No. 08-1977

United States Court of Appeals for the Fourth Circuit

The Real Truth About Obama, Inc., *Appellant*
v.
Federal Election Commission and
United States Department of Justice, *Appellees*

Appeal from U.S. Dist. Ct. for Eastern Dist. of Virginia, No. 3:08-cv-483

Appellant's Motion for Injunction Pending Appeal

Introduction. This case and motion seek timely protection for the constitutionally protected right of Appellant, The Real Truth About Obama, Inc. ("RTAO"), to engage in "issue advocacy": "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) (Roberts, C.J., joined by Alito, J.) ("*WRTL II*").[1] This Court has faithfully followed *WRTL II* and *Buckley v. Valeo*, 424 U.S. 1 (1976), in protecting issue advocacy with bright-line, speech-protective tests in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008).

[1]This opinion ("*WRTL II*") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding is position taken by concurrence on narrowest grounds).

Because effective issue advocacy depends on timely speech—when public interest in the issue is at its highest—RTAO sought a preliminary injunction below and moved for expedition. The district court denied both. *See* Attach. 1.[2] And it has not issued an injunction pending appeal[3] and has put the case on a track that could afford relief only after public interest has ebbed (after the November election), thereby depriving RTAO of its First Amendment rights. Where timely issue advocacy is involved, the preliminary injunction decision is a court's most important decision because if relief is withheld the auspicious moment is forever lost.

This appeal and motion are brought to seek relief for RTAO and to address the serious problem of preliminary injunctions being improperly denied and justice being delayed in issue-advocacy cases. The U.S. Supreme Court directly addressed the problem in *WRTL II*, requiring expeditious procedures in issue-advocacy cases,

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[2]Filed herewith are the following attachments: **(1)** *Order* (Dkt. 65; denying the two preliminary injunction motions); **(2)** *Verified Complaint* (Dkt. 1); and **(3)** *Motion for Injunction Pending Appeal* (Dkt. 68). The following documents are also attached, pursuant to Local Rule 8 ("include copies of all previous applications"), because they were relied on in the motion for an injunction pending appeal in the district court (Dkt. 68): **(4)** *Preliminary Injunction Brief* (Dkt. 4); **(5)** *Reply in Support of Preliminary Injunction Motion* (Dkt. 50); **(6)** *Second Preliminary Injunction Motion* (Dkt. 53); **(7)** and *Reply in Support of Second Preliminary Injunction Motion* (Dkt. 59).

[3]The district court has not issued a memorandum concerning the denial of preliminary injunction or an order denying RTAO's motion for injunction pending appeal, filed Sep. 12. Due to the delay and need for haste, RTAO files the present motion in reliance on Rule 8(a)(2)(A)(ii) ("failed to afford the relief requested").

127 S. Ct. at 2666, and even the *WRTL II* dissent agreed that preliminary injunctions are proper in this context:

> Although WRTL contends that the as-applied remedy has proven to be "[i]nadequate" because such challenges cannot be litigated quickly enough to avoid being mooted, . . . nothing prevents an advertiser from obtaining a preliminary injunction if it can qualify for one, and WRTL does not point to any evidence that district courts have been unable to rule on any such matters in a timely way.

127 S. Ct. at 2704 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.). The necessary implications of *WRTL II* and the dissent's argument is that there should have been a *real* possibility of obtaining a preliminary injunction in the situation that WRTL faced then and that there should be such a possibility in the situation that RTAO faces now. That means that all four preliminary-injunction elements must be *capable* of being met in this situation—and the benefit of the doubt goes to free speech. *Id.* at 2667. So the FEC[4] must not be permitted to trump preliminary injunctions, e.g., by asserting that it is always injured if it cannot enforce a statute, no matter how questionable its constitutionality.

A federal district court in this Circuit recently issued a preliminary injunction limiting West Virginia to regulation of (1) communications that contain "magic words" express advocacy and (2) "electioneering communications" defined like the federal model upheld in *WRTL II*. *See Center for Individual Freedom v. Ire-*

[4]"FEC" is used collectively for both Appellees, unless context indicates otherwise, because the DOJ has essentially adopted all of the FEC's arguments below.

land, No. 1:08-190 (S.D. W. Va. April 22, 2008) (Dkt. 38; order granting prelim. inj.) ("*CFIF*") (cited documents available on PACER). Another district court recently issued a preliminary injunction restricting the scope of Ohio's "electioneering communication" regime to the realm permitted by *WRTL II* and protecting proposed communications. *Ohio Right to Life Society v. Ohio Elections Comm'n*, No. 2:08-cv-492 (S.D. Oh. Sep. 5, 2008) (Dkt. 40; op. and order granting prelim. inj.).

But until lower courts uniformly provide expeditious relief and decide preliminary injunction motions based on the bright lines mandated by the First Amendment, *Buckley*, *WRTL II*, and *Leake*, there will be failures to defend the First Amendment right to engage in issue advocacy. The FEC even concedes that RTAO's *Change* ad and fundraising letter are constitutionally-protected, Dkt. 31, yet the court below did not even issue the needed relief as to those activities.

Motion & Standard. Because RTAO is currently suffering from the irreparable harm of being chilled from speaking, it moves for an injunction pending appeal to enjoin enforcement of the challenged provisions against RTAO for engaging in its intended activities while the present appeal is under consideration. *CFIF* set out the standards for a stay of a preliminary injunction, which involves the same considerations applicable here and in considering a preliminary injunction motion:

> Before petitioning the Fourth Circuit for immediate relief from a preliminary injunction the enjoined party must, pursuant to Rule 8(1)(A) . . . , move the district court to stay its own order. "It is established that a court's decision . . . is

> governed by four factors 1) whether the . . . applicant has made a strong showing of likely success on the merits; 2) whether the applicant will suffer irreparable injury . . . ; 3) whether issuance of a stay will injure other parties . . . ; and 4) how issuance of a stay will affect the public interest." *United States v. Dryer*, 750 F. Supp. 1278, 1299 (E.D. Va. 1990) (*citing Hilton v. Braunskill*, 481 U.S. 770 (1987); 11C. Wright & A. Miller, *Federal Practice & Procedure*, § 2904 (1973)). Obviously this test mirrors the preliminary injunction test . . . .

CFIF, No. 1:08-00190, slip op. at 1-2 (S.D. W. Va. April 24, 2008) (Dkt. 42; mem. op. and order denying mot. to stay prelim. inj.). Because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976)—so that irreparable harm is a given if rights are violated—First Amendment cases differ by requiring consideration of likely success on the merits first:

> The Fourth Circuit . . . held that when "the irreparable harm that [the plaintiff] has alleged is inseparably linked to his claim of a violation of his First Amendment rights . . . analysis of [the plaintiff's] likelihood of success on the merits" becomes the first and the most important factor for a court to consider. *Newsom ex rel. Newsom v. Albermarle County Sch. Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003). . . ; *Giovani Caradola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002) (explaining that where a plaintiff alleges a First Amendment violation, the irreparable harm determination cannot be made until it has been determined whether the plaintiff has a likelihood of success on the merits).

CFIF, No. 1:08-00190, slip. op. at 5-6 (S.D. W. Va. April 24, 2008) (Dkt. 37; mem. op. on prelim. inj. grant).

Facts. RTAO is an issue-advocacy 527 corporation. It is not a "political committee" ("PAC") because its Articles of Incorporation prohibit it from making the "contributions" (e.g., to candidates) or express-advocacy independent "expendi-

tures" that trigger PAC status. *See* 2 U.S.C. § 434(4)(A) ("political committee" definition). It is also not a PAC because its Articles establish that "the major purpose," *Buckley*, 424 U.S. at 79, of RTAO is issue advocacy, not the regulable campaign activities that could make its major purpose the nomination or election of candidates under the major-purpose test of *Buckley*, 424 U.S. at 79. Yet RTAO has a reasonable fear that it will be deemed a PAC because of (**a**) the FEC's recent use of two of the challenged provisions (11 C.F.R. §§ 100.22(b) and 100.57) and the FEC's enforcement policy concerning PAC status, *see* FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC Status 2*") (emphasizing the need for "flexibility" in determining PAC status based on a wide range of factors in a case-by-case analysis of "major purpose"), to deem several 527 organizations to be PACs and in violation of FECA, *see id.* at 5605 (listing Matters Under Review ("MURs") in which this occurred); and (**b**) the similar nature of RTAO and its planned activities to some of those in the MURs cited in *PAC Status 2*.

RTAO wants to put its issue-advocacy *Change* ad, *see Verified Complaint* (Attach. 2) at ¶ 16,[5] and *Survivors* ad, *see Second Preliminary Injunction Motion* (At

[5] *Change* is as follows:

> (Woman's voice) Just what is the real truth about Democrat Barack Obama's position on abortion?
>
> (Obama-like voice) Change. Here is how I would like to change America . . . about abortion:
>
> • Make taxpayers pay for all 1.2 million abortions performed in

tach. 6) at 2, on its website and broadcast them as radio advertisements in such a manner that the broadcasts would qualify as statutory "electioneering communications" under 2 U.S.C. § 434(f)(3).[6] In order to raise funds for its issue advocacy, RTAO intends to use a fundraising communication that is set out in the *Verified Complaint* (Attach. 2) at ¶ 19. The statutory trigger for PAC status is $1,000 of "contributions" received or "expenditures" made, 2 U.S.C. § 431(4), and RTAO intends to raise more than $1,000 with this fundraising communication and to disburse more than $1,000 to broadcast *Change* and *Survivors* and to place each be-

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> America each year
> - Make sure that minor girls' abortions are kept secret from their parents
> - Make partial-birth abortion legal
> - Give Planned Parenthood lots more money to support abortion
> - Change current federal and state laws so that babies who survive abortions will die soon after they are born
> - Appoint more liberal Justices on the U.S. Supreme Court.
>
> One thing I would *not* change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.
>
> (Woman's voice). Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?
>
> To learn more real truth about Obama, visit www.The RealTruthAboutObama.com. Paid for by The Real Truth About Obama.

[6]RTAO also intends to create on its website digital postcards setting out Senator Obama's public policy positions on abortion, and viewers will be able to send these postcards to friends from within the website, *see Verified Complaint* (Attach. 2) at 18, but examples of postcards provided are preliminary and no specific postcard has been finalized and put at issue here.

fore the public on RTAO's website.

However, RTAO is chilled from proceeding with these activities because it reasonably believes that it will be subject to an FEC investigation and a possible enforcement action potentially resulting in civil and criminal penalties, based on the fact that the FEC has deemed 527s to be PACs, based on (**a**) a rule defining "express advocacy" in a vague and overbroad manner, 11 C.F.R. § 100.22(b) (broad, contextual express-advocacy test), that may make *Change* and *Survivors* "independent expenditures;" (**b**) a vague and overbroad rule deeming donations to be "contributions," if made pursuant to a solicitation for activity to "support or oppose" a candidate, 11 C.F.R. § 100.57; and (**c**) a vague and overbroad enforcement policy for imposing PAC status, including the determination of a group's major purpose. *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC Status 1*"); *PAC Status 2*, 72 Fed. Reg. 5595. If RTAO is deemed by the FEC to have been a PAC, then it will be in violation of numerous federal law provisions for not having raised funds, spent funds, reported, etcetera as a PAC. *See Verified Complaint* (Attach. 2) at ¶¶ 22-24.

RTAO also reasonably fears, if it proceeds to broadcast *Change* and *Survivors*, that it will be deemed to have broadcasted a prohibited "electioneering communication" because the FEC's rule at 11 C.F.R. § 114.15, creating an exception to the corporate prohibition on electioneering communications, 2 U.S.C. § 441b, is

vague and overbroad and RTAO cannot be sure that the ads are a protected communications under the FEC's rule, although it believes that they are protected under *WRTL II*'s appeal-to-vote test. 127 S. Ct. at 2667 (an ad may be prohibited as an electioneering communication only if it both meets the statutory definition and "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). In fact, it is impossible to tell whether *Change* and *Survivors* might be deemed 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 regulatory tests are similar and similarly vague. So RTAO will not proceed with its plan to broadcast its ads during electioneering communication blackout periods unless it receives the judicial relief requested herein.

Despite the FEC's treatment of activities similar to RTAO's intended activities as subject to regulation or restriction as "independent expenditures," "contributions," and "electioneering communications," and its treatment of 527 groups similar to RTAO as "political committees," *see supra*, the FEC has taken the litigation position that *Change* is neither an express-advocacy independent expenditure under 11 C.F.R. § 100.22(b) nor a regulable "electioneering communication" under 11 C.F.R. § 114.15, and that the fundraising communication would not solicit regulable "contributions" under 11 C.F.R. § 100.57. Consequently, the FEC ar-

gued below that RTAO lacked standing to challenge anything. As set out in detail in RTAO's *Reply in Support of Preliminary Injunction Motion* (Attach. 5) at 3-15, this case remains justiciable despite the FEC's convenient litigation position because the challenged provisions themselves are inherently vague and overbroad, leading to the risk of arbitrary-and-capricious enforcement and a lack of predictability for RTAO's planned materially-similar ads, and in any event federal law permits private-party complainants to go to court to force FEC enforcement in situations where the FEC chooses not to do so. Moreover, the FEC has not asserted the same arguments with respect to the *Survivors* ad, and the district court did not rely on justiciability in denying the preliminary injunction. *See* Attach. 1.

Success on Merits. ***The Unambiguously-Campaign Related Requirement Controls.*** RTAO has a high likelihood of success on the merits in light of controlling precedents in this Court and the Supreme Court. *Leake*, 525 F.3d 274, readily establishes RTAO's likely success on the merits. *Leake* recognized that the unambiguously-campaign-related requirement controls campaign-finance law. *Id.* at 282-83, 287-88. This requirement is the analytic key from *Buckley*, 424 U.S. at 79-81, from which the Supreme Court derived two tests that govern this case: (1) the major-purpose test, which determines which groups may be treated as "political committees," *id.* at 79 ("organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate"), and

(2) the express-advocacy test, which determines when communications are subject to non-PAC regulation, *id.* at 80 ("[W]e construe 'expenditure' . . . to reach . . . communications that expressly advocate [footnote omitted] the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*." (emphasis added)).[7]

11 C.F.R. § 100.22(b) ("Expressly Advocating" Definition) Is Void. The FEC has created two "expressly advocating" definitions. 11 C.F.R. § 100.22.[8] The primary one, paragraph (a), generally follows *Buckley*'s mandate that government may only regulate "independent expenditures" for communications that contain "express words of advocacy of election or defeat, such as 'vote for.'" 424 U.S. 44 n.52, 80. *See also MCFL*, 479 U.S. at 249 (2 U.S.C. § 441b requires express advocacy). But § 100.22(b), strays from the "express words of advocacy" requirement:

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[7] *Buckley* applied the unambiguously-campaign-related requirement to (1) expenditure limitations, *id.* at 42-44; (2) PAC status and disclosure, *id.* at 79; (3) non-PAC disclosure of contributions and independent expenditures, *id.* at 79-81; and (4) contributions. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.").

[8] "Expressly advocating" is part of the "independent expenditure" definition. 2 U.S.C. § 434(17). Corporations are generally prohibited from making independent expenditures, 2 U.S.C. § 441b, and making them can trigger PAC status. 2 U.S.C. § 434(4). Independent expenditures require disclaimers, 11 C.F.R. § 110.10, and reports. 11 C.F.R. §§ 104.4, 109.10. Noncompliance penalties are serious. 2 U.S.C. §§ 437g(a)(4), 437g(a)(6), 437g(d).

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

This regulation violates the unambiguously-campaign-related requirement and is unconstitutionally vague and overbroad in violation of the First and Fifth Amendments to the U.S. Constitution. It was held unconstitutional in *Virginia Society for Human Life v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000), *aff'd in relevant part by Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001). *WRTL II* affirmed that "express advocacy" requires "magic words," such as "vote for." 127 S. Ct. at 2669 n.7.[9] This Court affirmed that express advocacy requires magic words, *Leake*, 525 F.3d at 281-82, giving government only two choices, not some hybrid between them, such as § 100.22(b):

> Pursuant to their power to regulate elections, legislatures may establish . . . laws . . . addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communica-

[9]In *WRTL II* all Justices joined Chief Justice Roberts and Justice Alito in agreeing that express advocacy requires "magic words." *See id.* at 2681 (Scalia, J., joined by Kennedy & Thomas, JJ.) (concurring in part and concurring in judgment) ("to avoid . . . 'constitutional deficiencies,' [*Buckley*] was compelled to narrow the statutory language . . . to cover only . . . magic words"); 2692 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) ("'magic words'").

> tion that uses *specific election-related words*. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Leake, 525 F.3d at 282-83 (emphasis added). Section 100.22(b) goes beyond any permissible construction of express advocacy, is unconstitutionally vague and overboad, and so is "in excess of the statutory . . . authority . . ." of the FEC and void. 5 U.S.C. § 706. Although the FEC decided that the *Change* ad was permissible under § 100.22(b), the district court would not even protect *Change* from the danger of a complainant going to court to force enforcement against RTAO.

11 C.F.R. § 100.57 (Converting Donations to "Contributions") Is Void. The FEC's regulation at 11 C.F.R. § 100.57(a) converts donations to an entity into "contributions"[10] based on a vague and overbroad support/oppose test:

> (a) Treatment as contributions. A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

Buckley employed an unambiguously-campaign-related analysis to limit "contributions" to "funds provided to a candidate or political party or campaign committee" or specifically "earmarked for political purposes," by which *Buckley* clearly meant *regulable* political purposes, i.e., express-advocacy "independent

[10]"Contributions" received can trigger PAC status, 2 U.S.C. § 434(4), and require reporting. 11 C.F.R. §§ 104.3, 104.8.

expenditures" or "contributions." 424 U.S. at 23 n.24. But 11 C.F.R. § 100.57(a) reaches beyond that approved scope of the statute in an attempt to create contributions where they would not otherwise exist. "Support or oppose" fails to provide the "'(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms.'" *Buckley*, 424 U.S. at 41 (citation omitted). The regulation is unconstitutionally vague and overbroad and "in excess of the statutory . . . authority . . ." of the FEC, so that it is void under 5 U.S.C. § 706. Although the FEC declared that RTAO's fundraising letter was protected under this regulation, the district court would not protect it from the danger of a complainant going to court to force enforcement against RTAO.

The FEC's Enforcement Policy on PAC Status Is Void. The FEC's enforcement policy regarding PAC status is set out in two FEC policy statements: *PAC Status 1*, 69 Fed. Reg. 68056, and *PAC Status 2*, 72 Fed. Reg. 5595. *PAC Status 2* cited 11 C.F.R. §§ 100.22(b) and 100.57 as central components of its enforcement policy, 72 Fed. Reg. at 5602-05, and, as a result, any flaws in those regulations are also fatal to the FEC's PAC status enforcement policy. The major-purpose test is the third element of the FEC's PAC status enforcement policy. In *PAC Status 2*, the FEC explained that, after having initiated a rulemaking proceeding, it 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 con-

duct." *Id*. at 5601. Instead, it set out its vague and overbroad enforcement policy regulating major purpose, requiring the FEC to engage in "a fact intensive inquiry," in order to weigh various vague and overbroad factors with undisclosed weight, requiring "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" (but not limited to spending on regulable activity) and other spending, and public and non-public statements, including statements to potential donors. *Id.*

PAC Status 2, therefore, sets out an enforcement policy based on an ad hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-ranging, intrusive, and burdensome investigations, often begun when a complaint is filed by a political or ideological rival, that, in themselves, can shut down an organization, without adequate bright lines to protect issue advocacy in this core First Amendment area.

This is inconsistent with this Court's holding that the major purpose test requires examination of "*the* major purpose," not "*a* major purpose," *Leake*, 525 F.3d at 287 (emphasis in original), which entails "an empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech." *Id.* at 287 (emphasis added). The FEC is engaging in a forbidden "'we'll know it when we see it approach.'" *Id.* at 290 (citation omitted). Because the FEC's en-

forcement policy for determination of PAC status 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 the FEC, it is void. 5 U.S.C. § 706.

11 C.F.R. § 114.15 (WRTL II's Appeal-to-Vote Test) Is Void. The FEC has created a multi-factor test at 11 C.F.R. § 114.15 (*see Verified Complaint* at ¶ 55), purporting to implement *WRTL II*'s appeal-to-vote test for whether a corporate "electioneering communication" may be prohibited. *WRTL II*'s appeal-to-vote test was simple: (1) an ad had to meet the statutory "electioneering definition"[11] and (2) be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. After stating its test, *WRTL II applied* the test to a specific grassroots lobbying context, addressing 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 standard set out above is the sole test is confirmed by *WRTL II*'s restatement of the test as follows: "Because WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not

[11] 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).

the functional equivalent of express advocacy . . . .” *Id.* at 2670. Notably, none of the language of the *application* of the test shows up in this restatement of the test, just as it was not present in the original statement of the appeal-to-vote test.

Turning to § 114.15(a), it might at first appear that the FEC is setting out *WRTL II*’s appeal-to-vote test as the primary test in the regulation. But more careful examination reveals that *WRTL II*’s test is never permitted to stand alone. *Leake* properly allowed the test to stand alone. 525 F.3d at 282. But in this rule two other FEC tests replace the actual *WRTL II* appeal-to-vote test. First, the FEC offers the “safe harbor” test in paragraph (b), which is not at issue here because neither of RTAO’s ads fit the safe harbor. Second, the FEC offers its “rules of interpretation” in paragraph (c), which says that this subsection controls if an ad does not fit the safe harbor. The rules-of-interpretation test 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. So the FEC’s test purporting to implement *WRTL II*’s appeal-to-vote test is not that test at all, but rather a choice between (1) the FEC’s safe-harbor test or (2) the FEC’s rules-of-interpretation test. The FEC goes on to include indicia of express advocacy and issue advocacy, that were part of *WRTL II*’s application of the test in a specific, grassroots-lobbying context, not factors to be included in any rule.

When this Court restated *WRTL II*’s test, it simply stated the test as *WRTL II*

stated it, *Leake*, 525 F.3d at 282, without employing any of the "indicia of express advocacy" and other factors that the FEC imported into its rule from *WRTL II*'s *application* of the actual test in the context of grassroots lobbying, *WRTL II*, 127 S. Ct. at 2667, which factors are inapplicable in other contexts. *Leake* declared that "for any test to meet the 'functional equivalent' standard, it must 'eschew "the open-ended rough-and-tumble of factors,"' which invite burdensome discovery and lengthy litigation." *Id.* at 282 (citation omitted); *see also id.* at 283 (same). So the regulation's use of convoluted and inaccurate factors is inconsistent with how *Leake* mandates that *WRTL II* be read. And the unambiguously-campaign-related requirement, which *Leake* recognized as a constitutional mandate in this area, 525 F.3d at 282, renders § 114.15 unconstitutional because it employs vague and overbroad factors to interpret the *WRTL II* test, including, as set out above, restating the *WRTL II* test itself (twice) as but part of the factors to consider in determining whether a communication meets the *WRTL II* test.

WRTL II limited the scope of the statutory "electioneering 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 the FEC's statutory authority. 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 the FEC, it is void under 5 U.S.C. § 706. Although the FEC declared that *Change* was safe under this regulation, the district court would not even protect *Change* from the danger of a complainant going to court to force enforcement against RTAO.

The Other Elements Are Met. RTAO clearly has irreparable harm as a result of its chilled speech. Self-censorship "[i]s a harm that can be realized even without actual prosecution." *American Bookseller's Ass'n*, 484 U.S. at 393. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *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.") RTAO wants to speak about the public policy views of an incumbent politician now, while public interest is focused on him in unusual way, so that this is the most effective time to engage in RTAO's planned issue advocacy. These opportunities are being lost day by day, and there is no remedy at law.

As another district court held recently in issuing a preliminary injunction limiting the reach of Ohio's "electioneering communication" law, "'if the plaintiff

shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere to its enjoinment.'" *Ohio Right to Life*, No. 2:08-cv-492, slip op. at 23 (S.D. Oh. Sep. 5, 2008) (op. and order granting prelim. inj.) (citation omitted). Certainly the FEC can have no harm as to an injunction protecting the *Change* ad and the fundraising letter for they insist that those are permissible under their regulation and no harm flows from them under their PAC status policy. Dkt. 31. "Finally, issuance of a preliminary injunction will serve the public interest because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Ohio Right to Life*, No. 2:08-cv-492, op. at 23 (citation omitted). For all the foregoing reasons an injunction pending appeal should issue.

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 17, 2008, I served upon the below listed non-CM/ECF participants copies of this document by First-Class Mail postage prepaid and by email at the listed addresses.

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