No. 08-1977

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE REAL TRUTH ABOUT OBAMA, INC., Plaintiff-Appellant,
v.
FEDERAL ELECTION COMMISSION, et al., Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEES FEDERAL ELECTION COMMISSION AND UNITED STATES DEPARTMENT OF JUSTICE

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) over the interlocutory appeal of the district court's denial of two preliminary injunction motions. The district court denied these motions by order dated September 11, 2008 (J.A. 94-95), and by opinion dated September 24, 2008 (J.A. 98-128). A notice of appeal was filed on September 12, 2008. (J.A. 96-97.)

ISSUES PRESENTED

Whether the district court abused its discretion in declining to preliminarily enjoin the Federal Election Commission ("Commission") and the Department of Justice from enforcing, both facially and as applied to specific activities: (1) a Commission regulation defining the statutory term "expressly advocating," 11 C.F.R. § 100.22(b); (2) a Commission regulation regarding contributions received in response to solicitations, 11 C.F.R. § 100.57; (3) a Commission policy statement regarding analysis of political committee status; and (4) a Commission regulation regarding corporation-funded "electioneering communications," 11 C.F.R. § 114.15.

STATEMENT OF THE CASE

This case presents facial and as-applied challenges to three regulations governing federal campaign activity, as well as to a Commission policy statement

related to such activity. At the height of the nationwide general election campaign, appellant The Real Truth About Obama, Inc. ("RTAO") requested that the district court preliminarily enjoin the Commission and the Department of Justice from enforcing these provisions on their face and as applied to RTAO. The district court denied RTAO's preliminary injunction motions, holding that RTAO was unlikely to prevail on the merits of its challenges and that the harm that the public and the Commission were likely to incur under an injunction outweighed RTAO's unsupported assertion of injury to itself.

RTAO timely appealed and sought an injunction pending appeal and an expedited briefing schedule. This Court denied both requests for relief on October 1, 2008.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Contributions and Expenditures

Under the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-55, "contribution" is defined to include giving anything of value "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Similarly, "expenditure" is defined to include any payment of money made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). FECA generally prohibits corporations and labor unions

from making any contribution or expenditure. 2 U.S.C. § 441b(a). This prohibition does not apply to a corporation that qualifies as a "political committee." *See* 11 C.F.R. § 114.12(a); *infra* pp. 4-5.

B. Express Advocacy

In *Buckley v. Valeo*, 424 U.S. 1, 41 (1976), the Supreme Court reviewed FECA's original prohibition on expenditures of more than $1,000 "relative to" a federal candidate. The Court found the provision unconstitutionally vague and so "construed [it] to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Congress then defined "independent expenditure" to mean an independent communication "expressly advocating the election or defeat of a clearly identified candidate." *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 2 U.S.C. § 431(17)).

The Commission later promulgated a regulatory definition of the term "expressly advocating." 11 C.F.R. § 100.22. Part (a) of the regulatory definition encompasses communications that use phrases or campaign slogans "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. § 100.22(a). Part (b) defines express advocacy as a communication that has an unambiguous "electoral portion" that cannot reasonably

be construed as anything other than an encouragement to elect or defeat a candidate. 11 C.F.R. § 100.22(b).

Citing *Buckley*, a number of courts had held that a limited, "magic words" interpretation of "expressly advocating" was the outer constitutional boundary of Congress's power to regulate campaign expenditures. *See infra* pp. 21-26. In *McConnell v. FEC*, 540 U.S. 93, 191-92 (2003), however, the Supreme Court held that *Buckley*'s express advocacy construction was imposed because of the vagueness of FECA's original statutory text, not because the government's power was in all cases circumscribed to regulating only a limited number of "magic words" of advocacy. Congress may regulate not only express advocacy, the Court held, but also the "functional equivalent of express advocacy," *id.* at 206; *see also FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 127 S. Ct. 2652, 2667 (2007) (same).

C. Political Committee Status

FECA provides that any "committee, club, association, or other group of persons" that receives over $1,000 in contributions or makes over $1,000 in expenditures in a calendar year is a "political committee." 2 U.S.C. § 431(4)(A). Political committees must register with the Commission and file periodic reports for disclosure to the public of all their receipts and disbursements, with limited exceptions for most transactions below a $200 threshold. *See* 2 U.S.C. §§ 433,

434. No person may contribute more than $5,000 per calendar year to any one political committee. 2 U.S.C. § 441a(a)(1)(C).

In *Buckley*, the Supreme Court held that defining political committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application of FECA's political committee requirements by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the Act's political committee provisions "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id*. Under the statute as thus limited, a non-candidate-controlled entity must register as a political committee — thereby becoming subject to limits on the sources and amounts of its contributions received — only if the entity crosses the $1,000 threshold of contributions or expenditures and its "major purpose" is the nomination or election of federal candidates.

D. Contributions in Response to Solicitations

FECA does not provide specific guidance as to when a donation is made "for the purpose of influencing any election" and thus constitutes a "contribution" for purposes of the $1,000 political committee threshold. 2 U.S.C. § 431(8)(A)(i). By regulation, the Commission has defined "contribution" to include a "deposit of money . . . made by any person in response to any communication . . . if the

communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a); *Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004).

E. Corporation-Funded Electioneering Communications

FECA prohibits corporations (other than incorporated political committees) and unions from making any "direct or indirect payment . . . for any applicable electioneering communication," which is defined in the context of a presidential campaign as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before a general election or thirty days before a primary or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i).

The Supreme Court has upheld the constitutionality of this financing restriction for non-express advocacy "to the extent that the issue ads . . . are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08; *WRTL*, 127 S. Ct. at 2667. Chief Justice Roberts' controlling opinion in *WRTL* defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. Shortly

after *WRTL* was decided, the Commission promulgated a regulation to codify the Court's controlling opinion. *See* 11 C.F.R. § 114.15.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Commission is the independent agency of the United States government with exclusive civil jurisdiction to administer, interpret, and enforce FECA. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce against violations of the Act. 2 U.S.C. § 437g. The Department of Justice prosecutes criminal violations of the Act. *See* 2 U.S.C. § 437g(d).[1]

RTAO is a nonprofit Virginia corporation. (J.A. 12.) RTAO was incorporated on July 24, 2008, six days before it filed its complaint. (J.A. 45-47.) On July 29, RTAO filed a notice of section 527 status with the Internal Revenue Service. (J.A. 49-50.) RTAO alleges that it has developed two radio advertisements, entitled *Change* and *Survivors*. (J.A. 15-16, 92-93.) *Change* purports to provide "the real truth about Democrat Barack Obama's position on abortion," using an "Obama-like voice." (J.A. 15-16.) That voice states, in a first-

[1] Because each of the regulations and policies at issue in this case was promulgated by the Commission, we refer exclusively to the Commission in the remainder of this brief.

person declaration, that Senator Obama wishes to provide federal funds for every abortion performed in the United States, legalize partial-birth abortion, and "give Planned Parenthood lots more money," *inter alia*. (*Id*.) Near the end of the ad, a woman's voice asks: "Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?" (*Id*.) *Survivors* states that Senator Obama "has been lying" about his voting history regarding abortion, thereby demonstrating "callousness" and "a lack of character and compassion that should give everyone pause." (J.A. 92-93.) RTAO allegedly intends to broadcast these ads on the radio "in heartland states" during the sixty-day period preceding the 2008 general election (J.A. 16, 93), but RTAO does not allege that it has taken any concrete steps towards creating or distributing the ads. RTAO alleges that it intends to raise more than $1,000 and to spend more than $1,000 to broadcast the ads (*see* J.A. 17), but it does not provide evidence that it has raised or spent any money in relation to its advertising, or that it has identified any potential donors or specific donations that it would like to accept to fund its activities. RTAO has written one fundraising communication that it alleges it intends to use to raise money (J.A. 16-17), but it does not allege that it has ever sent such a letter to any potential contributor. RTAO alleges that it is creating a website that will contain "accurate statements about [Obama's] public policy positions" (J.A. 15), but the website is not active.

On July 30, 2008, RTAO filed its complaint and a motion for a preliminary injunction challenging the Commission's regulations and policy as unconstitutional on their face and as applied to *Change*. On August 20, RTAO filed a second motion for a preliminary injunction, which sought to enjoin the Commission's enforcement of its regulations against *Survivors*. The district court denied those injunctions on September 11 (J.A. 94-95), and issued its memorandum opinion on September 24 (J.A. 98-128).

The district court held that RTAO failed to meet any of the requirements for preliminary injunctive relief. As to RTAO's likelihood of success on the merits, the district court found that RTAO was unlikely to prevail on any of its claims. First, the court held that the Commission's definition of express advocacy, 11 C.F.R. § 100.22(b), is "virtually the same test stated by [the controlling opinion] of *WRTL*," and therefore neither overbroad nor unconstitutionally vague. (J.A. 118.) Second, the district court held that the Commission's regulation governing solicitations that "support or oppose" a candidate, 11 C.F.R. § 100.57, is permissible because "the case law and Supreme Court precedent make it clear that the use of 'support or oppose' is not unconstitutionally vague." (J.A. 121.) Third, the district court rejected RTAO's claims of overbreadth regarding the Commission's analysis of political committee status "[b]ecause the FEC . . . employs the same factors the Supreme Court has approved" for such analysis.

(J.A. 123.) Finally, the district court held that RTAO was unlikely to succeed in its challenge to the Commission's regulation regarding corporation-funded electioneering communications, finding that "the FEC's regulation simply adopted the test enumerated in *WRTL*." (J.A. 124-25.)

In addition, the district court held that RTAO failed to establish any irreparable harm warranting an injunction. Even if RTAO were deemed to be a political committee under the regulations it challenged, the court reasoned, those regulations left RTAO "free to disseminate their message and make any expenditures they wish." (J.A. 126.) The "only limitation" created by the regulations was FECA's "constitutionally permitted restrictions" on individuals' contributions to RTAO, which the court held insufficient to constitute irreparable harm. (J.A. 126-27.)

Finally, the court held that the balance of harms and the public interest weighed in favor of denying injunctive relief, as the Commission would be harmed if it were enjoined from enforcing its presumptively valid regulations, and the public would be harmed if "the next two months of election law and enforcement . . . bec[ame] a 'wild west' of electioneering communication and contributions without the challenged regulations in place." (J.A. 127.) Thus finding against RTAO on each element of the relevant analysis, the district court denied RTAO's preliminary injunction motions. (J.A. 95.)

RTAO filed its notice of appeal on September 12, 2008, and moved the district court to enjoin the Commission from enforcing the challenged regulations and policy during the pendency of this appeal. The district court denied RTAO's motion on September 30, 2008. RTAO moved this Court for an injunction pending appeal, as well as to expedite consideration of the appeal. This Court denied both motions by order dated October 1, 2008.

SUMMARY OF THE ARGUMENT

RTAO cannot establish an entitlement to preliminary injunctive relief, and the district court did not abuse its discretion in so holding. The requested injunction is without basis in law, disserves the public interest, and is unsupported by any irreparable harm to RTAO.

RTAO faces no irreparable harm as a result of the regulations it has challenged. RTAO contends that those regulations would qualify the organization as a political committee. But even if this were true, RTAO — like all political committees — would be able to engage in unlimited, unrestricted speech, including all of the communications it purports to wish to broadcast. As a political committee, there would be no limit on RTAO's ability to broadcast *Change*, *Survivors*, or any other election-related advertising. Furthermore, RTAO cannot demonstrate any irreparable harm arising from the contribution limits applicable to political committees, for RTAO has provided no evidence regarding its ability or

desire to solicit funds in excess of the applicable $5,000 per person contribution limit. Nor would the political committee disclosure requirements cause RTAO any irreparable harm. In contrast, the Commission and the public would be substantially harmed if the Commission were enjoined during the immediate pre-election period from enforcing regulations that provide critical information to the public and prevent actual and apparent corruption.

RTAO also cannot demonstrate a likelihood of success on the merits of its case. First, the Commission's express advocacy regulation is entirely consistent with *McConnell*'s interpretation of *Buckley*'s express advocacy test, and it is highly similar to the test endorsed by the *WRTL* Court. Second, the Commission's solicitation regulation relies on a "support or oppose" standard that has uniformly been upheld by the Supreme Court and other courts nationwide. Third, the Commission's policy statement regarding political committee status is neither subject to judicial review nor inconsistent with the Supreme Court decisions it implements regarding the "major purpose" test. Finally, the Commission's regulation governing corporation-funded electioneering communications is derived exclusively and faithfully from *WRTL* itself.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] the grant or denial of a preliminary injunction for abuse of discretion, recognizing that preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quotation marks omitted); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 524 (4th Cir. 2003) (quoting *MicroStrategy*); *see also Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam) (vacating circuit court's reversal of denial of pre-election preliminary injunction on grounds that "[i]t was . . . necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error."). The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

The Court assesses the grant or denial of a preliminary injunction under four factors: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." *U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d

275, 280 (4th Cir. 2006) (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-94 (4th Cir. 1977)); *see also United States v. M/V Sanctuary*, 540 F.3d 295, 302 (4th Cir. 2008). RTAO bears the burden of proving that each factor supports the granting of such relief. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). In applying the factors, "the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied; if such a showing is made, the court must then balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant." *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002) (citations omitted).

II. RTAO CANNOT DEMONSTRATE IRREPARABLE HARM

RTAO fails to meet its burden to demonstrate that it will suffer irreparable harm without the requested temporary relief. RTAO offers only a single, conclusory allegation that its speech is being chilled, and it argues that this unsupported assertion is sufficient to demonstrate irreparable harm. (*See* RTAO Br. at 52-53.) But a mere allegation of First Amendment injury does not demonstrate irreparable harm for purposes of a preliminary injunction. *See Smith v. Frye*, 488 F.3d 263, 271 (4th Cir.), *cert. denied*, 128 S. Ct. 653 (2007) (holding that harm allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod* [*v. Burns*, 427 U.S. 347 (1976) (plurality)]"); *see also Christian*

Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (holding *Elrod* applicable only when "First Amendment rights were totally denied").

RTAO's allegation of chilled speech is demonstrably unfounded. RTAO purportedly fears that its solicitation and advertising would qualify the organization as a political committee under sections 100.57 and 100.22(b), respectively, and under the Commission's policy regarding political committee status determinations. As to the solicitation regulation, RTAO's claim of harm fails because the Commission has stated throughout this litigation that RTAO's proposed solicitation would not meet the test of section 100.57, and so donations received in response to that solicitation would not constitute contributions or count towards the $1,000 threshold for political committee status. But even if RTAO nonetheless qualified as a political committee, the regulations and policy at issue here still would not harm RTAO, for they impose absolutely no restriction on political committee speech or expenditures. As a political committee, RTAO could engage in *unlimited* independent campaign advocacy, including any communications constituting express advocacy independent expenditures under 11 C.F.R. § 100.22(b). *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985); 11 C.F.R. § 114.12 (treating incorporated political committee as political committee rather than as corporation). Similarly, RTAO could fund as

a political committee any electioneering communications it desired, regardless of whether those communications met the test for exemption from FECA's corporate financing restriction under 11 C.F.R. § 114.15. Thus, the presumption that irreparable harm occurs when a challenged regulation "directly limits speech," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006), does not apply here, because none of the Commission regulations at issue limits the speech of political committees.[2] As the district court held, "the evidence presented . . . was clear: Plaintiff is free to disseminate their message and make any expenditures they wish." (J.A. 126.)

Furthermore, neither of the types of regulatory restrictions actually applicable to political committees — *i.e.*, contribution limits and reporting requirements — would cause RTAO any irreparable harm. As to the contribution limit, RTAO has not alleged (much less demonstrated) that its fundraising would be irreparably harmed by abiding by the $5,000 limit on contributions to political committees in 2 U.S.C. § 441a(a)(1)(C). Indeed, it has alleged nothing specific about its actual or potential donors, whether it expects to receive more than $5,000 from any one person, or what concrete harm it would suffer by abiding by the

[2] As for RTAO's claim that the *WRTL* dissent argued in favor of granting preliminary injunctions in situations such as the instant case (*see* RTAO Br. at 17-18), that dissent noted only that an injunction would be granted to a plaintiff "*if it can qualify for one*." *WRTL*, 127 S. Ct. at 2704 (Souter, J., dissenting) (emphasis added). Neither this nor any of the other opinions in *WRTL* states that a mere allegation of chilled speech actually entitles a plaintiff to a preliminary injunction.

$5,000 limit. Similarly, RTAO has failed to show any irreparable harm from the reporting requirements for political committees under 2 U.S.C. §§ 433, 434. The Supreme Court has held that a plaintiff bringing an as-applied constitutional challenge to disclosure requirements must demonstrate a "reasonable probability" that the mandated disclosures "would subject identified persons to 'threats, harassment, and reprisals.'" *McConnell*, 540 U.S. at 198-99 (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)); *Buckley*, 424 U.S. at 69 (noting that NAACP members faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" (citation omitted)); *see also Citizens United v. FEC*, 530 F. Supp. 2d 274, 281 (D.D.C. 2008) (rejecting challenge to electioneering communication disclosure requirements due to lack of evidence showing likelihood of reprisals), *appeal docketed*, No. 08-205 (U.S. Aug. 18, 2008). RTAO has not alleged or shown a reasonable probability of such dangers.[3] Accordingly, neither the regulations that RTAO alleges might qualify it as a political committee nor the Commission's policy regarding political committee status impose any cognizable constitutional burdens on RTAO.

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[3] Before the district court, RTAO claimed that it would suffer certain administrative burdens as a political committee, but such burdens do not constitute *irreparable* harm. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Chaplaincy*, 454 F.3d at 297-98.

In sum, RTAO fails to make even a rudimentary showing of irreparable harm, let alone the "clear" or "strong" showing required in this Circuit. *See Scotts*, 315 F.3d at 271; *Dan River, Inc. v. Icahn,* 701 F.2d 278, 284 (4th Cir. 1983). Because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted), RTAO's failure to demonstrate that the district court abused its discretion on this point alone suffices to deny RTAO's requested relief.[4]

III. RTAO CANNOT DEMONSTRATE THAT IT IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

RTAO's facial challenges include claims of both overbreadth and vagueness. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications," *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v.*

[4] RTAO cites two district court cases (RTAO Br. at 19, 54), neither of which supports its position. In *Ohio Right to Life Soc., Inc. v. Ohio Elections Comm'n*, No. 08-492, 2008 WL 4186312 (S.D. Ohio Sept. 5, 2008), the court *denied* the plaintiff's motion for a preliminary injunction in all respects, *id*. at *11, except those that the state agency had already conceded, *id*. at *7. As to the contested portion of the lawsuit, the court explicitly held "that any injury to Plaintiff's First Amendment interests is outweighed by the state interests at issue." *Id*. at *11. In *Center for Individual Freedom, Inc. v. Ireland*, Civ. No. 1:08-190, 2008 WL 1837324, at *5 (S.D. W. Va. Apr. 22, 2008), the district judge held that "vagueness" in a state statute constituted harm where the plaintiff could not determine the legality of its planned activity — an issue not relevant here, where the Commission has already offered its views on RTAO's proposed conduct.

Salerno, 481 U.S. 739, 745 (1987)). At a minimum, RTAO carries the "heavy burden of proving" that the challenged regulations' "application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)). As to vagueness, RTAO must show that the regulations are unconstitutionally vague on their face, that is, they fail to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and permit "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). RTAO cannot meet these burdens.

A. The Definition of Express Advocacy at 11 C.F.R. § 100.22(b) Is Constitutional

It is "firmly embedded" in the Supreme Court's First Amendment jurisprudence that corporations and labor unions may constitutionally be prohibited from using their general treasuries to fund communications "expressly advocating" for or against the election of a candidate. *McConnell*, 540 U.S. at 203. RTAO alleges, however, that the Commission's regulatory definition of "expressly advocating" is unconstitutional, both facially and as applied to RTAO's proposed radio ads.

Under 11 C.F.R. § 100.22(b), the definition of "expressly advocating" includes a communication that

> [w]hen taken as a whole . . . 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.

RTAO argues that this regulation violates the First Amendment because (1) it allegedly regulates communications that are not "unambiguously campaign related," and (2) it does not comport with a narrow interpretation of "magic words" express advocacy. The former claim fails on the face of the regulation, which requires that "[t]he electoral portion of the communication [be] unmistakable, *unambiguous*, and suggestive of only one meaning," which is "advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b) (emphasis added). Any communication that unambiguously encourages the defeat of a specific candidate is, by definition, unambiguously campaign related. Thus, even assuming *arguendo* that the Constitution were to prohibit regulation of financing for communications that are not unambiguously campaign related, section 100.22(b) would not extend beyond that limit.

RTAO's argument that the regulation of express advocacy is constitutionally limited to "magic words" of advocacy was laid to rest in *McConnell*. In that case, the plaintiffs challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-115, argued that *Buckley* had found

communications containing "magic words" to be the outer constitutional boundary of Congress's power to regulate in this area. *See McConnell*, 540 U.S. at 190-91 (discussing *Buckley*, 424 U.S. at 44 & n.52). Thus, the plaintiffs argued, BCRA was unconstitutional to the extent that it permitted regulation of communications that simply referred to federal candidates shortly before elections. *See McConnell*, 540 U.S. at 190-91. The Supreme Court rejected this argument, noting that *Buckley* had imposed the magic words requirement because of the vagueness of FECA's original statutory text, not because the First Amendment required that limitation in all circumstances. *McConnell*, 540 U.S. at 191-92. Accordingly, *McConnell* held that *Buckley*'s "express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id*.[5]

As Justice Thomas noted in dissent, *McConnell*'s holding "overturned" all of the Court of Appeals decisions — including this Court's ruling in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997) — that had read *Buckley* as limiting regulation to magic words. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting). Other cases relying on this interpretation of *Buckley*, such as *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*"), were

[5] Congress expressly provided that amending FECA to reach electioneering communications had no effect on the Commission's regulatory definition of express advocacy. BCRA § 201(a), 116 Stat. 89 (codified at 2 U.S.C. § 434(f)(3)(A)(ii)) ("Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.").

similarly revealed to be in error. *See id*. at 392 (citing *Buckley* and *Christian Action Network* as support for magic words "limit"). As Justice Thomas further noted, the only express-advocacy decision that *McConnell* did not cast into doubt was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) — the case from which the Commission derived the test codified at section 100.22(b). *See Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,292-95 (July 6, 1995) ("[S]ection 100.22(b) . . . incorporate[s] . . . the *Furgatch* interpretation . . . ."). Thus, the narrow test of section 100.22(b) is entirely consistent with *McConnell*'s analysis, and RTAO's claim that the Constitution and *Buckley* prohibit regulation of non-magic words communications must fail.

Section 100.22(b) is also consistent with the Supreme Court's holding in *WRTL*. In that case, the Court reiterated *McConnell*'s upholding of restrictions on certain communications that are "the functional equivalent of express advocacy," *i.e.*, that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667. This constitutional standard is similar to the test in section 100.22(b): Both tests narrowly inquire whether there is any reasonable way to interpret a communication as non-candidate-advocacy and, if so, do not restrict the financing of the communication. (J.A. at 118 ("[S]ection 100.22(b) is virtually the same test stated

by Chief Justice Roberts in the majority opinion of *WRTL* . . . .").) Because *WRTL*'s constitutional test is, by definition, not unconstitutionally vague, the test in section 100.22(b) must also satisfy any vagueness concerns.[6] To the extent these standards differ, section 100.22(b) is narrower than the *WRTL* test, as the regulation requires an "unambiguous" electoral portion, 11 C.F.R. § 100.22(b)(1), while *WRTL* looks to the "mention" of an election and similar indicia of express advocacy. *See WRTL*, 127 S. Ct. at 2667. Thus, the Supreme Court's recent adoption of a constitutional test broader than that of section 100.22(b) further demonstrates the inapplicability here of any rigid magic words test and the permissibility of the Commission's construction.

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[6] In addition, both tests avoid vagueness concerns by refusing to consider the subjective intent of the speaker. *Compare* 60 Fed. Reg. at 35,295 ("[T]he subjective intent of the speaker is not a relevant consideration . . . .") *with WRTL*, 127 S. Ct. at 2668 ("To the extent th[e] evidence goes to WRTL's subjective intent, it is again irrelevant."). The regulation's "reasonable person" test is like other constitutional objective tests. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity depends upon "wholly objective standard" based on whether "reasonable person" would have known of clearly established rights (citation omitted)); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("[C]onsent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (citation omitted)). *WRTL's* adoption of a test based on a communication's reasonable interpretation thus undermines *VSHL's* holding that section 100.22(b) is flawed because the regulation purportedly "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer." *VSHL*, 263 F.3d at 391.

RTAO nonetheless claims that *McConnell* and *WRTL* "affirmed that . . . express advocacy requires the so-called 'magic words.'" (RTAO Br. at 27.) This argument distorts both cases. As discussed above, *McConnell* emphasized that the presence of magic words is not a constitutional requirement. *McConnell*, 540 U.S. at 191-92. And the portion of *WRTL* that RTAO cites affirmatively rejected the proposition, raised in Justice Scalia's partial concurrence, that the only permissible constitutional standard is a magic words test:

> Justice Scalia concludes that "[i]f a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." We are not so sure. The question in *Buckley* was how a particular statutory provision could be construed to avoid vagueness concerns, not what the constitutional standard for clarity was in the abstract, divorced from specific statutory language. *Buckley*'s intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test. The *Buckley* Court's "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law."

WRTL, 127 S. Ct. at 2669 n.7 (citations omitted); *see also id*. at 2692-96 (Souter, J., dissenting). Thus, neither case stands for the proposition that the line between permissible and impermissible regulation must be drawn at magic words.

RTAO relies heavily upon *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), in which this Court invalidated a state definition of express advocacy. The definition at issue in *Leake*, however, was significantly broader and less precise than section 100.22(b), including such "contextual

factors" as "the timing of the communication in relation to the events of the day" and "the cost of the communication." *Leake*, 525 F.3d at 298. This Court noted that the state statute "swe[pt] far more broadly than *WRTL*'s 'functional equivalent of express advocacy' test," and emphasized that "North Carolina remain[ed] free to adopt a definition of express advocacy consistent with the standards approved by *McConnell* and *WRTL*." *Id*. at 297, 301. Section 100.22(b) is consistent with both *McConnell* and *WRTL*, and it does not bear the overbreadth infirmities present in *Leake*.[7]

RTAO places tremendous emphasis on a single sentence from a footnote in *WRTL*, in which the Chief Justice noted that the test for the functional equivalent of express advocacy was "triggered" by the statutory definition of electioneering communications. *WRTL*, 127 S. Ct. at 2669 n.7. RTAO argues that this sentence, as interpreted by *Leake*, 525 F.3d at 282-83, renders the *WRTL* test inapplicable to

[7] RTAO also fails to identify any constitutional flaw in the *actual* cases in which the Commission has recently applied its express advocacy regulation. Such cases have included communications characterizing presidential candidates as untrustworthy and unfit for the presidency. For example, the Commission found to be express advocacy the "Swiftboat" ads, which stated that Senator John Kerry "lacks the ability to lead," "cannot be trusted," and "gave [aid] and comfort to the enemy." (J.A. 59-60.) Similarly, the Commission found that television ads were express advocacy where the ads stated that "John Kerry fought and bled in the Vietnam War. He fought side by side with brothers who could not get out of the draft because they didn't have a rich father like George W. Bush. . . . You better wake up before you get taken out." (J.A. 81-82.) Although none of these ads would satisfy a wooden test of magic-words express advocacy, RTAO fails to demonstrate why it was unconstitutional for the Commission to find that they were campaign ads.

any speech other than that which would be an electioneering communication under BCRA. (*See* RTAO Br. at 13-14, 25-29.) But as already discussed, *Leake* addressed a sweeping definition of express advocacy that was "clearly 'susceptible' to multiple interpretations and capable of encompassing ordinary political speech unrelated to electoral activity." 525 F.3d at 284. To the extent the Court referenced the footnote on which RTAO relies, it made clear that the discussion was not necessary to its constitutional holding. *Id.* at 299 ("[E]ven if . . . *WRTL* did not intend to mandate the specific dictates of BCRA § 203 as a necessary prerequisite for functional equivalency, it is inconceivable that the Supreme Court would ever allow a state to substitute a test as vague and broad as this 'context prong' as an alternative standard. For even a cursory reading of § 163-278.14A(a)(2) uncovers its serious constitutional infirmities."). Faced with a "complete lack of notice as to what speech is regulable, and the unguided discretion given to the State to decide when it will move against political speech and when it will not," the Court was left no option but to declare the statute in *Leake* unconstitutional. *Id.* at 285. Those infirmities are simply not present here.

RTAO's argument would turn BCRA's *statutory* definition of electioneering communications into a *constitutional* test, requiring that every regulation of non-magic-words express advocacy meet both the *WRTL* standard and the BCRA definition in order to be constitutional. There is no indication in *WRTL* that the

Chief Justice intended any such result; rather, the sentence on which RTAO relies specifically highlighted the distinction between statutory requirements and constitutional ones to rebut Justice Scalia's argument that the only permissible First Amendment standard is a magic words test. Under the logic of RTAO's argument, *WRTL* would forever prohibit Congress from expanding the statutory electioneering communication definition in any way. For example, Congress would be empowered to regulate as an electioneering communication an advertisement that airs sixty days before a general election and is the functional equivalent of express advocacy, but Congress would be *constitutionally prohibited* from regulating the same communication if it aired one day earlier. RTAO's attempt to manufacture such an enormous limitation on congressional power *sub silentio* is without merit.

In additional to its facial challenge, RTAO also challenges the application of section 100.22(b) to its two radio ads. Regarding *Change*, the Commission agreed with RTAO before the district court that the ad was not express advocacy under 11 C.F.R. § 100.22(b) because, *inter alia*: (1) a reasonable person could conclude that the ad encouraged listeners to seek information regarding Senator Obama's position on abortion; (2) the ad was devoted to speech regarding abortion as a public policy issue; (3) the ad contained only indirect and oblique references to the presidential campaign; and (4) the ad did not directly question Senator Obama's

leadership qualities. Thus, although *Change* contains several unambiguous references to Senator Obama's campaign for President, including a reference to the uniquely presidential duty of "[a]ppoint[ing] . . . Justices [to] the U.S. Supreme Court,"[8] the Commission has noted throughout this litigation that its narrow interpretation of section 100.22(b) does not encompass *Change*.

Survivors, in contrast, contains numerous elements of express advocacy, including almost all of the elements that the Commission noted were absent from *Change*. First, *Survivors* criticizes Senator Obama's character, saying that he has shown "callousness" and "a lack of character and compassion." Such character attacks are among what the Supreme Court has called "indicia of express advocacy." *See WRTL*, 127 S. Ct. at 2667 (holding that indicia include "tak[ing] a position on a candidate's character"). Second, *Survivors* refers to Senator Obama's political party, another mark of express advocacy. *Id*. ("mention[ing] an election . . . political party, or challenger"). Third, the ad attacks the candidate personally by saying that he "has been lying" for years. Fourth, *Survivors* characterizes

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[8] The Commission recognizes that the district court determined from such references that the ad meets the test in section 100.22(b) (J.A. 110-11), and the Commission agrees that it is reasonable to believe that the purpose of *Change* is to influence the presidential election. However, the ad also can be reasonably viewed as encouraging viewers to educate themselves about Senator Obama's position on abortion. Because of the narrowness and precision with which the Commission applies its regulation to advertising that lends itself to more than one reasonable interpretation, the Commission respectfully disagrees with the district court's determination.

Senator Obama's alleged record on the abortion issue as "horrendous" and uses this as evidence for his alleged "callousness" and "lack of character and compassion." *See id*. at 2667 n.6 (distinguishing WRTL's ads from those that "condemn[ ] [a candidate's] record on a particular issue"). Fifth, unlike issue advocacy, *Survivors* does not implore listeners to take action relative to any public policy on abortion. *See id*. at 2667 ("[G]enuine issue ad[s] . . . exhort the public to adopt [a] position, and urge the public to contact public officials . . . ."). Finally, and most importantly, *Survivors* says that "Obama's callousness . . . reveals a lack of character and compassion *that should give everyone pause*" (emphasis added). Because the phrase "give everyone pause" is explicitly linked to Senator Obama's character, not to any action on public policy, there is only one reasonable interpretation of that phrase: "Everyone" should "pause" before voting for Senator Obama. To ask listeners to hesitate before supporting a candidate is equivalent to "reject[ing]" him — one of the examples of words of express advocacy listed in *Buckley*, 424 U.S. at 44 n.52. Indeed, the ad emphasizes not only that abortion opponents should reject Senator Obama, but also that "*everyone*," regardless of any position on abortion, should hesitate because Senator Obama has character flaws.[9] Thus, "[r]easonable minds could not differ as to whether" *Survivors* encourages

[9] In an argument not presented to the district court, RTAO now claims that the "everyone" addressed in *Survivors* includes Senator Obama. (RTAO Br. at 51.) Even if true, requesting that the Senator "pause" before acting does not negate the ad's call for "everyone" else to pause before supporting him.

listeners not to vote for Senator Obama, and the ad can be regulated constitutionally as express advocacy.

In sum, the Commission's analysis of *Change* and *Survivors* demonstrates why the regulation is neither overbroad nor vague. The *Change* ad contains nuanced text that can be subject to multiple interpretations, and the Commission therefore analyzed the ad in accordance with its regulation to ensure that if reasonable minds could differ about whether the ad encourages an electoral result, then it is not express advocacy. In contrast, *Survivors* is "unmistakable" and "unambiguous," containing the express advocacy that *Change* omitted. In other words, the Commission applies the same regulatory criteria to both ads but reaches different results because of the distinct elements of their texts. There is no vagueness here, and the Commission's narrow application of its regulation is fully consistent with *WRTL's* teaching that any "tie goes to the speaker," *WRTL*, 127 S. Ct. at 2669. RTAO, like all other advertisers, can determine from the regulation and the Commission's precedent whether a given communication is or is not express advocacy.[10]

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[10] Advertisers such as RTAO have the option of requesting an advisory opinion from the Commission as to any given communication. 2 U.S.C. § 437f(a). The Commission is required by law to respond to such a request within sixty days, 2 U.S.C. § 437f(a)(1), and may provide a response in significantly less time when expedition is requested. *See, e.g.*, FEC Advisory Opinion 2006-16, http://saos.nictusa.com/aodocs/2006-16.pdf (May 10, 2006) (issued in 16 days); FEC Advisory Opinion 2007-03, http://saos.nictusa.com/aodocs/2007-03.pdf (Mar.

B. RTAO's Challenge to the Solicitation Regulation at 11 C.F.R. § 100.57 Is Not Justiciable, and the Regulation Is Constitutional

As the Commission explained before the district court, section 100.57 does not apply to RTAO's proposed solicitation letter because that letter does not indicate that funds received will be used to support or oppose Senator Obama's candidacy within the meaning of the regulation. Accordingly, donations received will not be "contributions," and the regulation will cause RTAO neither a distinct injury nor irreparable harm. As a result, RTAO's facial challenge presents only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991).

In any event, RTAO is not likely to succeed on the merits of its facial challenge: The regulation is well within the Commission's authority, "gives 'fair notice to those to whom [it] is directed,'" *McConnell*, 540 U.S. at 223, and is not arbitrary and capricious. Section 100.57 reasonably interprets FECA to ensure that money donated in response to an appeal to help influence federal elections will not evade the Act's contribution limits and undermine their anti-corruption objective. *See Political Committee Status*, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007).

1, 2007) (issued in 28 days); FEC Advisory Opinion 2008-09, http://saos.nictusa.com/aodocs/AO 2008-09 final.pdf (Aug 21, 2008) (issued in 27 days); *see also* Press Release, *FEC Releases Draft Advisory Opinion Under Expedited Process* (May 4, 2006), http://www.fec.gov/press/press2006/20060504detertao.html (explaining expedited process for issuance of an advisory opinion).

Buckley held that the definition of "contribution" raises lesser constitutional concerns than that of "expenditure." While expenditure limits are subject to strict scrutiny because they "place substantial and direct" limits on speech, *Buckley*, 424 U.S. at 58, limits on contributions entail "only a marginal restriction upon the contributor's ability to engage in free communication," *id*. at 20-21, and will be upheld if they are "closely drawn to match a sufficiently important interest," *McConnell*, 540 U.S. at 136 (citations and quotation marks omitted). In particular, *Buckley* found it unnecessary to narrowly construe "contribution" as it did "expenditure," and instead stated that the term includes

> not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but *earmarked for political purposes*, but also all expenditures placed in cooperation with . . . a candidate . . . .

424 U.S. at 78 (emphasis added).

Buckley did not, as RTAO suggests, employ an "unambiguously-campaign-related" analysis for contributions. *Id*. at 23 n.24, 78. Neither of the portions of *Buckley* that RTAO cites in support of this contention apply any such requirement. (RTAO Br. at 23, 30-31 (citing *Buckley*, 424 U.S. at 23 n.24, 78).) Instead, *Buckley* expressly noted that "contributions" include funds that are intended merely for "political purposes." *Buckley*, 424 U.S. at 23 n.24, 78. This category of "political" spending is far broader than the narrow "campaign related" limitation

the Court imposed on expenditures. *See id*. at 81. Furthermore, several of the quotations that RTAO (Br. at 21) ascribes to *Buckley*'s footnote 24 — a footnote discussing contributions — do not appear in that portion of the opinion, but rather in the Court's discussion of expenditures, 424 U.S. at 80-81. As noted above, expenditures are subject to stricter scrutiny than contributions, and the Court imposed no restriction on FECA's contribution definition equivalent to the restrictions it placed on the expenditure definition. Finally, the Supreme Court has also rejected RTAO's related contention (Br. at 31) that a donation cannot be a contribution unless there is an "unambiguously campaign related" expenditure "corresponding" to that donation. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 198 n.19 (1981) (holding that donations "earmarked for administrative support" and other non-political purposes are contributions because exempting such donations "could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit"). Because RTAO's challenge to section 100.57 rests heavily on these errors, RTAO has little likelihood of success on the merits. The regulation's requirement that a solicitation must seek funds to "support or oppose the election of a . . . candidate" is plainly narrower than *Buckley's* "earmarked for political purposes."

When the Commission promulgated section 100.57, it relied in part on *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995), which had addressed

whether a mailing sent by a nonprofit issue advocacy group constituted solicitation of "contributions" in the context of a disclaimer requirement. The court held that "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of " FECA's solicitation disclosure requirements if it "contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id*. at 295. More recently, the constitutionality of 11 C.F.R. § 100.57 was upheld against a facial challenge in *EMILY's List v. FEC,* 569 F. Supp. 2d 18 (D.D.C. 2008); *see also* 362 F. Supp. 2d 43 (D.D.C. 2005), *aff'd,* 2005 WL 3804998 (D.C. Cir. 2005). The court specifically rejected the argument that the use of "support or oppose" made the regulation unconstitutionally vague.

> [T]he Supreme Court rejected just such a claim in *McConnell*, stating that "[t]he words 'promote,' '*oppose*,' 'attack,' and '*support*' … 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"

569 F. Supp. 2d at 53 (emphasis by the court; citations omitted); *see also Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n,* 166 P.3d 1174, 1183-84 & nn.8-9 (Wash. 2007) (en banc), *cert. denied,* 128 S. Ct. 2898 (2008) (holding that "the phrase 'in support of, or opposition to, any candidate' in the definition of 'political committee'" is not unconstitutionally vague).

Conversely, as the district court held (J.A. 121), none of the cases RTAO cites (RTAO Br. at 32-34 & n.7) actually supports its argument. *Leake* invalidated part of North Carolina's "*method for determining* if a communication 'supports or opposes the nomination or election of'" a clearly identified candidate. 525 F.3d at 280 (emphasis added). However, contrary to RTAO's assertion, the Court did not find the "support or oppose" language itself unconstitutional. Indeed, after holding that the implementing method was unconstitutionally vague and overbroad, the Court assured North Carolina that it "remains free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of'" a clearly identified candidate. *Id.* at 301. Moreover, the Court distinguished the provision it invalidated from the "support or oppose" provision upheld in *Voters Education Committee. Leake*, 525 F.3d at 299.

In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), a state statute defined "political committee" as any entity "the primary or incidental purpose of which is to support or oppose any candidate or political party or *to influence or attempt to influence* the result of an election." *Id.* at 712 (emphasis added). Concerned that this definition would encompass entities engaged only in issue advocacy, this Court ruled that the statute's references to "influencing" elections rendered the definition unconstitutionally vague and overbroad. *Id.* at 712-13. In contrast, the Court expressly equated the "support or

oppose" terminology with the portion of FECA's political committee definition that *Buckley* had upheld as constitutional. *See id*. at 713. The *Bartlett* decision thus provides no support for the proposition that "support or oppose" language is unconstitutional.[11]

Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006), is even less germane, for it concerned a statutory definition of expenditures, not contributions. The state campaign finance statute at issue there defined an expenditure as "anything of value made for the purpose of supporting, opposing, or *otherwise influencing the nomination or election of a person* to public office." *Id*. at 663 (emphasis added). The Fifth Circuit, citing *Buckley*, found the phrase "or otherwise influencing" to be problematic, and the court construed it narrowly to avoid unconstitutional vagueness. *Id*. at 663-65. *Carmouche* did not concern

[11] RTAO also cites (Br. at 34) *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), and *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), neither of which is apt. *Anderson* discusses limits on "electioneering" near a polling place. The Sixth Circuit did not question the phrase "solicitation of votes for or against any candidate" but instead found that the prohibition of "the displaying of signs [and] the distribution of campaign literature, cards, or handbills" was vague and overbroad. In *ACLU of Nevada*, the Ninth Circuit invalidated an overly broad "content-based limitation on core political speech," but the problematic statutory phrase was "material or information relating to" an election, not "support or oppose." 378 F.3d at 992.

contributions at all, nor did it call into question (or even discuss) the statutory phrase "for the purpose of supporting [or] opposing."[12]

In sum, the solicitation regulation causes RTAO no harm, RTAO misunderstands the Supreme Court's explanation of "contribution," and the cases RTAO cites do not hold that "support or oppose the election of a . . . candidate" is unconstitutional. In contrast, the authorities on which the Commission relies confirm the constitutionality of that language.

C. The Commission's Explanation Regarding Its Determination of Political Committee Status Is Not Subject to APA Review; In Any Event, the Explanation Is Constitutional

RTAO challenges the Commission's explanation of how it determines whether the major purpose test for political committee status has been met, as noted in an Explanation and Justification ("E&J") published in the Federal Register. 72 Fed. Reg. 5595. But because this explanation binds no one and its discussion of the Commission's political committee analysis does not constitute final agency action, RTAO's claim is not reviewable under the APA. Courts may only hear APA suits based on "final agency action for which there is no other

[12] RTAO also cites (Br. at 32) two loyalty oath cases, but they, too, do not involve the "support or oppose" language found in the Commission's solicitation regulation. In *Cramp v. Bd. of Pub. Instr. of Orange County*, 368 U.S. 278, 286 (1961), the Court struck down as unconstitutionally vague a law requiring public employees to swear that they have not and will not knowingly "lend [their] aid, support, advice, counsel or influence to the Communist Party." And in *Cole v. Richardson*, 405 U.S. 676, 684 (1972), the Court upheld the "oppose the overthrow of the government" clause in a loyalty oath against a vagueness challenge.

adequate remedy in a court." 5 U.S.C. § 704. "Final agency action" consummates the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002) (holding publication of report not final agency action); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004).

The E&J that RTAO challenges was issued to explain the Commission's decision not to promulgate a revised definition of "political committee" or to single out for increased regulation entities claiming tax-exempt status as "political organizations" under section 527 of the Internal Revenue Code. 72 Fed. Reg. at 5595, 5598. As part of that E&J, the Commission "discusse[d] several recently resolved administrative matters that provide considerable guidance to all organizations regarding . . . political committee status." *Id*. at 5595. Its decision to continue analyzing political committee status on a case-by-case basis rather than promulgating a rule of general application was challenged and upheld in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). The E&J's primary purpose was to explain why a broad regulation was *not* created; it purports neither to establish a binding norm nor to decide anyone's legal status. The E&J did not create a new regulation or change past policy but simply explained how the Commission's particular case-by-case enforcement actions provide "guidance" to organizations

about political committee status and the major purpose test. 72 Fed. Reg. at 5604. This guidance is not "final" agency action subject to APA review, and RTAO cites no authority to the contrary.

Even if reviewable, the Commission's approach to political committee status is constitutional. The Supreme Court, not the Commission, established the major purpose test. *Buckley*, 424 U.S. at 79; *see also McConnell*, 540 U.S. at 170 n.64. RTAO's claim appears to focus on the Commission's implementation of that test, but the Commission's approach is not unconstitutionally vague or overbroad. The assessment of an organization's "major" purpose is an inherently comparative analysis and thus requires understanding an organization's overall activities. In enforcement decisions, the Commission considers a variety of factors to determine an organization's major purpose, including the organization's public statements, representations made in government filings, statements made to potential donors, internal governing documents, and the proportionate amount of spending on election-related activity. *See* 72 Fed. Reg. at 5605. As the district court noted (J.A. 123-24), courts have endorsed the use of these factors. *See, e.g.*, *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering, *inter alia*, organization's statements in brochures, fax alerts sent to potential and actual contributors, and spending to influence federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859, 864-66 (D.D.C. 1996) ("The organization's purpose may be

evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."). In numerous administrative enforcement proceedings and advisory opinions, the Commission has examined these and other factors to determine whether organizations satisfy the major purpose test. *See* 72 Fed. Reg. at 5605-06. RTAO cannot provide a single case in which the Commission incorrectly determined the major purpose of an organization.[13] Thus, there is no legal or factual basis for RTAO's claim that the Commission's political committee analysis is unconstitutionally overbroad or vague.

RTAO also argues that the Commission has improperly reformulated the major purpose test to focus on "Federal campaign activity," instead of on the nomination or election of candidates. (RTAO Br. at 36.) *Buckley*, however, uses the term "campaign related" to summarize the numerous categories of legitimately regulable activity by political committees, as well as to distinguish such organizations from groups "engaged purely in issue discussion." 424 U.S. at 79. The Commission's use of the phrase "federal campaign activity" when examining

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[13] RTAO concedes that the major purpose test "requires an examination of the entity's organic documents," but asserts that the purpose of this examination is only "to determine if there was an express intention to operate as a political committee, *e.g.*, by being designated as a 'separate segregated fund.'" (RTAO Br. at 38.) Such a limited inquiry, however, would be meaningless, for an entity "designated as a separate segregated fund," has already chosen to accept political committee status by definition. 2 U.S.C. § 431(4)(B). The major purpose test is therefore irrelevant to such entities.

a group's major purpose thus reasonably takes into account that not all "campaign related" spending involves *communications* regarding nomination or election of candidates; it may also involve expenditures for *activities*, such as gaining ballot access, rather than payments for disseminating advocacy messages. Moreover, as the district court noted (J.A. 123), the use of the word "federal" simply clarifies that to satisfy the major purpose test an organization's campaign activity must involve federal candidates, not state or local ones. *See* 72 Fed. Reg. at 5601. Like the rest of the Commission's interpretation, this is reasonable and constitutional.

D. The Regulation Regarding Corporation-Funded Electioneering Communications at 11 C.F.R. § 114.15 Is Constitutional

FECA prohibits corporations from funding "any applicable electioneering communication," which is defined in the context of a presidential campaign as a "broadcast . . . communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before a general election or thirty days before a primary or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i). The Supreme Court has upheld the constitutionality of this financing restriction "to the extent that the [communications] … are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08; *WRTL*, 127 S. Ct. at 2667.

Chief Justice Roberts' controlling opinion in *WRTL* defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific

candidate." *WRTL*, 127 S. Ct. at 2667. The opinion then listed indicia of genuine issue ads and express advocacy and analyzed the ads at issue:

> First, [the ads'] content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. Shortly thereafter, the Commission promulgated a regulation to codify the controlling opinion, using, essentially verbatim, the same criteria that the Chief Justice used. *See* 11 C.F.R. § 114.15.

Section 114.15 straightforwardly implements *WRTL*, providing additional guidance without exceeding the constitutional boundary described in that decision. As the district court explained, "[b]y doing a side-by-side comparison, it is very apparent that the FEC's regulation simply adopted the test enumerated in *WRTL* to create the electioneering communication regulation in section 114.15." (J.A. 124-25.) Tracking the language of *WRTL*, section 114.15 states that a corporation may fund an electioneering communication "unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a); *Electioneering Communications*, 72 Fed. Reg. 72,899, 72,902 (Dec. 26, 2007); *WRTL*, 127 S. Ct. at 2667. For additional clarity, two safe harbor provisions for

lobbying messages and commercial advertisements supplement the general exemption. 11 C.F.R. § 114.15(b); 72 Fed. Reg. at 72,903. The regulation also adheres to *WRTL*'s teaching that when there is doubt about a communication's meaning, the "tie goes to the speaker," 127 S. Ct. at 2669; the regulation's rule of interpretation states that in "interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication," 11 C.F.R. § 114.15(c)(3).

RTAO challenges section 114.15 both facially and as applied to *Change* and *Survivors*. As to *Change*, the Commission agreed with RTAO before the district court that the ad qualifies for the general exemption set out in section 114.15(a). Indeed, *Change* shares many characteristics of an example included in the Commission's rulemaking of a communication that does not qualify for the safe harbor but that is nevertheless permissible under 11 C.F.R. § 114.15(a). 72 Fed. Reg. at 72,908 (Example 1). That ad criticized a congressman for his environmental record and urged listeners to call him and "[t]ell him to protect America's environment." *Id.* While both ads include indicia of express advocacy under 11 C.F.R. § 114.15(c), they both focus on public policy issues. Because "any doubt is to be resolved in favor of finding the communication permissible," both may be financed with corporate or union funds. *Id*. In contrast, *Change* differs from another sample ad that is not permissible under the regulation; that ad

identifies two "candidates," then asks "where do the candidates stand?", and characterizes the candidates' records positively and negatively. 72 Fed. Reg. at 72,909 (Example 2). In sum, section 114.15 does not prohibit RTAO from running the *Change* advertisement.

As to *Survivors*, for substantially the same reasons that it is express advocacy under 11 C.F.R. § 100.22(b), it is also regulable as the functional equivalent of express advocacy under 11 C.F.R. § 114.15(a). *See supra* Part III.A. Indeed, the ad explicitly "condemn[s Senator Obama's] record on a particular issue," the precise distinction that Chief Justice Roberts drew between the ads at issue in *WRTL* and a hypothetical candidate ad analyzed in *McConnell*. *See WRTL*, 127 S. Ct. at 2667 n.6. Because RTAO's ad "is susceptible of no reasonable interpretation other than as an appeal to vote . . . against a specific candidate," *WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(c), the application of FECA's financing restrictions to the ad is constitutional.

The Commission's regulatory criteria for making this determination are essentially identical to the criteria set out in *WRTL*; thus, section 114.15 is neither vague nor overbroad. Contrary to RTAO's inaccurate description of section 114.15(c), the regulation does not "demote" the Supreme Court's standard. As explained above, section 114.15 contains only one standard, the one articulated by the Court itself: A corporation can pay for an electioneering communication

"unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a). The rules of interpretation articulated in section 114.15(c) come directly from the Court's analysis in *WRTL*. *See WRTL*, 127 S. Ct. at 2667. For example, RTAO asks "why would merely mentioning an incumbent politician's party identification . . . indicate that the ad is (or might be) express advocacy?" (RTAO Br. at 45.) The answer is that Chief Justice Roberts held in *WRTL* that "mention [of] an election, candidacy, [or] political party" constitutes "indicia of express advocacy." *WRTL*, 127 S. Ct. at 2667. Thus, contrary to RTAO's accusations, the Commission has not given short shrift to the Court's fundamental test by listing and considering indicia of express advocacy. That is precisely what the Supreme Court did in *WRTL*.

RTAO argues that *Leake* somehow supports its position that section 114.15 is void. It does not. *Leake* struck down a state law provision because it relied on open-ended factors such as the " 'essential nature [of the communication],' '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.'" 525 F.3d at 283-84. These sorts of factors are specifically excluded from consideration under section 114.15(d) ("[T]he Commission may consider only the communication itself and basic

background information . . . ."), and the Commission's regulation accordingly does not share the problematic aspects of the statute at issue in *Leake*.

Finally, RTAO argues at length that a communication must contain an "appeal to vote" in order to be regulable as the functional equivalent of express advocacy. This argument fails as a matter of law, for it seeks to reintroduce a test akin to the magic words requirement that the Supreme Court rejected in *McConnell* and *WRTL*. The *WRTL* test does not ask whether the communication *contains* specific words constituting an appeal to vote, but instead it asks whether the communication "is susceptible of no reasonable interpretation other than *as* an appeal to vote." *WRTL*, 127 S. Ct. at 2667 (emphasis added). *WRTL*'s application of the test further demonstrates that the inquiry is holistic, examining the "focus" of the communication, any "position" it manifests, and whether the "content is consistent" with "genuine" issue advocacy. *Id*. Indeed, when the Supreme Court analyzed whether the content of WRTL's ads contained "indicia of express advocacy," it "focus[ed] on the substance of the communication," *id*. at 2666-67, reviewing whether the ads "mention an election, candidacy, political party, or challenger" and whether they "take a position on a candidate's character, qualifications, or fitness for office," not whether the ads contain specific words exhorting viewers to vote for or against a candidate. *Id*. at 2667. The *WRTL* test is therefore necessarily broader than a wooden, magic words interpretation of express

advocacy. *WRTL* overruled neither *McConnell*'s facial upholding of the electioneering communication provision nor the Court's explanation that *Buckley*'s express advocacy interpretation is not a constitutional requirement. Thus, *WRTL* does not stand for the proposition that the presence or absence of specific words of electoral advocacy is the determining factor in whether a communication is the *functional equivalent* of express advocacy.

In sum, because section 114.15 is derived from and consistent with the Supreme Court's analysis in *WRTL,* it is neither overbroad nor vague nor in excess of the Commission's statutory authority.

IV. THE PUBLIC INTEREST AND THE BALANCE OF HARMS WEIGH AGAINST THE ISSUANCE OF A PRELIMINARY INJUNCTION

Enjoining the Commission from enforcing its regulations would substantially injure the Commission and harm the public, whose interests the Commission is charged with protecting. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). The imminent harm to the public if the Commission is not permitted to enforce its regulations far outweighs RTAO's speculative fear. In the key days leading up to the national election, halting enforcement of the challenged regulations could undermine the

public's confidence in the federal campaign finance system. As the Supreme Court has noted, "[c]ourt orders affecting elections . . . can themselves result in voter confusion . . . . As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 7 (vacating circuit court's grant of preliminary injunction against enforcement of election statute). The regulations and policy at issue implement longstanding limits on corporate influence in federal elections and ensure that political committees abide by contribution limits and disclose their receipts and disbursements to the public. These limits and disclosure requirements serve compelling government interests in preventing corruption, educating the public, and facilitating the Commission's enforcement of the law. Thus, enjoining application of the challenged provisions could confuse political actors, allow improper use of corporate funds in the election process, sanction excessive campaign contributions, and deprive the public of important information.

CONCLUSION

For the foregoing reasons, the district court's denial of RTAO's preliminary injunction motions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

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