No. 11-1760

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE REAL TRUTH ABOUT OBAMA, Inc.,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION, *et al*.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Virginia

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center (CLC) is a nonprofit corporation, and is not a publicly held corporation or other publicly held entity. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC. The CLC is not aware of any publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

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This case does not arise out of a bankruptcy proceeding.

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STATEMENT OF INTEREST

Amici curiae Campaign Legal Center and Democracy 21 are non-partisan, non-profit organizations that work to strengthen the laws governing campaign finance and political disclosure. *Amici* have filed multiple briefs in the instant case at the district court and appellate court levels, and more broadly, have participated in several of Supreme Court cases underlying the claims herein, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010). *Amici* thus have a demonstrated interest in the issues raised here.

All parties have consented to *amici*'s participation in this case.

SUMMARY OF ARGUMENT

The Real Truth About Obama, Inc. (RTAO) was organized shortly before the 2008 election for the stated purpose of sponsoring broadcast ads and other public communications to criticize then-Senator Barack Obama, the Democratic Party presidential nominee.

RTAO was free to spend as much money as it wished on such activities, provided that it did so independently of any candidate or political party. But fearing that it might qualify as a federal "political committee," subject to contribution limits, source prohibitions and disclosure requirements under the Federal Election Campaign Act (FECA), RTAO brought this case to challenge several rules governing the FEC's determination of federal political committee

status and its implementation of the "electioneering communications" funding restriction. *See* Am. Complaint (filed Oct. 16, 2008), Counts 1-4 (challenging 11 C.F.R. §§ 100.22(b), 100.57, 114.15 and the FEC's "major purpose" policy).

However, since the initiation of this case, intervening judicial decisions, most notably, *Citizens United*, have radically reshaped the landscape of campaign finance law. As a result, only RTAO's challenge to § 100.22(b) and the FEC's implementation of the "major purpose" test remain live. Furthermore, due to the recent judicial rulings, the "express advocacy" rule of § 100.22(b) and the FEC's "major purpose" policy for political committee status presently affect RTAO only insofar as they trigger disclosure obligations if RTAO makes "independent expenditures" or if it is deemed a federal political committee. *See* Section I.A. *infra*.

Thus, the question that remains is not whether RTAO can make expenditures for the speech it proposes, nor whether it must abide by contribution limits and source requirements, but rather whether it must provide comprehensive disclosure of its campaign advocacy to the American public. There is no support in either the federal campaign finance law or judicial precedent for RTAO's attempt to evade its disclosure obligations under FECA. In 2010 alone, the Supreme Court twice upheld, both times by 8-1 votes, laws requiring political disclosure, reiterating that such "transparency" "enables the electorate to make informed decisions and give

proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916; *see also Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding Washington state law authorizing disclosure of ballot referenda petitions).

In line with this precedent, the district court below rejected RTAO's challenges to § 100.22(b) and the Commission's "major purpose" policy, and granted summary judgment to the defendants. *RTAO v. FEC*, -- F. Supp. 2d --, 2011 WL 2457730 (E.D.Va. 2011). Indeed, this Court already determined in August 2009 that RTAO had not demonstrated a likelihood of success on the merits of its challenge to this rule and policy. *RTAO v. FEC*, 575 F.3d 342 (4th Cir. 2009) (vacated for consideration of mootness by 130 S. Ct. 2371 (2010)). Both the district court's decision and this Court's earlier decision are correct.

First, as a threshold matter, there is no support for the application of strict scrutiny or, as RTAO now phrases it, "high" exacting scrutiny, to this Court's review of either § 100.22(b) or the FEC's "major purpose" policy. Appellant's Brief (Sept. 19, 2011), at 17-18. The Supreme Court has made clear that disclosure laws are subject not to strict scrutiny, but rather only to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizen United*, 130 S. Ct. at 914, *quoting Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (internal citations omitted).

Second, RTAO's contention that the FEC rule defining "express advocacy," 11 C.F.R. § 100.22(b), is overbroad and unconstitutionally vague is contrary to all recent Supreme Court precedent in this area. The Supreme Court has held in a series of cases that Congress may regulate communications that do not constitute "magic words" express advocacy, and that disclosure laws in particular may reach beyond even the "functional equivalent of express advocacy." *McConnell*, 540 U.S. at 190; *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007); *Citizen United*, 130 S. Ct. at 915. Furthermore, the subpart (b) test is not vague; to the contrary, as the district court highlighted, "§ 100.22(b) is consistent with *Wisconsin Right to Life*'s appeal-to-vote test." 2011 WL 2457730, at *9.

Finally, with regard to the FEC's policy for implementing the "major purpose" test, RTAO provides no legal authority for its claim that the FEC impermissibly implements this test by making an inquiry into "vague and overbroad factors." App. Br. at 55. The Supreme Court itself in *Buckley* created the "major purpose" test to narrow the statutory definition of "political committee," *see* 424 U.S. at 79, but the Court in no way restricted the scope of the inquiry that the FEC may make in determining a group's "major purpose."

For all these reasons, RTAO's challenge has no merit and the district court's decision should be affirmed.

ARGUMENT

I. Strict Scrutiny Is Not Applicable to This Court's Review of Section 100.22(b) or the FEC's "Major Purpose" Policy.

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

RTAO's case has contracted greatly in scope, and now concerns only the federal disclosure requirements that are applicable to "independent expenditures" and that accompany federal political committee status. *See* 2 U.S.C. § 434(c) ("independent expenditure" reporting requirements); 2 U.S.C. §§ 432, 433, 434(a)(4) (political committee disclosure requirements). As such, the case is governed not by strict scrutiny, but rather only by "'exacting scrutiny," *i.e.*, the requirement that there be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64 (internal footnotes omitted).

RTAO originally filed suit to challenge three FEC rules, 11 C.F.R. §§ 114.15, 100.57 and 100.22(b), and the FEC's policy for determining a group's "major purpose," which is a requirement for "political committee" status. *See* Am. Complaint, Counts 1-4. Since initiation of RTAO suit, however, *Citizens United* struck down the federal corporate spending restrictions, *see* 2 U.S.C. § 441b, thus mooting RTAO's challenge to § 114.15, which implemented these restrictions. Similarly, RTAO's challenge to § 100.57 has been mooted by *EMILY'S List v.*

FEC, 581 F.3d 1 (D.C. Cir. 2009), which found this rule unconstitutional, albeit on grounds not asserted by RTAO in this action. Therefore, only RTAO's challenge to § 100.22(b)'s definition of "expressly advocate" and the FEC's "major purpose" policy remain.

The substantive requirements triggered by § 100.22(b) and the FEC's policy have also been greatly narrowed by recent judicial decisions. The subpart (b) definition now affects RTAO only insofar as it would trigger the federal disclosure requirements applicable to independent expenditures, 2 U.S.C. § 434(c), or would inform FEC determinations of political committee status. Similarly, the FEC's "major purpose" policy affects RTAO only insofar as it governs determinations of political committee status. Further, following *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), federal political committees that make only independent expenditures are no longer subject to contribution limits, 2 U.S.C. § 441a(a), and source prohibitions, 2 U.S.C. § 441b(a), and now need to comply only with disclosure requirements, *see* 2 U.S.C. §§ 432, 433, 434(a)(4), 441d. Thus, for groups like RTAO making only independent expenditures, federal "PAC status" has lost much of its previous regulatory bite.

In short, since RTAO's case now concerns rules and policies that implement only disclosure requirements, the challenged rules are subject to exacting, not strict, scrutiny.

B. Section 100.22(b) Should Be Reviewed Under "Exacting Scrutiny."

Although RTAO does not dispute the legal developments chronicled above, it contended in the district court proceeding below that strict scrutiny applied to the review of its challenge to § 100.22(b). *See* 2011 WL 2457730, at *8. The district court rejected this theory, however, finding that "[s]ince it effectuates disclosure requirements, § 100.22(b) is subject to exacting scrutiny." *Id*.

Upon appeal, RTAO largely abandons its claim for strict scrutiny in connection to § 100.22(b),[1] but nevertheless again attempts to heighten the applicable standard of judicial review by asserting that this Court should apply a "high" version of exacting scrutiny. App. Br. at 18 ("[T]he burden is high and scrutiny is high, even if exacting scrutiny applies."). But this hybrid standard of strict scrutiny and exacting scrutiny is pure invention. *Citizens United* made clear that the standard of review applicable to a disclosure requirement is exacting scrutiny, which simply requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" *Citizen United*, 130 S. Ct. at 914, *quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted). The Supreme Court in no way suggested the "exacting scrutiny" should be calibrated to a "higher" level whenever a party alleges that the disclosure law it is

[1] *See* note 2 *infra*.

challenging is particularly "onerous." App. Br. at 18. There is simply no support in the case law for multiple tiers of review within the standard of exacting scrutiny.

C. There Is No Basis for the Application of Strict Scrutiny to the Commission's "Major Purpose" Policy.

In a second attempt to heighten the standard of scrutiny applicable to this case, RTAO argues that the FEC's "major purpose" policy can trigger "PAC status," and that laws imposing PAC status require strict scrutiny.[2] App. Br. at 45-46. But "PAC status," in itself, is not a substantive regulation. Because the only substantive regulation triggered by "PAC status" in this case is disclosure, strict scrutiny is inappropriate.

The Supreme Court applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. Expenditure restrictions, as the most burdensome campaign finance regulations, are subject to strict scrutiny and reviewed for whether they are "narrowly tailored" to "further a compelling interest." *WRTL*, 551 U.S. at 476; *see also Buckley*, 424 U.S. at 44-45. Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisfy the lesser

[2] RTAO also asserts that § 100.22(b) can "trigger statutory PAC-status," *see* App. Br. at 18, but it is unclear whether RTAO wishes this Court to apply strict scrutiny or "high" exacting scrutiny to this rule. Insofar as RTAO is arguing that § 100.22(b) must also be reviewed under strict scrutiny because it informs "PAC status" determinations, then its argument fails for the reasons set forth in Section I.C. *supra*.

demand of being closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted). Disclosure requirements, the "least restrictive" campaign finance regulations, *Buckley*, 424 U.S at 68, are subject to "exacting scrutiny." Indeed, the Supreme Court twice reaffirmed last year that "exacting scrutiny" applies to disclosure requirements in the spheres of campaign finance law and ballot referenda. *See Citizens United*, 130 S. Ct. at 914 ("The Court has subjected [disclosure] requirements to 'exacting scrutiny,'…."); *Reed*, 130 S. Ct. at 2818 (finding that disclosure law relating to ballot referenda petitions was subject only to "exacting scrutiny").

Pursuant to this analytical framework, if political committee status is connected to a restriction on expenditures, then the rules that lead to imposition of such status may require review under strict scrutiny. If, on the other hand, "PAC status" entails only registration and reporting requirements, then the provisions governing this status would be reviewed under only "exacting scrutiny."

This principle is well illustrated by the decision of the D.C. Circuit Court of Appeals in *SpeechNow.org*. There, the Court of Appeals reviewed both the contribution limits connected to federal political committee status, and the registration, reporting and organizational requirements connected to such status. It struck down the contribution limits as applied to "independent expenditure

committees" after reviewing such limits under the intermediate scrutiny appropriate for contribution limits. 599 F.3d at 692 (noting that contribution limits must be "closely drawn to serve a sufficiently important interest") (citing *Davis v. FEC*, 128 S. Ct. 2759, 2772 n.7 (2008)). By contrast, the Court of Appeals upheld the political committee disclosure requirements under a more relaxed standard, stating that "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation'" to the requirements." *Id*. at 696. The appropriate standard of scrutiny thus turned on the nature of the substantive regulation associated with political committee status, not "PAC status" itself, as RTAO contends. And neither the contribution limits nor the disclosure requirements applicable to political committees were subjected to strict scrutiny.

RTAO offers no legal authority to the contrary. The cases it cites in support of strict scrutiny either did not review political disclosure requirements, or those that did applied only "exacting scrutiny" to such disclosure. *See* App. Br. at 45, 47-49, *citing Citizens United*, 130 S. Ct. at 896-98; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) (overturned on other grounds); *FEC v. Massachusetts Citizens for Life (MCFL),* 479 U.S. 238, 263 (1986). Instead, the cited cases focused on the constitutionality of federal or state laws that prohibited corporate independent expenditures except through a strictly-regulated separate segregated fund (or "PAC"):

- *Citizens United* reviewed 2 U.S.C. § 441b, the federal restriction on the expenditure of corporate and union treasury funds for independent expenditures. 130 S. Ct. at 913. In its review of the federal electioneering communications disclosure requirements, however, the Supreme Court applied exacting scrutiny. *Id.* at 914.

- *Austin* reviewed a Michigan law that prohibited corporations from using general treasury funds for independent expenditures in connection with state candidate elections. 494 U.S. at 654-55.

- *MCFL* reviewed the federal corporate expenditure restriction, 2 U.S.C. § 441b, as applied to an ideological not-for-profit corporation. 479 U.S. at 241.

Because the substantive laws challenged in these cases were expenditure restrictions, the most burdensome of campaign finance regulations, strict scrutiny was appropriate. Here, however, an expenditure restriction is not at issue, and the review of such restrictions in *Citizens United*, *Austin* and *MCFL* has no relevance to this action.

RTAO tries to bridge the obvious disparity between its cited cases and the instant matter by suggesting that all deal with "PAC-style burdens." App. Br. at 46. But its attempt to equate corporate expenditure bans with the federal political committee disclosure requirements is untenable. *Citizens United*, *Austin* and *MCFL* reviewed laws that prohibited corporate expenditures to influence an election and allowed corporate participation in elections only through a political committee that was "a separate association from the corporation." *Citizens United*, 130 S. Ct. at 897; *see also* 2 U.S.C. § 441b(b). Under federal law, corporate PACs

were subject to federal contribution limits, *see* 2 U.S.C. § 441a(a)(5), and could solicit these limited contributions only from the corporation's restricted class of officers, executive and administrative employees, and shareholders. 2 U.S.C. § 441b(b)(4); 11 C.F.R. §§ 114.5-114.8. The "PAC option" in these cases was thus a highly-regulated alternative to an absolute prohibition on corporate spending. In this case, by contrast, "PAC-style burdens" entail nothing more than registration, reporting and organizational requirements. 2 U.S.C. §§ 432, 433, 434(a)(4). RTAO's facile attempt to label both expenditure restrictions and disclosure obligations as "PAC requirements" does not justify application of strict scrutiny to the regulations at issue here.

Indeed, the Ninth Circuit Court of Appeals recently rejected a similar argument in *Human Life of Washington, Inc. (HLW) v. Brumsickle*, 624 F.3d 990, 997-98 (9th Cir. 2010). There, HLW challenged Washington State's disclosure law that required groups that supported or opposed candidates or ballot propositions to register as political committees and to satisfy detailed reporting and organizational requirements. 624 F.3d at 997-98. Although the challenged law thus "imposed PAC status," in the words of RTAO, the Court of Appeals rejected HLW's assertion that strict scrutiny applied. It noted that "confusion" had "emerged" in the Ninth Circuit regarding the scrutiny applicable to political disclosure laws because the Ninth Circuit had incorrectly interpreted the Supreme

Court's *MCFL* decision as applying strict scrutiny to the federal political committee disclosure requirements. *Id.* at 1003-04. But, as the Court of Appeals noted, "recent Supreme Court decisions have eliminated the apparent confusion as to the standard of review applicable in disclosure cases." *Id.* at 1005. The Ninth Circuit concluded that the decisions in *Citizens United* and *Reed* removed all doubt regarding the correct degree of scrutiny for PAC disclosure obligations by confirming that "a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest." *Id*. (emphasis added).[3]

[3] This has also been the approach of a number of courts that have heard challenges post-*Citizens United* to disclosure-related requirements accompanying state "political committee" status. *National Organization For Marriage v. McKee*, -- F.3d ---, 2011 WL 3505544, *14 (1st Cir. Aug. 11, 2011) ("Because Maine's PAC laws do not prohibit, limit, or impose any onerous burdens on speech, but merely require the maintenance and disclosure of certain financial information, we reject NOM's argument that strict scrutiny should apply."); *Iowa Right to Life Committee, Inc. v. Tooker*, --- F. Supp. 2d ----, 2011 WL 2649980, *7 (S.D. Iowa June 29, 2011) (finding that Iowa disclosure requirements connected to "independent expenditure committees" were subject to exacting scrutiny); *National Organization for Marriage v. Roberts*, 753 F. Supp. 2d 1217, 1222 (N.D. Fla. 2010) (finding that Florida disclosure requirements connected to "electioneering communications organizations" "would not prohibit [plaintiff] from engaging in its proposed speech" and were subject only to exacting scrutiny); *Yamada v. Kuramoto*, 2010 WL 4603936, *11 (D. Haw. Oct. 29, 2010) (finding that recent case law "leaves no doubt [that] exacting scrutiny applies" to Hawaii's regulation of non-candidate committees).

This Court should follow the clear guidance of *Buckley*, *Citizens United* and *Reed* and apply exacting scrutiny to the challenged rule and "major purpose" policy.

II. The Definition of "Expressly Advocating" at Section 100.22(b) Is Constitutional.

RTAO claims that the so-called "subpart (b)" definition of express advocacy is unconstitutionally vague and overbroad because "express advocacy requires magic words." App. Br. at 23. However, this stance flies in the face of all recent Supreme Court precedent, which has uniformly rejected the notion that "magic words" represent the outermost boundary of constitutional regulation. *McConnell*, 540 U.S. at 193; *WRTL*, 551 U.S. at 474 n.7. And as this Court's 2009 ruling found, the *WRTL* decision further confirmed the validity of § 100.22(b) by articulating a test for the "functional equivalent of express advocacy" that is "facially consistent" with subpart (b). *RTAO*, 575 F.3d at 349.

The Supreme Court's subsequent decision in *Citizens United* in no way alters this analysis. *Citizens United* did not require a "magic words" construction of "express advocacy," nor did it question the *WRTL* test for the "functional equivalent of express advocacy." Indeed, if anything, *Citizen United* cast further doubt on the "magic words" test by finding that a communication need not constitute express advocacy – or even the functional equivalent of express advocacy – to be regulable under the federal "electioneering communications"

disclosure requirements. 130 S. Ct. at 915. Accordingly, the district court below rejected RTAO's challenge to the subpart (b) definition, finding that "*Citizens United* does not change the Court's analysis of § 100.22(b)." 2011 WL 2457730, at *11. This holding should be affirmed.

A. The Constitutionality of the Subpart (b) Definition of "Expressly Advocate" Was Confirmed in *McConnell* and *WRTL*.

The debate over the role and scope of the "express advocacy" standard dates back to FECA's enactment. An expenditure limit originally included in FECA provided that "[n]o person may make any expenditure … relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." *Buckley*, 424 U.S. at 39. The *Buckley* Court was troubled by the vagueness of the phrase "relative to a clearly identified candidate," and consequently construed the "relative to" phrase to "apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id*. at 44 (emphasis added). The Court explained in a footnote that "[t]his construction would restrict the application of [the spending limit] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. These phrases became known as the "magic words" of express advocacy.

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

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

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

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

This Circuit in 2001 ruled that this subpart (b) standard "goes too far" because "it shifts the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation." *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (internal quotations omitted). Responding to the FEC's warning that invalidating

subpart (b) would allow a flood of union and corporate money to enter federal elections, this Court said its decision was grounded in Supreme Court precedent: "If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court." *Id.*

And that is exactly what has happened. The Supreme Court has rendered such "further review," and its decisions in *McConnell* and *WRTL* have effectively "overturned" this Circuit's ruling in *Virginia Society*. Both *McConnell* and *WRTL* confirm that the First Amendment does not limit the scope of campaign finance regulation to "magic words," and thus strongly support the constitutionality of subpart (b).[4]

First, in *McConnell,* the Supreme Court explained that *Buckley's* "magic words" express advocacy test was merely an "endpoint of statutory interpretation, not a first principle of constitutional law." 540 U.S. at 190. The Court reached this conclusion in its review of Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited the use of corporate or union treasury funds to pay for an "electioneering communication" – defined as any broadcast ad that refers to a clearly identified federal candidate, is targeted to the candidate's electorate and is

[4] Given these sweeping developments in the governing case law, it is inexplicable that RTAO devotes three pages of its brief citing lower court cases that predate *McConnell* and *WRTL* and that have been superseded by these Supreme Court decisions. App. Br. at 26-28 (citing, e.g., *Virginia Society*, 263 F.3d at 392).

aired within 30 days of a primary or 60 days of a general election. 2 U.S.C. §§ 434(f)(3), 441b(b)(2). These provisions were challenged on grounds that they regulated "'communications' that do not meet *Buckley*'s [magic words] definition of express advocacy." 540 U.S. at 190. The Court rejected this assertion, however, making clear that "the express advocacy limitation … was the product of statutory interpretation rather than a constitutional command." *Id*. at 191-92. The Court concluded that "the unmistakable lesson from the record in this litigation … is that *Buckley's* magic-words requirement is functionally meaningless[,]" and "has not aided the legislative effort to combat real or apparent corruption." *Id.* at 193-94 (emphasis added). Accordingly, the Court upheld BCRA's "electioneering communication" provisions against a facial challenge.

In *WRTL*, the Court re-visited Title II of BCRA in the context of an as-applied challenge regarding three broadcast ads that WRTL sought to air. Chief Justice Roberts, writing the controlling opinion for the Court, interpreted *McConnell* as upholding the Title II funding restrictions only insofar as "electioneering communications" contained either express advocacy or "the functional equivalent of express advocacy." 551 U.S. at 469-70. As to the latter category, "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* (emphasis added).

Applying this test, the Court held that WRTL's ads were not the functional equivalent of express advocacy and accordingly were exempt from the funding restriction. *Id.* at 476.

As the district court noted, *WRTL*'s "appeal-to-vote test" is "consistent" with the FEC's subpart (b) standard for express advocacy. *RTAO*, 2011 WL 2457730 at *9. Under *WRTL,* an ad constitutes the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"; under subpart (b), an ad constitutes express advocacy if "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)." There is no legal or practical difference between these tests.

Furthermore, Chief Justice Roberts in *WRTL* specifically responded to Justice Scalia's contention that the "functional equivalent" test was unconstitutionally vague because it did not incorporate a "magic words" standard. 551 U.S. at 474 n.7. The Chief Justice explained that the "magic words" formulation of express advocacy used in *Buckley* was not "the constitutional standard for clarity … in the abstract, divorced from specific statutory language," and that the *Buckley* "magic words" standard was a matter of statutory construction and "does not dictate a constitutional test." *Id.*

Finally, contrary to RTAO's claims, *WRTL* in no way suggested that its "appeal-to-vote" test would be rendered vague or overbroad were it to be applied outside the definition of "electioneering communications." App. Br. at 34-35. First, as discussed above, Chief Justice Roberts specifically addressed and rejected concerns that his test was vague, finding that it meets "the imperative for clarity in this area." 551 U.S. at 474 n.7. And indeed, if the test is not vague within the pre-election period regulated by Title II, as the controlling opinion holds, it is not vague outside that time frame either, for the time frame would only circumscribe the effect of vagueness, not cure it. RTAO certainly provides no reason why the "appeal to vote" test is sufficiently clear to "provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" within the 30- or 60-day pre-election windows established by Title II, but would suddenly become unworkable and vague 61 days before an election. *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

B. *Citizens United* Provides Further Support for the Subpart (b) Definition.

Citizens United did not break with the reasoning of *McConnell* and *WRTL* with respect to the scope of regulable speech. There, the Supreme Court again reviewed the corporate funding restriction of Title II of BCRA, and in a 5-4 opinion, struck down the federal prohibition on corporate expenditures in its entirety, *see* 2 U.S.C. § 441b. 130 S. Ct. at 913. But because the Court ruled

broadly that all corporate expenditures, including expenditures for express advocacy, are protected by the First Amendment, the Court had no reason to consider – or to narrow – the scope of "express advocacy." Nor did the Court question the validity of the *WRTL* test for "the functional equivalent of express advocacy." To the contrary, the Supreme Court actually applied *WRTL's* "appeal to vote" test to the communications at issue in *Citizens United* to determine whether they would be prohibited by 2 U.S.C. § 441b; only because it found they would be prohibited, did the Court then proceed on to consider the constitutionality of that prohibition.[5] *See RTAO*, 2011 WL 2457730, at *11 (noting that the Court "applied the appeal-to-vote test in *Citizens United*") (emphasis added).

Indeed, far from requiring a "magic words" standard for "express advocacy" or "expenditure," the Supreme Court in *Citizens United* instead consigned this standard to further irrelevance. In an 8-1 opinion, the Court upheld the federal disclaimer and disclosure requirements applicable to all "electioneering

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

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

Nevertheless, RTAO maintains that the *Citizen United* Court implicitly rejected the subpart (b) definition of express advocacy by finding that "express advocacy" was limited to "magic words." This is flatly incorrect. The only support RTAO offers for its theory is a footnote by the dissent, which by definition, is not a holding of the majority. *See* App. Br. at 23, *citing Citizens United*, 130 S. Ct. at 935 n.8 (Stevens, J.) ("If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the 'magic

words' test of *Buckley v. Valeo*…."). Furthermore, the dissenters did not limit express advocacy to "magic words," but merely observed that express advocacy has long been understood to include "magic words" speech. Hence, even if the dissent was the opinion of the majority, it still would not support RTAO's argument that the subpart (b) definition is overbroad with respect to disclosure.

Also unavailing is RTAO's claim that the skepticism expressed by *Citizen United* regarding 11 C.F.R. § 114.15 should be interpreted as an indirect critique of § 100.22(b). RTAO's only proffered reason for such an interpretation is its belief that both rules follow the same "subjective, balancing, speech chilling, FEC-empowering, ad-hoc, we-know-it-when-we-see-it approach." App. Br. at 38. First, it goes without saying that a judicial critique of one agency rule does not in any way suggest a critique of all agency rules. Subpart (b) does not remotely resemble § 114.15. Instead, as this court has found, subpart (b) is almost identical to the *WRTL* Court's "appeal-to-vote" test. If the *WRTL* test, as stated by the Supreme Court, is not "subjective," "speech-chilling" or "ad hoc," then neither is the subpart (b) definition. Further, even insofar as subpart (b) definition includes "contextual factors," *see* App. Br. at 40, the *WRTL* Court made clear that courts "need not ignore basic background information that may be necessary to put an ad in context – such as whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such

scrutiny in the near future[.]" 551 U.S. at 474 (internal quotations omitted). In keeping with this directive, consideration of context is permitted, but greatly limited, under the subpart (b) test ("with limited reference to external events"). As the district court below concluded, "100.22(b)'s reference to 'external events' does not broaden the provision beyond Chief Justice Roberts's test." 2011 WL 2457730, at *9

In short, since *Virginia Society* was decided, new Supreme Court case law – including *McConnell, WRTL* and *Citizens United*, has in effect overruled this Court's decision. *McConnell* made clear that the "magic words" standard was "functionally meaningless." 540 U.S. at 190. *WRTL* made clear that express advocacy is not limited to magic words – but may also include communications that can only be interpreted to appeal to vote for or against a candidate. Finally, *Citizens United* declared that for the purposes of disclosure, regulation can extend even beyond communications that meet the *WRTL* "appeal-to-vote" test. All three cases thus strongly support the constitutionality of subpart (b), and indeed suggest that disclosure-related regulation may sweep yet more broadly.

This Court was thus correct in denying RTAO preliminary relief on this claim in 2009, and the district court was correct in granting defendant-appellees summary judgment. If the *WRTL* test is constitutional – and *Citizen United* only further supports its validity – then so too is the virtually identical subpart (b) test.

III. The FEC's "Major Purpose" Policy Is Constitutional.

RTAO also challenges the FEC's implementation of the "major purpose" test for "political committee" status. In particular, RTAO claims that the FEC's application of the major purpose test is unconstitutional because it is based on "ad hoc, case-by-case, analysis of vague and impermissible factors." App. Br. at 56. The district was correct in rejecting RTAO's objections, and this Court should affirm this decision.

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

The *Buckley* Court resolved these concerns by narrowing the definition of "political committee" to only "encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a

candidate." *Id.* (emphasis added). For such "major purpose" groups, the Court had no vagueness concern about the statutory definition of "expenditure" because, the Court held, "expenditures" by such groups "are, by definition, campaign related." *Id.* (emphasis added).

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

RTAO argues that the FEC's implementation of the "major purpose" test, as set forth in its most recent statement on the question, *see* FEC Notice 2007-3, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007), represents an impermissible inquiry into "various vague and overbroad factors." App. Br. at 55. It asserts that the FEC, in implementing the "major purpose" test, instead may make only two inquiries. First, RTAO claims that the FEC can examine whether a group's express advocacy expenditures constitute a majority of its total disbursements. *Id*. at 51. Alternatively, RTAO states that the FEC can examine a group's "organic documents" – but only those documents – to determine if they contain an "express intention" to operate as a political committee. *Id*. at 52. According to RTAO, the FEC may make no other inquiry.

But these are limitations that RTAO simply makes up. It cites *MCFL* as support, *see id*. at 51-52, but this case contained no such restrictions on determinations of major purpose. 479 U.S. at 262.[6] The test set forth in Supreme Court precedent is whether a group's "major purpose" or "primary objective" is "the nomination or election of a candidate" or "campaign activity" or "to influence political campaigns." *Buckley*, 424 U.S. at 78-81; *MCFL,* 479 U.S. at 262. The Court has not limited the scope of the FEC's inquiry into a group's major purpose along the lines suggested by RTAO. As this Court found in its 2009 decision, "The approach taken by the Federal Election Commission in this regulation, however, appears simply to be adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose of a particular organization's contributions." *RTAO*, 575 F.3d at 351.

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[6] RTAO also cites *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), in support of its argument, but this case actually undercuts RTAO's position. App. Br. at 52-53. The *Coffman* Court stated that the "major purpose" determination should focus on "(1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates." 498 F.3d at 1152. The Court thus did not limit the inquiry in the manner RTAO suggests, but rather allowed the FEC to conduct an assessment of the "organization's central organizational purpose," without limiting what documents or activities would be relevant to this assessment. Certainly, the Court did not suggest that only the organization's "organic documents" could be reviewed under this prong.

Further, a federal district court in Washington, D.C. recently approved the FEC's "fact intensive approach" to this major purpose determination. *Shays v. FEC,* 511 F. Supp. 2d 19, 29 (D.D.C. 2007). There, the plaintiff sought a judicial determination requiring the FEC to issue a regulation governing when "527 organizations" (like RTAO) would be deemed political committees. The FEC defended its decision to not adopt a regulation but, instead, to make political committee status determinations through enforcement actions, arguing that the major purpose doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct," including "sufficiently extensive spending on federal campaign activity," "the content of [a group's] public statements," "internal statements of the organization," "all manner of the organization's spending" and "the organization's fundraising appeals." *Id.* The district court approved the FEC's approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id. See also FEC v. Malenick,* 310 F. Supp. 2d. 230, 234 (D.D.C. 2004), *quoting FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("An organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.").

RTAO's invocation of the *Citizens United* decision does not save its argument. *Citizens United* did not address the determination of political committee

status, much less the FEC's methodology for assessing a group's "major purpose." It has no application here. Indeed, RTAO does not really attempt to argue otherwise. It simply alleges that the Supreme Court criticized the FEC's rule implementing *WRTL*, *see* 11 C.F.R. § 114.15, and implies this court should be similarly critical of the FEC's "major purpose" policy. App. Br. at 49-50. But, as explained in Section II *supra*, this is not a legal argument; it is a non sequitur, and should be dismissed as such.

Nor does *North Carolina Right to Life (NCRL) v. Leake*, 525 F.3d 274 (4th Cir. 2008) provide support for RTAO's position. In *NCRL,* this Court described the "major purpose" test as an inquiry into whether an organization has the major purpose "of supporting or opposing a candidate" and said that political committee status is "only proper if an organization primarily engages in election-related speech." 525 F.3d at 288 (emphasis added). The Court further said that the test is to be implemented by examining, *inter alia*, whether "the organization spends the majority of its money on supporting or opposing candidates." *Id.* at 289 (emphasis added). None of these formulations states or implies the kind of "narrow major-purpose test" that RTAO advocates.

In short, the Supreme Court in *Buckley* added the "major purpose" test as a gloss to narrow statutory definition of "political committee." But neither the Supreme Court nor any lower court has constricted the scope of the "major

purpose" inquiry as narrowly as RTAO proposes. This Court should therefore affirm the district court decision – and its own earlier decision – to reject RTAO's challenge to the FEC's "major purpose" policy.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision below.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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