the court employed in *Buckley*." *Id.* at 663. It summarized *Buckley*'s interpretation, pointing out that it calls for "the well-known 'magic words.'" *Id.* at 664. And it specified that if "the State of Louisiana [believes] that the magic words requirement is 'functionally meaningless,' then . . . it is free to amend the CFDA," *id.* at 666 n.7 (emphasis added), something the State has not done.

CFIF is not saying that *Carmouche* limited the category of "magic words" to the eight specific words and phrases recited in *Buckley*. *Carmouche* quoted *Buckley*'s requirement of words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' defeat,' 'reject.'" *Id.* at 664 (emphasis added) (quoting *Buckley*, 424 U.S. at 44 n.52). Words such as "oppose candidate Smith" or "put Smith in the Senate" thus may qualify. *See Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1254 (Colo. 2012). But the

magic words requirement imposed by *Carmouche*, 449 F.3d 666 & n.7, is satisfied only by specific terms that are as express and explicit as the examples listed that qualify as "magic words," *Colo. Ethic Watch*, 269 P.3d at 1254 & n.6.[3]

C. Defendants Have Enforced the CFDA Against Speech That Is Not Express Advocacy As Defined By the Fifth Circuit in *Carmouche*.

Defendants have given lip service to *Carmouche*, citing it without acknowledging its magic words requirement and presenting its requirement of express advocacy as malleable in light of their understanding of other cases involving other laws. Thus, the Board Defendants have applied the statute to speech they deem to be "functionally equivalent" to express advocacy, a concept they define using language taken from Supreme Court decisions involving a federal statute that seeks to separately regulate "electioneering communications" and not express advocacy. *See infra* at 9-12. And Defendants have done so without identifying any magic words in the speech.

CFIF has obtained several documents reflecting Defendants' disregard of the *Carmouche* decision. For example, on September 1, 2009, the Board filed its Memorandum in Opposition [to] Motion for Summary Judgment in an enforcement proceeding against the Louisiana Justice Fund (Mazzella Ex. A). The Opposition (at 5) quotes the accused ad, which lacks explicit words of express advocacy. The Opposition (at 7-8) mentions *Carmouche* and says that "express advocacy" is required. But the Opposition does not acknowledge that *Carmouche* expressly required magic words in the speech. Nor does the Opposition purport to identify any such magic words in the speech. Instead, the Opposition mistakenly opines (at 8-9) that the Supreme Court has replaced the magic words of express advocacy standard with a broader test taken from the

[3] *Buckley* did not use the term "magic words." That description originated with critics of the opinion who sought to mock the very narrow test it established. But the term aptly conveys *Buckley*'s meaning and it now is widely used, including by the Supreme Court. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007) (opinion of Roberts, C.J.).

controlling opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). *See id.* at 8-9.

Similarly, on November 4, 2009, the Board opposed summary judgment in an enforcement proceeding against Scott Wilfong and Capital Business Services, L.L.C. (Mazzella Ex. B). Again, the accused ad is quoted (at 4), but it contains no explicit words of express advocacy. Again, the Opposition fails to acknowledge that *Carmouche* imposes a "magic words requirement," it does not claim to identify any magic words, and it relies on a test extracted from *WRTL*. *Id.* at 6-7.

There may well be other examples in Defendants' files. But these two formal filings, speaking for the Board Defendants, show that Defendants are applying the CFDA to speech that does not contain the type of magic words express advocacy required by *Carmouche*. And they are enough to inflict on CFIF's speech the same chill and self-censorship that *Carmouche* sought to remove.

D. The Supreme Court Has Not Changed the Declared Meaning of Louisiana's Statute, Nor Has It Altered *Buckley*'s Definition of Express Advocacy.

The Fifth Circuit made clear that, if Louisiana wanted to regulate speech that did not fall within the definition it imposed, new legislation was required. 449 F.3d at 666 & n.7. There has been no such legislation, so Defendants have no legal right to vary from the statutory meaning the Fifth Circuit declared.

Moreover, and contrary to Defendants' claims, the Supreme Court has never altered *Buckley*'s definition of express advocacy. Indeed, the Court has reaffirmed that *Buckley* express advocacy requires "magic words"—a fact the Board has deliberately ignored. Decl. of Jeffrey L. Mazzella Ex. A at 8 (prosecuting issue advocacy and representing that the magic words requirement is "not mandatory"). Instead, Defendants mistakenly rely on the Court's discussion

of a different legal standard regulating political speech that is not express advocacy, but an "electioneering communication." Defendants cite the Court's statements that because the "electioneering communication" standard regulates speech that is the "functional equivalent" of express advocacy, the "electioneering communication" standard is not unconstitutionally overbroad. *See* Decl. of Jeffrey L. Mazzella Ex. A at 8-9 & Ex. B. at 6-7. But as discussed in more detail below, that analysis is irrelevant here. The CFDA has been narrowly construed to apply only to express advocacy, and Louisiana has not adopted an electioneering communication statute or any other standard regulating speech beyond express advocacy where the "functional equivalent" concept might apply.

Defendants make misleading references to *McConnell*, 540 U.S. at 193. But that is nothing new or unforeseen. They suggest that *McConnell* somehow undermines the "magic words" requirement imposed by *Carmouche*. *See* Decl. of Jeffrey L. Mazzella Ex. A at 8. But in fact, the Fifth Circuit specifically quoted that statement from *McConnell*'s comments about express advocacy in its *Carmouche* opinion and still insisted on the "magic words requirement" for Louisiana. 449 F.3d at 665, 666 n.7.

Defendants also incorrectly claim that the Supreme Court adopted a substitute definition of express advocacy in *WRTL*. Decl. of Jeffrey L. Mazzella Ex. A at 8-9 & Ex. B. at 6-7. Not so. *WRTL* concerned a different statutory scheme that specifically did not regulate express advocacy and finds no analogue in Louisiana law.

Decades after *Buckley*, Congress decided to supplement its regulation of express advocacy by regulating a new category of speech known as "electioneering communications." 2 U.S.C. § 434(f)(3)(A). Congress provided a detailed and objective definition of this new category of speech, which referred only to speech that was broadcast by certain types of speakers

in specified media during limited periods before elections and that clearly identified a candidate and targeted the candidate's electorate in a defined way. *Id.* § 434(f)(3)(A)(i). It pointedly excluded from the new category any "express advocacy." *Id.* § 434(f)(3)(B)(ii). As a result, Congress created two different categories of speech subject to parallel restrictions and regulation.

In *McConnell*, the Court held that the detailed and objective statutory definition of "electioneering communications" was not facially vague. 540 U.S. at 194. It further held that the definition was not facially overbroad because much of the speech it encompassed – which was run in narrow, clearly defined time periods immediately before an election – functioned as if it were express advocacy and *Buckley* had held that such a function justified regulation. *Id.* at 193. Importantly, nothing in *McConnell* impaired *Buckley*'s definition of express advocacy. *Carmouche*, 449 F.3d 665 n.7 ("*McConnell* does not obviate the applicability of *Buckley*'s line-drawing exercise where, as in this case, we are confronted with a vague statute.").

Several years later, a litigant asserted that, even though the electioneering communication standard was facially valid, it violated the First Amendment "as-applied" to some speech that the definition encompassed. *WRTL*, 551 U.S. at 457. The Supreme Court agreed that overbroad application should be curtailed. The government's only justification for regulating electioneering communications was that (i) the Court had approved regulating express advocacy, and (ii) many electioneering communications were functionally equivalent to express advocacy. *Id.* at 465. However, (iii) some speech within the electioneering communication definition was not functionally equivalent to express advocacy. Therefore, *WRTL* held (iv) that the electioneering communication definition could not be applied to regulate such speech because the government had not justified the First Amendment burden. *Id.* at 476-81. In describing its holding, the Court said that speech was not functionally equivalent to express advocacy unless

"the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 470. That was not a substitute definition of express advocacy. To the contrary, express advocacy continued to be separately regulated. *See id.* at 474 n.7; 2 U.S.C. §§ 431(17), 434(f)(3)(B)(ii). And while there were several *WRTL* opinions, every Justice joined an opinion equating *Buckley* express advocacy with a magic words requirement. 551 U.S. at 474 n.7 (Roberts and Alito), 495 (Scalia, Kennedy, and Thomas), 513 (Souter, Stevens, Ginsberg, and Breyer).

At its heart, *WRTL* was about protecting speech, not finding new ways to burden and regulate it as Defendants suggest. The Court went to great lengths to limit application of the electioneering communication standard by giving an example of speech that should not be regulated because it was neither express advocacy nor its functional equivalent. On top of that, the Court emphasized that the *WRTL* test was not a valid, stand-alone test for determining what speech could be burdened. To the contrary, the Court stressed that its description applied only to speech that already was within the facially valid electioneering communication standard. *See id.* at 474 n.7 (explaining that the "no reasonable interpretation" test "is only triggered if the speech meets the bright-line requirements of [the definition of an electioneering communication] in the first place"); *Colo. Ethics Watch*, 269 P.3d at 1257-58 (description is not a stand-alone test).

But ultimately this discussion of post-*Carmouche* developments is beside the point. *Carmouche* declared a specific and fixed meaning for Louisiana's statute. Although the Fifth Circuit borrowed its definition from *Buckley*, it did not invite Defendants to continue tinkering on the basis of their understanding – or misunderstanding – of later Supreme Court precedent. Instead, the Fifth Circuit ruled that, unless and until the Louisiana legislature amended the

statute, it would have the narrow meaning declared in *Carmouche*. No such amendment has occurred.

E. CFIF Is Likely to Obtain a Remedy on the Merits.

CFIF is merely seeking the benefit of its prior litigation. Louisiana's statutory language remains the same as it was in *Carmouche*. There, the Fifth Circuit held the statutory language unconstitutionally vague on its face unless narrowly defined to encompass only *Buckley* magic words express advocacy. Because Defendants are all in privity with the original *Carmouche* parties, they are bound by that holding and precluded from contesting it here. But even if they were not so bound, the *stare decisis* force of directly applicable Fifth Circuit precedent would control litigation in this Court.

Because Defendants are not following the *Carmouche* definition but are developing different constructions, CFIF again faces the same facially vague statutory language now that the Fifth Circuit held to require a remedy in *Carmouche*. Once again, it cannot confidently determine in advance how Defendants will interpret the statute. Under 42 U.S.C. § 1983, CFIF is entitled to protection from chill and suppression of its speech due to such a facially vague statute. Thus, CFIF is very likely to obtain an injunction limiting enforcement to the Fifth Circuit's declared definition or, alternatively, forbidding any enforcement of the statute as facially invalid.

Moreover, the Fifth Circuit's imposition of a precise meaning on Louisiana's statute is properly viewed as a "declaratory judgment or decree" within 28 U.S.C. § 2202. *See Samuels v. Mackell*, 401 U.S. 66, 68, 73 (1971) (a ruling dismissing a constitutional challenge to a state statute on the basis of a narrowing construction is "in effect a declaratory judgment . . . [on] the merits"); *Richardson v. Ramirez*, 418 U.S. 24, 35 (1974) (an authoritative ruling on an issue, in the absence of formal relief, is "in effect a declaratory judgment" and so may be subjected to

review). Under § 2202, "[f]urther necessary or proper relief . . . may be granted, after reasonable notice and hearing, against any adverse party." *See also Samuels*, 401 U.S. at 72-73; *Sullo & Bobbitt, PLLC v. Abbott*, Civ. A. No. 3:11-CV-1926, 2012 WL 2796794, at *19 (N.D. Tex. July 10, 2012) (collecting authority). This complaint and motion provide the necessary notice and hearing. Thus, § 2202 also empowers this Court to enjoin Defendants from enforcing the CFDA against any speech other than *Buckley* magic words express advocacy.

IV. The Remaining Factors All Favor Preliminary Relief.

As noted above (at 5), a showing of likely success under factor one of the four-factor preliminary injunction test also satisfies each of the three remaining factors. *See Opulent Life*, 697 F.3d at 279, 288, 295, 297-98. As to the second factor, the Fifth Circuit explained:

> [Plaintiff] has satisfied the irreparable-harm requirement because it has alleged violations of its First Amendment . . . rights. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. . . . When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.

Id. at 295 (internal citations and quotation marks omitted). Here, the harm to CFIF's First Amendment rights will persist unless and until this Court issues the requested preliminary injunction.

Similarly, unless a defendant "present[s] powerful evidence of harm" to counterbalance the First Amendment injury, the third factor favors preliminary relief. *Id.* at 297. No such powerful evidence of harm exists here. To the contrary, Defendants (through their predecessors in interest) had a full and fair hearing before the Fifth Circuit prior to that court's decision imposing the narrowing construction CFIF seeks to enforce here.

Finally, factor four is satisfied because "injunctions protecting First Amendment freedoms are always in the public interest." *Id.* at 298 (punctuation and citations omitted).

Indeed, as public officials bound by the First and Fourteenth Amendments, Defendants share CFIF's strong interest in protecting its First Amendment rights and those of other similarly situated speakers, as well as all willing listeners. Defendants cannot establish any strong countervailing interest, particularly since their interests already have been adjudicated in a final judgment by the Fifth Circuit that Defendants purport to recognize as binding.

In short, all factors strongly favor preliminary relief.

V. Conclusion

For these reasons, CFIF's motion for a preliminary injunction should be granted. Defendants should be enjoined from enforcing the CFDA against any speech that lacks magic words express advocacy as required by *Carmouche*.

Respectfully submitted,

PHELPS DUNBAR LLP

/s/Christopher K. Ralston

CHRISTOPHER K. RALSTON (#26706)
BRYAN EDWARD BOWDLER (#32097)
365 Canal Street, Suite 2000
New Orleans, LA 70130-6534
Telephone: (504) 566-1311
Telecopier: (504) 568-9130
Email: ralsonc@phelps.com
bryan.nowdler@phelps.com

Of Counsel:

Renee L. Giachino (*pro hac vice pending*)
Center for Individual Freedom
815 King Street, Suite 303
Alexandria, VA 22314
(703) 535-5836

Thomas W. Kirby (*pro hac vice pending*)
Caleb P. Burns (*pro hac vice pending*)
Andrew G. Woodson (*pro hac vice pending*)
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

ATTORNEYS FOR PLAINTIFF,
CENTER FOR INDIVIDUAL FREEDOM

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Emergency Motion for a Preliminary Injunction has been served upon the following by United States mail, facsimile, and electronically on September 20, 2013:

Charles R. Scott
District Attorney
Caddo Parish Courthouse
501 Texas Street
Shreveport, LA 71101
Fax: 318-226-5900

M. Blake Monrose
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Scott Schneider
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Terry Backhaus
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Julie E. Blewer
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Charles Emile "Peppi" Bruneau, Jr.
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Jean Ingrassia
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Dr. Louis Leggio
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Dr. Steve Lemke
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Bob McAnelly
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Ashley Kennedy Shelton
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

Grove Stafford
Louisiana Board of Ethics
P.O. Box 4368
Baton Rouge, Louisiana 70821
Fax: 225-381-7271

/s/Christopher K. Ralston
Christopher K. Ralston