United States District Court
Eastern District of Virginia
Richmond Division

The Real Truth About Obama, Inc. *Plaintiff*, *v.* **Federal Election Commission** and **United States Department of Justice**, *Defendants*.	Case No. **3:08-cv-00483-JRS**

Plaintiff's Opposition to FEC and DOJ Summary Judgment Motions and Reply Supporting RTAO's Motion for Preliminary Injunction and Summary Judgment

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The Federal Election Commission ("FEC") and Department of Justice ("DOJ") (collectively "Government") argue that RTAO's challenge to FEC's alternate express-advocacy definition and PAC-status enforcement policy is *weaker* than in 2008 because two claims are mooted and "express advocacy" now only implements disclosure under lowered scrutiny. (FEC-Br. 1.)

Actually, RTAO's case is *stronger*. First, RTAO was proven correct about the fact that the two mooted provisions (11 C.F.R. §§ 100.57 and 114.15) were unconstitutional, and 11 C.F.R. 100.22(b) and PAC-status policy are based on the same vague, overbroad approach rejected as to the mooted provisions. Second, the opinion holding that RTAO lacked likely merits success on the remaining claims was vacated and remanded for reconsideration, indicating disagreement with its analysis. Third, though "independent expenditures" are no longer banned, they still trigger "political committee" status, which imposes burdens that *Citizens United v. FEC*, 130 S. Ct. 876 (2010) ("*Citizens*"), pronounced "onerous" and reviewed under strict scrutiny, *id.* at 898. Fourth, *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*Leake*"), was not vacated, so its analysis controls. *Leake* held that *Buckley*'s unambiguously-campaign-related requirement mandates that (a) the only communications that may be regulated are those containing magic-words express advocacy or meet the brightline electioneering-communications definition because only those strike the right balance between free speech and government's authority to regulate elections, 525 F.3d at 281-83, and (b) "*Buckley*'s articulation of the permissible scope of political committee regulation is best understood as an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287 (*citing Buckley v. Valeo*, 424 U.S. 1 (1976)). The Government's failed to distinguish *Leake* (FEC-Br. 38) does not eliminate its controlling analysis. *Citizens* is not carte blanche to regulate beyond the approved communications identified in *Leake*, so *Citizens*'s "8-1 vote" approving disclosure

meeting the simple electioneering-communications definition means only that disclosure can be required for electioneering communications, as it may be for magic-words express advocacy, not that FEC may make up tests that are beyond statutory authority, unconstitutional, and in conflict with Fourth Circuit decisions. And *Citizens* in no way overruled *Leake* on how to determine "major purpose" for imposing PAC-status.

Regarding a preliminary injunction, the Supreme Court recognized—by granting certiorari, vacating, and remanding—that this preliminary-injunction motion is not moot because it is capable of repetition yet evading review and that speech-protective preliminary-injunction standards for core political speech should be stated and applied so that future motions do not fail for lack of such standards. The irreparable harm of justified self-censorship and loss of speech rights was adequate for the original preliminary-injunction motion and remains adequate as in any case involving a matter that is not moot because it is capable of repetition yet evading review. If the preliminary injunction motion is not moot, then the irreparable harm on which it was based is not moot. This Court should grant RTAO's preliminary-injunction motion, deny the FEC and DOJ summary-judgment motions, and grant RTAO's summary-judgment motion.

Legal Background

The Government's legal background (FEC-Br. 8-15) omits key elements cutting against the Government's argument and misconstrues others. Regarding express advocacy, *Buckley* held *two* "expenditure" definitions unconstitutional unless construed to require magic-words express advocacy. 424 U.S at 44 & n.52, 80. The Government omits the second, which has the *same* operative language as the current expenditure definition and applied to the *discovery* context. The first "expenditure" definition regulated expenditures "relative to a clearly identified candidate" and governed a prohibition. *Id.* at 41 (citation omitted). It was challenged as unconstitutionally vague.

Id. at 40. *Buckley* said "[t]he test is whether the language . . . affords the '(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms,'" *id.* at 41 (citation omitted), construed "relative to" "to mean 'advocating the election or defeat of' a candidate," *id.* at 42, then held even this clearer construction vague because

> the distinction between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. (emphasis added).[1] This dissolving-distinction problem between (a) issue advocacy discussing candidates and (b) advocacy of candidates' election or defeat required construing the definition to apply only to "explicit words of advocacy of election or defeat of a candidate," *id.* at 43, i.e., to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* This required "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

That saving construction of "expenditure" is the one the Government mentions, though it ignores the underlying rationale that still controls, i.e., the need for a brightline distinction be-

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[1] *Buckley* also repeated a warning about the chill of vague language on robust public debate and articulated its rejection of any intent-and-effect test:

> "(W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Id. at 43 (citation omitted).

tween issue advocacy discussing candidates and express advocacy of the election or defeat of candidates. This need continues, both as to ordinary disclosure of "independent expenditures" and as to the extraordinary requirements imposed by PAC-status triggered by "expenditures."

The second "expenditure" definition governed expenditures "'for the purpose of . . . influencing' the nomination or election of candidates for federal office" federal elections. *Id.* at 77. *Buckley* held this vague and overbroad absent the express-advocacy construction given the other "expenditure" definition. *Id.* at 80. The Government's omission of this construction when discussing *Buckley* is telling because it applied precisely in the *disclosure* context—to which the Government points as license for less precision—and *Buckley* construed the *same* operative language as the *current* "expenditure" definition, 2 U.S.C. 431(9) ("for the purpose of influencing"), that triggers PAC-status, 2 U.S.C. 431(4) and is the "expenditure" in reportable "independent *expenditures*," 2 U.S.C. 431(17). Thus, in the disclosure context, an "expenditure" definition using "for the purpose of influencing" is unconstitutionally vague and overbroad unless it is construed to apply only to magic-words express advocacy. Moreover, Congress's post-*Buckley* use of "for the purpose of influencing"in an "expenditure" definition is presumed to incorporate *Buckley*'s magic-words, express-advocacy construction. *See, e.g.*, *McConnell v. FEC*, 540U.S. 93, 211 (2003) ("Because our decision in the [*FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*")] case was on the books for many years before BCRA was enacted, we presume that the legislators who drafted [the provision at issue] were fully aware that the provision could not validly apply to *MCFL*-type entities.").

Regarding "independent *expenditure*," 2 U.S.C. 431(17), the Government acknowledges that post-*Buckley* Congress defined "independent expenditure" to apply only to "expenditures by a person . . . expressly advocating the election or defeat of a clearly identified candidate." (FEC-Br.

8.) This language is taken directly from *Buckley*, *see supra*. The Government's acknowledgment of Congress's direct reliance on *Buckley* necessarily concedes that Congress meant, by the phrase "expressly advocating," *Buckley*'s *magic-words* express advocacy. Still FEC it relies on 2 U.S.C. 431(17) as authority for 11 C.F.R. 100.22(b) (FEC-Br. 9),[2] which *violates* both *Buckley*'s construction of a "for the purpose of influencing" "expenditure" definition and the assertion of a congressional interest only to regulating magic-words expenditures.

The Government acknowledges that the Fourth Circuit has already held subsection (b) unconstitutional (FEC-Br. 9 (*citing FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) ("*CAN-II*"))), but attempts to avoid this holding in two erroneous ways. First, it argues that "*Buckley*'s 'express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command.'" (FEC-Br. 9 (*quoting McConnell*, 540 U.S. at 191-92).) The Government continues: "This construction was imposed because of the vagueness of FECA's original statutory text, not because the government's power was in all cases circumscribed in regulating only a limited number of 'magic words' of advocacy." (FEC-Br. 9.) The Government

[2] Subsection (a) defines "expressly advocating" as employing magic words. The Government here points to a part of this definition that speaks of "context" and "reasonable meaning" (FEC-Br. 9), but fails to give the limiting context of "communication of campaign slogan(s) or individual word(s) . . . such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush,' or 'Mondale!'" This limiting context indicates that subsection (a) is no free-wheeling contextual reasonable-meaning test, but rather is limited to express *words* that in a very limited, unambiguously-campaign-related context constitute express advocacy of the sort approved by *Buckley*. If FEC applies another meaning to subsection (a), then it is also beyond statutory authority and in conflict with *Buckley*. Moreover, *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), expressly forbade more than the most basic (as here) reliance on context to interpret communications, *id.* at 473-74 (Roberts, C.J., joined by Alito, J.; principal opinion), and restricted its "appeal to vote test," *id.* at 469-70 ("an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"), to the context of federally defined "electioneering communications," *id.* at 474 n.7, which prevented the test from unconstitutional vagueness, *id.* (answering Justice Scalia's argument that the "appeal to vote" test was "impermissibly vague").

omits the facts that *Buckley* held that "for the purpose of influencing" is unconstitutionally vague and overbroad in a statute requiring disclosure of "expenditures," that Congress included the same language in the present "expenditure" definition, and that Congress expressly employed magic-word express-advocacy to define "independent expenditures." *See supra*. So even if *Buckley*'s express-advocacy test were only a product of statutory construction (it was more because it was an implementation of the underlying, constitutional unambiguously-campaign-related requirement), that construction controls here. Thus, the only "expenditures" or "independent expenditures" for which disclosure may be required under the "for the purpose of influencing" language are those using *Buckley*'s magic-words express advocacy.

Second, the Government argues that *McConnell* held that "Congress may regulate not only express advocacy . . . but also the 'functional equivalent of express advocacy.'" (FEC-Br. 9 (*quoting McConnell*, 540 U.S. at 206).) This substitutes what the Court did not hold for what it did hold—and is wrong. *McConnell* held that Congress could regulate beyond magic-words express advocacy, but the extent of that approved additional reach was to "electioneering communications," not to the "functional equivalent of express advocacy." *McConnell* only used the "functional equivalent" language in responding to the argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* The Court responded that "[t]his argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* This is no *holding* that *FEC* may now regulate "the functional equivalent of express advocacy." And Congress has enacted no new legislation attempting to regulate "the functional equivalent of express advocacy." It has only asserted interests in regulating "independent expendi-

tures" adopting *Buckley*'s magic-words express-advocacy language and clearly-defined "electioneering communications." FEC may not go beyond that statutory authority.

"The functional equivalent of express advocacy" is no free-floating test that FEC may implement (even if it had statutory authority) because: (a) it was only articulated as an analytical point in connection with communications that meet the electioneering communication definition; (b) *WRTL-II* specifically limited what *constituted* the "functional equivalent of express advocacy" in limiting the reach of the electioneering-communication prohibition with its appeal-to-vote test, 551 U.S. at 469-70 ("an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"); (c) *WRTL-II* made clear that the appeal-to-vote test was only suitable in the context of the electioneering communication definition, 551 U.S. at 474 n.7; and (d) that appeal-to-vote test ceased to have any function in campaign-finance law when *Citizens* overturned the prohibitions of independent expenditures and electioneering communications, 130 S. Ct. at 913.

So what *McConnell*'s statement *means* is that "express advocacy" is not the outer limit of possible regulation under duly-enacted, constitutional legislation, and its *application* in *McConnell* was to approve the interest that Congress had asserted in also regulating "electioneering communications." It does not mean that FEC has carte blanche to regulate communications in ways for which Congress has asserted no interest and based on terminology ("for the purpose of influencing") that has already been construed to avoid unconstitutional vagueness and overbreadth with the magic-words, express-advocacy construction, in which Congress acquiesced by enacting *Buckley*'s language in its "independent expenditure" definition, and which Congress made no effort to avoid by redefining "expenditure" or "independent expenditure," choosing instead to *add* the regulable category of "electioneering communication."

Statement of Genuine Issues About the Government's Material Facts

RTAO does not contest the Government's Statement of Material Facts, except to note, in response to No. 9, that RTAO took the "concrete steps" of "creating" the communications and project plan, of establishing § 527 nonprofit and corporate status, and of pursuing legal protection for its planned activities, all of which is evidenced in the record. Regarding the Government's "Statement of Genuine Issues Regarding RTAO's Statement of Material Facts," the Government correctly "notes that the material disputed issues in this case are legal in nature," so that "there are no disputes as to any material facts, and no trial or evidentiary hearing is necessary." (FEC-Br. 5.)

However, RTAO responds as follows to the Government's responses to RTAO's facts to highlight some problems. The Government's responses to RTAO Fact Nos. 3-16 and 19 generally dispute assertions regarding RTAO possibly being deemed a PAC, its communications possibly being regulable, and the reasonable nature of its asserted chill. The underlying legal debate is, of course, over the way that FEC determines what is an "expenditure" employing 11 C.F.R. 100.22(b) and who is a PAC under its PAC-status enforcement policy. The Government wants to argue that such determinations are clear, while RTAO argues that the standards are vague and overbroad. For example, RTAO Fact No. 6 asserts that RTAO could not properly be a PAC because it would lack *Buckley*'s "major purpose" if it proceeded with planned activities, but the Government argues that "RTAO has not provided sufficient information to determine . . . 'major purpose'" and cross-references a standing argument (FEC-Br. 5, 40). This begs the question because FEC provides no brightline guidance on what it considers when determining PAC-status and rejects the Fourth Circuit's brightline test, *Leake*, 525 F.3d at 287 ("primarily engages in regulable, election-related speech"). And if the non-magic-words communications at issue here

are deemed regulable,[3] then the Government might well deem RTAO a PAC for making such communications.[4] This makes real the chill on RTAO's free speech and association, providing standing. With its assertions, the Government is essentially making a standing argument, but this Court has already correctly addressed and rejected the Government's standing arguments (Doc. 77 at 10-16), and the Supreme Court's vacation of the appellate opinion has implications for the denial of preliminary injunction, but not for justiciability. Given *WRTL-II*'s sound rejection of FEC's standing arguments, 551 U.S. at 464-65, standing seems well-settled in this similar case.

The Government's response to RTAO Fact No. 17 asserts its belief that RTAO's intended fundraising communication (*see* RTAO-Br. 7-8 (No. 14) "would not have been a 'solicitation' within the meaning of former 11 C.F.R. 100.57 because it does not indicate that the funds received will be used to support or oppose Senator Obama's candidacy." (FEC-Br. 6.) But what "support or oppose" means is the very sort of vagueness problem at issue herein, and some of the "advertising" and a "radio ad" that the communication said was to be done with funds received included the *Survivors* ad that the Government deems to be express advocacy, which surely would "support or oppose." And while section 100.57 itself is no longer operative, FEC has not abandoned the *approach* of examining such solicitations for indications in determining "major

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[3] FEC deems *Survivors* express advocacy (FEC-Br. 5), and this Court said *Change* was express advocacy (Doc. 77 at 13, 15 n.3), though FEC asserts it is not.

[4] Moreover, regarding chill and standing, this Court should reaffirm its prior statement:

> [E]ven with the FEC's assertions—that Plaintiff's communication in the ad "Change" does not fall within the challenged regulations—this Court held that the threat of litigation 'initiated by a private citizens' is still a legitimate fear, enough to satisfy the standing requirements. *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*") (finding that FECA permits private individuals to sue to enforce FECA and this 'mere possibility that such a challenge may be brought by a private citizen is enough' to 'pose a very real threat of prosecution.') Because a private individual could bring a challenge here, this should be satisfactory for standing.

(Doc. 77 at 13.)

purpose" for imposing PAC-status.

The Government's response to RTAO Fact No. 18 disputes whether there is evidence for a "chill" resulting from a letter from Democracy 21 to DOJ. (FEC Br. 7.) Yet RTAO was in fact chilled because it did not proceed with its intended communications, and its verified complaint identified this letter as part of why it was chilled. There is evidence to support this chill.

The Government's response to RTAO Fact No. 20 disputes RTAO's statement that it intended to do materially similar ads as being without evidence and "vague, speculative, and ambiguous." (FEC-Br. 8.) There is nothing vague, speculative, or ambiguous about RTAO stating its *intent* to do materially similar future activity or about the *concept* of materially similar future activity. The assertion of such an intent is recognized by the Supreme Court as preserving cases such as this from mootness and are accepted as neither vague, speculative, nor ambiguous. *See, e.g.*, *WRTL-II*, 551 U.S. at 460 ("WRTL alleged that BCRA's prohibition . . . is unconstitutional as applied to "Wedding," "Loan," and "Waiting," as well as any materially similar ads it might seek to run in the future."), 463 (finding case justiciable because "WRTL credibly claimed that it planned on running '"materially similar"' future targeted broadcast ads mentioning a candidate within the blackout period " (citation omitted)) (principal opinion).

Argument

This case is on remand of the appeal of two denials of *preliminary injunction*, which appeal was remanded for reconsideration in light of *Citizens*, 130 S. Ct. 876. (RTAO-Br. 1.) If *Citizens* supported the decision vacated, there was no need to grant certiorari, vacate the decision, and remand for reconsideration in light of *Citizens*. If the need for a preliminary injunction were moot, there was no need to accept the case, vacate the decision affirming preliminary injunction denials, and remand for reconsideration *of the denial of preliminary injunction appeal*. The Su-

preme Court's remand was in response to two issues: (1) "[w]hether the First Amendment requires speech-protective preliminary-injunction standards for issue advocacy" and (2) "[w]hether RTAO had likely success on the merits (and so met the other preliminary-injunction standards) . . . ." (RTAO-Br. 1.)

I. Speech-Protective Preliminary-Injunction Standards Should Be Articulated and RTAO Should Be Granted a Preliminary Injunction.

RTAO has argued the first issue in the certiorari petition (*supra*), setting out standards governing First Amendment cases that must apply—in *addition* to the four factors in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008)—in the preliminary-injunction context. (RTAO-Br. 10-21.) RTAO highlighted the robust protection for issue-advocacy speech and groups reasserted in *WRTL-II*, 551 U.S. 449, and *Citizens*, 130 S. Ct. 876, and how those cases rejected the sort of vague, overbroad approach FEC has taken with 11 C.F.R. 100.22(b) and its PAC-status enforcement policy.

The Government argues against articulating and applying speech-protective standards because "[t]he Fourth Circuit had four opportunities . . . to adopt some preliminary injunction standards other than those of *Winter*, and it has declined to do so every time." (FEC-Br. 22.) But the Supreme Court vacated the first judgment (en banc rehearing denied), so apparently the Supreme Court deemed it incorrect, and it lacks precedential value. The decision on remand (en banc rehearing denied) simply restated the *Winter* preliminary-injunction standards, leaving to *this* Court the remand task of articulating and applying the *other* speech-protective standards.

The Government *concedes* that it has the burden of proving that its regulation and policy are constitutional for the likely-success-on-the merits factor under *Gonzales v. O Centro Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006), by not including that factor with the other three factors

for which it argues that the burden has not shifted. (FEC-Br. 22-23.) Recognizing that is an important first step in articulating how First Amendment principles apply in preliminary-injunction litigation so in future cases FEC cannot be heard to argue that this burden lies elsewhere. This Court should next establish who bears the burden on the other preliminary-injunction factors. The Government disputes that it bears the burden on the other *Winter* factors. But the Supreme Court held that "the *burdens* at the preliminary injunction stage track the burdens at trial. *Gonzales*, 546 U.S. at 429 (emphasis added). The plural "burdens" goes beyond what the Government concedes. And this Court should reaffirm that in free-speech cases the likely-success factor is decided first because the other preliminary-injunction factors follow from that determination. (*See* RTAO-Br. 15-17.) If a provision is likely unconstitutional or beyond statutory authority, irreparable harm, balance of harms, and public interest are already settled. Preliminary injunctions in free-speech cases turns on likely success, so all the "burdens" fall on the government.

The Government disputes whether "tie[s] go[] to the speaker, not the censor," *WRTL-II*, 551 U.S. at 474, insisting this applies only to bans. (FEC-Br. 23.) *WRTL-II* involved a ban, but its the ties-to-the-speaker principle was stated more broadly. In establishing speech-protective principles for issue-advocacy cases, it required that courts "give the benefit of any doubt to protecting rather than stifling speech. See *New York Times Co. v. Sullivan*, [376 U.S. 254,] 269-270[(1964)]." 551 U.S. at 469. *Sullivan* was not about a ban. PAC burdens (even absent source-and-amount limits) are "onerous" and can stifle speech. *Citizens*, 130 S. Ct. at 898. *MCFL* specifically warned that

> [t]hese additional regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage.

479 U.S. at 254-55 (plurality opinion). Self-censorship because of unconstitutionally vague and

overbroad provisions imposing unwarranted burdens, as here, chills and stifles speech. This Court should articulate and apply the ties-to-the-speaker principle, along with the principles the Government does not contest. (*See* RTAO-Br. 10-21).

The Government argues that RTAO's remaining claims are "moot because no meaningful relief can . . . be provided and . . . consolidation . . . renders a *preliminary* injunction superfluous." (FEC-Br. 18.) It adds that "RTAO cannot meets its burden of demonstrating that it will suffer irreparable harm," erroneously asserting that "RTAO repeatedly implies that this regulation and . . . analysis ban or limit speech," but the quotes from RTAO's brief prove it alleged no "ban." (FEC-Br. 23 and n.12.) The arguments regarding mootness and harm are ones the Government would have to take up with the Supreme Court, which has already recognized—by granting certiorari, vacating, and remanding—that this preliminary-injunction motion is not moot because it is capable of repetition yet evading review and that speech-protective preliminary-injunction standards for core political speech should be stated and applied so that future motions do not fail for lack of such standards. The original irreparable harm of justified self-censorship and loss of speech rights in the light of a likely unconstitutionally vague and overbroad rule and policy were adequate for the original preliminary-injunction motion and remain adequate as in any case involving a matter that is not moot because it is capable of repetition yet evading review. If the preliminary injunction motion is not moot, then the irreparable harm on which it was based is not moot. The Government's cite to a Second Circuit opinion for the proposition that the exception to mootness for cases capable of repetition yet evading review cannot apply to otherwise moot preliminary injunction appeals (FEC-Br. 20) only highlights the fact that the Supreme Court *did not* consider this appeal moot. The acceptance and remand of this case, in which it was expressly argued to the Supreme Court that the appeal of the preliminary-injunction denial is not moot be-

cause it is capable of repetition yet evading review, stands as *Supreme Court* precedent for the fact that preliminary injunction motions in cases such as this do not become moot under these facts because they *are* capable of repetition yet evade review. That overrules other precedents.

Why are cases that are otherwise moot decided on the basis that they are capable of repetition yet evade review? They are decided so that the law can be established for the *next time* clear legal rules are required on short notice. Here, speech-protective application of the preliminary-injunction standards to issue advocacy must be established so that when RTAO again needs a preliminary injunction it does not have to face the flawed arguments advanced by FEC (such as assigning likely-merits-success to the movant) and again be denied free speech rights. That need is likely to recur for RTAO (or another speaker). RTAO remains in existence. Abortion remains an issue hotly in debate, including in the 2010 election, *see, e.g.*, http://nrlc.org/ElectionResults.html (National Right to Life Committee, Inc.'s "Most Competitive Races Involving Abortion and/or Abortion-Related Legislation"), which undoubtedly will remain true in 2012. President Obama remains a public figure whose views on abortion remain important, and it is highly likely that he will be a candidate in 2012.

The Government's argument that RTAO's intent to run materially similar future ads is too speculative and might preclude standing (FEC-Br. 20 n.8), does not square with *WRTL-II*'s rejection of just such an FEC argument, 551 U.S. at 460 ("WRTL alleged that BCRA's prohibition . . . is unconstitutional as applied to "Wedding," "Loan," and "Waiting," as well as any materially similar ads it might seek to run in the future."), 463 ("WRTL credibly claimed that it planned . . . '"materially similar"' future targeted broadcast ads mentioning a candidate within the blackout period" (citation omitted)) (principal opinion). The notion that litigation well in advance of a coming election is speculative does not square with "[t]he FEC conten[tion] that the 2-year win-

dow between elections provides ample time for parties to litigate their rights before each BCRA blackout period." *Id.* at 462. If litigation well in advance of the next election is too speculative, FEC's contention in *WRTL-II* posited a meaningless option. FEC can't have it both ways.[5]

The Government argues that RTAO would have no harm if it would just *be* a PAC! (FEC-Br. 24.) This ignores the pronouncement that PAC burdens, even absent source-and-amount limitations, are "onerous." *Citizens*, 130 S. Ct. at 898. *See WRTL-II*, 551 U.S. at 477 n.9 ("PACs impose well-documented and onerous burdens, particularly on small nonprofits." (*citing MCFL,* 479 U.S. at 253-255 (plurality opinion))). And PAC burdens are "onerous" and do not adequately protect free speech rights for groups not properly PACs, *Citizens*, 130 S. Ct. at 898, *regardless* of whether RTAO alleged threatened reprisals for persons disclosed. (*See* FEC-Br. 25.)

The Government argues that *SpeechNow.org v. FEC*, 599 F.3d 686, 697 (D.C. Cir. 2010), upheld PAC burdens for *political committees* making only independent expenditures. (FEC-Br. 25-26.) The italicized words, "political committees," readily dismisses this argument. The court held that PAC burdens are not unconstitutionally burdensome for *PACs*. For groups not properly PACs, those burdens are "onerous," *supra*, and RTAO does not believe it should be deemed a PAC, though it is at risk for being deemed so under FEC's vague and overbroad independent -

[5] The Government suggests that RTAO provides only conclusory allegations of chilled speech and insists that irreparable harm for loss of speech is cognizable only with a speech ban. (FEC-Br. 24.) Chill has long been recognized as a cognizable First Amendment harm, and RTAO was in fact chilled. It did not speak prior to the 2008 election when interest in its issue was high. The Government's effort to dodge this case on justiciability and downplay RTAO's harm are reminiscent of its similar effort in *WRTL-II*, where it argued "these cases are moot because the 2004 election has passed and WRTL 'does not assert any continuing interest in running [its three] advertisements, nor does it identify any reason to believe that a significant dispute over Senate filibusters of judicial nominees will occur in the foreseeable future.'" 551 U.S. at 462 (citation omitted). It asserted that "in order to prove likely recurrence of the same controversy, WRTL must establish that it will run ads in the future sharing all 'the characteristics that the district court deemed legally relevant.'" *Id.* at 463 (citation omitted). As the Supreme Court said then, and this Court should say now: "The FEC asks for too much." *Id.*

expenditure definition and PAC-status policy.

The Government argues that administrative burdens do not constitute irreparable harm because compensation might be available. (FEC-Br. 26.) Will Defendants compensate RTAO for PAC burdens if RTAO is improperly deemed a PAC? No. Is there any mechanism to force such compensation? No. RTAO can't even get attorneys fees under 42 U.S.C. 1988 if it is a prevailing party as it could if state action were at issue. The chill of a vague and overbroad rule and policy, resulting in self-censorship and loss of speech are the irreparable harms at issue. And RTAO would suffer the harm of enforcement and penalties if it proceeded without compliance with the challenged rule and policy that it deems unconstitutional.

The Government says RTAO's chill is nothing but "amorphous fears [that] are not imminent or otherwise sufficient" for irreparable harm. (FEC-Br. 27.) It seeks to dismiss, as threatening no harm to RTAO, the DOJ's letter stating its intent to enforce campaign-finance laws against 527 organizations and FEC's own enforcement actions against 527s, based on the rule and policy here challenged. (FEC-Br. 27.) The answer is the same one the Supreme Court gave FEC in response to FEC's similarly tenuous arguments on standing in *WRTL-II*: "there is no reason to believe that the FEC will 'refrain from prosecuting violations,'" 551 U.S. at 463 (*citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978)). Defendants have not indicated they would refrain from prosecution. They defend here to permit to continued enforcement of the challenged rule and policy. Until DOJ withdraws its letter and FEC repeals its rule and policy, RTAO's fears remain real and concrete.

Regarding balance of harms and public interest, the Government asserts the very interests that are invalid if there is likely success that First and Fourteenth Amendment rights are being violated. (FEC-Br. 27-29; RTAO-Br. 41-43.) This underscores the need for clear articulation and

affirmation of speech-protective standards in the preliminary-injunction context, including what interests are not cognizable where there is likely merits success on a free-political speech and association claim. (*See* RTAO-Br. 12-21.) For example, it should be made clear that in the face of a likely free speech and association violation, the Government has *no* cognizable interest in enforcement; no alleged confusion, lack of information, or lack of public confidence is cognizable; and any allegation of confusion and the like must be the result of rigorous government proof, not speculation. (RTAO-Br. 12-21, 41-43.)[6] That is the point of constitutional *rights*. These speech-protective principles must be applied here, but they should also be clearly articulated to provide prompt, proper resolution the next time there is a preliminary injunction motion with a likely violation of constitutional speech rights.

Regarding consolidation, RTAO has explained the sound reasons for filing motions both for preliminary injunction and summary judgment and asking for a consolidation of the hearings (not the decisions) with an issuance of the preliminary injunction first, followed by a summary judgment ruling. (RTAO-Br. 1-2.) The preliminary injunction ruling is important because central to RTAO's claims and the remand is the need for clearly articulated, speech-protective, preliminary injunction standards to protect RTAO's future issue activity. Proper standards will preclude the

[6] The Government even converts one of RTAO's arguments to a different one by ellipses. RTAO asserted that "[t]he Government also must *prove* its interests, e.g., that the public-interest would be served by denying the preliminary injunction because a 'wild west' scenario is likely to ensue. The government must provide proof, not speculation."(RTAO-Br. 18-19 (providing authorities)) The Government converts this to an argument that "the government 'must *prove* . . . that the public interest would be served by denying the preliminary injunction," and argues that this is plaintiff's duty, citing *Winter*. (FEC-Br. 28.) Who has what burdens as to this preliminary-injunction *factor* has been addressed, *supra* at 11-12, and since *Winter* was not a First Amendment case—where burdens shift—it does not resolve who has the burden on this *factor*. But the point of the argument was that in balancing harms both sides advance *interests*, and the government clearly must *prove its interests*, not offer mere speculation. The Government's sleight of hand in changing RTAO's argument does not refute it.

Government from arguing incorrect things it argued before (e.g., that proximity to an election lowers instead of raising the need to protect issue advocacy) and will assure that the Government bears its rightful burdens—all of which is a non-moot, ongoing need that can only be met in a preliminary inunction setting. After preliminary injunction is decided, under the remand instructions, summary judgment can be decided without affecting the preliminary injunction.

II. Summary Judgment Should Be Entered for RTAO.

The Government asserts that "RTAO's *constitutional* challenges have less merit now than they did when this Court and the Fourth Circuit found that RTAO was unlikely to succeed on the merits." (FEC-Br. 29 (emphasis added).) The reverse is true, and RTAO also asserts a *statutory authority* challenge that remains equally strong. If the Supreme Court had believed those decisions to be correct, it would have denied certiorari. Grants of certiorari are exceedingly rare because the Court receives myriad requests and, by necessity and choice, limits grants of certiorari to the most meritorious. So the grant of certiorari—for unprecedented review of a *preliminary injunction appeal*—recognized the merits of RTAO's claims precisely *because* of *Citizens*, in the light of which reconsideration was ordered. In its opening brief, RTAO explained the reasons why *Citizens* means that preliminary injunction and summary judgment should be granted to RTAO. (RTAO-Br. 11-12, 26-35, 40-41.) And since the certiorari grant vacated the judgment below, it by implication vacated this Court's parallel analyses, so the Government's repeated reliance on what was decided before is improper. The Supreme Court disagreed with the analyses in the Fourth Circuit (and so also here) or it would have simply denied certiorari. Of course, the grant of certiorari was based on a view of the preliminary injunction appeal as not moot (RTAO clearly argued that it was not moot because it was capable of repetition yet evading review

(RTAO-Br. 3 n.2)),[7] so prior analysis finding justiciability may be reissued, just as the Fourth Circuit reissued Parts I and II of its prior opinion. In any event, *Citizens* by reason of the remand instruction works in RTAO's favor, and should be so applied, not in the Government's favor.

A. The *Buckley*/*Leake* Unambiguously-Campaign-Related Analysis Governs, and the Government's Assertion that Complacent Scrutiny Applies Is Erroneous.

In its opening brief, RTAO established that the constitutional scrutiny must be strict because, inter alia, provisions imposing PAC status have always been reviewed under strict scrutiny and *Citizens* reviewed the "onereous" PAC-style burdens under strict scrutiny. (RTAO-Br. 22-23).[8] In any event, the unambiguously-campaign-related requirement controls this case (RTAO-Br. 23-26), which *Buckley* articulated precisely in the "disclosure" context under "exacting scrutiny" to an "expenditure" definition employing the same operative language ("for the purpose of influencing:) as the current "expenditure" definition. *See infra*. And 11 C.F.R. 100.22(b) is beyond statutory authority (RTAO-Br.28-35), which analysis does not vary with any level of scrutiny, and the same is true of RTAO's vagueness challenges.

The Government seeks to sweep the whole analysis here into a complacent exacting scrutiny

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[7] The Supreme Court remand order to "reconsider[] in light of *Citizens* . . . and the Solicitor General's suggestion of mootness," 130 S. Ct. 2371, applied *only* to the mootness of 11 C.F.R. §§ 100.57 and 114.15. (RTAO-Br. 1-3.)

[8] *Citizens* did not limit its "onerous" pronouncement to PAC-style burdens involving source-and-amount limitations. In fact it made no mention of such limitations when it itemized PAC-style burdens and pronounced them "onerous." *See* 130 S. Ct. at 897-98 (listing appointment of a treasurer, detailed recordkeeping, regular reports, the need to organize before speaking, etc. but *not* source-and-amount restrictions before pronouncing *these* restrictions "onerous"). Thus, this list of burdens is what the Court meant when it said that "PACs are burdensome," *id.* at 897, and that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" 130 S. Ct. at 898. So the burden that was onerous and required strict scrutiny is just the sort of burden at issue here, regardless of whether there remains a corporate prohibition on independent expenditures.

based on the notion that only mere disclosure is at issue.[9] And it erroneously seeks to lower standards and to shift burdens to RTAO that the Government must bear. (FEC-Br. 29-32.)

This case is in the Fourth Circuit. Yet one would barely know it from reading the Government's brief. The Fourth Circuit set out a careful analysis in *Leake*, 525 F.3d 274, that controls this case. *Leake* established and employed, *id.* at 281-83, the analysis the Supreme Court articulated to determine the breadth of *disclosure* permissible under an "*expenditure*" defined as "for the purpose of . . . influencing." *Buckley*, 424 U.S. at 77, 80. In considering compelled disclosure, *Buckley* said that it required "exacting scrutiny" and that the Court "*also* . . . insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." 424 U.S. at 64 (emphasis added; footnotes omitted). This was no complacent review because *Buckley* called it "[t]he strict test" that "is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id.* at 66. Moreover, in applying this "strict test" and "substantial relation" requirement in the specific context of compelled disclosure of "expenditures" defined, as in the present case, as "for the purpose of . . . influencing"), *Buckley* held two things that control this case. First, requiring disclosure of such "expenditures" by "political committees" would be constitutionally permissible only if "political committee" is limited to candidate-controlled groups and those with "the major purpose of . . . nominating or electing candidates" because

[9] To the extent "exacting scrutiny" applies to the constitutional analysis here, *Davis v. FEC*, 128 S. Ct. 2759 (2008), held that under exacting scrutiny "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights," *id.* at 2775. Since PAC-style burdens are "onerous," *Citizens*, 130 S. Ct. at 898, even under exacting scrutiny there must be high-level scrutiny that operates as the functional equivalent of strict scrutiny. The challenged rule and policy are readily unconstitutional under exacting scrutiny because they differ sharply from the simple disclaimer and one-time reports upheld as disclosure for electioneering communications under exacting scrutiny in *Citizens*.

"[e]xpenditures of candidates and of 'political committees' so construed . . . are, by definition, *campaign related*," 424 U.S. at 79 (emphasis added). Second, disclosure by non-PAC entities must be limited to magic-words express advocacy to assure that the reach of the disclosure is not "too remote" or "impermissibly broad" but "is directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*," *id.* at 80 (emphasis added). Because *Buckley* employed the unambiguously-campaign-related requirement to avoid the reach of disclosure being "*impermissibly broad*," *id.* (emphasis added), this requirement may be termed *Buckley*-overbreadth.

Leake, 525 F.3d 274, held that *Buckley*-overbreadth mandates two things that directly control this case. First, the only communications that may be regulated are those containing magic-words express advocacy or meet the brightline electioneering-communications definition because only those strike the right balance between free speech and government's authority to regulate elections. *Leake*, 525 F.3d at 281-83. Second, "*Buckley*'s articulation of the permissible scope of political committee regulation is best understood as an empirical judgment as to whether an organization primarily engages in regulable, election-related speech." *Id.* at 287.

The Government's superficial attempt to distinguish *Leake* (FEC-Br. 38) does not eliminate the fact that *Leake*'s *analysis* controls this case. *Leake* was not the decision vacated by the Supreme Court. *Citizens* did not moot *Leake* but affirmed its requirement of unambiguous lines for regulating core political speech. Simply applying *Leake*'s controlling analysis will result in preliminary injunction and summary judgment for RTAO.

Moreover, the Government confuses *Buckley*-overbreadth with the First Amendment overbreadth doctrine commonly associated with *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), whereby provisions are struck facially if they sweep in a substantial amount of protected speech.

(*See* FEC Br. 29-30). The Government thereby attempts to assign RTAO the burden of proving substantial overbreadth to achieve a facial invalidation of the challenged rule and policy. But *Buckley*-overbreadth is a threshold analysis that the Government must prove. (RTAO-Br. 20, 25-26.) And under *Buckley*-overbreadth a provision is facially unconstitutional for being "impermissibly broad," *Buckley*, 424 U.S. at 79, unless given a saving construction. Here, *Buckley* has already provided saving constructions of "expenditure" for disclosure by PACs and non-PACs, and FEC has created the rule and policy challenged here to reach *beyond* those approved constructions, so the rule and policy are facially unconstitutional. Furthermore, because the rule and policy are unconstitutionally vague, they are facially invalid unless they can be given a saving construction. The enforcement policy may be saved from facial invalidation by imposing a proper construction to comply with *Leake*, but the rule may not. Because 11 C.F.R. 100.22(b) exceeds statutory authority, *supra* at 19, it is void on its face.

B. 11 C.F.R. 100.22(b) Is Vague, Overbroad, Beyond Statutory Authority, and Void.

The Government insists that "exacting scrutiny" governs here because subsection (b) "merely provides a definition of express advocacy" without imposing a "direct restraint on speech." (FEC-Br. 30.) This is wrong. *See supra* at 19-20. (*See* RTAO-Br. 22-23). FEC's alternate express-advocacy definition is beyond statutory authority because *Buckley* already construed an "expenditure" definition, in the *disclosure* context, with the same operative language as the current definition, i.e., "for the purpose of influencing," as requiring magic-words express advocacy. *See supra* at 21. Congress enacted a new "expenditure" definition with the same operative language, in full knowledge of *Buckley*, and thereby acquiesced in *Buckley*'s construction that only magic-words, express-advocacy "expenditures" defined with "for the purpose of influ-

encing" are subject to disclosure. *See supra*. Congress adopted *Buckley*'s express-advocacy language in "independent expenditure," as the Government concedes, and thereby imported the magic-words construction of "expressly advocating" into that definition. *See supra* at 7. So FEC may not cite, as it does, the magic-words "independent expenditure" definition at 2 U.S.C. 431(17), as authority for its non-magic-words definition of "expressly advocating" at 11 C.F.R. 100.22(b). The rule is beyond statutory authority regardless of scrutiny level.

The Government makes no effort to refute what *Buckley* and Congress did with regard to requiring "expenditure" disclosure using the "for the purpose of influencing" formulation. It cannot. So it argues instead that this statutory argument "was laid to rest in *McConnell* and *Citizens United*." (FEC-Br. 34.) The Government argues that "*McConnell* held that *Buckley*'s 'express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command.'" (FEC-Br. 35 (citation omitted).) But that concedes the statutory authority point here. *McConnell* acknowledged that a "for the purpose of influencing" "expenditure" definition requires express advocacy and also held that Congress could regulate "electioneering communications." But that is no statutory authority to regulate "expenditures" or "independent expenditures" more broadly. Indeed, Congress understood that because it made no effort to alter those definitions, instead introducing newly-defined "electioneering communications." So *McConnell* overturned no case, such as *VSHL*, 263 F.3d 379, holding that *Buckley* restricted such "expenditure" disclosure to magic-words express advocacy. And the holdings in *McConnell* and *Citizens* that the government may also regulate "electioneering communications" changes none of the facts about the extent of the "expenditures" subject to disclosure under a "for the purpose of influencing" formulation that has already been narrowly construed to

save it from unconstitutional vagueness. And finally as to statutory authority, the Government attempts to evade the clear statements by all Supreme Court Justices that express advocacy requires magic words,[10] instead quoting the principal opinion's statement about whether the express advocacy test would be required "divorced from specific statutory language." (FEC-Br. 36 (*quoting WRTL-II*, 551 U.S. at 474 n.7).) But that actually supports the argument that where two "expenditure" definitions *share* the "specific statutory language," i.e., "for the purpose of influencing," the saving construction of the first is required of the second, especially where Congress expressly incorporates *Buckley*'s holding into its "independent expenditure" definition.

FEC's alternate express-advocacy definition is unconstitutionally vague and creates unconstitutional vagueness. *Buckley* construed an "expenditure" definition, in the *disclosure* context, to avoid unconstitutional vagueness with the operative language "for the purpose of . . . influencing" by requiring express advocacy. *See supra*. So that same language is unconstitutional in the current "expenditure" definition unless construed, as this same context and *Buckley* require, to apply only to magic-words express advocacy. *See supra*. And the "expenditure" in the "independent expenditure" definition is unconstitutionally vague absent the magic-words express-advocacy construction. *See supra*. When Congress passed its "independent expenditure" definition, it was everyone's understanding that it applied only to non-coordinated "expenditures" for magic-words express advocacy. *See supra*. When FEC promulgated 11 C.F.R. 100.22(b), it rein-

[10] The *Citizens* dissent said: "[T]here has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley v. Valeo*," 130 S. Ct. at 935 n.8 (Stevens, J., joined Ginsburg, Breyer & Sotomayor, JJ.). *See also id.* at 956 (equating express advocacy with "magic words"). In *WRTL-II*, all Justices in the principal, concurring, and dissenting opinions equated "express advocacy" with "magic words." *See* 551 U.S. at 474 n.7 (Roberts, C.J., joined by Alito, J.), 495 (Scalia, J., joined by Kennedy & Thomas, JJ.), 513 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.).

troduced the vagueness in the "expenditure" and "independent expenditure" definitions that *Buckley* had removed with the express-advocacy construction for the same operative "expenditure" language. And the operative language that 11 C.F.R. 100.22(b) uses, which the Government likens to *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70, (FEC-Br. 32-34), was defended in the *WRTL-II* principal opinion against Justice Scalia's accusation of vagueness on bases that conclude with this: "And keep in mind this test is only triggered if the speech meets the brightline requirements of [the electioneering communication definition] in the first place." 551 U.S. at 474 n.7. The Government says that *WRTL-II* held that the appeal-to-vote test is not vague, citing this footnote (FEC-Br. 34), but it omits the necessary fact that the test is not vague *if* anchored to the electioneering-communication definition. If used as a free-floating test, it is unconstitutionally vague.

FEC's alternate express-advocacy definition violates the unambiguously-campaign-related requirement, i.e., *Buckley*-overbreadth. The Fourth Circuit has clearly held that only two types of regulable communications satisfy this requirement, magic-words express advocacy and communications that *both* meet the electioneering-communication definition *and* contain an "appeal to vote" under *WRTL-II*'s test. *Leake*, 525 F.3d at 281-82. Whatever might apply in other circuits, this holding is conclusive and controlling here. The Government attempts to equate *Buckley*-overbreadth with the use of the *word* "unambiguous" in 11 C.F.R. 100.22(b) (requiring that "[t]he electoral portion . . . [be] . . . unambiguous"). (FEC-Br. 36-37.) The argument is self-evidently erroneous, and RTAO has already answered it. (RTAO-Br. 25 n.21.) The Government attempts to distinguish *Leake*'s striking of a "non-magic words express advocacy" statute on several grounds (FEC-Br. 38), but this ignores the plain statement of *Leake* that only magic-

words express advocacy and appeal-to-vote electioneering communications may be regulated under the unambiguously-campaign-related requirement. *Supra*. Any case may be distinguished on superficial grounds, as the Government attempts here, but the plain *analysis* of *Leake* controls. That analysis says essentially that there are two benchmarks against which definitions of regulable speech may be measured, and if they fail to measure up, they are unconstitutional. Section 100.22(b) does not measure up.

Finally, the Government argues that RTAO does not allege that it or its members will suffer reprisals. (FEC-Br. 38.) Such allegations would only apply to a "blanket exemption" to an otherwise valid disclosure provisions. *Buckley*, 424 U.S. at 72-74. But 11 C.F.R. 100.22(b) is not an otherwise valid disclosure provision from which RTAO needs a blanket exemption. It is an invalid provision that may not be imposed on anyone, whether or not they might suffer reprisals.

In sum, section 100.22(b) was invalid before *Citizens*, as this Circuit has held, but the Supreme Court's utter repudiation in *Citizens* of FEC's similar overreaching effort to regulate issue advocacy in 11 C.F.R. 114.15 (previously challenged here) clearly reveals that the same approach cannot be tolerated regarding section 100.22(b). (*See* RTAO-Br. 11-12, 26-35.)

C. FEC's PAC-Status Policy Is Vague, Overbroad, Beyond Authority, and Void.

In its opening brief, RTAO established that strict scrutiny applies to the imposition of PAC-status and PAC-style burdens (RTAO-Br. 36), that the unambiguously-campaign-related requirement applies (RTAO-Br. 36), that there is a permissible way to determine major purpose (RTAO-Br. 36-39), that FEC impermissibly determines major purpose (RTAO-Br. 39-40), that *Citizens* repudiated with regard to 11 C.F.R. 114.15 the same sort of vague and overbroad approach to regulating free speech that FEC applies to PAC-status enforcement (FEC-Br. 40-41),

and that the Fourth Circuit struck similar vague and overbroad standards regulating PAC status, *Leake*, 525 F.3d at 290 (FEC-Br. 41).

The Government disputes justiciability, arguing that "it is *not clear* [whether RTAO] would be a political committee." (FEC-Br. 40 (emphasis added).) That vagueness is exactly the problem that RTAO challenges and which establishes standing. The Government concedes that spending $1,000 to run *Survivors* would trigger statutory standing. This Court held that *Change* would also be express advocacy. (Doc. 77 at 13, 15 n.3.) And RTAO has alleged its intent to do materially similar ads. How many express-advocacy ads does RTAO need to run to trigger "major-purpose" under FEC's vague and overbroad test? No one knows. And under the sort of criteria FEC has suggested in *PAC-Status 2*, 72 Fed. Reg. 5595, FEC might count toward major purpose RTAO's solicitations for running these ads that have been deemed express advocacy. But it might not. No one knows. And the fact that RTAO's bylaws forbid express advocacy does not eliminate standing because the very ads that RTAO considers *not* express advocacy, in compliance with the bylaws, have been deemed express advocacy. The same is true of RTAO's claim that it is not properly deemed a PAC, because that claim is based on the objective major-purpose test as set out in *MCFL* and *Leake*, *supra*, not FEC's vague and overbroad test.

The Government argues that its enforcement policy is not reviewable under the APA, while conceding that this Court has already ruled against it on this issue. (FEC-Br. 41.) This Court's prior holding on this subject remains should be reaffirmed:

> Final agency action combines the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) . . . . Plaintiff's challenge to the definition of "political committee" is still valid, because the rule establishing what the FEC would consider as a "political committee" is a standard set by the FEC, even absent a definition.

(Doc. 77 at 16-17).

The Government claims its PAC-status enforcement policy is lawful in part because the Fourth Circuit and this Court upheld it, and nothing has changed since then. (FEC-Br. 41.) Of course there was a change. The Fourth Circuit opinion was vacated, rejecting the analysis therein, and the issue was remanded for reconsideration in light of *Citizens*—presumably with the expectation that there would be a different outcome or else there would have been no need to grant certiorari, vacate, and remand. If the prior decision was correct, certiorari would have been denied. The Government cites some courts upholding aspects of its policies, but these do not govern here. Nowhere does the FEC indicate that it follows *Leake*'s prescription that major purpose "is best understood as an empirical judgment as to whether an organization primarily engages in regulable, election-related speech." 525 F.3d at 287.

Conclusion

For the reasons stated, this Court should grant RTAO's preliminary-injunction motion, deny FEC and DOJ summary-judgment motions, and grant RTAO's summary-judgment motion.

Respectfully submitted,

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