UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FREE SPEECH, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 12-CV-127-S

MEMORANDUM OF CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Donald J. Simon
(DC Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005
Tel.: (202) 682-0240
Fax: (202) 682-0249

Fred Wertheimer,
(DC Bar No. 154211)
DEMOCRACY 21
2000 Massachusetts Avenue, NW
Washington, DC 20036
Tel.: (202) 429-2008
Fax: (202) 355-9606

Counsel for *Amici Curiae*

Larry B. Jones, WSB # 5-1847
SIMPSON, KEPLER & EDWARDS, LLC
The Cody, Wyoming Division of
BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C.
1135 14th Street
P.O. Box 490
Cody, WY 82414
ljones@skelaw.com
Tel.: (307) 527-7891
Fax: (307) 527-7897

J. Gerald Hebert
(VA Bar No. 38432)
Tara Malloy
(DC Bar No. 988280)
Paul S. Ryan
(DC Bar No. 502514)
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
Tel.: (202) 736-2200
Fax: (202) 236-2222

Counsel for *Amici Curiae*

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Miscellaneous Resources:

INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiff Free Speech was organized in February of this year for the stated purpose of running advertisements that discuss the positions of President Obama and other "public servants and candidates for public office" on gun rights, land rights, environmental policy, health care and free speech. *See* Complaint, ¶¶ 13, 15-17; Free Speech AOR 2012-11 (February 29, 2012).

Plaintiff is free to spend as much money as it wishes on such independent advertisements, and to raise this money without limit from a wide range of sources, including wealthy individuals, corporations and unions. But fearing that its spending might qualify it as a federal "political committee" subject to disclosure requirements under the Federal Election Campaign Act (FECA), plaintiff filed an advisory opinion request earlier this year with the Federal Election Commission (FEC), urging the agency to find that a number of its proposed campaign ads were not regulable as "express advocacy." Although the FEC issued an advisory opinion agreeing with plaintiff and finding that four of its proposed ads were not express advocacy, *see* FEC AO 2012-11 (Free Speech), plaintiff nevertheless filed this suit to challenge the constitutionality of the FEC rule defining express advocacy, the FEC's policy governing the determination of federal "political committee" status and the views on the definition of "solicitation" expressed in a non-binding draft of the Free Speech advisory opinion. *See* Complaint, Counts 1-4 (challenging 11 C.F.R. 100.22(b), the FEC's "major purpose" policy and FEC AO 2012-11, Draft B (April 11, 2012)).

Plaintiff devotes its complaint and brief to denouncing the FEC's advisory opinion process and excoriating the challenged rule and agency policies as, *inter alia*, "the nation's largest system of prior restraint," a "labyrinth," a "model of murkiness," a "comprehensive system of speech censorship, intimidation and vagary," a "multiverse of confusion and caprice," "the mountain of obscurity," and a "complicated maze of ever-shifting, undefined regulatory

burdens." *See* Memorandum in Support of Motion for Preliminary Injunctive Relief, at 4, 6, 15, 23, 27, 28 (July 13, 2012) ("Pl. Br."). But plaintiff's invective should not be permitted to obscure that its case concerns only disclosure. The rules and policies challenged here implement only the federal disclosure requirements that are applicable to "independent expenditures" and that accompany federal political committee status. *See* 2 U.S.C. § 434(c) (reporting requirements for "independent expenditures"); 2 U.S.C. §§ 432, 433, 434(a)(4) (federal political committee reporting and organizational requirements).

The question that is before this Court is thus not whether plaintiff can make expenditures for the speech it proposes, nor raise money without limitation, but simply whether it must provide disclosure of its electoral advocacy to the American public. And while plaintiff's papers are heavy on rhetoric, they contain virtually no legal authority supporting plaintiff's attack on political transparency. The omission is hardly surprising given that both the Supreme Court and the lower courts have been overwhelmingly supportive of disclosure. Indeed, in the last three years, the Supreme Court has twice upheld, by 8-1 votes, laws requiring disclosure of spending in the political arena, reiterating that such "transparency" "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916; *see also Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding Washington state law authorizing disclosure of ballot referenda petitions). Plaintiff is thus unlikely to succeed on the merits of its challenge, and its motion for a preliminary injunction should be denied.

First, as a threshold matter, there is no basis to plaintiff's argument that strict scrutiny should apply to this Court's review of 11 C.F.R. 100.22(b) and the FEC's policies. Plaintiff asserts that the agency's rule and policies govern determinations of "political committee status" (or "PAC status") and therefore require strict scrutiny, but concedes that political committee

status here entails only registration, reporting and other disclosure requirements. The Supreme Court has made clear that disclosure laws are subject not to strict scrutiny, but rather only to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizen United*, 130 S. Ct. at 914, *quoting Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (internal citations omitted).

Second, plaintiff's contention that the FEC rule defining "express advocating," 11 C.F.R. 100.22(b), is overbroad and unconstitutionally vague is contrary to all recent Supreme Court precedent in this area. The Supreme Court has reiterated in a series of cases that Congress and the FEC may regulate communications beyond a narrow class that constitutes "magic words" express advocacy, and that disclosure laws in particular may be applied beyond even the "functional equivalent of express advocacy." *McConnell v. FEC*, 540 U.S. 93, 190 (2003); *FEC v. Wisconsin Right to Life (WRTL)*, 551 U.S. 449, 469-70 (2007); *Citizen United*, 130 S. Ct. at 915.

Third, with regard to the Supreme Court standard of determining whether a group has a "major purpose" to influence elections, plaintiff provides no legal authority for its claim that the FEC impermissibly implements this standard by making an inquiry into vague and overbroad factors. The Supreme Court in *Buckley* created the "major purpose" test to narrow the statutory definition of "political committee," but the Court in no way restricted the scope of the inquiry that the FEC may make in determining a group's "major purpose." *Buckley*, 424 U.S. at 79.

Finally, plaintiff complains about the views on the solicitation of contributions expressed in Advisory Opinion 2012-11 Draft B,[1] *see* Complaint at Count 3 & Exhibit C, but this draft was

[1] Furthermore, even if Draft B had been adopted by the FEC and was a final agency action, this draft uses the same standard for assessing solicitations as urged by plaintiff, i.e., a standard drawn from *FEC v. Survival Education Fund (SEF)*, 65 F.3d 285 (2d Cir. 1995). *Compare* Draft B at 17 (quoting *SEF* for the principle that "[r]equests for funds that 'clearly indicate[] that the contributions will be

not adopted by the FEC and thus does not constitute reviewable agency action. *Amici* will not address this argument in further detail as it is self-evident that plaintiff does not have standing to challenge a draft document that has no legal effect.

ARGUMENT

I. Strict Scrutiny Is Not Applicable to This Court's Review of Section 100.22(b) or the FEC's Policy for Determining Political Committee Status.

A. The Challenged Rules All Pertain to Disclosure, and Thus Are Reviewed Under "Exacting Scrutiny."

Plaintiff filed suit to challenge, on an as-applied and facial basis, the FEC's definition of "express advocating," *see* 11 C.F.R. 100.22(b), the FEC's policy for determining political committee status, and a draft advisory opinion pertaining to when donations given in response to solicitations will be deemed "contributions" under FECA. Even insofar as these rules and policies represent reviewable final agency actions, they all implement only disclosure requirements. *See* 2 U.S.C. § 434(c) (reporting requirements for "independent expenditures"); 2 U.S.C. §§ 432, 433, 434(a)(4) (federal political committee reporting and organizational requirements).

Prior to *Citizens United* and a decision of the D.C. Circuit Court of Appeals, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), these rules had considerably broader impact.

Section 100.22(b) previously implemented the federal restrictions on corporate independent spending, *see* 2 U.S.C. § 441b. But by striking down the federal corporate spending restrictions, *Citizens United* has greatly limited the scope of 11 C.F.R. 100.22(b): no longer does

---

targeted to the election or defeat of a clearly identified candidate for federal office' raise 'contributions' under the Act."), *with* Complaint, ¶ 82 (citing *SEF* for the principle that "a fundraising or donation request may fall within the reach of the FECA and constitute a solicitation '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.'"). Plaintiff's objection to the draft opinion thus remains unclear.

it define the scope of "expenditures" covered by the now-invalidated corporate spending restrictions, but rather now simply delineates which political advertisements are subject to disclosure.

Similarly, Section 100.22(b) and the FEC's "major purpose" policy govern FEC determinations of federal political committee status, and this status previously entailed disclosure, 2 U.S.C. §§ 432, 433, 434(a)(4), as well as contribution limits, 2 U.S.C. §§ 441a(a)(1), (a)(2), and restrictions on corporate and union contributions, 2 U.S.C. § 441b(a). But in *SpeechNow.org*, the D.C. Circuit invalidated the federal contribution limits as applied to federal political committees that make only independent expenditures and that do not coordinate expenditures with candidates or political parties. 599 U.S. at 696. The FEC clarified the impact of this decision by issuing two advisory opinions confirming that political committees that make only independent expenditures are not bound by the federal contribution limits, and in addition, are not subject to the corporate and union contribution source restrictions. *See* FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten). Today, potential "PAC status" for independent groups such as plaintiff[2] has thus lost much of its former bite. An "independent expenditure only committee" is now subject only to disclosure requirements, including registration, reporting and organizational obligations. 2 U.S.C. §§ 432, 433, 434(a)(4).

Despite these developments, plaintiff argues that strict scrutiny applies to this Court's review of its challenge to 11 C.F.R. 100.22(b) and the FEC's "major purpose" and "solicitations" policies. *See* Pl. Br. at 5-6, 27-28. But the challenged rule and policies today give rise only to disclosure obligations, and consequently, plaintiff's case is governed not by strict scrutiny, but

[2] Plaintiff describes itself as a group organized under Section 527 of the Internal Revenue Code, 26 U.S.C. § 527, that does not coordinate its activities with candidates or national, state, district, or local political party committees or their agents. Complaint, at ¶¶ 10, 58.

rather only by "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" *Citizen United*, 130 S. Ct. at 914, *quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted).

B. There Is No Basis for the Application of Strict Scrutiny.

Plaintiff argues that both 11 C.F.R. 100.22(b) and the FEC's "major purpose" and "solicitation" policies warrant strict scrutiny review because (1) they "implicate political speech," and (2) they impose PAC status and such status entails "severe burdens of registration and reporting." Pl. Br. at 5, 27. The first argument, however, is so vague as to be meaningless. The second argument contradicts all applicable judicial authority on the subject of disclosure, including that of the Tenth Circuit, which has applied only exacting scrutiny to reporting and registration requirements.

First, the fact that the challenged regulations "implicate speech" means only that heightened scrutiny may apply; it does not speak to what level of heightened scrutiny is appropriate. It is the substantive requirements imposed by a law that determine the degree of scrutiny to be applied.

The Supreme Court applies varying standards of scrutiny in the campaign finance context depending on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. Expenditure restrictions, as the most burdensome campaign finance regulations, are subject to strict scrutiny and reviewed for whether they are "narrowly tailored" to "further[] a compelling interest." *WRTL*, 551 U.S. at 476; *see also Buckley*, 424 U.S. at 44-45. Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisfy the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162

(2003) (internal quotations omitted). Disclosure requirements, the "least restrictive" campaign finance regulations, *Buckley*, 424 U.S at 68, are subject to "exacting scrutiny," which requires only that there exist a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. at 64 (internal footnotes omitted). Indeed, the Supreme Court twice in 2010 reaffirmed that "exacting scrutiny" applies to political disclosure requirements in both the sphere of campaign finance law and in the context of ballot referenda. *See Citizens United*, 130 S. Ct. at 914 ("The Court has subjected [disclosure] requirements to 'exacting scrutiny,'…."); *Reed*, 130 S. Ct. at 2818 (finding that disclosure law relating to ballot referenda petitions was subject only to "exacting scrutiny"). Thus, because the challenged regulation and policies here trigger only reporting and registration obligations, this case is governed by exacting – not strict – scrutiny.

Plaintiff also attempts to heighten the level of scrutiny here by emphasizing that the challenged regulations impose "political committee status," arguing that the registration and reporting obligations entailed in political committee status warrant strict scrutiny. Pl. Br. at 27. But plaintiff cannot find a single case to support this proposition. All courts that have examined political committee registration and reporting requirements following *Citizens United* have eschewed strict scrutiny and instead applied the more relaxed standard of exacting scrutiny. *Real Truth About Abortion (RTAA) v. FEC*, 681 F.3d 544, 549 (2012) ("[A]n intermediate level of scrutiny known as 'exacting scrutiny' is the appropriate standard to apply in reviewing provisions that impose disclosure requirements, such as the regulation and policy."); *Nat'l Org. For Marriage v. Sec. State of Fla.*, 753 F. Supp. 2d 1217, 1222 (N.D. Fla. 2010) (noting that the "Florida statutes being challenged would not prohibit NOM from engaging in its proposed speech" and that consequently "instead of strict scrutiny, a standard known as 'exacting scrutiny'

applies"), *aff'd* 2012 WL 1758607 (11th Cir. May 17, 2012); *Nat'l Org. For Marriage v. McKee*, 649 F.3d 34, 56 (1st Cir. 2011) ("Because Maine's PAC laws do not prohibit, limit, or impose any onerous burdens on speech, but merely require the maintenance and disclosure of certain financial information, we reject NOM's argument that strict scrutiny should apply."); *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) (noting that *Citizens United* and *Reed* decisions "have eliminated the apparent confusion as to the standard of review applicable in disclosure cases" by confirming that "a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest."); *see also Iowa Right to Life Committee, Inc. (IRTL) v. Tooker*, 795 F. Supp. 2d 852, 863-84 (S.D. Iowa 2011); *Yamada v. Kuramoto*, 2010 WL 4603936, *11 (D. Haw. Oct. 29, 2010).

Nor do the cases cited by plaintiff from this Circuit support the application of strict scrutiny. To the contrary, *New Mexico Youth Organized (NMYO) v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010), makes clear that regulations that "require disclosure," in contrast to "regulations that limit the amount of speech a group may undertake," must pass only "exacting scrutiny."

To be sure, PAC status for independent groups entailed more restrictive regulations and these regulations may have warranted more stringent review than "exacting scrutiny." As discussed in Section I.A. *supra*, prior to recent judicial decisions, an "independent expenditure only committee" was subject not only to disclosure requirements, 2 U.S.C. §§ 432, 433, 434(a)(4), but also to contribution limits, 2 U.S.C. §§ 441a(a)(1), (2), and source prohibitions, 2 U.S.C. § 441b(a). Corporate and union PACs were subject to additional restrictions, including a prohibition on the use of treasury funds to finance either political contributions or independent

expenditures, 2 U.S.C. § 441b(b)(2), and restrictions on the class of individuals that the corporate or union parent could solicit for contributions, 2 U.S.C. § 441b(b)(4). Thus, it is unremarkable that earlier cases such as *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) and *Citizens United* noted that political committee status "impose[d] administrative costs." *See* Pl. Br. at 30-31, *quoting MCFL*, 479 U.S. at 254–55; *Citizens United*, 130 S. Ct. at 898. Establishment of a corporate PAC in those cases was a highly-regulated alternative to an absolute prohibition on corporate spending. But now, by contrast, "political committee status" entails nothing more than registration and reporting. Because the applicable standard of scrutiny turns on the nature of the specific political committee regulation at issue, here "PAC status" warrants only exacting scrutiny.

This principle is well illustrated by the D.C. Circuit's decision in *SpeechNow.org v. FEC*. There, the Court of Appeals reviewed both the contribution limits connected to federal political committee status, and the registration, reporting and organizational requirements connected to such status. It struck down the contribution limits as applied to "independent expenditure only committees" after reviewing such limits under the "closely drawn" level of scrutiny appropriate for contribution limits. 599 F.3d at 692 (noting that contribution limits must be "closely drawn to serve a sufficiently important interest") (citing *Davis v. FEC*, 128 S. Ct. 2759, 2772 n.7 (2008)). By contrast, the Court of Appeals upheld the political committee disclosure requirements under a more relaxed standard, stating that "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation'" to the requirements." *Id.* at 696. The appropriate standard of scrutiny thus turned on the nature of the substantive regulation associated with political committee status.

This was also the approach of the Fourth Circuit Court of Appeals in *RTAA*, which applied exacting scrutiny to the same regulations as challenged in this case. The Court recognized that Section 100.22(b) and the Commission's "major purpose" policy effected only disclosure requirements and that "disclosure and organizational requirements . . . are not as burdensome on speech as are limits imposed on campaign activities or limits imposed on contributions to and expenditures by campaigns." 681 F.3d at 548; *see also id.* at 552, n.3 It acknowledged that the Supreme Court in *Citizens United* had "used the word 'onerous' in describing certain PAC-style obligations and restrictions" but noted that "it did so in a context significantly different than that facing RTAA." *Id*. at 549. It highlighted, for example, that the law invalidated in *Citizens United*, 2 U.S.C. § 441b, required corporations to set up a separate PAC with segregated funds to make expenditures, and that these funds were "subject to several limitations on allowable contributions, including a prohibition on the acceptance of funds from the corporation itself." *Id*. Because PAC status for RTAA entailed none of these burdens – and, like this case, involved only reporting and registration – *Citizens United* was inapplicable, and the Court of Appeals applied only exacting scrutiny. *Id*.

This Court should follow the clear guidance of *Buckley*, *Citizens United* and recent lower court decisions and apply exacting scrutiny to the challenged law.

II. The Definition of "Expressly Advocating" at Section 100.22(b) Is Indistinguishable From the *WRTL* "Functional Equivalent" Test and Is Constitutional.

Plaintiff claims that the so-called "subpart (b)" definition of express advocacy is unconstitutionally vague and overbroad, suggesting that "express advocacy" cannot extend beyond "magic words." Pl. Br. at 11-27. However, this stance flies in the face of all recent Supreme Court precedent.

In *McConnell*, the Supreme Court cast doubt on the functionality of the "magic words" construction of "express advocacy." 540 U.S. at 193. *WRTL* made clear that the state may regulate not only "magic words" express advocacy, but also the "functional equivalent of express advocacy," and articulated a test for the latter that is virtually identical with subpart (b). *WRTL*, 551 U.S. at 474 n.7. *Citizens United* cast further doubt on the "magic words" test by finding that a communication need not constitute express advocacy – or even the functional equivalent of express advocacy – to be regulable under the federal "electioneering communications" disclosure requirements. 130 S. Ct. at 915. Thus, all three cases contradict plaintiff's suggestion that the FEC can only regulate "magic words" express advocacy and strongly support the constitutionality of the subpart (b) test definition of express advocacy.

Finally, arguments almost identical to those asserted by plaintiff have been rejected by the Fourth and Eleventh Circuits; both Courts of Appeals recognized that the *WRTL* test – and disclosure laws based on this test – are neither vague nor overbroad, but rather are consistent with all recent Supreme Court precedent.

A. The Constitutionality of the Subpart (b) Definition of "Expressly Advocating" Is Supported by *McConnell*, *WRTL* and *Citizens United*.

The debate over the role and scope of the "express advocacy" standard dates back to FECA's enactment. An expenditure limit originally included in FECA provided that "[n]o person may make any expenditure … relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." *Buckley*, 424 U.S. at 39. The *Buckley* Court was troubled by the vagueness of the phrase "relative to a clearly identified candidate," and consequently construed the "relative to" phrase to "apply only to expenditures for communications that <u>in express terms</u> advocate the election or defeat of a clearly identified

candidate for federal office." *Id*. at 44 (emphasis added). The Court explained in a footnote that "[t]his construction would restrict the application of [the spending limit] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. These phrases became known as the "magic words" of express advocacy.

More than a decade after *Buckley,* the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), concluded that, "[S]peech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864 (emphasis added).

In 1995, the FEC codified this *Furgatch* test in subpart (b) of its regulation defining "expressly advocating." Section 100.22(b) of the FEC's regulations provides that "expressly advocating" means any communication that:

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b) (emphasis added).

In the time period following the adoption of this rule but prior to the Supreme Court's decisions in *McConnell* and *WRTL*, the courts of a few jurisdictions outside the Ninth Circuit expressed doubts as to the constitutionality of this formulation of express advocacy. All of the cases plaintiff cites in support of its argument are drawn from this period. *See* Pl. Br. at 10,

citing *Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *Maine Right to Life Cmte. v. FEC*, 914 F. Supp. 8, 13 (D. Maine 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). But plaintiff fails to acknowledge that the Supreme Court in *McConnell* and *WRTL* revised its analysis of "express advocacy," effectively overturning the cases cited by plaintiff. Both *McConnell* and *WRTL* confirm that the First Amendment does not limit the scope of campaign finance regulation to "magic words," but rather allows regulation of a broader category of speech consisting of the "functional equivalent of express advocacy," and thus strongly support the constitutionality of subpart (b).

First, in *McConnell*, the Supreme Court explained that *Buckley's* express advocacy test was merely an "endpoint of statutory interpretation, not a first principle of constitutional law." 540 U.S. at 190. The Court reached this conclusion in its review of Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited the use of corporate or union treasury funds to pay for an "electioneering communication" – defined as any broadcast ad that refers to a clearly identified federal candidate, is targeted to the candidate's electorate and is aired within 30 days of a primary or 60 days of a general election. 2 U.S.C. §§ 434(f)(3), 441b(b)(2). These provisions were challenged on grounds that they regulated "'communications' that do not meet *Buckley*'s [magic words] definition of express advocacy." 540 U.S. at 190. The Court rejected this assertion, however, making clear that "the express advocacy limitation … was the product of statutory interpretation rather than a constitutional command." *Id*. at 191-92. The Court concluded that "the unmistakable lesson from the record in this litigation . . . is that *Buckley's* magic-words requirement is functionally meaningless[,]" and "has not aided the legislative effort

to combat real or apparent corruption." *Id.* at 193-94 (emphasis added). Accordingly, the Court upheld BCRA's "electioneering communication" funding provisions against a facial challenge.

In *WRTL,* the Court re-visited Title II of BCRA in the context of a challenge to the "electioneering communication" provisions as applied to three broadcast ads that WRTL wished to air. Chief Justice Roberts, writing the controlling opinion for the Court, interpreted *McConnell* as upholding the Title II funding restrictions only insofar as "electioneering communications" contained either express advocacy or "the functional equivalent of express advocacy." 551 U.S. at 469-70. As to the latter category, "a court should find that an 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." *Id.* (emphasis added). Applying this test, the Court held that WRTL's ads were not the functional equivalent of express advocacy and accordingly were exempt from the funding restriction. *Id.* at 476.

WRTL's "functional equivalent" test closely correlates to the FEC's subpart (b) standard for express advocacy. Under *WRTL,* an ad constitutes the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"; under subpart (b), an ad constitutes express advocacy if it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" There is no legal or practical difference between these tests.

Further, Chief Justice Roberts in *WRTL* specifically addressed the argument asserted by plaintiff here that the "functional equivalent" test is unconstitutionally vague because it does not incorporate a "magic words" standard. 551 U.S. at 474 n.7. The Chief Justice explained that the "magic words" standard of express advocacy formulated in *Buckley* is not "the constitutional

standard for clarity . . . in the abstract, divorced from specific statutory language," and the standard "does not dictate a constitutional test." *Id.* In light of Justice Robert's strong affirmation of his "functional equivalent" test, the fact that FEC did not "issue a conclusive opinion" on some of plaintiff's proposed ads in the advisory opinion process is immaterial. Pl. Br. at 23. The FEC's partial deadlock cannot render a test endorsed by the Supreme Court unconstitutionally vague. As noted by the Fourth Circuit, some degree of disagreement over application of the subpart (b) test "is simply inherent in any kind of standards-based test." *RTAA*, 681 F.3d at 554. *See also Sec. State of Fla.*, 753 F.Supp.2d at 1221 ("The fact that it may be difficult in some cases to determine whether these clear requirements have been met does not mean that the statute is void for vagueness.") (internal quotations omitted).

And even insofar as subpart (b) definition includes "limited reference to external events," *see* Pl. Br. at 13, the *WRTL* Court made clear that courts "need not ignore basic background information that may be necessary to put an ad in context – such as whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future[.]" 551 U.S. at 474 (internal quotations omitted). In keeping with this directive, consideration of context is permitted, but greatly limited, under the subpart (b) test ("with limited reference to external events"). Thus, contrary to plaintiff's claims, Section 100.22(b)'s reference to "external events" does not broaden the rule beyond Chief Justice Roberts's test.

Finally, *Citizens United* reaffirmed the constitutionality of the *WRTL* test. There, the Supreme Court again reviewed the corporate funding restriction of Title II of BCRA, and in a 5-4 opinion, struck down the federal prohibition on corporate expenditures in its entirety, *see* 2 U.S.C. § 441b. 130 S. Ct. at 913. Far from questioning the validity of the *WRTL* "functional

equivalent" test, the Supreme Court actually applied *WRTL*'s test to the communications at issue in *Citizens United* to determine whether they would be prohibited by 2 U.S.C. § 441b; only because it found that the communications would be prohibited, did the Court then proceed to consider the constitutionality of that prohibition.[3] *See RTAA*, 681 F.3d at 551 (noting that by "[u]sing *Wisconsin Right to Life*'s 'functional equivalent' test" the Court concluded that *Hillary: The Movie* "qualified as the functional equivalent of express advocacy") (emphasis added).

The *Citizens United* Court also consigned the "magic words" standard for "express advocacy" to further irrelevance. In an 8-1 opinion, the Court upheld the federal disclaimer and disclosure requirements applicable to all "electioneering communications." 130 S. Ct. at 914. In so holding, the Court "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 915. Otherwise expressed, the Supreme Court not only rejected the "magic words" standard when delineating the constitutionally permissible scope of disclosure, but also found that disclosure could extend beyond speech that was the "functional equivalent of express advocacy." *Id*. *See also Human Life*, 624 F.3d at 1016 ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."). The *Citizens United* decision thus directly contradicts plaintiff's argument that the subpart (b) definition is overbroad with respect to disclosure.

---

[3] The Supreme Court applied the *WRTL* test to Citizens United's film, *Hillary: The Movie*, to determine how broadly the Court would have to rule in order to decide the case. Had *Hillary* not met *WRTL*'s test for the "functional equivalent of express advocacy," then the film would not have been prohibited by 2 U.S.C. § 441b, and the case could have been resolved on these "narrower grounds." 130 S. Ct. at 888. The Court ultimately found that "under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy," *id.* at 890, and thereby considered itself bound to consider the broader question of "whether *Austin* should be overruled." *Id.* at 888. The fact that the *Citizens United* Court applied the *WRTL* test without difficulty, however, belies plaintiff's argument that this test is unconstitutionally vague or unworkable.

In short, since the lower court decisions cited by plaintiff were decided, new Supreme Court case law – including *McConnell, WRTL* and *Citizens United* – has in effect overruled those decisions. *McConnell* made clear that the "magic words" standard was "functionally meaningless." 540 U.S. at 190. *WRTL* made clear that the state may regulate not only "magic words" express advocacy, but also the functional equivalent of express advocacy, which it defined in a manner that closely tracked the language of subpart (b). Finally, *Citizens United* declared that for the purposes of disclosure, regulation can extend even beyond communications that meet the *WRTL* test for the "functional equivalent of express advocacy." All three cases thus strongly support the constitutionality of subpart (b), and indeed suggest that disclosure-related regulation may sweep yet more broadly.

B. Lower Court Decisions Following *Citizens United* Have Recognized the Validity of *WRTL*'s Test for the Functional Equivalent of Express Advocacy.

Following the Supreme Court's decision in *WRTL* and *Citizens United*, multiple lower courts have upheld laws based on *WRTL*'s "functional equivalent" test. Plaintiff offers no authority to the contrary.

Indeed, plaintiff acknowledges that the Fourth Circuit in *RTAA* rejected a challenge to Section 100.22(b) that is virtually identical to the one plaintiff brings here. In *RTAA*, the Court of Appeals held that the subpart (b) definition of express advocacy was neither vague nor overbroad according to recent Supreme Court decisions in *McConnell, WRTL* and *Citizens United*. It dismissed RTAA's overbreadth argument on grounds that the *McConnell* Court held that "Congress could permissibly regulate not only communications containing the 'magic words' of *Buckley*, but also communications that were 'the functional equivalent' of express advocacy.'" 681 F.3d at 550-51. The Court further found that *Citizens United* also suggested that the subpart (b) test was not overbroad, noting that the Supreme Court there actually held that

disclosure regulations could extend beyond the functional equivalent of express advocacy to include some issue speech. *Id.* at 551. The Court also rejected RTAA's vagueness argument, highlighting that in *WRTL*, the Supreme Court's formulated a test for the "functional equivalent of express advocacy" that is "consistent" with the "language of § 100.22(b)." *Id.* at 552.[4]

Similarly, the Eleventh Circuit Court of Appeals recently upheld Florida's electioneering communications disclosure statute which incorporates *WRTL*'s test for the "functional equivalent of express advocacy." *National Organization for Marriage Inc. v. Sec. State of Fla.*, 753 F. Supp. 2d 1217 (N.D. Fla. 2010), *aff'd* 2012 WL 1758607 (11th Cir. May 17, 2012). The plaintiff there had challenged the state's definition of "electioneering communications" on grounds that its inclusion of language drawn from the *WRTL* test rendered it vague and overbroad. *See* FLA. STAT. § 106.011(18) (defining "electioneering communications" as a communication that, *inter alia*, refers to "a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate") (emphasis added). The district court disagreed, holding that the language included in Florida's statute "provides an objective standard that was created and applied by the United States Supreme Court" in *WRTL*. 753 F. Supp. 2d at 1221. The Court also rejected plaintiff's argument that *Citizens United* cast doubt on the validity of the *WRTL* test, finding that "[f]ar from overruling *WRTL*, the Court [in *Citizens United*] embraced a straight forward application of the appeal to vote test." *Id*. at 1220.

The Tenth Circuit cases that plaintiff cites do not hold to the contrary. Both cases instead ruled on a different issue, namely the constitutionality of a statutory definition of "political

[4] In *Center for Individual Freedom, Inc. (CIF) v. Tennant*, --- F.Supp.2d ----, 2011 WL 2912735 (S.D.W. Va. July 18, 2011), a West Virginia district court found *WRTL*'s "functional equivalent" test vague. *Id.* at *21. However, this decision predated the Fourth Circuit's *RTAA* decision, which controls and would seem to effectively overrule *CIF*.

committee" that used a monetary spending threshold as a substitute for a more traditional "major purpose" test. *See* Pl. Br. at 18-19, *citing Colorado Right to Life Comm., Inc. (CRTL) v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007) *and NMYO*, 611 F.3d 669. First, in *CRTL*, the Court of Appeals struck down Colorado's statutory definition of "political committee" on an as-applied basis because it relied on a $200 monetary threshold as a proxy for a group's major purpose. *See* 498 F.3d at 1141, *citing* Colo. Const. art. XXVIII, § 2(12)(a) (defining political committee as "any person, other than a natural person, or any group of two or more persons, including natural persons that have accepted or made contributions or expenditures in excess of $200 to support or oppose the nomination or election of one or more candidate"); *id.* at 1154. *NMYO* similarly considered and rejected a state statute that used a $500 spending threshold as a proxy for the "major purpose" test. 611 F.3d at 677-78.

While both *CRTL* and *NMYO* support the use of a "major purpose" test as a prerequisite for political committee status, neither case even considered the definition of express advocacy, much less suggested that the *WRTL* test was constitutionally suspect. Indeed, insofar as the issue arose at all, the Tenth Circuit indicated that speech that was the "functional equivalent of express advocacy for the election or defeat of a specific candidate is unambiguously related to the campaign of a candidate and thus properly subject to regulation regardless of its origination." *NMYO*, 611 F.3d at 676 (emphasis added). Thus, contrary to plaintiff's argument, the Tenth Circuit appears to be in accord with other appellate decisions that have upheld *WRTL*'s test for the "functional equivalent of express advocacy" – and by extension, the subpart (b) test for the same.

III. The FEC's Methodology for Determining a Group's "Major Purpose" Is Constitutional.

Plaintiff also challenges the FEC's "case-by-case approach to determining political committee status" and its use of a "host of elusive factors" to implement the "major purpose" test. Pl. Br. at 33, 34. The FEC, however, is simply using the standard established by the Supreme Court to determine a group's "major purpose" and evaluating factors identified as relevant by the courts to this analysis. Plaintiff fails to identify any actual constitutional defects in this methodology.

The so-called "major purpose" test was first articulated by the Supreme Court in *Buckley* in its analysis of FECA's disclosure requirements. 424 U.S. at 78-81. FECA established disclosure requirements both for individuals and for "political committees," prompting the Court to address constitutional concerns that the statutory definition of the term "political committee" was overbroad and, to the extent it incorporated the definition of "expenditure," vague as well. The Court feared that because the term "expenditure" potentially "encompass[ed] both issue discussion and advocacy of a political result," the "political committee" definition (which relies on the definition of "expenditure") might "reach groups engaged purely in issue discussion." *Id.* at 79.

The *Buckley* Court resolved these concerns by narrowing the definition of "political committee" to 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.* (emphasis added). For such "major purpose" groups, the Court had no vagueness concern about the statutory definition of "expenditure" because, the Court held, "expenditures" by such groups "are, by definition, campaign related." *Id.* (emphasis added).

In *MCFL*, the Court expressed the "major purpose" test in slightly different terms, describing political committees as "those groups whose primary objective is to influence political campaigns." 479 U.S. at 262 (emphasis added). The Court in *McConnell* restated the "major purpose" test for political committee status as articulated by *Buckley*. 540 U.S. at 170 n.64.

Plaintiff argues that the FEC's implementation of the "major purpose" test, as set forth in its most recent statement on the question, *see* FEC Notice 2007-3, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007), relies upon an impermissible "case-by-case" approach. It provides no legal authority to support its argument, however, beyond a snippet drawn out-of-context from *Citizens United*. *See* Pl. Br. at 32, *citing* 130 S. Ct. at 32 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned."). But this language does not purport to set forth a general rule forbidding a case-by-case approach in the entire area of campaign finance – and plaintiff does not seriously suggest as much. Furthermore, even insofar as the Supreme Court declined to endorse a case-by-case approach in *Citizens United*, that case concerned an expenditure ban, the most onerous of campaign finance regulations. The Supreme Court made no suggestion that a case-by-case approach was in any way suspect in a different context, such as to implement the far less restrictive disclosure regulations at issue here.

Plaintiff also complains that the FEC conducts a "vague and overbroad" inquiry into impermissible factors when determining a group's major purpose, objecting to the analysis of, for instance, the "timing of an organization's formation" or the "geographic targeting of advertisements." Pl. Br. at 34. While plaintiff never articulates the constitutional defect in a multi-factor major purpose analysis, it implies that the Supreme Court allows only the review of

a group's expenditures for express advocacy communications in this analysis. *Id.* at 33 (claiming that *MCFL* Court "specifically tied the definition of express advocacy to major purpose").

But this is a limitation that plaintiff simply makes up. It cites *MCFL* as support, but this case contained no such restrictions on the major purpose inquiry. 479 U.S. at 262. The test set forth in Supreme Court precedent is whether a group's "major purpose" or "primary objective" is "the nomination or election of a candidate" or "campaign activity" or "to influence political campaigns." *Buckley*, 424 U.S. at 78-81; *MCFL*, 479 U.S. at 262.

Nor has this Circuit endorsed the highly circumscribed major purpose inquiry that plaintiff urges. *See* Pl. Br. at 27 (arguing that the Tenth Circuit has "consistently demanded strict protection against intrusive political committee registration and reporting requirements"). Both *CRTL* and *NMYO* focused on <u>whether</u> a "major purpose" test was required to be included in a definition of "political committee," not <u>how</u> the major purpose test should be implemented. Insofar as the cases touched upon the determination of a group's major purpose, they suggested two methods for such a determination: (1) "examination of the organization's central organizational 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." *CRTL*, 498 F.3d at 1152 (citing *MCFL*, 479 U.S. at 252, 262);[5] *NMYO*, 611 F.3d at 678. Neither approach constricts the analysis of major purpose

[5] Although the scope of *CRTL*'s two methods for "major purpose" determinations is somewhat unclear, *amici* note that the *CRTL* Court's reliance on *MCFL* as the basis for its methodology is misplaced. 498 F.3d at 1152. The *CRTL* Court highlighted two passages in *MCFL*: first, the Supreme Court's statement that MCFL's "central organizational purpose [wa]s issue advocacy," *MCFL*, 479 U.S. at 252 n.6, and second, its statement that "if 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," *id.* at 262. But the first statement was merely a description of MCFL in *dicta*: MCFL's "central purpose" was not in dispute in the litigation, *id.* at 252 n.6. With respect to the second statement, as the Fourth Circuit points out, the *MCFL* Court "indicates that the amount of independent spending is a relevant factor in determining PAC status, but it does not imply that the Commission may

to only an examination of a group's express advocacy spending as plaintiff demands. To the contrary, "an examination of the organization's central organizational purpose" would appear to potentially allow a even broader inquiry than the FEC's approach that plaintiff decries here.

Plaintiff also ignores the fact that every court to have specifically considered the FEC's case-by-case, multi-factor approach has upheld it as constitutional. In *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007), the plaintiff sought a judicial determination requiring the FEC to issue a regulation governing when "527 organizations" would be deemed political committees. The FEC defended its decision to not adopt a regulation but, instead, to make political committee status determinations through enforcement actions, arguing that the major purpose doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct," including "whether there is sufficiently extensive spending on federal campaign activity," "the content of [a group's] public statements," "internal statements of the organization," "all manner of the organization's spending" and "the organization's fundraising appeals." *Id.* *See also FEC v. Malenick*, 310 F. Supp. 2d. 230, 234 (D.D.C. 2004), *quoting FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("An 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."). The district court approved the FEC's approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id.*

More recently, the Fourth Circuit upheld the FEC's case-by case method for political committee determinations in *RTAA*. It found that "[a]lthough *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's

---

only consider spending." *RTAA*, 681 F.3d at 557. Thus neither passage from *MCFL* highlighted by the *CRTL* Court purported to set forth a particular methodology for the major purpose inquiry, and the *CRTL* Court had no grounds to characterize such passages as authoritative in terms of the major purpose test.

major purpose." 681 F.3d at 556. It went on to note that "the necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *Id.* at 557, *citing FEC v. Malenick*, 310 F. Supp. at 234–37; *GOPAC*, 917 F. Supp. at 859, 864–66. The Court of Appeals concluded that the FEC had "adopted a sensible approach to determining whether an organization qualifies for PAC status," *id.* at 558, highlighting that "[t]he determination of whether the election or defeat of federal candidates for office is the major purpose of an organization, and not simply a major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others," *id*. at 556.

In short, the Supreme Court in *Buckley* added the "major purpose" test to narrow statutory definition of "political committee." But neither the Supreme Court nor any lower court has constricted the scope of the inquiry that the FEC is to use in making a "major purpose" determination as narrowly as plaintiff apparently demands. This Court should therefore reject plaintiff's challenge to the FEC's "major purpose" policy, and deny plantiff's motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, the challenged rule, *see* 11 C.F.R. 100.22(b), the FEC's implementation of the "major purpose" test for political committee status and Draft B of Advisory Opinion 2012-11 do not violate the First Amendment. Accordingly, this Court should deny plaintiff's motion for preliminary injunction.

Respectfully submitted,

/s/ Larry B. Jones
Larry B. Jones
(WSB # 5-1847)
SIMPSON, KEPLER & EDWARDS, LLC
The Cody, Wyoming Division of
BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C.
1135 14th Street
P.O. Box 490
Cody, WY 82414
ljones@skelaw.com
Tel.: (307) 527-7891
Fax: (307) 527-7897

*Counsel of Record

J. Gerald Hebert
(VA Bar No. 38432)
Tara Malloy
(DC Bar No. 988280)
Paul S. Ryan
(DC Bar No. 502514)
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
Tel.: (202) 736-2200
Fax: (202) 236-2222

Donald J. Simon
(DC Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE ENDRESON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, D.C. 20005
Tel.: (202) 682-0240
Fax: (202) 682-0249

Fred Wertheimer,
(DC Bar No. 154211)
DEMOCRACY 21
2000 Massachusetts Avenue, NW
Washington, D.C. 20036
Tel.: (202) 429-2008
Fax: (202) 355-9606

Counsel for *Amici Curiae*

Dated: August 10, 2012

CERTIFICATE OF SERVICE

I certify that on August 10, 2012, I electronically filed a copy of the foregoing document using the CM/ECF system, which will then send a notification of such filing on the following counsel of record at the listed e-mail addresses:

John B. Speight,
jbspeight@gmail.com
4021 Snyder
Cheyenne, WY 82001

Stephen R. Klein,
stephen.klein@wyliberty.org
WYOMING LIBERTY GROUP
1902 Thomes Avenue, Suite 201
Cheyenne, WY 82001

Benjamin T. Barr,
benjamin.barr@gmail.com
10737 Hunting Lane
Rockville, MD 20850

Counsel for Plaintiff

Anthony Herman,
aherman@fec.gov
David B Kolker,
dkolker@fec.gov
Erin R Chlopak,
echlopak@fec.gov
Lisa J Stevenson,
lstevenson@fec.gov
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463-0000

Nicholas Vassallo,
nick.vassallo@usdoj.gov
US ATTORNEY'S OFFICE
P O Box 668
Cheyenne, WY 82003-0668

Counsel for Defendant

I further certify that courtesy copies of the brief were sent to the above counsel on August 10, 2012 via email (where email addresses were available and known).

/s/ Larry B. Jones

Larry B. Jones
(WSB # 5-1847)
SIMPSON, KEPLER & EDWARDS, LLC,
The Cody, Wyoming Division of
BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C.
1135 14th Street
P.O. Box 490
Cody, WY 82414

Dated: August 10, 2012