

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REAL TRUTH ABOUT OBAMA,)
INC.,)
)
 Plaintiff,)
)
 v.)
)
FEDERAL ELECTION COMMISSION)
and UNITED STATES DEPARTMENT)
OF JUSTICE,)
)
 Defendants.)

No. 3:08-cv-00483-JRS

OPPOSITION TO
PRELIMINARY INJUNCTION

**FEDERAL ELECTION COMMISSION’S MEMORANDUM IN OPPOSITION TO
PLAINITFF’S MOTION FOR PRELIMINARY INJUNCTION**

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** pro hac vice application pending*

TABLE OF CONTENTS

	<i>Page</i>
I. BACKGROUND	1
A. Factual Background	1
B. Legal Background	2
1. Contributions And Expenditures	2
2. Express Advocacy	3
3. Political Committee Status	4
4. Contributions In Response To Solicitations	4
5. Corporation-Funded Electioneering Communications	5
II. RTAO HAS NOT MET ITS BURDEN FOR A PRELIMINARY INJUNCTION	5
A. RTAO Has Not Demonstrated That The Court Has Jurisdiction	5
B. A Preliminary Injunction Is An Extraordinary Remedy That Requires The Plaintiff To Meet A Heavy Burden	7
C. Plaintiff Fails To Demonstrate Irreparable Harm	8
D. The Balance Of Harms Weighs In Favor Of The Commission	10
E. Even If Plaintiff’s Challenges Are Justiciable, The Commission Is Likely To Succeed On The Merits	11
1. Plaintiff’s Burden For Its Facial Challenges	11
2. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Definition Of Express Advocacy In 11 C.F.R. § 100.22(b)	11
a. RTAO’s Challenge To 11 C.F.R. § 100.22(b) Is Not Justiciable	12
b. RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That 11 C.F.R. § 100.22(b) Is Facially Unconstitutional	13
3. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Solicitation Regulation	17

a.	RTAO’s Challenge To 11 C.F.R. § 100.57 Is Not Justiciable	18
b.	RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That The Solicitation Regulation Is Unconstitutional On Its Face	18
4.	RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Commission’s Analysis Of Political Committee Status	23
a.	The Commission’s Enforcement Policy Is Not Reviewable Under The APA.....	23
b.	The Commission’s Political Committee Analysis Is Lawful	24
5.	RTAO Has Not Met Its Burden For A Preliminary Injunction Against 11 C.F.R. § 114.15	27
a.	RTAO’s Challenge To 11 C.F.R. § 114.15 Is Not Justiciable	27
b.	RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That 11 C.F.R. § 114.15 Is Unconstitutional On Its Face.....	28
III.	CONCLUSION	30

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Abbott Labs., Inc. v. Gardner</i> , 387 U.S. 136 (1967).....	6
<i>ACLU of Nevada v. Heller</i> , 378 F.3d 979 (9th Cir. 2004).....	22
<i>Akins v. FEC</i> , 101 F.3d 731 (D.C. Cir. 1996).....	25
<i>Anderson v. Spear</i> , 356 F.3d 651 (6th Cir. 2004).....	22
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997).....	6
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	23
<i>Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.</i> , 550 F.2d 189 (4th Cir. 1977)	7
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	11
<i>Brock v. Cathedral Bluffs Shale Oil Co.</i> , 796 F.2d 533 (D.C. Cir. 1986)	23
<i>Brown v. Socialist Workers '74 Campaign Comm.</i> , 459 U.S. 87 (1982).....	9
<i>Bryant v. Cheney</i> , 924 F.2d 525 (4th Cir. 1991).....	6
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	<i>passim</i>
<i>Cal. Med. Ass'n v. FEC</i> , 453 U.S. 182 (1981).....	19
<i>Ctr. for Individual Freedom v. Carmouche</i> , 449 U.S. 655 (5th Cir. 2006)	22
<i>Chaplaincy of Full Gospel Churches v. England</i> , 454 F.3d 290 (D.C. Cir. 2006).....	8, 9
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	19
<i>Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia</i> , 919 F.2d 148 (D.C. Cir. 1990)	8
<i>Cole v. Richardson</i> , 405 U.S. 676 (1972).....	22
<i>Cramp v. Bd. of Pub. Instr. of Orange County, Fla.</i> , 368 U.S. 278 (1961).....	22
<i>Dan River, Inc. v. Icahn</i> , 701 F.2d 278 (4th Cir. 1983).....	8
<i>Direx Israel, Ltd. v. Breakthrough Med. Corp.</i> , 952 F.2d 802 (4th Cir. 1991)	7, 10
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	8

<i>EMILY’s List v. FEC</i> , 362 F. Supp. 2d 43 (D.D.C.)	20
<i>EMILY’s List v. FEC</i> , Civ. No. 05-0049, 2008 WL 2938558 (D.D.C. July 31, 2008).....	18
<i>FEC v. Christian Action Network, Inc.</i> , 100 F.3d 1049 (4th Cir. 1997).....	14, 15
<i>FEC v. Furgatch</i> , 807 F.2d 857 (9th Cir. 1987)	15
<i>FEC v. GOPAC, Inc.</i> , 917 F. Supp. 851 (D.D.C. 1996)	25
<i>FEC v. Malenick</i> , 310 F. Supp. 2d 230 (D.D.C. 2004).....	25
<i>FEC v. Massachusetts Citizens for Life, Inc.</i> , 479 U.S. 238 (1986)	18, 24
<i>FEC v. Nat’l Conservative Political Action Comm.</i> , 470 U.S. 480 (1985)	8
<i>FEC v. Survival Educ. Fund, Inc.</i> , 65F.3d 285 (2d Cir. 1995)	20
<i>FEC v. Wisconsin Right to Life, Inc.</i> , 127 S. Ct. 2652 (2007)	<i>passim</i>
<i>Florida v. Jimeno</i> , 500 U.S. 248 (1991)	15
<i>FTC v. Standard Oil Co. of Cal.</i> , 449 U.S. 232 (1980)	26
<i>Golden v. Zwickler</i> , 394 U.S. 103 (1969)	6
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	11
<i>Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982).....	11
<i>In re Premier Auto. Servs., Inc.</i> , 492 F.3d 274 (4th Cir. 2007)	7
<i>Lewis v. Cont’l Bank Corp.</i> , 494 U.S. 472 (1990)	7
<i>Longshoremen’s Union v. Boyd</i> , 347 U.S. 222 (1954)	13
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003).....	<i>passim</i>
<i>Nat’l Ass’n of Mfrs. v. Taylor</i> , 549 F. Supp. 2d 68 (D.D.C. 2008).....	9
<i>New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.</i> , 434 U.S. 1345 (1977)	10
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	11
<i>N.C. Right to Life, Inc. v. Bartlett</i> , 168 F.3d 705 (4th Cir. 1999)	21, 22
<i>N.C. Right to Life, Inc. v. Leake</i> , 525 F.3d 274 (4th Cir. 2008).....	16, 17, 21, 29
<i>Perot v. FEC</i> , 97 F.2d 553 (D.C. Cir. 1996).....	26

<i>Peterson v. Nat’l Telecomm. & Info. Admin.</i> , 478 F.3d 626 (4th Cir. 2007).....	13
<i>Renne v. Geary</i> , 501 U.S. 312 (1991).....	6, 13, 18, 23, 28
<i>Sampson v. Murray</i> , 415 U.S. 61 (1974)	9
<i>Scotts Co. v. United Indus. Corp.</i> , 315 F.3d 264 (4th Cir. 2002)	7, 8
<i>Shays v. FEC</i> , 511 F. Supp. 2d 19 (D.D.C. 2007)	24, 25
<i>Smith v. Frye</i> , 488 F.3d 263 (4th Cir. 2007).....	8
<i>Thomas v. Union Carbide Agricultural Products Co.</i> , 473 U.S. 568 (1985)	7
<i>Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.</i> , 60 F.3d 27 (2d Cir. 1987).....	7
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	11
<i>U.S. Dep’t of Labor v. Wolf Run Mining Co.</i> , 452 F.3d 275 (4th Cir. 2006).....	7
<i>Univ. of Tex. v. Camenisch</i> , 451 U.S. 390 (1981).....	7
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003).....	11
<i>Va. Soc’y for Human Life, Inc. v. FEC</i> , 263 F.3d 379 (4th Cir. 2001).....	7, 14, 15, 16
<i>Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm’n</i> , 166 P.3d 1174 (Wash. 2007).....	20, 21
<i>Walters v. Nat’l Ass’n of Radiation Survivors</i> , 468 U.S. 1323 (1984)	10
<i>Wyatt v. Cole</i> , 504 U.S. 158 (1992)	15
<i>Statutes and Regulations</i>	
Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-115, 116 Stat. 81	14
Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-55.....	1
Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475	3
2 U.S.C. § 431(4)	23
2 U.S.C. § 431(4)(A).....	4
2 U.S.C. § 431(8)	6, 19
2 U.S.C. § 431(8)(A)(i).....	2, 4
2 U.S.C. § 431(9)(A)(i).....	2

2 U.S.C. § 431(17)	3
2 U.S.C. § 431(20)(A)(iii).....	21
2 U.S.C. § 433.....	4
2 U.S.C. § 434.....	4
2 U.S.C. § 434(f)(3)(A)(i).....	2, 5
2 U.S.C. § 437c(b)(1).....	1
2 U.S.C. § 437d(a)(7).....	1
2 U.S.C. § 437d(a)(8).....	1
2 U.S.C. § 437f	1
2 U.S.C. § 437f(a)(1)	6
2 U.S.C. § 437g.....	1
2 U.S.C. § 437g(a)(2).....	26
2 U.S.C. § 441a(a)(1)(C).....	4, 9
2 U.S.C. § 441b.....	6
2 U.S.C. § 441b(a)	2
2 U.S.C. § 441b(b)(2)	5
5 U.S.C. § 704.....	23
11 C.F.R. § 100.22	3
11 C.F.R. § 100.22(a).....	3
11 C.F.R. § 100.22(b)	<i>passim</i>
11 C.F.R. § 100.22(b)(1).....	16
11 C.F.R. § 100.57	6, 18, 19, 20
11 C.F.R. § 100.57(a).....	5, 17
11 C.F.R. § 114.12	8
11 C.F.R. § 114.15	<i>passim</i>

11 C.F.R. § 114.15(a).....	27, 28
11 C.F.R. § 114.15(b)	27
11 C.F.R. § 114.15(c).....	28, 29
11 C.F.R. § 114.15(c)(2).....	29
11 C.F.R. § 114.15(c)(3).....	27

Miscellaneous

<i>Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures,</i> 60 Fed. Reg. 35,292 (July 6, 1995).....	15
<i>Political Committee Status,</i> 69 Fed. Reg. 68,056 (Nov. 23, 2004).....	5, 18
<i>Political Committee Status; Supplemental Explanation and Justification,</i> 72 Fed. Reg. 5595 (Feb. 7, 2007)	5, 23-26
<i>Electioneering Communications,</i> 72 Fed. Reg. 72,899 (Dec. 26, 2007)	27, 28
<i>In the Matter of Swiftboat Veterans and POWs for Truth, MUR 5511, 5525, Conciliation Agreement</i> (Dec. 4, 2006).....	17
<i>In the Matter of The Media Fund, MUR 5440, Conciliation Agreement</i> (Oct. 29, 2007).....	17

One week after it incorporated, plaintiff filed this suit asking for extraordinary injunctive relief that would alter the status quo and prevent the Federal Election Commission, near the peak of the election cycle, from enforcing longstanding regulations and enforcement policy. Plaintiff does not allege that it has yet done anything that implicates federal election law or that the Commission has taken any action against it. Rather, without engaging in any fundraising or electoral speech, or any other relevant concrete action, plaintiff has attempted to invoke this Court's jurisdiction because of its unfounded fear of prosecution if it should carry out its alleged intentions. In fact, the particular advertisement and fundraising solicitation plaintiff intends to pursue will not be regulated as plaintiff fears. Plaintiff thus fails to present a justiciable case or controversy. In any event, the provisions plaintiff challenges are all constitutional. The Court should deny plaintiff's request for a preliminary injunction.

I. BACKGROUND

A. Factual Background

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-55. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce against violations of the Act. 2 U.S.C. § 437g.

Plaintiff The Real Truth About Obama, Inc. ("RTAO") is a nonprofit Virginia corporation. (Compl. ¶ 5.) RTAO was incorporated on July 24, 2008. (*See* FEC Exh. 1.) On July 29, two days before RTAO filed this suit, RTAO filed a notice of section 527 status with the Internal Revenue Service. (FEC Exh. 2 (RTAO IRS Form 8871, Notice of Section 527 Status).)

RTAO alleges that it intends to produce an audio advertisement entitled *Change*, post the ad on its website, and air it on the Rush Limbaugh and Sean Hannity radio programs. (Compl. ¶¶ 16-17.) The audio ad purports to provide “the real truth about Democrat Barack Obama’s position on abortion,” using an “Obama-like voice.” (*Id.* ¶ 16.) Near the end, a woman’s voice will state: “Now you know the real truth about Obama’s position on abortion. Is this the change that you can believe in?” (*Id.*) RTAO alleges that it is creating a website at www.therealtruthaboutobama.com that will contain “accurate statements about [Obama’s] public policy positions” (*id.* ¶ 15), but the website is not yet active. RTAO intends to broadcast *Change* on the radio “in heartland states” during pre-election periods that meet the timing element of the FECA’s “electioneering communication” definition. (*Id.* ¶ 17; *see* 2 U.S.C. § 434(f)(3)(A)(i).) The complaint does not allege that RTAO has produced the ad or taken any concrete steps toward its creation or distribution.

RTAO alleges that it intends to raise more than \$1,000 and to spend more than \$1,000 to broadcast *Change*, but it does not allege that it has raised or spent any money. (Compl. ¶ 20.) Nor does it allege that it has identified any potential donors or specific donations. RTAO has written one fundraising communication that it alleges it intends to use to raise money (*id.* ¶ 19), but it does not allege that it has ever sent such a letter to any potential contributor.

B. Legal Background

1. Contributions And Expenditures

Under the FECA, “contribution” is defined to include giving anything of value “for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). Similarly, “expenditure” is defined to include any payment of money made “for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i). FECA generally prohibits corporations and labor unions from making any contribution or expenditure. 2 U.S.C. § 441b(a).

2. Express Advocacy

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

The Commission later promulgated a regulatory definition of the term "expressly advocating." 11 C.F.R. § 100.22. Part (a) of the regulatory definition encompasses communications that use phrases or campaign slogans "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. § 100.22(a). Part (b) defines express advocacy as a communication that has an unambiguous "electoral portion" and that cannot reasonably be construed as anything other than an encouragement to elect or defeat a candidate. 11 C.F.R. § 100.22(b). Citing *Buckley*, a number of courts had held that a limited, "magic words" interpretation of "expressly advocating" was the outer constitutional boundary of Congress's power to regulate campaign expenditures. *See infra* Part II.E.2.b. In *McConnell v. FEC*, 540 U.S. 93, 191-92 (2003), however, the Supreme Court held that *Buckley*'s express advocacy construction was imposed because of the vagueness of FECA's original statutory text, not because the government's power was in all cases circumscribed to regulating only a limited number of "magic words" of advocacy. Congress may regulate not only express advocacy, the Court held, but also the "functional equivalent of express advocacy,"

id. at 206; *see also* *FEC v. Wisconsin Right to Life, Inc.* (“WRTL”), 127 S. Ct. 2652, 2667 (2007) (same).

3. Political Committee Status

FECA provides that any “committee, club, association, or other group of persons” that receives over \$1,000 in contributions or makes over \$1,000 in expenditures in a calendar year is a “political committee.” 2 U.S.C. § 431(4)(A). Political committees must register with the Commission and file periodic reports for disclosure to the public of all their receipts and disbursements, with limited exceptions for most transactions below a \$200 threshold. *See* 2 U.S.C. §§ 433, 434. No person may contribute more than \$5,000 per calendar year to any one political committee. 2 U.S.C. § 441a(a)(1)(C).

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

4. Contributions In Response To Solicitations

FECA does not provide specific guidance as to when a donation is made “for the purpose of influencing any election” and thus constitutes a “contribution” for purposes of the \$1,000 political committee threshold. 2 U.S.C. § 431(8)(A)(i). In 2004, the Commission promulgated a

regulation specifying that a “deposit of money . . . made by any person in response to any communication is a contribution . . . if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.” 11 C.F.R. § 100.57(a); 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004). The regulation was part of the Commission’s effort to “significantly curb[] the raising and spending of non-Federal funds in connection with Federal elections.” 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007).

5. Corporation-Funded Electioneering Communications

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

The Supreme Court has upheld the constitutionality of the financing restriction for non-express advocacy “to the extent that the issue ads . . . are the functional equivalent of express advocacy.” *McConnell*, 540 U.S. at 189-94, 203-08; *WRTL*, 127 S. Ct. at 2667. Chief Justice Roberts’ controlling opinion in *WRTL* defined “the functional equivalent of express advocacy” as a communication that is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* The opinion then listed indicia of genuine issue ads and express advocacy and analyzed the ads at issue. *Id.*; *see infra* p. 29. Shortly after *WRTL* was decided, the Commission promulgated a regulation to codify the Court’s controlling opinion, using, essentially verbatim, the same criteria that the Chief Justice used. *See* 11 C.F.R. § 114.15.

II. RTAO HAS NOT MET ITS BURDEN FOR A PRELIMINARY INJUNCTION

A. RTAO Has Not Demonstrated That The Court Has Jurisdiction

Federal courts must presume that they “lack jurisdiction unless the contrary appears

affirmatively from the record.” *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations and internal quotation marks omitted). “In ... constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (footnote omitted). Here, the answer is no: As we discuss *infra*, based on plaintiff’s few factual allegations, RTAO’s proposed radio ad does not contain express advocacy under 11 C.F.R. § 100.22(b) and is exempt under § 114.15 from the financing restrictions of 2 U.S.C. § 441b. Moreover, under 11 C.F.R. § 100.57, any donations RTAO raises from its proposed fundraising letter will not be “contributions” under 2 U.S.C. § 431(8). Thus, because RTAO’s proposed activities are not restricted by the regulations it challenges, plaintiff has not demonstrated a live grievance or a ripe regulatory challenge, and there is no “case or controversy” within the meaning of Article III.¹

“Doctrines like standing, mootness, and ripeness are simply subsets of Article III’s command that the courts resolve disputes, rather than emit random advice.” *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991). Here, where the dispute between the parties concerns injunctive relief, this principle is particularly apt because the “courts should be especially mindful of this limited role [under Article III] when they are asked to award prospective equitable relief instead of damages for a concrete past harm.” *Id.*

[T]he Article III question is ... whether [the plaintiff] has a stake in that relief. Even in order to pursue the declaratory and injunctive claims, in other words, [the plaintiff] must establish that it has a “specific live grievance” against the application of the statutes ..., *Golden v. Zwickler*, 394 U.S. 103, 110 (1969), and not just an “abstract disagree[men]t” over the constitutionality of such application, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148 (1967)).

¹ Had RTAO requested an advisory opinion instead of rushing into federal court, it might have avoided this lawsuit. See *McConnell*, 540 U.S. at 170 n.64 (“[S]hould plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification, see 2 U.S.C. § 437f(a)(1) . . .”).

Lewis v. Cont'l Bank Corp., 494 U.S. 472, 479 (1990).²

B. A Preliminary Injunction Is An Extraordinary Remedy That Requires The Plaintiff To Meet A Heavy Burden

A preliminary injunction is an “extraordinary” remed[y] “involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.” *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 284 n.2 (4th Cir. 2007). The purpose of a preliminary injunction “is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). When the movant seeks to alter rather than maintain the status quo, courts generally exercise a higher degree of scrutiny. *Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995).

In the Fourth Circuit, courts consider the four *Blackwelder* factors: “(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.” *U.S. Dep’t of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 280 (4th Cir. 2006) (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 193-94 (4th Cir. 1977)). RTAO bears the burden of proving that each factor supports the granting of such relief. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). In applying the factors, “the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied; if such a showing is made, the court must then balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant.” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th

² The decision in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) (“*VSHL*”), does not establish that this Court has jurisdiction. In *VSHL*, the Commission had conceded the unenforceability of its regulation because of a prior adverse decision that it intended to continue to challenge on further appellate review. Here, the Commission does not contend that its regulations, even if upheld and enforced according to the Commission’s own interpretation, would regulate the activity that RTAO describes in its complaint.

Cir. 2002) (citations omitted).

C. Plaintiff Fails To Demonstrate Irreparable Harm

RTAO fails to meet its burden of demonstrating that it will suffer irreparable harm without the requested temporary relief. RTAO's mere allegation of harm under the First Amendment is insufficient to constitute irreparable harm for entry of a preliminary injunction. *See Smith v. Frye*, 488 F.3d 263, 271 (4th Cir. 2007) (allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod [v. Burns]*, 427 U.S. 347 (1976) (plurality)"]").³

RTAO devotes one paragraph (Br. 27) to the issue of harm and provides only conclusory allegations of chilled speech. It thus fails to make even a rudimentary showing of irreparable harm, let alone the "clear" or "strong" showing required in this Circuit. *See Scotts*, 315 F.3d at 271; *Dan River, Inc. v. Icahn*, 701 F.2d 278, 284 (4th Cir. 1983). The presumption that irreparable harm occurs when a challenged regulation "directly limits speech," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006), does not apply here, because the Commission's regulations do not directly, or even indirectly, limit plaintiff's speech. Any decrease in its speech is self-imposed.

Rather than demonstrating irreparable harm, RTAO presents speculative scenarios of the "if-then" variety. (*See Compl.* ¶¶ 21-25.) However, even if RTAO's activities were regulated by the provisions it challenges and those provisions required plaintiff to abide by the rules for political committees, it would not suffer irreparable harm. As a political committee, RTAO could pay for unlimited independent campaign advocacy, including express advocacy independent expenditures and electioneering communications. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985); 11 C.F.R. § 114.12 (treating an incorporated political

³ *See also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (mere allegation of any First Amendment burden does not constitute irreparable injury; *Elrod v. Burns* applicable only when "First Amendment rights were totally denied by the disputed Government action").

committee as a political committee rather than a corporation). It has not alleged that its fundraising would be harmed, let alone irreparably harmed, by abiding by the \$5,000 limit on contributions to political committees in 2 U.S.C. § 441a(a)(1)(C). Indeed, it has alleged nothing specific about its actual or potential donors, whether it expects to receive more than \$5,000 from any one person, or what concrete harm it would suffer by abiding by the \$5,000 limit.

RTAO has also failed to allege any irreparable harm from the reporting requirements for political committees. Proof of such harm would require evidence of burdensome reprisals against its members, but RTAO has not alleged any such harm. Serious harm of this kind has been demonstrated only in cases involving organizations, such as the NAACP and the Socialist Workers Party, whose members faced actual, documented danger at the relevant time. *See Buckley*, 424 U.S. at 69 (noting that NAACP members faced “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility”) (citation omitted); *McConnell*, 540 U.S. at 198-99 (noting that *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982), found “reasonable probability” of “threats, harassment, and reprisals”); *see also Nat’l Ass’n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 75-76 (D.D.C. 2008) (trade association suffers no irreparable harm in disclosing membership list under lobbying disclosure provisions). Finally, RTAO also claims that it would suffer certain administrative burdens as a political committee, but these do not constitute *irreparable* harm. “Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.” *Chaplaincy*, 454 F.3d at 297-98.

Since “[t]he basis of injunctive relief in the federal courts has always been irreparable harm,” *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted), RTAO’s failure on this

point alone suffices to deny RTAO's requested relief.

D. The Balance Of Harms Weighs In Favor Of The Commission

In contrast, enjoining the Commission from enforcing its regulations would substantially injure the Commission and harm the public, whose interests are essentially the same as those of the Commission.⁴ “[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury.” *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A “presumption of constitutionality [] attaches to every Act of Congress,” and that presumption is “an equity to be considered in favor of . . . [the government] in balancing hardships.” *Walters v. Nat’l Ass’n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

The imminent harm to the public if the Commission is not permitted to enforce its regulations far outweighs RTAO's self-imposed censorship and speculative fear. In these key months leading up to the national election, a temporary lifting of the challenged regulations could undermine the public's confidence in the federal campaign financing system. The regulations and policy at issue implement longstanding limits on corporate influence in federal elections and ensure that political committees, whose major purpose is campaign activity, abide by certain contribution limits and disclose their receipts and disbursements to the public. The applicable limits and disclosure requirements serve compelling government interests in preventing corruption, educating the public, and facilitating the Commission's enforcement of the law. Thus, enjoining application of the challenged provisions could confuse political actors,

⁴ The Court should reject RTAO's request (Br. 7) that the Court allow it to “make a more modest showing as to concerns about harm to the FEC or others and about promoting the public interest” since, as it claims, its harm is so substantial and its success on the merits so likely. RTAO inverts the applicable standard. Until a court balances the harms to the parties, it cannot know how strong or substantial the plaintiff's showing on the “likelihood of success” on the merits must be. *See Direx*, 952 F.2d at 813-14, 817.

allow improper use of corporate funds in the election process, sanction excessive campaign contributions, and deprive the public of important information.

E. Even If Plaintiff’s Challenges Are Justiciable, The Commission Is Likely To Succeed On The Merits

1. Plaintiff’s Burden For Its Facial Challenges

RTAO’s facial challenges include claims of both overbreadth and vagueness. The Supreme Court has used various formulations in determining facial overbreadth. *Compare, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiff must “establish that no set of circumstances exists under which the Act would be valid”) *with, e.g., New York v. Ferber*, 458 U.S. 747, 769-771 (1982) (plaintiff can succeed if it establishes that a “substantial number” of the challenged law’s applications are unconstitutional) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Thus, at a minimum, RTAO carries the “heavy burden of proving” that the challenged regulations’ “application to protected speech is substantial, ‘not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications.’” *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)).

RTAO also argues that the regulations are unconstitutionally vague on their face, that is, fail to give “the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly” and permit “arbitrary and discriminatory enforcement.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). “A court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

2. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Definition Of Express Advocacy In 11 C.F.R. § 100.22(b)

It is “firmly embedded” in the Supreme Court’s First Amendment jurisprudence that corporations and labor unions may constitutionally be prohibited from using their general

treasuries to fund communications “expressly advocating” for or against the election of a candidate. *McConnell*, 540 U.S. at 203. RTAO, however, alleges that the regulatory definition of “expressly advocating” in 11 C.F.R. § 100.22(b) is unconstitutional, both facially and as applied to RTAO’s proposed radio advertisement. (*See* Compl. ¶¶ 16, 33; Br. 12-13.) Under 11 C.F.R. § 100.22(b), the definition of “expressly advocating” includes a communication that

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

a. RTAO’s Challenge To 11 C.F.R. § 100.22(b) Is Not Justiciable

Because plaintiff’s *Change* ad does not constitute express advocacy under section 100.22(b), RTAO fails to demonstrate that there is a ripe controversy or that it will suffer a distinct injury from the provision. Specifically, “[r]easonable minds could . . . differ as to whether [the ad] encourages actions to . . . defeat” Senator Obama’s presidential candidacy. 11 C.F.R. § 100.22(b). Because a reasonable person could conclude that the ad encourages listeners to seek information regarding Senator Obama’s position on abortion, the ad is not express advocacy under 11 C.F.R. § 100.22(b).⁵ Whether the regulation is unconstitutionally

⁵ The planned ad (Compl. ¶ 16) does contain several unambiguous “electoral portion[s]” referring to Senator Obama’s campaign for President. The electoral portions include a reference to “[a]ppoint[ing] . . . Justices [to] the U.S. Supreme Court” — a uniquely presidential duty — and the manipulation of one of Senator Obama’s campaign slogans, “Change we can believe in,” (*see* <http://www.barackobama.com/splash/>), into a rhetorical question, “Is this the change that you can believe in?” Given the ad’s devotion to speech regarding the abortion issue and the indirect and oblique references to the presidential campaign, however, the ad “as a whole” could reasonably be interpreted as a call for the listener to learn more about his views on abortion. 11 C.F.R. § 100.22(b). The campaign slogan has been altered and may be uniquely suited to adaptation for non-express advocacy because it contains no explicit electoral component and does not reference the candidate in any way. Furthermore, the ad does not question his leadership qualities or patriotism, or compare him to other candidates. *Cf., e.g., infra* p.17 n.8 (application of express advocacy test in other Commission enforcement matters).

overbroad and vague on its face is thus not justiciable based on RTAO's proposed activities, because plaintiff's sole alleged ad is not regulated. "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.'" *Renne*, 501 U.S. at 323 (quoting *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954)). The First Amendment overbreadth doctrine "only assists plaintiffs who have suffered some injury from application of the contested provision to begin with.' ... In other words, a party asserting overbreadth standing must still demonstrate a 'distinct and palpable injury.'" *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 634 (4th Cir. 2007) (internal citations omitted).

b. RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That 11 C.F.R. § 100.22(b) Is Facially Unconstitutional

Even if the Court finds plaintiff's claim against section 100.22(b) justiciable, the regulation is neither overbroad nor vague. As the Commission's assessment of plaintiff's intended radio ad demonstrates, the regulation is narrow and clear. RTAO nevertheless claims (Br. 8-14) that section 100.22(b) violates the First Amendment because it allegedly regulates communications that are not "unambiguously campaign related" and does not comport with a narrow interpretation of "magic words" express advocacy. The former claim fails on the face of the regulation, which requires that "[t]he electoral portion of the communication [be] unmistakable, *unambiguous*, and suggestive of only one meaning," which is "advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b) (emphasis added). Any communication that unambiguously encourages the defeat of a specific candidate is, by definition, unambiguously campaign related. Thus, even assuming *arguendo* that the Constitution were to prohibit all regulation of financing for communications that are not unambiguously campaign related, section 100.22(b) would not extend beyond that limit.

RTAO's related argument that the regulation of express advocacy is constitutionally limited to a rigid interpretation of whether a communication contains "magic words" was laid to rest in *McConnell*. In that case, the plaintiffs challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-115, 116 Stat. 81, argued that *Buckley* had characterized communications containing magic words as the outer constitutional boundary of Congress's power to regulate in this area. *See McConnell*, 540 U.S. at 190-91 (discussing *Buckley*, 424 U.S. at 44 & n.52). Thus, the plaintiffs argued, BCRA was unconstitutional to the extent that it permitted regulation of communications that simply referred to federal candidates shortly before elections. *See McConnell*, 540 U.S. at 190-91. The Supreme Court rejected this argument, noting that *Buckley* had imposed the magic words requirement because of the vagueness of FECA's original statutory text ("relative to" a candidate), not because the First Amendment required it in all circumstances. *Id.* at 191-92. Accordingly, *McConnell* held that *Buckley*'s "express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id.* Because magic words were not a constitutional requirement, and because the statute otherwise satisfied constitutional scrutiny, the Court upheld BCRA's prohibition of pre-election, corporation-funded communications that refer to federal candidates and are functionally equivalent to express advocacy. *See id.* at 206, 209; *WRTL*, 127 S. Ct. at 2659.

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

were similarly revealed to be in error. *See id.* at 392 (citing *Buckley* and *Christian Action Network* as support for magic words “limit”). As Justice Thomas further noted, *McConnell*, 540 U.S. at 278 n.11, the only express-advocacy decision that *McConnell* did not cast into doubt was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) — the case from which the Commission derived the test codified at section 100.22(b). *See Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,292-95 (July 6, 1995) (“[S]ection 100.22(b) . . . incorporate[s] . . . the *Furgatch* interpretation . . .”). Thus, the claim that the Constitution and *Buckley* prohibit regulation of non-magic words communications must fail, and the narrow test of section 100.22(b) is entirely consistent with *McConnell*’s analysis.

Section 100.22(b) is also consistent with the Supreme Court’s holding in *WRTL*. In that case, the Court reiterated *McConnell*’s upholding of BCRA’s restriction on corporate electioneering communications that are “the functional equivalent of express advocacy,” *i.e.*, communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL*, 127 S. Ct. at 2667. This constitutional standard is similar to the test in section 100.22(b): Both tests narrowly inquire into whether there is any reasonable way to interpret a communication as non-candidate-advocacy and, if so, do not restrict the financing of the communication. Because the constitutional test of *WRTL* is, by definition, not unconstitutionally vague, the test in section 100.22(b) must also satisfy any vagueness concerns.⁶ To the extent these standards differ, section 100.22(b) is narrower than the

⁶ In addition, both tests avoid vagueness concerns by refusing to consider the subjective intent of the speaker. *Compare* 60 Fed. Reg. at 35,295 (“[T]he subjective intent of the speaker is not a relevant consideration . . .”) *with WRTL*, 127 S. Ct. at 2668 (“To the extent th[e] evidence goes to *WRTL*’s subjective intent, it is again irrelevant.”). The regulation’s “reasonable person” test is like other constitutional objective tests. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity depends upon a “wholly objective standard” based on whether a “reasonable person” would have known of clearly established rights) (citation omitted); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (“[C]onsent under the Fourth Amendment is that of ‘objective’ reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?”). *WRTL*’s adoption of a test based on a communication’s

WRTL test, as the regulation requires an “unambiguous” electoral portion, 11 C.F.R.

§ 100.22(b)(1), while *WRTL* looks to the “mention” of an election and similar indicia of express advocacy. *See WRTL*, 127 S. Ct. at 2667. Thus, the Supreme Court’s recent adoption of a constitutional test broader than that of section 100.22(b) further demonstrates the inapplicability here of any rigid magic words test and the permissibility of the Commission’s construction.

Plaintiff nonetheless claims (Br. 13) that *McConnell* and *WRTL* “affirmed that ‘express advocacy’ requires the so-called ‘magic words.’” This argument distorts both cases. As discussed above, *McConnell* emphasized that the presence of magic words is not a constitutional requirement. *McConnell*, 540 U.S. at 191-92. And the portion of *WRTL* that RTAO cites affirmatively rejected the proposition, raised in Justice Scalia’s partial concurrence, that the only permissible test is a magic words test:

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

WRTL, 127 S. Ct. at 2669 n.7 (citations omitted).⁷ Thus, neither case stands for the proposition that the line between permissible and impermissible regulation must be drawn at magic words.

RTAO also relies upon *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), which invalidated a state statute defining non-magic words express advocacy. The

“reasonable” interpretation thus undermines *VSHL*’s holding that section 100.22(b) is flawed because the regulation purportedly “shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer.” *VSHL*, 263 F.3d at 391.

⁷ The four dissenting Justices in *WRTL* also explained at length their disagreement with the magic words standard. *See WRTL*, 127 S. Ct. at 2692-96 (Souter, J., dissenting).

definition at issue in *Leake*, however, was significantly broader and less precise than section 100.22(b), including such “contextual factors” as “the timing of the communication in relation to the events of the day” and “the cost of the communication.” *Leake*, 525 F.3d at 298. As the Fourth Circuit noted, the state statute “swe[pt] far more broadly than *WRTL*’s ‘functional equivalent of express advocacy’ test.” *Id.* at 297. This is in contrast to section 100.22(b), which is narrower than the *WRTL* standard. The Fourth Circuit concluded, therefore, that “North Carolina remains free to adopt a definition of express advocacy consistent with the standards approved by *McConnell* and *WRTL*.” *Id.* at 301. Accordingly, section 100.22(b) is consistent with both *McConnell* and *WRTL* and does not bear the overbreadth infirmities present in *Leake*.⁸

3. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Solicitation Regulation

The Commission’s solicitation regulation reasonably implements the Act’s definition of “contribution” and provides in part that money given in response to a communication is a “contribution . . . if the communication indicates that any portion of the funds received will be used to *support or oppose the election* of a clearly identified Federal candidate.” 11 C.F.R. § 100.57(a) (emphasis added). The regulation does not apply to RTAO’s proposed solicitation

⁸ RTAO also fails to identify any constitutional flaw in the *actual* cases in which the Commission has recently applied its express advocacy regulation. The Commission has applied the regulation to communications characterizing presidential candidates as untrustworthy and unfit for the presidency. *See, e.g., In the Matter of Swiftboat Veterans and POWs for Truth*, MUR 5511, 5525, Conciliation Agreement ¶¶ 15-17, 25-27 (Dec. 4, 2006) (FEC Exh. 3); *In the Matter of The Media Fund*, MUR 5440, Conciliation Agreement ¶¶ 26-29 (Oct. 29, 2007) (FEC Exh. 4). For example, the Commission found that television ads were express advocacy where the ads stated that “John Kerry fought and bled in the Vietnam War. He fought side by side with brothers who could not get out of the draft because they didn’t have a rich father like George W. Bush. . . . You better wake up before you get taken out.” *Media Fund*, Conciliation Agreement ¶¶ 28-29. Similarly, the Commission found to be express advocacy ads stating that Senator John Kerry “lacks the ability to lead,” “cannot be trusted,” and “gave [aid] and comfort to the enemy.” *Swiftboat Veterans*, Conciliation Agreement ¶ 15. Although none of these ads would satisfy a wooden test of magic-words express advocacy, RTAO fails to demonstrate why it was unconstitutional for the Commission to find that they were campaign ads.

letter (Compl. ¶ 19) and thus RTAO can demonstrate neither irreparable harm nor an Article III case or controversy. In any event, RTAO is not likely to succeed on the merits of its facial challenge: The regulation is well within the Commission’s delegated authority, “gives ‘fair notice to those to whom [it] is directed,’” *McConnell*, 540 U.S. at 223, and is not overbroad or arbitrary and capricious.

a. RTAO’s Challenge To 11 C.F.R. § 100.57 Is Not Justiciable

Section 100.57 “turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings” or “depend on reference to external events, such as the timing or targeting of a solicitation.” 69 Fed. Reg. 68,057. Because the “plain meaning” of RTAO’s proposed fundraising letter (Compl. ¶ 19) is that the organization will be launching a new project to disseminate information about Senator Obama’s views on abortion, the letter does not indicate that funds received will be used to support or oppose his candidacy within the meaning of the regulation.⁹ Accordingly, donations received will not be “contributions,” and the regulation will cause RTAO neither a distinct injury nor irreparable harm. As a result, RTAO’s facial challenge presents only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. *See Renne*, 501 U.S. at 323-24; *supra* pp. 5-7, 13.

b. RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That The Solicitation Regulation Is Unconstitutional On Its Face

The Act authorizes the Commission to regulate “contributions,” but does not specify the circumstances under which proceeds from a communication soliciting funds are “contributions.”

⁹ The letter asserts that “there won’t be any ‘vote for’ or ‘vote against’ type of ads.” This disclaimer, however, would not preclude applying section 100.57 if other parts of the letter indicated that some of the funds received would be used to support or oppose Senator Obama’s election. *See* 69 Fed. Reg. 68,057; *EMILY’s List v. FEC*, No. 05-0049, 2008 WL 2938558, at *32, 36 (D.D.C. July 31, 2008); *cf. FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (“*MCFL*”) (“disclaimer of endorsement cannot negate” express advocacy in rest of communication).

See 2 U.S.C. § 431(8). Section 100.57 reasonably fills this “gap,” thereby ensuring that money donated in response to an appeal to help influence federal elections will not evade the Act’s contribution limits and undermine their anti-corruption objective. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The Court in *Buckley* found that the definitions of “contribution” and “expenditure” raise very different constitutional concerns. Because limits on contributions entail “only a marginal restriction upon the contributor’s ability to engage in free communication,” 424 U.S. at 20-21, they will be upheld under the “less rigorous scrutiny applicable to contribution limits,” *McConnell*, 540 U.S. at 141, *i.e.*, if they are “closely drawn to match a sufficiently important interest.” *Id.* at 136 (citations and quotation marks omitted). In particular, *Buckley* found it unnecessary to narrowly construe “contribution” as it did “expenditure,” and instead stated that the term includes

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

424 U.S. at 78 (emphasis added). The Court did not, as plaintiff suggests (Br. 14-15), employ an “unambiguously-campaign-related” analysis or narrowly construe “contribution” beyond the “earmarked for political purposes” criterion. 424 U.S. at 24 n.24, 78. Because RTAO’s challenge to 11 C.F.R. § 100.57 rests heavily on this mistaken notion of the Court’s construction, plaintiff has little likelihood of success on the merits.¹⁰

¹⁰ RTAO compounds its errors by suggesting (Br. 15) that donations cannot be deemed “contributions” until the recipient identifies specific regulable activity for which the money will be spent. The definition of “contribution” contains no such tracing requirement, 2 U.S.C. § 431(8), and the Supreme Court has never suggested such a construction. *Cf. Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 199 n.19 (1981) (contribution limits apply to all donations to political committees, despite attempt to donate solely for administrative expenses).

When the Commission promulgated section 100.57, it relied in part on *FEC v. Survival Educ. Fund, Inc.* (“*SEF*”), 65 F.3d 285 (2d Cir. 1995), which had addressed whether a mailing sent by a nonprofit issue advocacy group constituted solicitation of “contributions” in the context of a disclaimer requirement. To resolve this issue, the court analyzed the phrase “earmarked for political purposes” as used in *Buckley*. It explained that, “[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of” the Act’s provision requiring certain disclosures in communications that “solicit” any contributions if the communication “contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office.” *SEF*, 65 F.3d at 295-96.

More recently, courts in the D.C. Circuit have refused to enjoin application of section 100.57. In *EMILY’s List*, the court upheld the constitutionality of 11 C.F.R. § 100.57 against a facial challenge. 2008 WL 2938558; *see also EMILY’s List v. FEC*, 362 F. Supp. 2d 43 (D.D.C.), *aff’d*, 170 Fed. Appx. 719, 2005 WL 3804998 (D.C. Cir. 2005) (previously denying a preliminary injunction against the regulation). The court specifically rejected the argument that the use of “support or oppose” made the regulation unconstitutionally vague.

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

2008 WL 2938558, at *29 (emphasis by the court; citations omitted).

The Washington Supreme Court, sitting *en banc*, recently also upheld the constitutionality of “support” and “oppose.” *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm’n*, 166 P.3d 1174 (Wash. 2007), *cert. denied*, 128 S. Ct. 2898 (2008). The court concluded that “the phrase ‘in support of, or opposition to, any candidate’ in the definition of ‘political committee’” is not unconstitutionally vague. *Id.* at 1183 n.8. Rather, it is “significantly more precise than the phrase ‘relative to a clearly identified candidate,’ which the

[United States Supreme] Court determined was vague in *Buckley*.” *Id.* at 1184. A “person of ordinary intelligence” could understand the meaning of the state’s definition. *Id.* Relying on *McConnell’s* judgment, 540 U.S. at 170 n.64, that the words “promotes,” “supports,” “attacks,” and “opposes” in 2 U.S.C. § 431(20)(A)(iii) were sufficiently precise to satisfy First Amendment concerns, the Washington court explained that *McConnell’s* reasoning goes beyond political party speakers. “[U]nlike the political party-specific statutes that are the primary focus of the *McConnell* decision, ... in note 64 the Court rejects a vagueness challenge to the definition of ‘[f]ederal election activity,’ in ... § 431(20)(A)(iii), a provision that is *not* limited to party speakers.” 166 P.3d at 1184 n.9 (emphasis in original).

Conversely, none of the cases RTAO cites (Br. 16) actually supports its argument. *Leake* invalidated part of North Carolina’s “*method for determining* if a communication ‘supports or opposes the nomination or election of’” a clearly identified candidate. *Leake*, 525 F.3d at 280 (emphasis added). However, contrary to RTAO’s assertion (Br. 15-16), the court did not find the “support or oppose” language itself unconstitutional. Indeed, after holding that the implementing method was unconstitutionally vague and overbroad, the court assured North Carolina that it “remains free to enforce all campaign finance regulations that incorporate the phrase ‘to support or oppose the nomination or election of’” a clearly identified candidate. *Leake*, 525 F.3d at 301. Moreover, the court distinguished the provision it invalidated from the “support or oppose” provision upheld in *Voters Educ. Comm.* *Id.* at 299.

In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), a state statute defined “political committee” as any entity “the primary or incidental purpose of which is to support or oppose any candidate or political party or *to influence or attempt to influence* the result of an election.” *Id.* at 712 (emphasis added). Concerned that this definition would include entities engaged only in issue advocacy, the Fourth Circuit ruled that the references to

influencing elections made the definition unconstitutionally vague and overbroad. *Id.* at 712-13. The decision thus provides no support for the proposition that “support or oppose” language is unconstitutional.¹¹

Similarly, *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), concerned a state campaign finance statute that included language in addition to “support” and “oppose,” and the court found the additional language problematic. Using *Buckley* as a guide, the court construed the definition of “expenditure” to avoid unconstitutional vagueness of the phrase “or otherwise influencing.” The case did not concern the definition’s phrase “for the purpose of supporting, opposing.”¹²

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

¹¹ RTAO also cites (Br. 16; Compl. ¶ 36) *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), and *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), neither of which is apt. *Anderson* discusses limits on “electioneering” near a polling place. The Sixth Circuit did not question the phrase “solicitation of votes for or against any candidate” but instead found that the prohibition of “the displaying of signs [and] the distribution of campaign literature, cards, or handbills” was vague and overbroad. In *ACLU of Nevada*, the Ninth Circuit invalidated an overly broad “content-based limitation on core political speech,” but the problematic statutory phrase was “material or information relating to” an election, not “support or oppose.” 378 F.3d at 992.

¹² RTAO also cites two loyalty oath cases (Br. 16; Compl. ¶ 36), but they, too, do not involve the “support or oppose” language found in the Commission’s solicitation regulation. In *Cramp v. Bd. of Pub. Instr. of Orange County, Fla.*, 368 U.S. 278, 286 (1961), the Court struck down as unconstitutionally vague a law requiring public employees to swear that they have not and will not knowingly “lend [their] aid, support, advice, counsel or influence to the Communist Party.” And in *Cole v. Richardson*, 405 U.S. 676, 684 (1972), the Court upheld the “oppose the overthrow of the government” clause in a loyalty oath against a vagueness challenge.

4. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Commission’s Analysis Of Political Committee Status

As explained above, RTAO’s intended activity as alleged in its complaint would not constitute making expenditures or receiving contributions; therefore, RTAO would not meet either of the statutory criteria for “political committee” status in 2 U.S.C. § 431(4). RTAO has thus failed to demonstrate a distinct injury or irreparable harm from the Commission’s approach to analyzing political committee status. As a result, RTAO’s facial challenge presents only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. *See Renne*, 501 U.S. at 323-24; *supra* pp. 5-7, 13. Even if the Court determines that plaintiff has alleged a case or controversy within Article III, the Administrative Procedure Act (“APA”) does not provide for judicial review of the Commission’s enforcement policy. In any event, this policy is constitutional and properly within the Commission’s discretion.

a. The Commission’s Enforcement Policy Is Not Reviewable Under The APA

RTAO challenges a policy that does not constitute final agency action, so this claim is not reviewable under the APA. Courts may only hear APA suits based on “[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court.” 5 U.S.C. § 704 (emphasis added). “Final” agency action consummates the agency’s decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (enforcement policy and guidelines “used by inspectors as guidance in making individual enforcement decisions” not final agency action).

After a rulemaking concerning political committee status, the Commission issued an Explanation and Justification (“E&J”) for its decision not to promulgate a revised definition of “political committee” or to single out section 527 organizations for increased regulation. 72 Fed. Reg. at 5595. As part of that E&J, the Commission “discusse[d] several recently resolved

administrative matters that provide considerable guidance to all organizations regarding ... political committee status.” *Id.* Its decision to continue analyzing political committee status on a case-by-case basis rather than promulgating a rule of general application was challenged and upheld in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007) (“*Shays II*”). The E&J’s primary purpose was to explain why a broad regulation was *not* created; it neither describes itself as a “policy statement,” nor purports to establish a binding norm or decide anyone’s legal status. RTAO cites nothing to the contrary. The E&J did not create a new regulation or change past policy but simply explained how the Commission’s particular case-by-case enforcement actions provide “guidance” to organizations about political committee status and the major purpose test. 72 Fed. Reg. at 5604. This guidance is not “final” agency action subject to APA review.

b. The Commission’s Political Committee Analysis Is Lawful

Even if reviewable, the Commission’s approach to political committee status is constitutional. As explained *supra* p. 4, in *Buckley*, the Court established the “major purpose” test and limited the definition of “political committee” to organizations controlled by a candidate or whose major purpose is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79. “Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” *Id.*; *see also* *MCFL*, 479 U.S. at 252 n.6 (plaintiff not a political committee because “its central organizational purpose is issue advocacy”); *McConnell*, 540 U.S. at 170 n.64.

RTAO’s claim appears to focus on the Commission’s implementation of the major purpose test, but the Commission’s approach is not unconstitutionally vague or overbroad. The assessment of an organization’s “major” purpose is inherently comparative and necessarily requires an understanding of an organization’s overall activities. In its enforcement decisions, the Commission considers a variety of factors — most of which courts have endorsed or RTAO

does not challenge — to determine whether an organization’s major purpose is the election or defeat of a candidate.¹³ Those factors include an organization’s public statements, representations made in government filings, statements made to potential donors, internal governing documents, and the proportionate amount of spending on election-related activity. *See* 72 Fed. Reg. at 5605. Although RTAO concedes (Br. 19) that an organization’s “organic” documents are relevant to determine major purpose, documents like articles of incorporation, though useful, paint only an abstract picture of an organization’s actual activities and disbursements.

Courts have endorsed evaluation of public statements and an organization’s spending or contributions to determine its major purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (court considered organization’s statements in brochures and “fax alerts” sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996) (“The organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”). Courts also consider non-public statements. *Malenick*, 310 F.Supp. 2d at 235 (letter from president to organization’s primary contributor); *GOPAC*, 915 F.Supp. at 864, 866 (description of

¹³ The Commission generally considers the major purpose test after first determining that an organization has either spent more than \$1,000 in expenditures or raised more than \$1,000 in contributions. *See* 72 Fed. Reg. at 5603-04. The only court to address this approach has criticized the Commission for determining whether communicative expenditures contain express advocacy before evaluating the major purpose of an organization; the court believed that the express advocacy analysis is unnecessary for groups whose major purpose is known to be campaign related. *Shays II*, 511 F. Supp. 2d at 26-27. Although the Commission disagrees with that court’s criticism, it recognizes that its own interpretation may tend to limit the number of organizations that qualify as political committees. RTAO ignores the conservative aspect of the Commission’s approach. *Cf. also Akins v. FEC*, 101 F.3d 731, 741-42 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 524 U.S. 11 (1998) (D.C. Circuit would not have applied major purpose test at all if organization made more than \$1,000 in contributions, as opposed to independent expenditures).

organization's meetings attended by national leaders; reference to organization's "Political Strategy Campaign Plan and Budget").

In numerous administrative enforcement proceedings and advisory opinions, the Commission has examined these factors and others to determine whether organizations satisfy the major purpose test. *See* 72 Fed. Reg. at 5605-06. RTAO does not allege that any of these analyses came to the wrong conclusion. Instead, RTAO relies upon unsubstantiated and irrelevant allegations.¹⁴

Finally, RTAO argues (Br. 18) that the Commission has improperly reformulated the major purpose test to focus on "Federal campaign activity." *Buckley*, however, uses the term "campaign related" to summarize legitimately regulable activity by political committees and to distinguish such organizations from groups "engaged purely in issue discussion." 424 U.S. at 79. The Commission's use of the phrase "federal campaign activity" when examining a group's major purpose is thus reasonable and also takes into account that not all "campaign related" spending involves communications; it may also involve expenditures for activity such as gaining ballot access rather than payments for disseminating advocacy messages. Moreover, the use of the word "federal" simply clarifies that to satisfy the major purpose test an organization's campaign activity must involve federal candidates, not state or local ones. *See* 72 Fed. Reg. at 5601. Like the rest of the Commission's interpretation, this part is reasonable and constitutional.

¹⁴ For example, RTAO makes the unsubstantiated claim that the existence of an administrative complaint filed with the FEC "can shut down an organization." (Compl. ¶ 45; Br. 19.) Even if it were true, that statement would prove too much. Congress established the Commission's balanced enforcement mechanisms decades ago, providing specific "procedures purposely designed to ensure fairness not only to complainants but also to respondents." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). The Commission does not investigate potential violations of the Act until at least four of its members have voted to find "reason to believe" that the law has been violated. *See* 2 U.S.C. § 437g(a)(2). RTAO's argument would sacrifice proper law enforcement to speculative and generalized fear. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (expense and annoyance of agency proceedings do not constitute irreparable injury, but are part of social burden of living under government).

5. RTAO Has Not Met Its Burden For A Preliminary Injunction Against 11 C.F.R. § 114.15

Section 114.15 straightforwardly implements *WRTL* by providing additional guidance without expanding beyond the constitutional boundary described in that decision. Tracking the language of *WRTL*, section 114.15 states that a corporation or union may fund an electioneering communication “unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” 11 C.F.R. § 114.15(a); *Electioneering Communications*, 72 Fed. Reg. 72,899, 72,902 (Dec. 26, 2007); *WRTL*, 127 S. Ct. at 2667. For additional clarity, this general exemption is supplemented by a safe harbor provision for lobbying messages and commercial advertisements. 11 C.F.R. § 114.15(b); 72 Fed. Reg. at 72,903. The regulation also adheres to *WRTL*’s teaching that when there is doubt about a communication’s meaning, the “tie goes to the speaker,” 127 S. Ct. at 2669; the regulation’s rule of interpretation states that in “interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication,” 11 C.F.R. § 114.15(c)(3).

a. RTAO’s Challenge To 11 C.F.R. § 114.15 Is Not Justiciable

For substantially the same reasons that the ad is not express advocacy under 11 C.F.R. § 100.22(b), it also qualifies for the general exemption set out in section 114.15(a).¹⁵ *See supra* p. 12 & n.5. Moreover, *Change* shares many characteristics with an example included in the Commission’s rulemaking of a communication that does not qualify for the safe harbor but that is nevertheless permissible under 11 C.F.R. § 114.15(a). 72 Fed. Reg. at 72,908 (Example 1). That ad criticized a congressman for his environmental record and urged listeners to call him and

¹⁵ The parties agree that *Change* does not fall within the safe harbor of section 114.15(b) “because *Change* identifies Senator Obama as a Democrat and the ad neither has a grassroots lobbying ‘focus[]’ nor ‘proposes a commercial transaction.’” (Br. 22.)

“[t]ell him to protect America’s environment.” *Id.* While both ads include indicia of express advocacy under 11 C.F.R. § 114.15(a), they both focus on public policy issues. Because “any doubt is to be resolved in favor of finding the communication permissible,” both may be financed with corporate or union funds. *Id.* In contrast, *Change* differs from another sample ad that is not permissible under the regulation; that ad identifies two “candidates,” then asks “where do the candidates stand?”, and characterizes the candidates’ records positively and negatively. 72 Fed. Reg. 72,909 (Example 2). In sum, section 114.15 does not prohibit RTAO from running the *Change* advertisement, and the regulation causes RTAO no distinct injury or irreparable harm. As a result, RTAO’s facial challenge presents only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. *See Renne*, 501 U.S. at 323-24; *supra* pp. 5-7, 13.

b. RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That 11 C.F.R. § 114.15 Is Unconstitutional On Its Face

Even if the Court finds plaintiff’s claim against section 114.15 justiciable, the regulation is effectively a verbatim adoption of the Supreme Court’s analysis in *WRTL* and therefore constitutional. It is neither vague nor overbroad.

Contrary to plaintiff’s inaccurate description (Br. 22-23) of a rule of interpretation in section 114.15(c), the regulation does not “demote” the Supreme Court’s standard. As explained above, section 114.15 contains only one standard, the one articulated by the Court itself:

A corporation or union can use its general treasury funds to pay for a communication “unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” 11 C.F.R. § 114.15(a). The rules of interpretation articulated in section 114.15(c) come directly from the Court’s analysis in *WRTL* when it found the reasonable interpretation of the advertisements at issue in that case. The Court’s criteria for determining whether an ad lacks or contains indicia of express advocacy were the following:

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

WRTL, 127 S. Ct. at 2667. These are precisely the factors identified in section 114.15(c)(2), and plaintiff's assertion (Br. 23) that they are "peripheral" to the Supreme Court's analysis is belied by the Court's own express words quoted above.¹⁶

The Commission's explanation in section 114.15(c) that it will consider both whether a communication includes indicia of express advocacy and whether it has an interpretation other than as an appeal to vote for or against a candidate to determine, "on balance," whether it is permissible, is entirely consistent with the Supreme Court's own analysis. The Court itself set out the criteria quoted above and, in succeeding paragraphs, analyzed both whether the particular ads at issue included indicia of express advocacy and whether they had a message other than an appeal to vote against a particular Senator. *See WRTL*, 127 S. Ct. at 2667. Thus, contrary to RTAO's accusation, the Commission has not given short shrift to the Court's fundamental test by listing indicia of express advocacy and by indicating that such indicia will be noted in determining a communication's reasonable interpretation. That is precisely what the Supreme Court did in *WRTL*; the fact that the Court did not provide step-by-step instructions for its own mode of analysis is irrelevant.

¹⁶ RTAO argues that the decision in *Leake* somehow supports its position that section 114.15 is void. It does not. *Leake* struck down a state law provision because it relied on open-ended factors such as "[the] essential nature [of the communication], 'the timing of the communication in relation to events of the day,' 'the distribution of the communication to a significant number of registered voters for that candidate's election,' and 'the cost of the communication.'" 525 F.3d at 283-84. These sorts of factors are specifically excluded from consideration under section 114.15(d) ("[T]he Commission may consider only the communication itself and basic background information ..."). RTAO does not question that section 114.15 adheres to the Supreme Court's limited use of context in *WRTL*.

In sum, because section 114.15 adheres closely to the Supreme Court's analysis in *WRTL*, it is not overbroad or vague, and does not exceed the FEC's statutory authority.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

/s/

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FEDERAL ELECTION COMMISSION

999 E Street NW

Washington, DC 20463

Telephone: (202) 694-1650

Fax: (202) 219-0260

* *pro hac vice application pending*

CERTIFICATE OF SERVICE

I hereby certify that I will cause the foregoing to be hand-delivered on the 14th day of August, 2008, to:

Michael Boos
Attorney & Counselor at Law
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030

And I hereby certify that on the 14th day of August, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Michael Boos, michael.boos@gte.net
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4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030

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Debra Jean Prillaman, debra.prillaman@usdoj.gov
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600 East Main Street, Suite 1800
Richmond, VA 23219

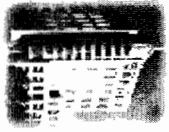
/s/

Audra Hale-Maddox
VA Bar No. 46929
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999 E Street NW

Washington, DC 20463
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ahale-maddox@fec.gov

FEC EXHIBIT 1

Commonwealth of Virginia



State Corporation Commission

WEB#343 CTS 08/11/08
TCP00004 CISM0180 CORPORATE DATA INQUIRY 19:05:15

CORP ID: 0697779 - 7 STATUS: 00 ACTIVE STATUS DATE: 07/24/08
CORP NAME: REAL TRUTH ABOUT OBAMA, THE

DATE OF CERTIFICATE: 07/24/2008 PERIOD OF DURATION: INDUSTRY CODE: 00
STATE OF INCORPORATION: VA VIRGINIA STOCK INDICATOR: N NON-STOCK
MERGER IND: CONVERSION/DOMESTICATION IND:
GOOD STANDING IND: Y MONITOR INDICATOR:
CHARTER FEE: 50.00 CASE NO: CASE STATUS: HEARING DTE:
R/A NAME: JAMES K DISNEY

STREET: 4515 FOREST HILL AVE AR RTN MAIL:
APT 1

CITY: RICHMOND STATE : VA ZIP: 23225 3510
R/A STATUS: 1 DIRECTOR EFF. DATE: 07/24/08 LOC.: 216 RICHMOND CITY
ACCEPTED AR#: 000 00 0000 DATE: ASSESSMENT INDICATOR: 0
CURRENT AR#: 000 00 0000 STATUS: BALANCE TOTAL SHARES
YEAR FEES PENALTY INTEREST TAXES
00

COMMAND:

Enter

Signoff

Help

Print

NOTE: Function Key usage varies depending on the Application Screen.
For specifics, refer to Function Key Documentation.

Commonwealth of Virginia



State Corporation Commission

WEB#343 CIS 08/11/08
TCP000004 CISM1001 OFFICERS/DIRECTORS AND PRINCIPAL OFFICE 19:06:16

CORPORATE ID: 0697779
CORP NAME: REAL TRUTH ABOUT OBAMA, THE CURRENT AR# DATE

STREET:

CITY: STATE: ZIP: DIR REQUIRED: Y

Signoff

OFFICERS/DIRECTORS DISPLAY FOR AR# TITLE SIGN

Help

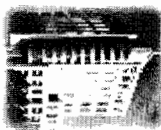
D	KEVIN ALLEN	DIRECTOR	
D	JAMES K DISNEY	DIRECTOR	
D	LAURA ECHEVARRIA	DIRECTOR	

Print

COMMAND:

NOTE: Function Key usage varies depending on the Application Screen.
For specifics, refer to Function Key Documentation.

Commonwealth of Virginia



State Corporation Commission

WEB#343
TCP00004
CISM0190
CORPORATE ACTIVITY SUMMARY
CIS
08/11/08
19:08:14

CORP ID: 0697779 - 7
CORP NAME: REAL TRUTH ABOUT OBAMA, THE
ACTIVITY TYPE: 9999

LINE	TYPE	DESC	STATUS	EFF DATE	SCC FEE	DCN
1	NEW	NEW CHARTER	3 ACCEPTED	07/24/08	75.00	08-07-23-0626

COMMAND:

NOTE: Function Key usage varies depending on the Application Screen.
For specifics, refer to [Function Key Documentation](#).

FEC EXHIBIT 2

Political Organization Notice of Section 527 Status

Part I General Information

1 Name of organization

THE REAL TRUTH ABOUT OBAMA

Employer identification number

26 - 3068430

2 Mailing address (P.O. box or number, street, and room or suite number)

C/O JAMES K DISNEY 4515 FOREST HILL AVE APT 1

City or town, state, and ZIP code

RICHMOND, VA 23225

3 Check applicable box:

Initial notice

Amended notice

Final notice

4a Date established

07/29/2008

4b Date of material change

5 E-mail address of organization

jkdisney@juno.com

6a Name of custodian of records

Barry A Bostrom

6b Custodian's address

Bopp Coleson and Bostrom 1 South 6th Street
Terre Haute, IN 47807 - 3510

7a Name of contact person

Barry A Bostrom

7b Contact person's address

Bopp Coleson and Bostrom 1 South 6th Street
Terre Haute, IN 47807 - 3510

8 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number

C/O JAMES K DISNEY 4515 FOREST HILL AVE APT 1

City or town, state, and ZIP code

RICHMOND, VA 23225

9a Election authority

NONE

9b Election authority identification number

Part II Notification of Claim of Exemption From Filing Certain Forms (see instructions)

10a Is this organization claiming exemption from filing Form 8872, Political Organization Report of Contributions and Expenditures, as a qualified state or local political organization? Yes No

10b If 'Yes,' list the state where the organization files reports:

11 Is this organization claiming exemption from filing Form 990 (or 990-EZ), Return of Organization Exempt from Income Tax, as a caucus or associations of state or local officials? Yes No

Part III Purpose

12 Describe the purpose of the organization

To provide accurate and truthful information about the public policy positions of Senator Barack Obama; To engage in any activities related to federal elections that are authorized by and are consistent with Section 527 of the Internal Revenue Code except that the corporation shall not (a) expressly advocate the election or defeat of any clearly identified candidate for public office, or (b) make any contribution to any candidate for public office.

Part IV List of All Related Entities (see instructions)

13 Check if the organization has no related entities.....✓

14a Name of related entity	14b Relationship	14c Address
----------------------------	------------------	-------------

Part V List of All Officers, Directors, and Highly Compensated Employees (see instructions)

15a Name	15b Title	15c Address
----------	-----------	-------------

Dan Magan Sr	Member, Board of Directors	518 Buck Mountain Road Earlsville, VA 22936
--------------	----------------------------	--

James K Disney	Secretary/Treasurer	C/O JAMES K DISNEY 4515 FOREST HILL AVE APT 1 RICHMOND, VA 23225
----------------	---------------------	---

Laura Echevarria	Vice Chairman	4514 Garfield Court Fredericksburg, VA 22408
------------------	---------------	---

Kevin Allen	Chairman	3001 Emerald Chase Dr Oakhill, VA 20171
-------------	----------	--

Under penalties of perjury, I declare that the organization named in Part I is to be treated as a tax-exempt organization described in section 527 of the Internal Revenue Code, and that I have examined this notice, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I further declare that I am the official authorized to sign this report, and I am signing by entering my name below.

Barry A Bostrom

07/29/2008

Sign Here



Name of authorized official



Date

FEC EXHIBIT 3



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 13, 2006

Benjamin L. Ginsberg, Esq.
Glenn M. Willard, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037-1350

Re: MURs 5511 and 5525
Swift Boat Veterans and POWs for Truth

Dear Messrs. Ginsberg and Willard:

On December 8, 2006, the Federal Election Commission accepted the signed conciliation agreement and civil penalty submitted on your client's behalf in settlement of violations of 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended. Accordingly, the file has been closed in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). Information derived in connection with any conciliation attempt will not become public without the written consent of the respondent and the Commission. See 2 U.S.C. § 437g(a)(4)(B).

Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date. If you have any questions, please contact us at (202) 694-1650.

Sincerely,

Handwritten signatures of Peter G. Blumberg and Julie McConnell.

Peter G. Blumberg
Attorney

Julie McConnell
Attorney

Enclosure
Conciliation Agreement

26044152268

BEFORE THE FEDERAL ELECTION COMMISSION

2006 DEC -4 P 3:46

In the Matter of)	
)	
Swiftboat Veterans and POWs for Truth)	MURs 5511 and 5525
)	

CONCILIATION AGREEMENT

These matters were initiated by signed, sworn, and notarized complaints. The Federal Election Commission ("Commission") found reason to believe that Swiftboat Veterans and POWs for Truth ("SwiftVets") violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) of the Federal Election Campaign Act, as amended, ("the Act") by failing to register as a political committee with the Commission, by failing to report contributions and expenditures as a political committee to the Commission, by knowingly accepting individual contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions. Following an investigation, the Commission concluded that SwiftVets did not unlawfully coordinate its activities with, or make excessive in-kind contributions to, any federal candidate or political party committee.

NOW, THEREFORE, the Commission and SwiftVets, having participated in informal methods of conciliation, prior to a finding by the Commission of probable cause to believe, do hereby agree as follows:

- I. The Commission has jurisdiction over the SwiftVets and the subject matter of this proceeding.
- II. SwiftVets has had a reasonable opportunity to demonstrate that no action should be taken in this matter.
- III. SwiftVets enters voluntarily into this agreement with the Commission.

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IV. The pertinent facts in these matters are as follows:

Applicable Law

1. The Act defines a political committee as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A).

2. The Act defines the term “contribution” as including “anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i); *see also FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation “leaves no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies during the election year,” proceeds from that solicitation are contributions).

3. The Act defines the term “expenditure” as including “anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i).

4. Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” *See* 11 C.F.R. § 100.22(a); *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (“[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally

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less direct than “Vote for Smith” does not change its essential nature.”). Courts have held that “express advocacy also include[s] verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.” *FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976), included the word “support,” in addition to “vote for” or “elect,” on its list of examples of express advocacy communication).

5. The Commission’s regulations provide that express advocacy also includes communications containing an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable minds could not differ as to whether it encourages actions to elect or defeat” a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). Communications discussing or commenting on a candidate’s character, qualifications or accomplishments are considered express advocacy under section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.” *See Explanation and Justification*, 60 Fed. Reg. 35,291, 35,295 (Jul. 6, 1995).

6. The Supreme Court has held that “[t]o fulfill the purposes of the Act” and avoid “reach[ing] groups engaged purely in issue discussion,” only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1975); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“*MCFL*”). It is well-settled that an organization can satisfy *Buckley*’s “major purpose” test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-264; *see also Richey v. Tyson*, 120 F. Supp. 2d 1298, 1310 n.11 (S.D. Ala. 2000). An organization’s “major purpose” may also be established through public statements of purpose. *See, e.g., FEC v.*

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Malenick, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004); *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996).

7. The Act requires all political committees to register with the Commission and file a statement of organization within ten days of becoming a political committee, including the name, address, and type of committee; the name, address, relationship, and type of any connected organization or affiliated committee; the name, address, and position of the custodian of books and accounts of the committee; the name and address of the treasurer of the committee; and a listing of all banks, safety deposit boxes, or other depositories used by the committee. *See* 2 U.S.C. § 433.

8. Each treasurer of a political committee shall file periodic reports of the committee's receipts and disbursements with the Commission. *See* 2 U.S.C. § 434(a)(1). In the case of committees that are not authorized committees of a candidate for Federal office, these reports shall include, *inter alia*, the amount of cash on hand at the beginning of the reporting period, *see* 2 U.S.C. § 434(b)(1); the total amounts of the committee's receipts for the reporting period and for the calendar year to date, *see* 2 U.S.C. § 434(b)(2); and the total amounts of the committee's disbursements for the reporting period and the calendar year to date. *See* 2 U.S.C. § 434(b)(4).

9. The Act states that no person shall make contributions to any political committee that, in the aggregate, exceed \$5,000 in any calendar year, with an exception for political committees established and maintained by a state or national political party. *See* 2 U.S.C. § 441a(a)(1)(C). Further, the Act states that no political committee shall knowingly accept any contribution in violation of the limitations imposed under this section. *See* 2 U.S.C. § 441a(f).

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10. Pursuant to 2 U.S.C. § 441b(a), it is unlawful for any political committee to knowingly accept or receive, directly or indirectly, any contribution made in connection with a federal election from a corporation.

11. Under certain circumstances, organizations established under I.R.C. § 527 may not qualify as political committees. There is substantial overlap in the content of disclosures required of such Section 527 organizations and the disclosures required of political committees, although they differ in format, timing and level of detail. Unlike a political committee, which must register and file reports with the Commission, a Section 527 organization may avoid disclosing certain receipts to the IRS if it pays the highest corporate tax rate on such funds. SwiftVets, however, maintains that it did not avail itself of this provision and disclosed all of its receipts. In addition, an organization that does not trigger political committee status may accept contributions larger than \$5,000 and accept (for limited purposes) funds from corporate or union sources.

Factual Background

12. SwiftVets is an unincorporated entity organized under Section 527 of the Internal Revenue Code, and it filed its Notice of 527 Status with the IRS on April 23, 2004. SwiftVets has not registered as a political committee with the Federal Election Commission, but filed public reports of its receipts and disbursements with the IRS, and also filed reports as to some of its receipts and disbursements with the Commission under the electioneering communications provisions of the Act.

13. SwiftVets contends that its 2004 activities were intended to set the record straight with regard to the public discussion of John Kerry's conduct in, and statements about, the Vietnam War, particularly Mr. Kerry's statements about the conduct of those who fought in

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Vietnam, and the declaration that he was "reporting for duty" in connection with his 2004 Presidential campaign. SwiftVets engaged in no activities prior to it becoming apparent that John Kerry would be the Democratic Party's nominee for President of the United States in Spring 2004, and also engaged in no political activities after John Kerry lost the Presidential election in November 2004, which it contends was because it had made its point on the issue of concern at the time it was the focus of public debate.

14. During the 2004 election cycle, SwiftVets raised \$25,080,796. As discussed below, most if not all of the solicitations for such funds made reference to Mr. Kerry's 2004 Presidential campaign. SwiftVets contends that a majority of its receipts came from 155,000 separate individual contributions from small grassroots donors, at an average of \$124 each. The remaining SwiftVets receipts came from large individual donors or corporations. SwiftVets also maintains that its \$715,050 in receipts from corporations constituted a relatively small percentage of its overall revenues, and that these were placed in a segregated account for administrative purposes and not used to make electioneering communications under the Act.

15. During the 2004 cycle, SwiftVets spent \$19,304,642 for 12 television advertisements that were broadcast in the Presidential election battleground states of Colorado, Florida, Minnesota, Nevada, New Mexico, Ohio, Pennsylvania, Tennessee, Wisconsin, and West Virginia, as well as in the District of Columbia and on national cable television stations, such as CNN and the History Channel. All of these advertisements attacked the character, qualifications, and fitness for office of Senator John Kerry, the Democratic Presidential nominee. Excerpts from several of these advertisements include:

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Any Questions?

John Kerry has not been honest.

And he lacks the capacity to lead.

When the chips are down, you could not count on John Kerry.

...

I served with John Kerry ... John Kerry cannot be trusted.

Why?

How can you expect our sons and daughters to follow you, when you condemned this fathers and grandfathers?

Why is this relevant?

Because character and honor matter. Especially in a time of war.

John Kerry cannot be trusted.

Never Forget (a/k/a Other Hand)

John Kerry gave aide [*sic*] and comfort to the enemy by advocating their negotiating points to our government.

Why is it relevant? Because John Kerry is asking us to trust him.

I will never forget John Kerry's testimony. If we couldn't trust John Kerry then, how could we possibly trust him now?

Friends

Even before Jane Fonda went to Hanoi to meet with the enemy and mock America, John Kerry secretly met with enemy leaders in Paris.

...

Eventually, Jane Fonda apologized for her activities, but John Kerry refuses to.

In a time of war, can America trust a man who betrayed his country?

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Medals

Symbols. They represent the best things about America.

Freedom ... Valor ... Sacrifice.

Symbols, like the heroes they represent, are meant to be respected.

Some didn't share that respect ... and turned their backs on their brothers.

...

How can the man who renounced his countries [*sic*] symbols now be trusted?

16. SwiftVets also spent \$1,120,881.09 for mailers sent to households in Presidential election battleground states. The first mailer accused Senator Kerry of "dishonoring" and "demoralizing" his fellow soldiers and of "aiding and abetting the enemy" by secretly meeting with North Vietnamese officials, and concluded,

Why is John Kerry's Betrayal Relevant Today? Because character and trust are essential to leadership, especially in a time of war. A man who so grossly distorts his military record, who betrays his fellow soldiers, who endangers our soldiers and sailors held captive, who secretly conspires with the enemy, who so brazenly mocks the symbols of sacrifice of our servicemen ... all for his own personal political goals ... has neither the character nor the trust for such leadership. **JOHN KERRY CANNOT BE TRUSTED.** If we couldn't trust John Kerry then, how could we possibly trust him now?

The second mailer listed "Four reasons why John Kerry is unfit for command," claiming Kerry (1) "lied to the American people about his service record in Vietnam," (2) "betrayed his fellow soldiers when he charged them with war crimes," (3) "lost the respect of the men he served with by throwing away his medals – America's symbols of valor and sacrifice," and (4) "betrayed America by assisting North Vietnamese Communists and extreme leftist radicals." This mailer

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concluded by stating, "We're not debating Vietnam, it's about John Kerry's character, he betrayed us in the past, how do we know he won't do it again?"

17. SwiftVets spent \$39,140.91 for a newspaper advertisement in the St. Louis Post Dispatch for a two-day period coinciding with the 2004 Presidential debate held in St. Louis, Missouri. This advertisement features photographs of Kerry and Jane Fonda, and, after raising questions about Kerry's postwar activities, the advertisement asks in bold type "WHY IS THIS RELEVANT? Because in a time of War – America needs a man that can be trusted to make the right decisions. JOHN KERRY CANNOT BE TRUSTED."

SwiftVets' Contributions

18. The Commission concludes that language used in various SwiftVets fundraising solicitations that made reference to Senator Kerry's 2004 Presidential campaign clearly indicated that the funds received would be targeted for the defeat of Senator Kerry. SwiftVets contends that its solicitations indicated that the funds would be utilized to discuss John Kerry's conduct in and statements about the Vietnam War and those who fought in it, and to respond to his statements about these issues in order to present an accurate record.

19. SwiftVets made a direct mail solicitation to potential donors in September and October 2004, which stated,

[W]e plan to make sure every American is aware of how John Kerry is misrepresenting his record and ours in Vietnam... ...and to demonstrate why he is clearly unfit for command.... The truth is that the man whose entire Presidential campaign is based on his experience in Vietnam, used highly suspicious personal injuries to cut his tour of duty to a mere four months.... All of this makes it clear to us that Mr. Kerry is clearly unfit for command of the armed forces of the United States!... [N]ow that a key creator of that poisonous image – John Kerry – is seeking to be Commander-in-Chief of the United States we have resolved to end our silence

and set the record straight. Your gift will help us do that by ensuring our message stays on TV.

SwiftVets received total income of \$2,020,286.10 in response to three mailings of this solicitation, netting \$1,489,683.89.

20. SwiftVets also made e-mail and Internet fundraising solicitations. One such e-mail solicitation, dated September 8, 2004, stated,

I would like to extend my sincere and personal gratitude for your generous contribution to Swift Boat Veterans for Truth. I am sure you have seen the impact your contribution has had on the public discussion surrounding Senator Kerry's fitness for duties as Commander-in-Chief... John Kerry's campaign – aided by a sympathetic media – has responded to our work by evading our criticisms and turning up the volume on their attacks... You have already done so much, but I'm here now to ask you to help once more. We are at a critical point in this effort and we must keep our ads – including some new ones which I think you'll really appreciate – on the airwaves in key battleground states. We are up against the big guns, and we now need to make sure they can't drown us out... You can lend us a hand, as well, by passing this information on to other friends you think might be interested in helping us tell the true story of John Kerry.

SwiftVets' Third Quarter 2004 Report to the IRS includes approximately 509 contributions to SwiftVets on September 8, 2004, and approximately 554 contributions to SwiftVets on September 9, 2004. These contributions totaled substantially more than \$1,000.

21. The Commission concludes that all funds received in response to various solicitations, including those set forth above, constituted contributions under the Act, that SwiftVets received more than \$1,000 in contributions by no later than May 2004, and that SwiftVets accepted more than \$12.5 million in individual contributions in excess of the \$5,000 limit and \$715,050 in prohibited corporate contributions. *See* 2 U.S.C. § 431(4)(A).

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22. SwiftVets contends that it made all of its fundraising communications with the good faith belief that they did not constitute solicitations for contributions under 2 U.S.C. § 431(8)(A)(i).

SwiftVets' Expenditures

23. The Commission concludes that SwiftVets made more than \$1,000 in expenditures for fundraising communications and communications to the general public that expressly advocated the defeat of a clearly identified federal candidate, Senator John Kerry. SwiftVets contends that these communications sought to discuss John Kerry's conduct in and statements about the Vietnam War and those who fought in it.

24. The Commission concludes that SwiftVets' fundraising letters unmistakably exhort the recipients to contribute funds to prevent Kerry from becoming President. In one fundraising appeal, SwiftVets stated,

All of this makes it clear to us that Mr. Kerry is clearly unfit for command of the armed forces of the United States!... Which is why I have sent you this letter. And why I hope I can count on you to send back a special gift of \$25, \$35, \$50, \$75, \$100 or more to Swift Boat Veterans for Truth.

The Commission concludes that SwiftVets fundraising communications, such as the example above, constitute express advocacy under 11 C.F.R. § 100.22(a) because it references an election and specific candidates, and it advocates action – in this case contributing funds – designed to lead to the candidate's defeat in the election. The Commission concludes that costs associated with the various fundraising appeals that contained express advocacy exceeded \$1,000.

25. SwiftVets spent \$9,477,999 on five television advertisements, "Any Questions," "Why?" "Never Forget (a/k/a Other Hand)," "Friends," and "Medals," that the Commission concludes expressly advocated the defeat of Senator John Kerry. The television

advertisements were broadcast shortly before the 2004 Presidential Election, explicitly challenge Senator Kerry's "capacity to lead," assert that he cannot be "trusted," and ask why citizens should be willing to "follow" him as a leader. The Commission concludes that, speaking to voters in this context, the advertisements unambiguously refer to Senator Kerry as a Presidential candidate by discussing his character, fitness for office, and capacity to lead, and have no other reasonable meaning than to encourage actions to defeat him. *See* 11 C.F.R. § 100.22(b); *Explanation and Justification*, 60 Fed. Reg. at 35,295.

26. SwiftVets spent \$1,120,881.09 for two mailers that the Commission concludes expressly advocated John Kerry's defeat in the 2004 election. Both mailers comment on Kerry's character, qualifications and accomplishments and the Commission concludes that, in context, they have no other reasonable meaning than to encourage actions to defeat Senator Kerry. Senator Kerry, the recipient is told, lacks an essential requirement to lead in a time of war – he "cannot be trusted" and is "unfit for command." Thus, the Commission concludes that the only manner in which the reader can act on the message that "Kerry cannot be trusted" is to vote against him in the upcoming election. *See* 11 C.F.R. § 100.22(b).

27. SwiftVets paid \$39,140.91 to place a newspaper advertisement in the St. Louis Post Dispatch. The ad featured photos of John Kerry and Jane Fonda, raised questions about Kerry's "betrayal," and asked in bold type, "WHY IS THIS RELEVANT? Because in a time of War – America needs a man that can be trusted to make the right decisions. JOHN KERRY CANNOT BE TRUSTED." The Commission concludes that, here, the "man" that "America needs" "in a time of war" can only mean "the President," and the reader is to understand that Kerry cannot be trusted to make the right decisions as the country's president in a time of war. The Commission concludes that the only action a voter exposed to this

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advertisement could take to ensure that America gets a “man that can be trusted to make the right decisions” is to vote against Kerry.

28. The Commission concludes that all of these communications comment on Senator Kerry’s character, qualifications, and fitness for office, explicitly link those charges to his status as a candidate for President, and have no other reasonable meaning than to encourage actions to defeat Senator Kerry. Therefore, because the Commission concludes that the communications are “unmistakable, unambiguous, and suggestive of only one meaning” and because reasonable minds cannot differ that the communications urge Kerry’s defeat, the Commission concludes that they are express advocacy as defined at 11 C.F.R. § 100.22(b). Accordingly, the Commission concludes that SwiftVets made expenditures in excess of \$1,000, surpassing the statutory threshold for political committee status. *See* 2 U.S.C. § 431(4)(A).

29. The Commission states that in the thirty years since the enactment of the relevant provisions of the Act and the Supreme Court’s decision in *Buckley*, *see supra* paras. IV.1-6, the definition of express advocacy and the prerequisites for political committee status have been addressed in Supreme Court and lower court opinions, Commission regulations, advisory opinions, and enforcement actions. This includes the “major purpose” test, which serves as a constitutional limit in determining whether an organization is a political committee. The Commission states that it has been applying these principles for many years, and it will continue to do so in the future. *See* Explanation and Justification, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004).

30. Notwithstanding the foregoing paragraph 29, SwiftVets contends that their referenced communications were intended to respond to statements by John Kerry on the issue of his conduct in, and his statements about, the Vietnam War and those who fought in it. SwiftVets

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further maintains that it made all of its communications with the good faith belief that the communications did not contain express advocacy or constitute expenditures under 2 U.S.C. § 431(9)(A)(i), and that its expenditures were properly and in good faith publicly disclosed under I.R.C. § 527. While the Commission disagrees with its reasoning, SwiftVets contends that it was uncertain as to the continued validity and application of the alternative express advocacy test set forth in 11 C.F.R. § 100.22(b) because of: (1) SwiftVets' understanding of the First and Fourth Circuit court decisions holding 11 C.F.R. § 100.22(b) unconstitutional; (2) SwiftVets' understanding of the Commission's history of not relying on 11 C.F.R. § 100.22(b) in recent enforcement matters; (3) SwiftVets' understanding of the division on the Commission in voting whether to initiate a rulemaking to revise or repeal 11 C.F.R. § 100.22(b); and (4) SwiftVets' understanding of the Commission's decision in 2004 not to issue specific regulation regarding the political committee status of 527 organizations whose major purpose was the nomination or election of Federal candidates (May 13, 2004), and its September 27, 2001 decision to hold in abeyance a rulemaking to revise the definition of "expenditure" and to promulgate a definition for the "major purpose" test.

SwiftVets' Major Purpose

31. The Commission concludes that SwiftVets' statements and activities demonstrate that its major purpose was to defeat John Kerry. *See* Paragraphs IV.12-IV.30. SwiftVets contends that its purpose was to discuss John Kerry's conduct in, and statements about their service in, the Vietnam War and what they believed to be a more accurate record of this issue.

32. In a document distributed to a limited number of prospective donors by a SwiftVets fundraiser, SwiftVets stated,

GOAL

Prevent John Kerry from becoming Commander-in-Chief....

STRATEGY

Dramatize for key elements of the American public what Kerry did and why he is unfit to be Commander-in-Chief....

TACTICS

Train, equip and deploy the Swift Boat Vets who can speak with unique credibility.... *We Will Conduct Such An Aggressive, Passionate Effort That The American People Will Reject John Kerry As A Liar And A Fraud....*

FUNDING

Large gifts: the Swift Boat vets ability to reach the American people depends on large gifts from individuals who understand the potent message they carry and why John Kerry must be stopped from being Commander-in-Chief....

33. In addition, SwiftVets made other statements that the Commission concludes establish that its major purpose was to defeat John Kerry. For example, during the 2004 election, its website showed a picture of Kerry and stated, “[O]f the 19 veterans pictured with Kerry, only THREE actually support him for president. 12 now state that Kerry is ‘UNFIT to be Commander-in-Chief.’” Also, a letter signed by the Chairman of SwiftVets thanking a large donor for a \$100,000 contribution stated,

We will do our utmost to assure this timely donation will be expended directly and prudently in our quest to derail Senator Kerry’s well organized and funded campaign to become the Commander in Chief of the United States Armed Forces. We are adamantly opposed to the political self serving ambitions of this man who betrayed us in 1971.

Finally, On August 6, 2004, a Steering Committee member was asked on a news program whether SwiftVets’ advertisements were produced and made to influence the Presidential election and responded, “Yes, of course.”

34. In its fundraising solicitations, SwiftVets referred repeatedly to efforts to demonstrate that John Kerry is “unfit to be Commander-in-Chief of the United States” through advertisements targeted to battleground states. Consistent with these statements, the funds

donated to SwiftVets paid for advertisements and direct mail pieces that were focused on states such as Ohio, Pennsylvania, Florida, Nevada, New Mexico, Colorado, Minnesota, West Virginia, Wisconsin and Tennessee. SwiftVets contends that it targeted these states because it believed people were paying the closest attention to John Kerry's conduct in, and statements about, the Vietnam War and those who fought in it.

35. SwiftVets spent \$20,464,664, or approximately 91 percent of its reported disbursements, on television and print advertisements and direct mail pieces attacking Senator John Kerry or expressly advocating his defeat.

36. Since the 2004 election, SwiftVets has effectively ceased active operations. It has added no new content to its website, no longer solicits contributions, and has limited its disbursements primarily to legal and administrative costs, as well as charitable contributions to veteran-related charities.

37. SwiftVets contends that it operated under the good faith belief that it had not triggered political committee status in 2004, and that it fulfilled the applicable regulatory requirements via public disclosure to the IRS of its overall receipts and disbursements under I.R.C. § 527, and contemporaneous disclosure to the Commission of its electioneering communications. Indeed, the Commission has never alleged that the SwiftVets acted in knowing defiance of the law, or with the conscious recognition that their actions were prohibited by law, made no findings or conclusions that there were any knowing and willful violations of the law in connection with this matter, and, thus, does not challenge SwiftVets' assertion of its good faith reliance on its understanding of the law.

V. Solely for the purpose of settling this matter expeditiously and avoiding litigation, without admission with respect to any other proceeding, and with no finding of probable cause by

the Commission, SwiftVets agrees not to contest the Commission's conclusions, as stated herein, that it violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) of the Act by failing to register and report as a political committee with the Commission, by knowingly accepting individual contributions in excess of \$5,000, and by knowingly accepting corporate contributions.

VI. SwiftVets states that, upon completing its obligations under this Agreement, it intends to cease operations as an IRC Section 527 organization and to donate the remainder of its funds to a charity supporting the families of U.S. servicemen and servicewomen killed or wounded in the War in Iraq. Pursuant to this Agreement, SwiftVets agrees to do the following:

1. SwiftVets will pay a civil penalty to the Federal Election Commission in the amount of \$299,500 pursuant to 2 U.S.C. § 437g(a)(5)(A).

2. SwiftVets will cease and desist from violating 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee, and will cease and desist from violating 2 U.S.C. § 441(a)(f) by accepting individual contributions in excess of the limits set forth in the Act. SwiftVets states that it has no present intention to accept contributions or to make expenditures as defined by the Act, and will register and report to the Commission if it should engage in activities that the Commission has concluded would trigger Federal political committee status in connection with future elections.

3. SwiftVets will submit to the FEC copies of its Form 8872 reports previously filed with the Internal Revenue Service for activities from January 1, 2004 until December 31, 2004, supplemented with the additional information that Federal political committees are required to include on page 2 of the Summary Page of Receipts and Disbursements of FEC Form 3X.

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VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.


X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

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FOR THE COMMISSION:

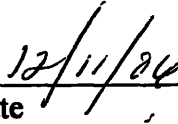
Lawrence H. Norton
General Counsel

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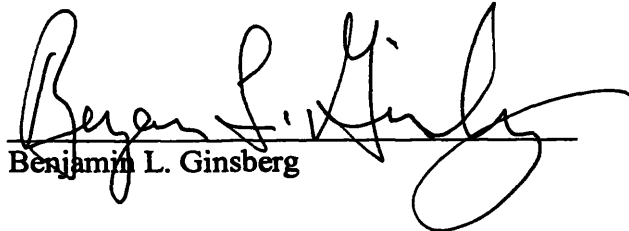

Rhonda J. Vosdingh

Associate General Counsel
for Enforcement

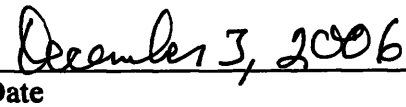
Date


12/11/06

FOR THE RESPONDENT:


Benjamin L. Ginsberg

Date


December 3, 2006

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FEC EXHIBIT 4

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BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of)
) MUR 5440
The Media Fund)

CONCILIATION AGREEMENT

This matter was initiated by three signed, sworn, and notarized complaints.¹ The Federal Election Commission ("Commission") found probable cause to believe that The Media Fund ("TMF" or "Respondent") violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting individual contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions.

NOW, THEREFORE, the Commission and the Respondent, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

- I. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding.
- II. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.
- III. Respondent enters voluntarily into this agreement with the Commission.
- IV. The pertinent facts in this matter are as follows:

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OFFICE OF GENERAL
COUNSEL

¹ The Commission merged allegations as to The Media Fund from MURs 5403 and 5427 into MUR 5440.

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Applicable Law

1. The Act defines a political committee as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A).

2. The Act defines the term “contribution” as including “anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i); *see also FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation “leaves no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not simply to criticize his policies during the election year,” proceeds from that solicitation are contributions).

3. The Act defines the term “expenditure” as including “anything of value ... made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i).

4. Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” *See* 11 C.F.R. § 100.22(a); *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (“*MCFL*”) (“[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this

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message is marginally less direct than “Vote for Smith” does not change its essential nature.”). Courts have held that “express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.” *FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976), included the word “support,” in addition to “vote for” or “elect,” on its list of examples of express advocacy communication).

5. The Commission’s regulations further provide that express advocacy also includes communications containing an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and about which “[r]easonable minds could not differ as to whether it encourages actions to elect or defeat” a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). “Communications discussing or commenting on a candidate’s character, qualifications or accomplishments are considered express advocacy under ... section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.” *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995).

6. The Supreme Court has held that “[t]o fulfill the purposes of the Act” and avoid “reach[ing] groups engaged purely in issue discussion,” only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See, e.g., Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. It is well-settled that an organization can satisfy *Buckley*’s “major purpose” test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-4; *see also Richey v. Tyson*, 120 F. Supp. 2d 1298, 1310 n.11 (S.D. Ala. 2002).

An organization's "major purpose" may also be established through public statements of purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004), *rev'd in part on other grounds, on reconsideration*, 2005 WL 588222 (D.D.C. Mar. 7, 2005); *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996).

7. The Act requires all political committees to register with the Commission and file a statement of organization within ten days of becoming a political committee, including the name, address, and type of committee; the name, address, relationship, and type of any connected organization or affiliated committee; the name, address, and position of the custodian of books and accounts of the committee; the name and address of the treasurer of the committee; and a listing of all banks, safety deposit boxes, or other depositories used by the committee. *See* 2 U.S.C. § 433.

8. Each treasurer of a political committee shall file periodic reports of the committee's receipts and disbursements with the Commission. *See* 2 U.S.C. § 434(a)(1). In the case of committees that are not authorized committees of a candidate for Federal office, these reports shall include, *inter alia*, the amount of cash on hand at the beginning of the reporting period, *see* 2 U.S.C. § 434(b)(1); the total amounts of the committee's receipts for the reporting period and for the calendar year to date, *see* 2 U.S.C. § 434(b)(2); and the total amounts of the committee's disbursements for the reporting period and the calendar year to date. *See* 2 U.S.C. § 434(b)(4).

9. The Act states that no person shall make contributions to any political committee that, in the aggregate, exceed \$5,000 in any calendar year, with an exception for political committees established and maintained by a state or national political party. *See*

27044181357

2 U.S.C. § 441a(a)(1)(C). Further, the Act states that no political committee shall knowingly accept any contribution in violation of the limitations imposed under this section. See 2 U.S.C. § 441a(f).

10. Pursuant to 2 U.S.C. § 441b(a), it is unlawful for any political committee knowingly to accept or receive, directly or indirectly, any contribution made in connection with a federal election from a corporation or a labor organization.

Factual Background

11. TMF is an unincorporated entity organized under Section 527 of the Internal Revenue Code. TMF filed its Notice of 527 Status with the Internal Revenue Service on November 5, 2003.

12. TMF has not registered as a political committee with the Commission.

13. From its inception through 2004, TMF raised \$59,414,183. While TMF received substantial sums from small individual donors, approximately 93% of its receipts during that time period—over \$55 million—came from labor organizations (or corporations) and individuals who gave in amounts that exceeded the \$5,000 limit established under the Act for contributions to political committees.

14. TMF received the majority of its funds (\$44,475,000) through a joint fundraising committee, Joint Victory Campaign 2004 (“JVC”), in which TMF and America Coming Together participated. JVC received contributions from individuals in excess of \$5,000 and it also received labor and corporate contributions. The Commission determined that approximately 85% of the funds that JVC transferred to TMF were in excess of \$5,000 and 6% of those funds were from corporate and labor sources.

27044181358

15. TMF disbursed \$57,637,115 from its inception through 2004. TMF spent approximately \$53,389,856 – or more than 92% of its reported disbursements during that time period – on 37 television advertisements, 24 radio advertisements, nine newspaper advertisements, and 20 mailers that reference President George Bush or Senator John Kerry in the context of the 2004 Presidential election. TMF broadcast or disseminated some of these communications in “battleground states,” including Florida, Missouri, Nevada, New Hampshire, Ohio, Pennsylvania, Wisconsin, and West Virginia.

16. TMF contends that its 2004 activities consisted of issue advocacy relating to the 2004 election cycle. TMF’s communications centered on pertinent social and public policy issues, such as the economy, unemployment, poverty, education, health care, prescription drugs, government special interests and fuel prices.

17. According to IRS reports and electioneering communications reported filed with the Commission, from January 1, 2005 through December 31, 2006, TMF raised \$1,020,000 and spent \$1,985,044.

TMF’s Contributions

18. The Commission concludes that the language used in fundraising solicitations sent by TMF or its joint fundraising committee, JVC, preceding the 2004 election clearly indicated that the funds received would be targeted to the election or defeat of a specific federal candidate. TMF contends that its solicitations indicated that the funds would be utilized to further the national discussion of issues relevant to the 2004 election cycle.

19. Some TMF solicitations to potential donors made it clear that the funds received would be used to sponsor advertisements depicting George Bush in “battleground

27044181359

states” that would decide the upcoming presidential election. TMF touted its ongoing advertising campaigns as the basis for polls reflecting decreased public support for George Bush in these “battleground states.”

20. TMF’s former president, Harold Ickes, made direct solicitations to donors, most of which were made from joint fundraising solicitations with America Coming Together (that had a federally registered political committee). Some solicitations included slides containing messages such as “Bush can be beaten,” “The Race for 270; The fight for the White House is a state-by-state battle,” “270 Electoral Votes (Evs) Needed to Win, and “17 Key States Will Decide the 2004 Election.” The presentation also outlined TMF’s “17 state media plan” which was “[t]imed to counter Bush onslaught . . .” and indicated that TMF intended to “challenge Bush: trust, competence, economy, and other issues”

21. In addition to the general efforts of TMF to raise funds, TMF made specific solicitations to certain individuals in which it highlighted the effectiveness of its ads, as well as its overall advertising efforts, in depressing public support for Bush and increasing public support for Kerry. For example, one solicitation noted that the polls “found Bush’s job performance among swing voters fall in the states where TMF was advertising” and stated that during this “critical” time period, “TMF and [its] allies made a significant impact ensuring a Democratic message was on the airwaves at competitive levels.”

22. The Commission concludes that the fundraising efforts of JVC—premiered mainly on solicitations that only identified presidential candidates—also produced “contributions” to TMF. JVC began raising funds in November 2003, and one of its solicitation documents explained “to potential donors what The Media Fund was and the need for it and,

ultimately the groundwork for asking them to support it financially.” This fundraising document, entitled “The Media Fund; Victory Campaign 2004; A Strategic Plan for Winning,” contains the following messages: “Without the aggregated resources of The Media Fund, the Democrats simply will not be competitive in this pre-convention period” and “17 states will decide who takes the oath of office for President in January 2005.”

23. In response to specific solicitations from TMF’s former president, Harold Ickes, which, the Commission concludes, indicated that the funds received would be targeted to the defeat of George Bush, certain donors gave funds to TMF through JVC as part of a fundraising “challenge” where donors agreed to donate \$20 million to TMF on the condition that a collection of labor organizations gave the same amount. For example, in a letter forwarded to potential donors, Mr. Ickes enclosed a polling report in that letter and noted that “the fact that Kerry is dead even with Bush in these [17 battleground states] and now leads with Independents by 7 points, after trailing Bush with them, speaks to the effectiveness of the combined paid media programs of TMF and AFL-CIO.”

24. The Commission concludes that all funds received in response to these solicitations constituted contributions under the Act and caused TMF to surpass the \$1,000 statutory threshold by December 2003. *See* 2 U.S.C. § 431(4)(A). TMF subsequently accepted more than \$46 million in individual contributions in excess of the \$5,000 limit and more than \$9 million in labor or corporate contributions.

25. TMF contends that it made all its fundraising communications with the good faith belief that they did not constitute solicitations for contributions under 2 U.S.C.

27044181361

§431(8)(A)(i), and that FEC regulations allow joint fundraising between federal political committees and non-federal entities.

TMF's Expenditures

26. The Commission concludes that TMF expended more than \$1,000 for certain communications to the general public that expressly advocated the defeat of a clearly identified federal candidate, George Bush. These advertisements attacked the character, qualifications, and fitness for office of George Bush, or supported the character, qualifications, and fitness for office of John Kerry. TMF contends that these communications sought to discuss pertinent social and policy issues relevant to the 2004 election cycle. Examples of these communications appear below.

27. TMF spent more than \$1,000 for the following mailers that depicted or referred to George Bush or John Kerry in the context of the 2004 election:

- The "Education Mailer" addresses rising college tuition costs and states in boldtype: "John Kerry Wants Every Child To Be Able To Afford A College Education And Live The American Dream." The accompanying text addresses John Kerry's plan for the "American Dream," declaring: "We need a President who encourages pursuit of the American Dream instead of dashing these hopes. John Kerry will make college affordable for every American."
- The "Health Care Mailer" describes details of the Kerry-Edwards health care plan and announces in large-font text: "George W. Bush and Dick Cheney have NO PLAN to lower health care costs." The juxtaposition of the candidates' health care initiatives is followed with the tagline: "For Florida's Families. The Choice is Clear."
- The "Military Service Mailer" states, "These Men Could Have Served In Vietnam, But Didn't" (next to pictures of George Bush and Dick Cheney). The ad references Kerry's military service stating that it provides him a "unique perspective on decisions about sending our children into combat and caring for them when they return and when they retire." The mailer links Kerry's 30-year old military record to today's events by stating: "Vietnam was a long time ago. Some say it's not important now, while others must think it is...."

27044181362

28. TMF spent more than \$1,000 on broadcast advertisements that depicted George Bush or John Kerry in the context of the 2004 election, an example of which includes the following text and imagery:

“Stand Up”

This 30-second television ad, features a screen image of Kerry accompanied by a voiceover stating,

Only a man who stands up to his government can truly lead.

John Kerry fought and bled in the Vietnam War. He fought side by side with brothers who could not get out of the draft because they didn't have a rich father like George W. Bush.

The ad concludes with the statement: “You better wake up before you get taken out.”

29. The Commission concludes that all of these communications comment on George Bush's character, qualifications, and fitness for office, explicitly link those charges to his status as a candidate for President, and have no other reasonable meaning than to encourage actions to defeat George Bush. Therefore, because the Commission concludes that the communications are “unmistakable, unambiguous, and suggestive of only one meaning” and because reasonable minds cannot differ that the communications urge Bush's defeat, they are express advocacy as defined at 11 C.F.R. § 100.22(b).

30. Furthermore, the Commission concludes that one of these communications, the “Education Mailer” also contains express advocacy under 11 C.F.R. § 100.22(a) because it refers to the “need” for a particular kind of President, followed by identification of John Kerry as that type of candidate.

27044181363

31. As a result of these communications, the Commission concludes that TMF made expenditures in excess of the \$1,000 statutory threshold for political committee status. See 2 U.S.C. § 431(4)(A).

32. TMF contends that the communications described above centered upon important policy issues. TMF further contends that it made all of its communications with the good faith belief that the communications did not contain express advocacy or constitute expenditures under 2 U.S.C. §431(9)(A)(i), and that its expenditures were properly and in good faith publicly disclosed under I.R.C. §527. TMF contends that it predicated this belief on their understanding, informed by legal advice, of the legal definition and scope of “express advocacy” under Supreme Court and other appellate case law and the Commission’s regulatory and enforcement policies and practices regarding “express advocacy.”

33. Furthermore, TMF contends that to the extent that its communications referred to a clearly identified federal candidate, it used only individual funds and filed electioneering reports with the Commission.

TMF’s Major Purpose

34. The Commission concludes that TMF’s statements and activities demonstrate that its major purpose was to elect John Kerry and defeat George Bush. From its inception, TMF presented itself to donors as a destination for “soft money” that the DNC no longer could accept, but which TMF could use to support the Democratic presidential nominee. TMF proclaimed that, “Under the new law, the DNC ... will not be able to raise enough money to pay for sufficient media in 2004 to make an impact. Without the aggregated resources of The Media Fund, the Democrats simply will not be competitive in this pre-convention period.”

27044181364

35. The Commission concludes that the focus of TMF was on running advertisements in the “17 key states” considered to be battleground states in the 2004 Presidential election. TMF noted that these “17 states will decide who takes the oath of office for President in January 2005.” It argued that

The key to winning enough of these 17 battleground states will be the turnout of Democratic base constituencies ... and, very importantly, the ability to identify the key swing votes who are open to persuasion to vote Democratic. Figuring out the effective issue messages that will move these swing votes [sic] and delivering those messages between March and late August, before the race is defined by the Bush campaign, is critical to the outcome of the 2004 race.

TMF’s fundraising presentations explicitly cited the goal of reaching “270 electoral votes” for the Democratic Presidential nominee.

36. The Commission concludes that TMF’s communications to the public further establish its major purpose of federal campaign activity—specifically the defeat of George Bush. The vast majority of TMF’s advertisements—34 out of 36 television advertisements, 20 out of 24 radio advertisements, and 26 out of 29 print advertisements—mention either George Bush or John Kerry. Moreover, not one of TMF’s advertisements mentions any candidates other than the presidential and vice-presidential contenders in the 2004 general election. TMF’s self-proclaimed goal in producing and running these advertisements was to decrease public support for Bush and to increase public support for Kerry.

37. TMF contends that it operated under a good faith belief that it had not triggered political committee status. The Commission has never alleged that TMF acted in knowing defiance of the law, or with the conscious recognition that its actions were prohibited by law, made no findings or conclusions that there were knowing and willful violations of the law in

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connection with this matter and, thus, does not challenge TMF's assertion of their good faith reliance on their understanding of the law.

V. Solely for the purpose of settling this matter and avoiding litigation costs, without admitting or denying each specific basis for the Commission's findings above, Respondent agrees not to contest the Commission's conclusion that Respondent violated the Act in the following ways:

1. TMF violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee.
2. TMF violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000 and 2 U.S.C. § 441b(a) by knowingly accepting labor or corporate contributions.

VI. Respondent will cease and desist from violating 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee. Respondents will cease and desist from violating 2 U.S.C. §§ 441a(f) and 441b(a) by accepting contributions in excess of the limits as set forth in the Act or from prohibited sources. Respondent will provide an executed copy of this agreement to each of its current and former officers, principals, agents, representatives, successors, and assigns, and certify in writing to the Commission that it has complied with this requirement, including identifying each individual that Respondent has provided with an executed copy of the Agreement.

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VII. Respondent will pay a civil penalty to the Federal Election Commission in the amount of Five Hundred and Eighty Thousand Dollars (\$580,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VIII. Respondent will register with the Commission as a political committee. TMF will submit to the FEC copies of its Form 8872 reports previously filed with the Internal Revenue Service for activities from January 1, 2004 through the present, supplemented with the additional information that Federal political committees are required to include on page 2 of the Summary Page of Receipts and Disbursements of FEC Form 3X.

IX. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia..

X. This agreement resolves all matters that relate to the activities of The Media Fund arising from MUR 5440 and, except as provided in Section IX of the agreement, no further inquiry or action will be taken by the FEC regarding the matters described herein.

XI. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

XII. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

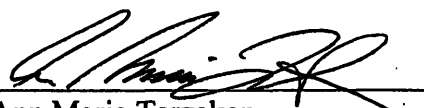
XIII. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

27044181368

MUR 5440 (The Media Fund)
Conciliation Agreement


FOR THE COMMISSION:

Thomasenia P. Duncan
General Counsel

BY: 
Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

11/15/07
Date

FOR THE RESPONDENT:


Lyn Utrecht
Counsel

10/29/07
Date

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FEC EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REAL TRUTH ABOUT OBAMA, INC.,)	
)	
)	
Plaintiff,)	
)	No. 3:08-cv-00483-JRS
v.)	
)	
FEDERAL ELECTION COMMISSION and UNITED STATES DEPARTMENT OF JUSTICE,)	DECLARATION
)	
)	
Defendants.)	

DECLARATION OF REGINALD W. FREEMAN


1. My name is Reginald W. Freeman. I make this declaration based on my personal knowledge.
2. I am a resident of Washington, D.C.
3. I am a Paralegal Specialist at the Federal Election Commission (FEC) and have been employed in this capacity since February 1997. I have been employed by the FEC since May 16, 1994. I have a B.S. from Hampton University and obtained a Paralegal Certificate from West Group in 1998.
4. I performed a search of the Clerk's Information System (CIS) of the Virginia Corporation Commission, available at <http://www.scc.virginia.gov/clk/bussrch.aspx> (last visited August 12, 2008) for all information related to The Real Truth About Obama, Inc. (RTAO). FEC Exhibit 1, page 1 contains the results of the corporate data inquiry search. FEC Exhibit 1, page 2 contains the results of the Officers/Directors and principal office search. FEC Exhibit 1, page 3 contains the results of the activity detail search.

5. I performed a search of the Internal Revenue Service forms and found RTAO Form 8871, Notice of Section 527 Status. FEC Exhibit 2 is a true and correct copy of this form.

6. The signed conciliation agreement in MUR 5511, 5525 (Swiftboat Veterans and POWs for Truth) (Dec. 4, 2006) is available in the FEC's Enforcement Query System, at <http://eqs.nictusa.com/eqsdocs/00005900.pdf> (last visited August 12, 2008). FEC Exhibit 3 is a true and correct copy of this agreement.

7. The signed conciliation agreement in MUR 5440 (The Media Fund) (Oct. 29, 2007) is available in the FEC's Enforcement Query System, at <http://eqs.nictusa.com/eqsdocs/00006691.pdf> (last visited August 12, 2008). FEC Exhibit 4 is a true and correct copy of this agreement.

8. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink that reads "Reginald W. Freeman". The signature is written in a cursive style with a horizontal line underneath the name.

Reginald W. Freeman

Executed on August 14, 2008.