

No. 08-1977

United States Court of Appeals for the Fourth Circuit

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

v.

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

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

Petition for Rehearing En Banc

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

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

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

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

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

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

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

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

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

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

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

² The panel’s labeling of RTAO as an ““issue-*adversary*”” group is erroneous. *See Slip op.* at 3 (emphasis added).

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

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

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

While the panel recited *Winter*’s “likely” test,⁵ it created an enhanced burden

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

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

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

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

Slip op. at 10 (emphasis added).⁶

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

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

(emphasis added).

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

speech” is contrary to the First Amendment.

Third, even if applicable law *were* complex, any doubts about its constitutionality work to the advantage of the *speaker*, not the censor. *See supra* at note 6.

“Complexity” would be an argument for a *lowered*, not heightened, preliminary injunction burden on speakers in First Amendment cases.

Fourth, any heightened burden, even if it were appropriate, ultimately falls on the FEC, not RTAO, because in free-speech cases “the burdens at the preliminary injunction stage track the burdens at trial.” *Gonzalez*, 546 U.S. at 428. When *Winter* spoke of a “clear showing,” 129 S. Ct. at 376, it cited *Mazureck v. Armstrong*, 520 U.S. 968 (1997), which held that the “clear showing” applies to “the burden of persuasion,” *id.* at 972. That burden of persuasion, *in a First Amendment case*, requires the *government*, even at the preliminary injunction stage, to prove that it has a compelling interest to justify its regulation, that any regulation is narrowly tailored, and that any proffered less-restrictive means are inadequate to serve a compelling interest. *See Gonzalez*, 546 U.S. at 428.⁷ *See also WRTL-II*, 127 S. Ct. at 2664 (government bears burden of proving constitutionality of all applications of campaign-finance law); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S.

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

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

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

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

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

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

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

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

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

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

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

Leake, 525 F.3d at 281.⁹

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

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

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

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

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

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

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

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

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

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

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

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

Expressly advocating means any communication that . . . (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

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

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

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

nition (11 C.F.R. § 100.22(b)) and its rule (11 C.F.R. § 114.15) purporting to implement *WRTL-II*'s appeal-to-vote test, 127 S. Ct. at 2667, is starkly illustrated in this case by the fact that the FEC and district court differed as to the interpretation of an ad at issue. The FEC said that "Change" contained no "appeal to vote" under *WRTL-II* and so was not a prohibited "electioneering communication" under § 114.15 (and so also was not "express advocacy"). The district court disagreed, leapfrogging whether it was a prohibited "electioneering communication" under § 114.15 to declare it prohibited *express advocacy* under § 100.22(b). See JA–112 n.15.¹³

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

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

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

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

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

V. This Decision Conflicts With Other Circuits’ Decisions.

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

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

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

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

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

Certificate of Service

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

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