In The
Supreme Court of the United States

The Real Truth About Obama, Inc., *Petitioner*

v.

Federal Election Commission and
United States Department of Justice

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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Questions Presented

1. Whether the district court abused its discretion by applying improper legal standards to deny a preliminary injunction permitting The Real Truth About Obama, Inc. ("RTAO") to engage in issue advocacy concerning the positions of a public figure on issues in public debate.

2. Whether the First Amendment requires speech-protective preliminary-injunction standards for issue advocacy.

3. Whether RTAO had likely success on the merits (and so met the other preliminary-injunction standards) because the following provisions violate the First Amendment, Fifth Amendment, and/or exceed statutory authority:

a. 11 C.F.R. § 100.22(b) (Federal Election Commission's ("FEC") non-"magic words" "express advocacy" definition);

b. 11 C.F.R. § 100.57 (FEC's rule treating all of a donation as a regulable "contribution" if made in response to a communication "indicat[ing] that any portion . . . will be used to support or oppose the election of a . . . federal candidate");

c. FEC's enforcement policy for imposing "political committee" status based on activity other than regulable election-related activity; and

d. 11 C.F.R. § 114.15 (FEC's test for determining regulable "electioneering communications" that purports to implement the "appeal to vote" test of *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (Roberts, C.J., joined by Alito, J.), but makes that test merely part of FEC's test).

Corporate Disclosure

The Real Truth About Obama, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock.

Table of Contents

Appendix Contents

Table of Authorities

Cases

Constitutions, Statutes, Regulations & Rules

Other Authorities

Petition[1]

RTAO requests certiorari review of *RTAO v. FEC*, 575 F.3d 342 (4th Cir. 2009).

Opinions Below

The order denying rehearing en banc (App. 56a) is unreported. The opinion affirming the district court (App. 1a) is reported at 575 F.3d 342. The district court's order denying a preliminary injunction (App. 54a) is unreported. The district court's opinion denying a preliminary injunction (App. 19a) is reported at *RTAO v. FEC*, No. 08-483, 2008 WL 4416282 (Aug. 5, 2009).

Jurisdiction

The appellate court's opinion (App. 1a) and judgment (App. 18a) were filed August 5, 2009. RTAO filed a timely petition for rehearing en banc on August 17, 2009. The appellate court's order denying rehearing en banc (App. 56a) was entered October 6, 2009. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations

Appended are: First Amendment (App. 57a); Fifth Amendment (App. 57a); 2 U.S.C. § 431(17) (App. 57a); 11 C.F.R. § 100.16(a) (App. 58a); 11 C.F.R. § 100.22 (App. 58a); 11 C.F.R. § 100.57(a) (App. 59a); 11 C.F.R. § 114.15 (App. 59a).

Case

This case involves a pre-enforcement, as-applied

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[1] As this petition goes to the printer, *Citizens United v. FEC* (No. 08-205) remains undecided. *Citizens* may affect this case.

and facial challenge to an FEC policy and three regulations that restrict RTAO's issue advocacy.

RTAO filed suit July 30, 2008, moving for preliminary injunction regarding *Change* (App. 20a), an ad it intended to post on its website and broadcast, and a fundraising solicitation (App. 22a). On August 20, RTAO filed another preliminary injunction motion regarding *Survivors* (App. 21a), an ad it intended to post on its website and broadcast.

RTAO sought judgment (**a**) declaring 11 C.F.R. §§ 100.22(b), 100.57, and 114.15 and FEC's policy for determining "political committee" ("PAC") status unconstitutional for vagueness and overbreadth (under the First and Fifth Amendments) and beyond statutory authority; (**b**) declaring the regulations and policy void under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; and (**c**) preliminarily and permanently enjoining enforcement of the regulations and policy, facially and as applied to RTAO and its activities.

RTAO is a nonstock, nonprofit, Virginia corporation, with its principal place of business in Richmond, Virginia. FEC is the federal government agency with enforcement authority over the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 et seq. FEC promulgated the regulations and policy at issue. The Department of Justice ("DOJ") is an executive department of the federal government that controls criminal prosecutions and civil suits in which the United States has an interest. (Compl. ¶¶ 5-7.)

RTAO was incorporated in July 2008. It is nonprofit under 26 U.S.C. § 527, i.e., it is a "political organization" that may receive donations and make disbursements for political purposes without paying corporate income taxes. RTAO is an issue-advocacy 527. (Compl.

¶¶ 8-9.)

RTAO is not a FECA "political committee" because none of its communications will qualify as either a "contribution" or "expenditure" aggregating more than $1,000 during a calendar year, the trigger requirement under 2 U.S.C. § 431(4) (PAC definition). Under its organic documents, RTAO may not engage in the "express advocacy" that would make a communication a regulable "independent expenditure" under 2 U.S.C. § 431(17). RTAO is also not properly a PAC because, even if it were to reach the $1,000 trigger, it does not meet the major-purpose test. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 253 (1986) ("*MCFL*"). (Compl. ¶¶ 10-11.)

However, RTAO had a reasonable belief that it would be deemed a PAC by FEC because of (**a**) FEC's recent use of 11 C.F.R. §§ 100.22(b) and 100.57 and other elements of FEC's PAC-status enforcement policy, *see* FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC-Status 2*"), to declare 527s PACs, *id.* at 5605, and (**b**) the similarity of RTAO and its intended activities to organizations identified in *PAC-Status 2*. (Compl. ¶ 13.)

As a corporation, RTAO may not make "independent expenditures," 2 U.S.C. § 431(17) (definition); 2 U.S.C. § 441b(a) (prohibition). This express-advocacy prohibition extends to websites and emails. *See* FEC, "Internet Communications," 71 Fed. Reg. 18589 (Apr. 12, 2006); 11 C.F.R. § 114.4.

RTAO intended to provide accurate and truthful information about then-Senator Obama's public-policy positions on a website and produce audio ads, *Change* and *Survivors*, and place them on its website and

broadcast them within sixty days before the 2008 general election, so they would have been "electioneering communications," 2 U.S.C. § 434(f)(3). RTAO intended to create digital postcards setting out Senator Obama's public-policy positions on abortion, and website viewers could have sent them to friends. One would have been like *Change* but in first person and "signed" by "Barack Obamabortion." (Compl. ¶¶ 16-19.)

To fund its activities, RTAO needed to solicit potential donors. One planned means was a fundraising communication. RTAO intended to raise over $1,000 with this communication and disburse over $1,000 to broadcast the ads and put them on the website. (Compl. ¶ 20.)

RTAO was chilled from proceeding by a reasonable belief that it would be subject to investigation and possible enforcement action potentially resulting in civil and criminal penalties, based on the fact that FEC has deemed 527s to be PACs based on 11 C.F.R. §§ 100.22(b) and 100.57 and FEC's PAC-status policy *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC-Status 1*"); *PAC-Status 2*, 72 Fed. Reg. 5595. (Compl. ¶ 22.)

RTAO was also chilled from proceeding because, if it were later deemed to have been a PAC while doing its activities, it would have violated FECA for not using "federal funds" (funds raised subject to federal source-and-amount restrictions) for the fundraising communication, *see* FEC Advisory Opinion 2005-13 at 1 (EMILY's List). (Compl. ¶ 23.)

RTAO's chill was heightened by DOJ's declaration that investigations and criminal prosecutions of "knowing and willful" violations of these FECA provisions by 527 corporations was a priority. (Compl. ¶ 24.)

Consequently, RTAO reasonably feared, if it proceeded with its intended activities: (**a**) that *Change* and *Survivors* (both on RTAO's website and as broadcast) would be deemed express advocacy under 11 C.F.R. § 100.22(b) and, if RTAO were *not* deemed a PAC, it would be in violation of FECA for making a forbidden corporate independent expenditure, failing to place a disclaimer on its ads, and failing to file independent expenditure reports; (**b**) that, if RTAO *were* deemed to be a PAC, under FEC's PAC enforcement policy and because either the publication of its ads were considered an "expenditure" (under § 100.22(b)) or the fundraising communication were considered a "contribution" (under § 100.57), RTAO would be in violation of FECA for failure to abide by numerous PAC requirements; and (**c**) in any event, that RTAO would suffer an intrusive and burdensome investigation and possible enforcement action with civil and criminal penalties. So RTAO would not proceed with its intended activities unless it received the judicial relief requested. (Compl. ¶ 25.)

RTAO also reasonably feared, if it broadcast *Change* and *Survivors*, that it would have broadcast prohibited electioneering communications because FEC's rule at 11 C.F.R. § 114.15 (creating an exception to the electioneering communication prohibition, 2 U.S.C. § 441b) is vague and overbroad and RTAO could not be sure that its ads are protected communications under FEC's rule, although it believes that they are protected under the "appeal to vote" test of *FEC v. Wisconsin Right to Life*, 551 U.S. at 470 (Roberts, C.J., joined by Alito, J.).[2] It was impossible at the time of

[2] This opinion ("*WRTL-II*") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

filing to tell whether FEC (or courts) might deem *Change* and *Survivors* to be prohibited electioneering communications under 11 C.F.R. § 114.15 or prohibited express-advocacy independent expenditures under 11 C.F.R. § 100.22(b) because the tests are similar and vague. So RTAO would not proceed with its plan to broadcast *Change* and *Survivors* during electioneering communication blackout periods absent requested judicial relief. (Compl. ¶ 26.)

RTAO's chill was irreparable harm because it was the loss of First Amendment rights. RTAO would like to do materially similar future activities, so the need for a preliminary injunction is capable of repetition yet evading review. There is no adequate remedy at law. (Compl.¶¶ 27-28.)

In opposing the first preliminary injunction motion, FEC insisted that *Change* was neither express advocacy under 11 C.F.R. § 100.22(b) nor a prohibited electioneering communication under 11 C.F.R. § 114.15 and that the fundraising communication would not solicit "contributions" under 11 C.F.R. § 100.57. So FEC insisted that RTAO would not trigger the $1,000 "expenditure" or "contribution" thresholds for PAC status under 2 U.S.C. § 431(4) and the case was non-justiciable as to those. (FEC Answer ¶¶ 22-24.) But FEC decided that *Survivors* was prohibited both as express advocacy (§ 100.22(b)) and an electioneering communication (§ 114.15). (FEC Answer ¶¶ 22, 25.) Despite FEC's position that *Change* was not express advocacy, the district court decided that "it is clear that reasonable people could not differ that [*Change*] is promoting the defeat of Senator Obama," so it would be express advocacy under § 100.22(b). (App. 34a; *see also* App. 36a n.3 ("clear both are expressly advocating the

defeat of Senator Obama").)

This case was brought under 28 U.S.C. § 1331. On September 10, 2008, the district heard the preliminary injunction motions. On September 11, the court issued an order denying the motions (and motions to expedite and consolidate the preliminary injunction and merits hearings). On September 12, RTAO noticed appeal (under 28 U.S.C. § 1292(a)(1)) of the denials of preliminary injunction. On September 24, the district court issued its preliminary-injunction Memorandum Opinion, deciding that RTAO had standing but failed its preliminary-injunction burden. (App. 19a.)

The appellate court affirmed the district court on August 5, 2009 (App. 1a), and denied rehearing en banc on October 6 (App. 56a).

Reasons to Grant the Petition

I. This Case Involves a Matter of Great National Importance.

Central to this case is the vitally important question of how to protect the issue advocacy essential to our democratic republic. This Court has rejected attempts to restrict issue-advocacy communications and issue-advocacy groups in *Buckley*, 424 U.S. 1; *MCFL*, 479 U.S 238; *McConnell v. FEC*, 540 U.S. 93 (2003);[3] and *WRTL-II*, 551 U.S. 449. This case challenges renewed efforts to restrict issue-advocacy communica-

[3] While *McConnell* facially upheld regulation of electioneering communications, it worked *within Buckley*'s speech-protective framework by seeking to identify the "functional equivalent of express advocacy," *id.* at 206, recognizing the need to protect issue advocacy, *id.* at 206 & n.88, employing unambiguously-campaign-related principle (*see infra*), *id.* at 192, and restating the major-purpose test, *id.* at 170 n. 64.

tions and groups.

While *WRTL-II* went far to reaffirm protection for issue-advocacy communications, there remains a concerted effort to collaterally attack issue advocacy by trying to impose onerous PAC status on issue-advocacy groups. Uniquely, this case brings together all three elements involved in defining PACs, i.e., regulations governing the "expenditures" (11 C.F.R. § 100.22(b)) and "contributions" (11 C.F.R. § 100.57) triggering PAC status under 2 U.S.C. § 431(4) and an enforcement policy governing the major-purpose test that *Buckley*, 424 U.S. at 79, and *MCFL*, 479 U.S. at 252 n.6, held that the First Amendment requires to protect issue-advocacy groups. This Court's review is again required to protect issue advocacy groups.

II. The Appellate Court's Preliminary-Injunction Standard Conflicts With This Court's Decisions.

The appellate court employed a *heightened* version of the preliminary-injunction standard in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008). *See* II.A. The court ignored this Court's holding that preliminary-injunction burdens follow merits burdens. *See* II.B. *Winter* did not state how the preliminary-injunction standard applies to issue-advocacy, which this Court should decide. *See* II.C.

A. The Appellate Court Misinterpreted *Winter*.

The Fourth Circuit recited *Winter*'s likely-success-

and-harm standard[4] but substituted a "stringent" test and "heavy" burden:

> 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.

App. 10a (emphasis added). This "heavy burden" on RTAO was erroneous. First, FEC had the burden. *See* II.B. Second, *speakers* cannot be penalized if *courts* complicate the First Amendment's prohibition on "abridging . . . freedom of speech." Third, if the court had followed this Court's unambiguously-campaign-related analysis as explained in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), it would have found the law simple. Fourth, perceived complexity should *lower* standards in an issue-advocacy case, where doubts are resolved in favor of *speakers*, not censors. *See WRTL-II*, 551 U.S. at 469 ("benefit of . . . doubt to protecting . . . speech"), 474 n.7 (same), 482 (same).

The appellate court's reliance on the required "clear showing" of "likely" success and harm to make *Winter*'s test "stringent" (App. 10a) was also erroneous because "clear showing" applies only to whether there is "*likely*" success and harm. It does not *elevate* "likely" to "highly

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[4] "'[P]laintiff . . . must establish that he is *likely* to succeed on the merits, . . . he is *likely* to suffer irreparable harm . . . , that the balance of equities tips in his favor, and that an injunction is in the public interest.'" App. 4a (*quoting Winter*, 129 S. Ct. at 374) (emphasis added).

likely," as the appellate court believed. And in First Amendment cases, burdens are raised on the Government, not speakers. *See, e.g.*, *WRTL-II*, 551 U.S. at 464 ("*Government* must prove that applying [restriction] . . . to . . . ads furthers a compelling interest and is narrowly tailored to achieve that interest.").

B. The Courts Below Did Not Require the Burden to Follow the Merits Burden.

The preliminary-injunction burden should have fallen on government because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). 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, under strict scrutiny,[5] requires the *government*, even at the preliminary-injunction stage, to prove that its regulation is narrowly tailored to a compelling interest and that less-restrictive means are inadequate to serve the interest. *See Gonzales*, 546 U.S. at 428, *citing Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). *See also WRTL-II*, 551 U.S. at 464, 478; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). The court below erroneously ignored the First Amendment context in placing a heightened burden on RTAO instead of the government.

The burden was also on the government to prove its argument, which the court adopted (App. 17a), that the public-interest would be served by denying the prelimi-

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[5] Strict scrutiny applies to the core-political-speech restrictions in the present case. *See WRTL-II*, 551 U.S. at 464.

nary injunction because a "wild west" scenario was likely to ensue.[6] The government must provide proof, not speculation. *See Gonzales*, 546 U.S. at 430 ("strict scrutiny" rejects "categorical approach"). The government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (internal citation omitted).

C. Speech-Protective Standards Apply to Preliminary Injunctions Involving Issue Advocacy.

This Court's speech-protective standards were ignored below. This case should be accepted to establish the protections afforded issue advocacy in the preliminary injunction context.

1. Preliminary Injunction Denials Effectively Decide Time-Sensitive Speech Cases.

Preliminary-injunction denials deprive issue-advocacy groups of timely opportunities to advocate their issues. RTAO wanted to talk about a politician's public-policy position during hot public debate on a subject when public attention was focused so as to make the communication uniquely effective. While this case is not moot because it is capable of repetition yet evading review, *see WRTL-II*, 551 U.S. at 461-64, the particular

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[6] Another federal district court expressly rejected this argument: "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *Ctr. for Individual Freedom, Inc. v. Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *26 (S.D. W. Va. Oct. 17, 2008).

public teachable moment was lost. Where issue-advocacy involves time-sensitive issues, preliminary-injunction denials effectively decide the case. For example, in *WRTL-II*, WRTL was denied a preliminary injunction, which deprived it of the timely opportunity to advocate against judicial-nominee filibusters, 551 U.S. at 460. The 2007 vindication of WRTL's right to run its 2004 ads did not repair the deprivation when most timely. Recognizing this problem, *WRTL-II* set speech-protective standards for future as-applied challenges to assure expeditious decisions. *See id.* at 467-69.[7] These and other speech-protective standards should be incorporated into the preliminary-injunction standard. *See infra.*

2. This Case Should Be Accepted to Establish Speech-Protective Preliminary-Injunction Tests and Interests.

This Court should clarify that preliminary-injunction standards in issue-advocacy cases must protect speech. Some of these are provided briefly:

(1) the requirements of "likely" success and irreparable harm are not made "stringent" (i.e., "*highly* likely") by the required "clear showing" of likelihood, *see supra* at 8-9;

(2) the preliminary-injunction burden is not heavier with "a difficult and complicated area of law that is still developing," *see supra* at 9;

(3) the preliminary-injunction burden follows the merits burden, i.e., the government must justify restrictions, *see supra* at 10;

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[7] The dissent agreed that preliminary injunctions are available, 551 U.S. at 353, meaning that the standard must be *capable* of being met.

(4) the government must prove that alleged harms are *real*, not speculative, *see supra* at 10-11;

(5) likelihood of success should be considered first because other preliminary-injunction elements follow (violating free speech is irreparable harm and the balance of equities and public interest favor upholding constitutional rights);

(6) *WRTL-II*'s streamlined procedures and protective rules must be reflected in preliminary-injunction decisions involving issue advocacy near elections, *see* 551 U.S. at 478;

(7) standards involving issue advocacy must reflect that "the people are sovereign," *Buckley*, 424 U.S. at 14, there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted), and the First Amendment mandates a "freedom of speech" presumption;

(8) this free-speech presumption means that the status quo in a prohibitory injunction is the state of the law *before* the challenged provision regulating speech;

(9) where the unambiguously-campaign-related requirement is at issue, *see infra* at 30-33, the government always has the burden of meeting that threshold burden before meeting the burden imposed by the required scrutiny;

(10) because strict scrutiny is the antithesis of deference or presumed constitutionality, these are not afforded to speech regulation;

(11) in determining the balance of harms and public interest, "[w]here the First Amendment is implicated, the tie goes to the speaker," *WRTL-II*, 551 U.S. at 474;

(12) agencies have no per se interest in restricting

or regulating speech; their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond the agency's interest when balancing harms;

(13) the fact that issue-advocacy cases may occur near elections favors the plaintiffs in the preliminary-injunction balancing because issue advocacy is most important when public interest is highest: "a group can certainly choose to run an issue ad to coincide with public interest" without election proximity indicating "electioneering," *WRTL-II*, 551 U.S. at 473; and

(14) likely unconstitutional laws may not operate just because an election is near.

Issue-advocacy cases involve our most cherished liberties and the right of sovereign people to participate in self-governance. The high constitutional protection for issue advocacy reflects that fact. The preliminary injunction standard and cognizable interests must reflect that protection. The First Amendment forbids employing the same preliminary-injunction standards to issue advocacy that apply to feuds between neighbors over fence location. Under proper standards, RTAO would have received a preliminary injunction. Those standards should be articulated so issue-advocacy groups may advocate when public interest is high, as the First Amendment requires.

III. The Holding Below on Likely Success Conflicts With Decisions of This and Other Courts.

The enforcement policy and three regulations challenged here conflict with decisions of this Court and of federal district courts, *see infra*, and are inconsistent with this Court's jurisprudence, including its unambiguously-campaign-related principle (governing the

scope of regulable First Amendment activity in the campaign-finance context), *see infra*. RTAO had a clear likelihood of success on the merits.

A. Section 100.22(b): "Express Advocacy" Requires "Magic Words."

RTAO challenges 11 C.F.R. § 100.22(b), FEC's alternate, non-magic-words, express-advocacy definition as vague, overbroad, and beyond statutory authority. The appellate panel held that RTAO lacked a reasonable likelihood of success on the merits because it said that the definition is similar to *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70. (App. 11-12a.)

1. The Holding Conflicts With Other Circuit Decisions.

The panel's decision conflicts with other circuit decisions holding that express advocacy requires the so-called "magic words," i.e., "express words of advocacy of election or defeat, such as 'vote for,'" *Buckley*, 424 U.S. at 44 n.52. The Fourth Circuit itself held this very regulation, § 100.22(b), unconstitutional for not requiring magic words, *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 329 (4th Cir. 2001),[8] and prior decisions held that express advocacy requires magic words, *see Leake*, 525 F.3d at 283 (requires "specific election-related words"); *FEC v. Christian Action Network*, 110 F.3d 1049, 1062 (4th Cir. 1997). The panel's decision also conflicts with other circuits that have held that it is a magic-words test. *See Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991); *FEC v. Central Long Island Tax Reform*, 616 F.2d 45, 53 (2d Cir.1980);

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[8] The challenged provision was also held unconstitutional by *Right to Life of Duchess County v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D. N.Y. 1998), for not employing magic words.

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); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) (striking definition patterned on 11 C.F.R. § 100.22(b)); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003)[9].[10]

2. The Holding Conflicts With This Court's Decisions.

The panel's holding also conflicts with this Court's holdings that—where the express-advocacy test applies—it is a magic-words test. *Buckley* clearly said that the express-advocacy test was an "express words of advocacy" test and provided examples. 424 U.S. at 44 n.52. *MCFL* said that "a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc.," 479 U.S. at 249 (citation omitted). *McConnell* repeatedly equated "express

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[9] This decision recognized that even *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), on which FEC relies for the challenged regulation, "presumed express advocacy must contain some explicit *words* of advocacy." *See also American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("'*McConnell* left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest'" (citation omitted)).

[10] State supreme courts have also held that "express advocacy" requires "magic words." *See Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999); *Osterberg v. Peca*, 12 S.W. 3d 31 (Tex. 2000).

advocacy" with "magic words." *See* 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," rather *McConnell* used that analysis to *add* regulation of "electioneering communications" to regulation of magic-words express advocacy. In *WRTL-II*, all members of the Court equated "express advocacy" with "magic words." *See* 551 U.S. at 474 n.7 (Alito, C.J., joined by Alito, J.), 495 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in judgment), 513 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

3. The Lower Court's Justification Is Flawed.

The reliance of the appellate panel (App. 11-12a) on the similarity of § 100.22(b) to *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70, is misplaced. *WRTL-II*'s test is not a free-floating test that may be employed to communications that are *not* federally defined "electioneering communications." *WRTL-II* specifically acknowledged that the test is impermissibly vague absent that definition. *See* 551 U.S. at 474 n.7.

The disagreement of FEC and the district court over how § 100.22(b) applies to the *Change* ad, *see supra* at 6, reveals its unconstitutional vagueness. FEC insists that *Change* is *not* express advocacy (Dkt. 31 at 12-13, 27), but the district court declares that it *is*: "reasonable people could not differ that this advertisement is promoting the defeat of Senator Obama." (App. 34a.) When a federal oversight agency and a federal court—both "reasonable"—cannot agree on the application of a test, the test is unconstitutional and offers no "'no security for free discussion. In these conditions it

blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim,'" *Buckley*, 424 U.S. at 43 (citation omitted).

Section 100.22(b) is also beyond statutory authority. The regulation cites as authority 2 U.S.C. § 431(17), the "independent expenditure" definition, which regulates only "an expenditure by a person [] expressly advocating the election or defeat of a clearly identified candidate." That definition implements the magic-words, express-advocacy constructions in *Buckley*, 424 U.S. 44 ("expenditure" limitation), 80 ("expenditure" disclosure), and *MCFL*, 479 U.S. at 249 (construing 2 U.S.C. § 441b, at issue here). There is no congressional authority anywhere for FEC to interpret "expressly advocating" other than as requiring magic words. Moreover, the only "expenditure" that FEC may regulate is one "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(9), and it was precisely to such "for the purpose of influencing" language that *Buckley* gave "expenditure" an express-advocacy construction to preserve it from vagueness and overbreadth. 424 U.S. at 77, 80.

In sum, § 100.22(b) goes beyond any permissible construction of "express advocacy" or "expenditure," is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority" and void under 5 U.S.C. § 706. RTAO had likely success on the merits.

B. Section 100.57: Donations May Not Be Deemed "Contributions" Under Vague, Overbroad Standards.

RTAO challenges 11 C.F.R. § 100.57(a) (App. 59a) —which converts donations into regulable FECA "contributions"—as vague, overbroad, and beyond statutory authority. The appellate panel focused on

only one of RTAO's arguments against the provision, holding that RTAO lacked a reasonable likelihood of success on the merits because language it identified as vague ("support or oppose the election of") had been "sanctioned" by the Fourth Circuit.[11] (App. 13a.)

1. The Holding Conflicts With Other Circuit Decisions.

The appellate panel's holding conflicts with two circuits. First, it conflicts with the D.C. Circuit, which recently vacated this regulation in its entirety[12] as unconstitutional, *EMILY's List v. FEC*, 581 F.3d 1, 4, 18, 25 (D.C. Cir. 2009), and beyond statutory authority, *id.* at 21, 25. That court held that § 100.57 violates the First Amendment "right of citizens to band together and pool their resources as an unincorporated group or non-profit organization in order to express their views about policy issues and candidates for public office," *id.* at 4, because it was "not 'closely drawn' to serve a cognizable anticorruption interest," *id.* at 18. "Non-profits are entitled to raise money for their soft-money accounts to help support their preferred candidates, yet this regulation prohibits non-profits from saying as much in their solicitations." *Id.* This speech restriction violates a speaker's right "'to choose the content of his own message.'" *Id.* at 18 (*quoting WRTL-II*, 551 U.S. at 477 n. 9). The court held that § 100.57 was motivated by an "equalization rationale" that this Court has repeatedly "repudiated." *Id.* The court declared § 100.57 beyond statutory authority for "requir[ing] covered non-profits to treat as hard money certain donations

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[11] This assertion is erroneous. *See infra.*

[12] The regulation also provides allocation rules when both federal and non-federal candidates are involved. § 100.57(b)-(c).

that are not actually made 'for the purpose of influencing' federal elections." *Id.* at 21 (citation omitted). "Under FECA, FEC's authority extends only to regulating donations and expenditures made 'for the purpose of influencing any election for Federal office.'" *Id.* at 20 (*quoting* 2 U.S.C. § 431(8)(A)(i) ("contribution" definition)).

Second, this regulation conflicts with the decision on which FEC says it is based, *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) ("*SEF*"). *See* 69 Fed. Reg. at 68057. FEC attempts to justify § 100.57(a) under *Buckley*'s phrase, "earmarked for political purposes," *supra*, as interpreted by *SEF*. But *SEF* does not justify the regulation. *SEF* said that *Buckley*'s "earmarked" language would apply to solicitations for contributions "that will be *converted* to expenditures *subject to regulation* under FECA," i.e., "activities or 'communications that *expressly advocate* the election or defeat of a clearly identified candidate.'" 65 F.3d at 295 (emphasis added). So for a donation to become a "contribution" under *SEF*, (a) the solicitation must request donations for express advocacy and (b) the recipient must actually "convert" the contribution into an expenditure for express advocacy. Section 100.57(a) fails both requirements. It waters down "express advocacy" to vague and overbroad "support or oppose," and it ignores the requirement that the donation actually be "converted" to express advocacy.

2. The Holding Conflicts With This Court's Decisions.

The panel's holding also conflicts with *Buckley*, which provided an authoritative construction of "contribution." *Buckley* restricted the scope of "contribution" to "funds provided to a candidate or political party or

campaign committee" or to "dollars given to another person or organization that are earmarked for political purposes." 424 U.S. at 23 n.24. By "earmarked for political purposes," *Buckley* meant donations designated and used for regulable campaign-related activity, e.g., express-advocacy "expenditures." But § 100.57(a) reaches beyond that approved "contribution" construction, creating "contributions" where they may not exist.

3. The Lower Court's Justification Is Flawed.

The appellate court is wrong on the one argument on which it relied, i.e., that *Leake*, 525 F.3d at 301, "sanctioned" "support or oppose" language. (App. 13a.) While *Leake* is not precedent here, it provides a lucid articulation of this Court's unambiguously-campaign-related principle, *see infra*, and the state of campaign-finance jurisprudence after *WRTL-II*, and it did *not* endorse the sort of approach taken in § 100.57.[13] The unambiguously-campaign-related principle that *Leake* recognized *excludes* the sort of vague, overbroad approach to campaign-finance law taken in § 100.57.

In sum, because *Buckley* has authoritatively con-

[13] *Leake* dealt with "whether North Carolina's method for determining if a communication 'supports or opposes the nomination or election of one or more clearly identified candidates' unconstitutionally regulates issue advocacy," 525 F.3d at 280, and upheld an express-advocacy definition of "supports or opposes" while striking down another more akin to the FEC express-advocacy test at 11 C.F.R. § 100.22(b), 525 F.3d at 280, 285. This is the context of its statement that the state "remain[ed] free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of one or more clearly identified candidates.' *See* N.C. Gen. Stat. § 163-278.14A(a) (2007)." 525 F.3d at 301. The portion that *Leake* cited as permissible was the express-advocacy definition, and it was in no way approving "support or oppose" as defined in any way other than express advocacy.

strued the definition of "contribution" and established a constitutional limit on its application, § 100.57 is vague, overbroad, and void as "in excess of the statutory . . . authority . . . ," 5 U.S.C. § 706. RTAO had likely success on the merits of this claim.

C. PAC Status May Only Be Imposed on Groups With the Primary Purpose of Regulable, Campaign-Related Activity.

RTAO challenges FEC's PAC-status enforcement policy, found in *PAC-Status 1*, 69 Fed. Reg. 68056, and *PAC-Status 2*, 72 Fed. Reg. 5595. *PAC-Status 2* cites 11 C.F.R. §§ 100.22(b) and 100.57 (*see supra*) as central elements of FEC's enforcement policy, 72 Fed. Reg. at 5602-05, so the flaws in those regulations, *supra*, are also fatal to this enforcement policy.

A third element of the policy is FEC's interpretation of *Buckley*'s major-purpose test. In *PAC-Status 2*, FEC declined to adopt a rule for the major-purpose test, declaring that "the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct," *id.* at 5601. FEC's vague and overbroad enforcement policy requires "a fact intensive inquiry" weighing vague and overbroad factors (with undisclosed weight) and "investigations into the conduct of specific organizations that may reach well beyond publicly available statements," including all an organization's "spending on Federal campaign activity" (not limited to spending on regulable activity) and other spending, as well as public and non-public statements, including statements to potential donors. *Id.*

PAC-Status 2 also indicated that FEC would consider other factors in its ad hoc, totality-of-the-circumstances, major-purpose test when it discussed its application of the policy to some 527 organizations in

previous investigations. 72 Fed. Reg. at 5603-04. These included the fact that an entity spent much of its money "on advertisements directed to Presidential *battleground States* and direct mail *attacking* or expressly advocating," *id.* at 5605 (emphasis added), the fact that groups ceased activity after an election, *id.*, and the fact that they didn't make disbursements in state and local races. *Id.* In addition, FEC thought that it could determine a 527 group's major purpose from internal planning documents and budgets, *id.*, which would normally be protected by the First Amendment privacy right and were only obtained because the organization was subjected to a burdensome, intrusive investigation (which this approach encourages). Major purpose was even based on a private thank-you letter to a donor, after the donation had already been made. *Id.*

The appellate court held that RTAO lacked a reasonable likelihood of success on the merits because the policy "appears . . . adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose of a particular organization's contributions." (App. 51-52a.) The court's formulation reveals its misunderstanding of the jurisprudence. *See infra.*

1. The Holding Conflicts With Other Circuit Decisions.

The appellate panel's holding conflicts with another Fourth Circuit panel in *Leake*, which held that major purpose "is best understood as an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," 525 F.3d at 287 (emphasis added). That approach would examine how much an advocacy group spends on express-advocacy

"independent expenditures" compared to its total disbursements in a particular year to determine if the group was a "political committee" for that year.[14] If over fifty percent of a group's expenditures were for express advocacy (or for FECA "contributions"), then the major purpose of the group would be "nominating or electing candidates," *Buckley*, 424 U.S. at 79, and PAC status could be imposed. There would be no examination of the non-regulable factors that FEC includes in its enforcement policy.

The appellate panel's holding also conflicts with another Fourth Circuit panel in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), which held that the "major purpose" must be "engaging in *express advocacy*," 168 F.3d at 712 (emphasis in original), which clearly requires that the activity considered to determine major purpose must be *regulable* election-related activity.[15]

The appellate panel's holding also conflicts with *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), which took a similar objective approach, relying on *MCFL* for how to determine PAC status, *id.* at 1152:

> In *MCFL*, the Court suggested two methods to determine an organization's "major purpose": (1) examination of the organization's central organi-

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[14] *See FEC v. GOPAC*, 917 F. Supp. 851, 852 (D.D.C. 1996) (PAC-status determination done by particular year).

[15] *See also Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (*affirming Florida Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. Dec. 15,1999) ("organizations whose major purpose is engaging in 'express advocacy,'" *id.* at *4)).

> zational purpose; or (2) comparison of the organization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates. 479 U.S. at 252, 107 S.Ct. 616 n. 6 (noting that MCFL's "central organizational purpose [wa]s issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates"); *see id.* at 262, 107 S.Ct. 616 (noting that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee").

The cited "independent spending" at issue in *MCFL* was magic-words express advocacy. *See MCFL*, 479 U.S. at 249. In the present case, FEC's enforcement policy conflicts with these bright-line tests for PAC status, and the appellate court's holding conflicts with these decisions.

While other circuit courts have recognized the major-purpose test,[16] only *Leake*, *Bartlett*, and *Coffman*, *supra*, provide guidance on what *activities* may be considered in determining major purpose beyond what *MCFL* provided, *see supra*. And their guidance

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[16] *See United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392-93 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Florida Right to Life*, 238 F. 3d 1288 (*affirming* 1999 WL 33204523); *Colorado Right to Life*, 498 F.3d at 1153-54. Federal district courts have also addressed the test. *See, e.g.*, *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171 (D. Me. 1999); *GOPAC*, 917 F. Supp. 851; *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75 (1978).

conflicts with FEC's policy.

This issue is hotly debated among those affected by it, as may be seen in the comments on how major purpose should be determined in response to FEC's notice of proposed rulemaking (ending in FEC's decision in *PAC-Status 2* not to make a rule). *See* 69 Fed. Reg. 68056. And Professor Foley has published an article on the subject. *See* Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. Ky. L. Rev. 341 (2004). But this Court's guidance is required to resolve the confusion.[17]

2. The Holding Conflicts With Decisions of This Court.

The appellate court's holding clearly conflicts with this Court's bright-line approach to determining "major

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[17] Confusion about PAC status and standards in the circuits is particularly evident in *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006), in which the Ninth Circuit approved the imposition of PAC-style burdens on an *MCFL*-corporation, which *MCFL* forbade, 479 U.S. at 262-64, 253-54. *Miles* said the burdens (imposed on groups making state-defined "electioneering communications") were "not particularly onerous," 441 F.3d at 791, because they did not "limit the amount that may be contributed to, or spent by, the entity," *id.* But Alaska imposed the same registration and periodic reporting requirements imposed on state PACs, required disclosure of *all* transactions, forbade corporate contributions, and required disbanding to discontinue reporting obligations—all of which are PAC-style burdens, not the one-time reporting of a regulated expenditure approved in *MCFL* for entities lacking the major purpose of nominating or electing candidates, 479 U.S. at 252-55. *Miles* conflicts with *California Pro-Life Council*, 328 F.3d 1088, which noted that *MCFL* "recognized that reporting and disclosure requirements," at issue in *Miles*, "are more burdensome for multi-purpose organizations . . . than for political action committees whose sole purpose is political advocacy," *id.* at 1101.

purpose," which provides no encouragement to intrusive investigations and permits ready determination of major purpose. Major purpose may be determined by either an entity's expenditures, *MCFL*, 479 U.S. at U.S. at 262 (major-purpose calculation looks at express-advocacy independent expenditures in relation to total expenditures), or by the organization's central purpose revealed in its organic documents, *id.* at 252 n.6 ("[O]n this record . . . MCFL['s] . . . central organizational purpose is issue advocacy."). The first test determines major purpose based on "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287, i.e., true "contributions" and "expenditures" would be counted. The second test requires an examination of the entity's organic documents to determine if there is an express intention to operate as a political committee, e.g., by being designated as a "separate segregated fund" (an internal "PAC") under 2 U.S.C. § 441b(2)(c).

3. The Court's Justification Is Erroneous.

The lower court's formulation reveals its misunderstanding of the jurisprudence, *see supra*, because "contributions" are not even at issue here and the major-purpose test examines the nature of the *entity*, not the nature of a "contribution" (or "expenditure"), to determine whether PAC-status may be imposed or whether the one-time, "independent expenditure" reports endorsed in *MCFL*, 479 U.S. at 262, satisfy any government interest. The appellate court failed to comprehend the need for a bright-line test that could be easily understood and quickly applied without resorting to expensive, intrusive, time-consuming investigations (based on vague, overbroad criteria) and

after-the-fact determinations that a group that thought it was not a PAC was a PAC (and so in violation of numerous PAC requirements). FEC's ad-hoc, case-by-case approach chills free speech and association.

In sum, because FEC's enforcement policy goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity received a "contribution" or made an "expenditure," is unconstitutionally vague and overbroad, and is "in excess of the statutory . . . authority . . ." of FEC, it is void under 5 U.S.C. § 706. RTAO had likely success on the merits on this claim.

D. *WRTL-II*'s "Appeal to Vote" Test for Regulable "Electioneering Communications" May Not Be Demoted to a Mere Part of FEC's Test.

RTAO challenges 11 C.F.R. § 114.15, which purports to implement *WRTL-II*'s appeal-to-vote test for whether a corporate "electioneering communication"[18] may be prohibited. *WRTL-II*'s test is as follows: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-70. *WRTL-II* also provided instructions on how litigation must be conducted expeditiously without burden to challengers, *id.* at 469 (citations omitted), and required that the nature of an ad be determined from its actual text, not from surrounding *context* or from any effort to discern the *intent* behind the ad or the *effect* of the ad on an election, *id.* at 467-68, 473-74. After stating the test, *WRTL-II*

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[18] An "electioneering communication" is essentially a "targeted" ad identifying a candidate that is broadcast within 30 and 60 days before primaries (and conventions) and general elections. 2 U.S.C. § 434(f)(3).

applied it to specific grassroots lobbying and addressed arguments made by the parties in briefing, e.g., regarding "indicia of express advocacy." But none of this *application* was part of the *test*. That the appeal-to-vote test is the *only* test is confirmed by *WRTL-II*'s restatement of the test without an elements of the application. *See id.* at 476.

Section § 114.15(a), at first appears to set out the appeal-to-vote test as the primary test, but that test is never permitted to stand alone. Two FEC tests replace it. First, is the "safe harbor" test in paragraph (b), which is not applicable here. Second, is the "rules of interpretation" test in paragraph (c), which is a balancing test that demotes *WRTL-II*'s appeal-to-vote test to just *one* of *two* elements to be weighed on equal terms. The rules-of-interpretation test, balances two further equipoised tests: (1) an indicia-of-express-advocacy test and (2) a restatement of *WRTL-II*'s appeal-to-vote test. When a constitutional test is demoted to being only a part of a statutory test to determine whether the constitutional test is met, the statutory test is inherently vague and overbroad.

FEC then lists factors to put into the pans on the scale (without indicating the weight assigned each factor). Nothing in FEC's rule requires any clear call to action, which is essential for there to be an unambiguous "*appeal* to vote." Rather than focusing on the "appeal to vote" central to *WRTL-II*'s test, the factors listed are all peripheral and could be present in a wide range of constitutionally-protected issue advocacy. FEC has erroneously imported the *application* of *WRTL-II*'s appeal-to-vote test in the grassroots lobbying setting of that case, 551 U.S. at 469-70, into the test itself.

WRTL-II limited the scope of the statutory "elec-

tioneering communications" prohibited by 2 U.S.C. § 441b, but 11 C.F.R. § 114.15 rejects this limitation. Because *WRTL-II's* appeal-to-vote test is an authoritative construction to the extent of the corporate prohibition on "electioneering communications," and a constitutional limit on the application of the electioneering communication prohibition, the rule is beyond FEC's statutory authority.

The court below held that RTAO lacked likely success as to this challenge because "§ 114.15 mirrors the language of [*WRTL-II*]" (App. 13a), but as just shown, the regulation actually demotes *WRTL-II*'s test to being merely a *part* of another test.

Because the regulation at 11 C.F.R. § 114.15 goes beyond any permissible construction of *WRTL-II*'s appeal-to-vote test, is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority . . ." of FEC, it is void under 5 U.S.C. § 706. RTAO had likely success on this claim.

E. This Court Restricts Campaign-Finance Regulation to "Unambiguously Campaign Related" Activity.

The challenged regulations and enforcement policy all violate this Court's "unambiguously campaign related" principle for determining the permissible scope of campaign-finance regulation. *See infra.* The appellate panel noted that RTAO "relied heavily on . . . *Leake*, 525 F.3d 274" (App. 8a)—which articulated the principle and relied on it to establish the scope of regulable expenditures and the major-purpose test (*see infra*)—but then ignored the principle.

1. The Decision Below Conflicts With Other Circuit Decisions.

The appellate court's decision conflicts with another Fourth Circuit panel's decision in *Leake*, which held that "after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate'" 525 F.3d at 281 (*quoting Buckley*, 424 U.S. at 80). It also conflicts with other circuit decisions that have recognized the principle. *See Furgatch,* 807 F.2d at 860; *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 & n.10 (11th Cir. 1982); *Machinists Non-Partisan Political League,* 655 F.2d at 391 & n.23.[19]

2. The Decision Below Conflicts With This Court's Decisions.

The decision below—ignoring the unambiguously-campaign-related principle—conflicts with *Buckley* and other decisions of this Court applying this threshold principle. *Buckley* held that disclosure may only be compelled for expenditures for communications "unambiguously related to the campaign of a particular federal candidate," 424 U.S. at 80, i.e., "unambiguously campaign related," *id.* at 81. *Buckley* applied this principle to expenditure limitations, *id.* at 42-44, PAC status and disclosure, *id.* at 79, non-PAC disclosure of contributions and independent expenditures, *id.* at 79-

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[19] Federal district courts have also recognized the unambiguously-campaign-related principle. *See Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at *5 (N.D. Fla. May 22, 2009); *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp.2d 777, 785 (S.D. W.Va. 2009); *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1141, 1144 (D. Utah 2008).

81, and contributions, *id.* at 23 n.24, 78. *Buckley* employed the major-purpose and express-advocacy tests to implement this principle. *Id.* at 44, 79-80.

FEC recognized and adopted the principle in its Petition for Writ of Certiorari in *FEC v. Faucher* (No. 90-1923), arguing authority to regulate an "expenditure that is unambiguously election related, *id.* at 19. And Senators McCain and Feingold, the other primary BCRA sponsors, and other members of the "reform" lobby recognized and adopted the principle in *McConnell*, identifying it as the principle on which Congress based BCRA.[20] For them to reject the analysis now would be a bait and switch.

McConnell endorsed the reformers' reliance on *Buckley*'s twin precepts. 540 U.S. at 192 ("vagueness and overbreadth"), citing the *Buckley* passage to which the reformers pointed for the unambiguously-campaign-related precept, *id.* at 191 (citation omitted).

WRTL-II limited regulable "electioneering communications" to "campaign speech," 551 U.S. at 478-79, with the appeal-to-vote test, *id.* at 469-470, which is the application of the unambiguously-campaign-related

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[20] They argued that

> [t]wo general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not 'dissolve in practical application,' [*Buckley*,] 424 U.S. at 42; and they should be 'directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*,' *id.* at 80; *see id.* at 76-82. Those are precisely the *precepts* to which *Congress* adhered in framing Title II.

Brief for Intervenor-Defendants Senator John McCain et al. at 62, *McConnell*, 540 U.S. 93 (emphasis added) (*available at* http:// supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf).

principle to electioneering communications, *see Leake*, 525 F.3d at 281-83.

The principle clarifies campaign-finance jurisprudence. It permits regulation of only express-advocacy "independent expenditures" and appeal-to-vote "electioneering communications," *Leake*, 525 F.3d at 284, so the hybrid at 11 C.F.R. § 100.22(b) is unconstitutional. The requirement that the only regulated activity be "unambiguously campaign related" dooms the vague, overbroad approach of § 100.57. The principle requires an objective major-purpose test determined on the basis of "regulable, election-related speech," *Leake*, 525 F.3d at 287, so FEC's vague, overbroad PAC-status policy fails. FEC's demotion of *WRTL-II*'s appeal-to-vote test—the implementation of the principle for electioneering communications—to a mere part of FEC's own test, dooms § 114.15.

IV. RTAO Had Irreparable Harm And Met the Other Preliminary-Injunction Elements.

In an expressive association case, the other elements of the preliminary-injunction standard essentially follow from likely success on the merits. "Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.")

The balance of harms favors RTAO, whose hardship

is the irreparable loss of First Amendment rights to engage in core political speech in the form of highly-protected issue advocacy at the most opportune time in terms of public interest. Defendants' interest in enforcing FEC's regulations and policy is substantially reduced by the showing of the high probability of success on the merits. Clearly, if the challenged provisions are unconstitutional, Defendants have *no* cognizable interest in enforcing them. Moreover, there remain numerous campaign-finance laws and regulations that will remain in effect that will adequately protect the governmental interests that this Court has identified in this area to the extent that they regulate only activity that meets the unambiguously-campaign-related requirement and the derivative express-advocacy test, "contribution" construction, major-purpose test, and appeal-to-vote test.

The public interest analysis also follows the high likelihood of success and favors RTAO. The public has an interest in its government entities promulgating and enforcing constitutional regulations and policies. It has an interest in promoting core political speech. And it has an interest, in the First Amendment context, in receiving RTAO's speech. An injunction serves these interests.

Conclusion

For the reasons stated, this Court should grant this petition.

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