No. 11-1760

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 OF APPELLEES FEDERAL ELECTION COMMISSION AND UNITED STATES DEPARTMENT OF JUSTICE

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and entered its final decision granting summary judgment to the Federal Election Commission ("Commission" or "FEC") and the Department of Justice on June 16, 2011. (J.A. 56-81.) A notice of appeal and an amended notice of appeal (J.A. 82) were filed on July 15, 2011. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the Federal Election Commission's regulatory definition of the statutory term "expressly advocating" is constitutional.

2. Whether a statement that the Federal Election Commission published in the Federal Register to provide guidance regarding how the Commission determines if an entity is a "political committee" constitutes final agency action subject to judicial review.

3. Whether the Federal Election Commission's method of determining if an entity is a "political committee" is constitutional.

STATEMENT OF THE CASE

This appeal presents facial and as-applied constitutional challenges to (1) a Federal Election Commission regulation defining the communications that must be disclosed as "independent expenditures," and (2) a notice that the Commission published in the Federal Register in 2007 regarding the Commission's approach to determining whether entities are "political committees" for purposes of federal campaign-finance law.

During the 2008 presidential campaign, The Real Truth About Obama, Inc. ("RTAO") filed a complaint and two motions seeking to preliminarily enjoin the Commission and the Department of Justice from enforcing three allegedly unconstitutional Commission regulations and the approach described in the Commission's Federal Register notice. The district court denied RTAO's preliminary injunction motions. 2008 WL 4416282, at *9-*15 (E.D. Va. Sept. 24, 2008). This Court affirmed. 575 F.3d 342, 346-47 (4th Cir. 2009). RTAO petitioned the Supreme Court for a writ of certiorari, and the government noted in response that two of RTAO's claims had been rendered moot by, *inter alia*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The Supreme Court

then remanded "for further consideration in light of *Citizens United v. FEC* . . . and the [government's] suggestion of mootness." *RTAO v. FEC*, 130 S. Ct. 2371 (2010).

On June 8, 2010, this Court re-issued the portions of its original opinion regarding the facts and the preliminary injunction standard, and the Court remanded the case to the district court. 607 F.3d 355 (4th Cir. 2010). On remand, RTAO withdrew its preliminary injunction motions (J.A. 55) and its two moot claims (*see* J.A. 60 n.3). The district court then granted summary judgment to the Commission and the Department of Justice on RTAO's remaining regulatory challenge and its challenge to the Federal Register notice. (J.A. 66-80.)

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Express Advocacy and Electioneering Communications

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57, as enacted, prohibited corporations and labor unions from making "expenditures," 2 U.S.C. § 441b(a). FECA defines an "expenditure" to include any payment of money made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). In *Buckley v. Valeo*,

however, the Supreme Court held that this definition was unconstitutionally vague in the context of independent spending and so construed it "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. 1, 44 (1976). Congress then amended FECA to incorporate the Court's construction by defining an "independent expenditure" as a communication "expressly advocating the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 2 U.S.C. § 431(17)).

Exercising its authority to "to make . . . such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8), the Commission promulgated a regulation defining the statutory term "expressly advocating," 11 C.F.R. § 100.22. The regulation established a two-part definition. Part (a) of the regulation includes communications that use phrases — such as "vote for" or "reject" — "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. § 100.22(a). This is

sometimes referred to as "magic words" express advocacy. *See McConnell v. FEC*, 540 U.S. 93, 126 (2003) (citing *Buckley*, 424 U.S. at 44 n.52). Part (b) defines express advocacy as a communication that has an unambiguous "electoral portion" as to which "[r]easonable minds could not differ [that] it encourages actions to elect or defeat one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b). An entity that finances an independent expenditure of more than $250 must file with the Commission a disclosure report that identifies, *inter alia*, the date and amount of the expenditure and anyone who contributed over $200 to further it. *See* 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(e).

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), which introduced new financing and disclosure requirements for "electioneering communications." Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002). The statute prohibited corporations and unions from making any "direct or indirect payment . . . for any applicable electioneering communication," which is defined in the context of a presidential election as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before the general election or thirty days before

a primary election or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i).[1] BCRA also mandated disclosure for electioneering communications, including a requirement that every person who makes electioneering communications aggregating in excess of $10,000 during a calendar year must file within 24 hours a statement that identifies the maker, amount, and recipient of each disbursement over $200, as well as information about donors who contributed to the person making the disbursement. 2 U.S.C. § 434(f)(1)-(2).

The Supreme Court initially upheld the constitutionality of the financing restriction for electioneering communications "to the extent that the issue ads . . . are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08 (quotation at 206). Later, in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), the Chief Justice's controlling opinion defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against

[1] In the context of campaigns for the United States Senate and House of Representatives, the communication must also be broadcast within the geographic area of the given campaign to constitute an electioneering communication. *See* 2 U.S.C. § 434(f)(3)(A)(i)(III).

a specific candidate." 551 U.S. 449, 469-70 (2007). In 2007, the Commission codified this standard in a regulation. 11 C.F.R. § 114.15.

The Supreme Court subsequently held unconstitutional FECA's restriction on corporate financing of independent expenditures, as well as BCRA's electioneering communication financing restrictions. *Citizens United*, 130 S. Ct. at 913. The Commission has accordingly announced that it will no longer enforce these restrictions.[2]

But in *Citizens United* eight Justices upheld BCRA's disclosure requirements for electioneering communications, even if those communications are *not* the functional equivalent of express advocacy. 130 S. Ct. at 914-15. The Court recognized that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'" *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64). The Court thus declined to review such requirements through the lens of strict scrutiny and instead "subjected these requirements to 'exacting scrutiny,' which requires 'a substantial relation' between the disclosure requirement and a 'sufficiently

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[2] Press Release, *FEC Statement on the Supreme Court's Decision in* Citizens United v. FEC, http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml (Feb. 5, 2010).

important' governmental interest." *Id.* (quoting *Buckley*, 424 U.S. at 64, 66). The Court also explained that disclosure is "less restrictive" than a limit on spending, and that the public has an interest in knowing who is responsible for pre-election communications that speak about candidates, "[e]ven if the ads only pertain to a commercial transaction." *Id.* at 915-16.[3]

B. Political Committee Status

Under FECA, any "committee, club, association, or other group of persons" that makes over $1,000 in expenditures or receives over $1,000 in contributions in a calendar year is a "political committee." 2 U.S.C. § 431(4)(A). A "contribution" includes anything of value given "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Political committees — commonly known as "PACs" — must register with the Commission and file periodic reports of their receipts and disbursements for disclosure to the public, with limited exceptions for most transactions below a $200 threshold. *See* 2 U.S.C.

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[3] Because *Citizens United* found the ban on corporate and union independent expenditures in 2 U.S.C. § 441b to be unconstitutional, the Commission's regulatory definition of express advocacy in 11 C.F.R. § 100.22, which had helped to implement that ban, continues to trigger disclosure obligations but no longer operates as part of any limit on speech. *See infra* pp. 23-24.

§§ 433, 434. Under FECA as originally enacted, political committees were permitted to accept individual contributions up to $5,000 but could not accept corporate or union contributions. *See* 2 U.S.C. § 441a(a)(1)(C).

In *Buckley*, however, the Supreme Court held that defining political committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application of FECA's PAC provisions by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the definition "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* Under the statute as thus limited, an organization that is not controlled by a candidate must register as a political committee only if (1) the entity crosses the $1,000 threshold of contributions or expenditures, and (2) its "major purpose" is the nomination or election of federal candidates.

In 2004, the Commission issued a notice of proposed rulemaking, asking whether the agency should promulgate a regulatory definition of "political committee." *See Political Committee Status*, 69 Fed. Reg.

11,736, 11,743-49 (Mar. 11, 2004). The notice specifically asked whether the Commission should promulgate a regulation providing that all "527" groups — *i.e.*, "political organizations" organized under section 527 of the Internal Revenue Code — meet the major purpose requirement because 527 groups, by definition, are operated "primarily for the purpose of . . . accepting contributions or making expenditures . . . to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office." *See id.* at 11,748-49 (quoting 26 U.S.C. § 527(e)(2)).

In 2007, after receiving public comments and holding extensive hearings, the Commission published in the Federal Register a notice stating that the Commission had decided not to promulgate a new definition of "political committee" but instead to continue its longstanding practice of determining each organization's major purpose on a case-by-case basis. *Political Committee Status*, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007).[4] The notice then discussed a number of administrative and civil matters in which the Commission or a court had analyzed a group's major purpose; these descriptions cumulatively

[4] The complete administrative record, including public comments, is available at http://sers.nictusa.com/fosers/viewreg.htm?regno=2003-07.

"provid[ed] considerable guidance to all organizations" regarding the criteria that are used to apply the "major purpose" test. *See id.* at 5595, 5605-5606. In addition, the notice explained that the Commission refers to its regulatory definition of "express advocacy" to help determine whether an organization has satisfied the statutory criteria for political committee status by making $1,000 in expenditures in a calendar year. *See id.* at 5604.

Relying upon *Citizens United*, the D.C. Circuit recently held that a group that receives contributions only from individuals and whose campaign-related activity consists only of independent expenditures is not subject to the $5,000 limit on contributions received by political committees. *SpeechNow.org v. FEC*, 599 F.3d 686, 692-97 (D.C. Cir.) (en banc), *cert. denied*, 131 S. Ct. 553 (2010). Regarding disclosure and reporting, however, *SpeechNow* upheld the Act's requirements for political committees. *Id.* at 696-98. The court noted that the reporting required of political committees does not "impose much of an additional burden" compared with the reporting requirements for persons making independent expenditures. *Id.* at 697.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Commission is the independent agency of the United States government with exclusive civil jurisdiction over the administration, interpretation, and enforcement of FECA. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce the Act, 2 U.S.C. § 437g. The Department of Justice prosecutes criminal violations of the Act. *See* 2 U.S.C. § 437g(d).[5]

RTAO is a nonprofit Virginia corporation. 575 F.3d at 345.[6] RTAO was incorporated on July 24, 2008, *id.*, and requested section 527

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[5] Because the regulation and enforcement approach at issue in this case were promulgated by the Commission, we refer exclusively to the Commission in the remainder of this brief.

[6] The facts found by this Court and set out in the first opinion in this case, 575 F.3d at 345, which were reissued on remand, 607 F.3d 355, are binding. *See CFTC v. Bd. of Trade*, 701 F.2d 653, 657 (7th Cir. 1983) (findings made in preliminary injunction decisions have preclusive effect "if the circumstances make it likely that the findings are accurate [and] reliable"); *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 474 n.11 (3d Cir. 1997).

status from the Internal Revenue Service on July 29, 2008 (J.A. 16-17). In its IRS filing, RTAO stated that its purpose was "[t]o provide accurate and truthful information about the public policy positions of Senator Barack Obama," and RTAO stated that it would not "expressly advocate the election or defeat" of any political candidate or "make any contribution" to a candidate. (J.A. 16; *id.* at 68 (citing RTAO's articles of incorporation).) RTAO then filed this lawsuit the next day. (J.A. 5.)

In its complaint and other civil filings, RTAO alleged that it had developed two radio advertisements, entitled "Change" and "Survivors." (*See* J.A. 57-58.) In "Change," a woman's voice asks "what is the real truth about Democrat Barack Obama's position on abortion?," and an "Obama-like voice" responds in the first-person that then-Senator Obama wishes to provide federal funds for every abortion performed in the United States, legalize partial-birth abortion, and "give Planned Parenthood lots more money." (*Id.* at 57.) Near the end of the ad, the woman's voice asks: "Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?" (*Id.*)[7] In "Survivors," a narrator states that Senator Obama "has been lying"

[7] "Change you can believe in" was a slogan of the 2008 Obama presidential campaign. (*See* J.A. 57.)

about his voting history regarding abortion, thereby demonstrating "callousness" and "a lack of character and compassion that should give everyone pause." (*Id.* at 57-58.) RTAO alleged that it intended to spend over $1,000 to broadcast these ads on the radio during the sixty-day period preceding the 2008 general election. (*See id.*)

RTAO moved to enjoin the Commission from enforcing 11 C.F.R. § 100.22(b) on its face and as applied to "Change" and "Survivors" — *i.e.*, to prohibit the Commission from finding that either ad would constitute an independent expenditure. *See* 2008 WL 4416282, at *7-*8. RTAO also sought to enjoin the Commission from applying the case-by-case approach described in the 2007 Federal Register notice to determine whether RTAO would meet *Buckley*'s major purpose test for PAC status. *Id.* at *8. Finally, RTAO moved to enjoin enforcement of two additional Commission regulations: 11 C.F.R. § 100.57, which provided that donations made in response to certain solicitations constituted "contributions" under FECA; and 11 C.F.R. § 114.15, which implemented the *WRTL* decision by defining which electioneering communications were the "functional equivalent of express advocacy."

The district court held that RTAO was unlikely to prevail on any of its constitutional claims and denied the motions for preliminary relief. *Id.* at *9-*15. RTAO appealed to this Court and moved both the district court and this Court to enjoin the Commission from enforcing the challenged regulations and policy during the pendency of the appeal. Both Courts denied the injunction motions. No. 08-1977 (4th Cir. Oct. 1, 2008); Civ. No. 08-483 (E.D. Va. Sept. 30, 2008). This Court then affirmed the district court's denial of preliminary relief, holding that RTAO had not demonstrated a likelihood of success on the merits of its claims or met any of the other requirements for a preliminary injunction. 575 F.3d at 346-52. RTAO filed a petition for rehearing en banc, which this Court denied, with no Judge requesting a vote thereon. No. 08-1977 (4th Cir. Oct. 6, 2009).

RTAO petitioned the Supreme Court for a writ of certiorari. The government's response to the petition asked the Supreme Court to vacate aspects of this Court's ruling that had been rendered moot by two other judicial opinions post-dating the ruling. *See* Brief for the Respondents at 10-11, 24-25, S. Ct. No. 09-724 (Mar. 2010), available at http://www.justice.gov/osg/briefs/2009/0responses/2009-0724.resp.pdf.

Specifically, the government noted that *Citizens United*, 130 S. Ct. 876, had mooted RTAO's challenge to 11 C.F.R. § 114.15 by determining that all corporate funding of independent campaign advocacy was permissible; and the Commission had announced that it would cease enforcement of 11 C.F.R. § 100.57 after the D.C. Circuit invalidated certain aspects of that regulation in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

In April 2010, the Supreme Court granted certiorari, vacated this Court's judgment, and remanded "for further consideration in light of [*Citizens United*] and the [government's] suggestion of mootness." 130 S. Ct. 2371.[8] On June 8, 2010, this Court re-issued the sections of its original opinion that had articulated the facts of this case and annunciated the Circuit's standard for assessing preliminary injunction

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[8] This kind of "GVR order" is not a determination on the merits, but indicates only that intervening case law "*may* affect the outcome of the litigation" and that the appellate court should be afforded the chance to fully consider the issue in light of new precedent. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (emphasis added); *see also Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1473 (Fed. Cir. 1998) ("The use of a GVR order . . . 'flag[s] a particular issue that . . . does not appear to have [been] fully considered.' Vacatur and remand by the Supreme Court . . . does not create an implication that the lower court should change its prior determination.") (citations omitted), *abrogated on other grounds by Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 234 F.3d 558, 574 (Fed. Cir. 2000).

motions, and remanded the rest of the case to the district court for final determination. 607 F.3d 355. RTAO filed a petition for rehearing en banc, which this Court denied, with no Judge requesting a vote thereon. No. 08-1977 (4th Cir. Aug. 6, 2010).

On remand, RTAO withdrew its preliminary injunction motions (J.A. 55),[9] and the parties agreed that RTAO's challenges to 11 C.F.R. § 114.15 and 11 C.F.R. § 110.57 were moot in light of *Citizens United* and *EMILY's List*, respectively (*see* J.A. 60 n.3). The district court then granted summary judgment to the Commission on RTAO's remaining claims. (J.A. 66-80.)

The district court held that the challenged provisions are constitutional on their face and as applied to RTAO. The court first noted that, after *Citizens United*, the only consequence of a communication being deemed express advocacy under section 100.22(b) is that the entity financing the communication must file a disclosure statement. (J.A. 67-68.) Similarly, the court noted that, after *SpeechNow*, the only consequence of being deemed a political committee for an entity such as RTAO (*i.e.*, an entity that does not make

[9] The district court held in its final opinion that RTAO's preliminary injunction motions were moot. (J.A. 62-65.)

contributions or coordinated expenditures) is that disclosure requirements are triggered. (J.A. 68.) Because the Commission's regulation and its PAC methodology implement disclosure provisions but trigger no spending restrictions, the court held that they are both subject to intermediate scrutiny. (J.A. 67-68.)

Applying that scrutiny to section 100.22(b), the district court found the regulation constitutional under *WRTL*, in which the Supreme Court had held that a communication "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" is "functional[ly] equivalent" to what *Buckley* termed "express advocacy." (*See* J.A. at 69-75.) Because section 100.22(b) "mirrors" the Supreme Court's *WRTL* standard — a standard the Court later applied in *Citizens United* — the district court held that the regulation is constitutional on its face, not vague or overbroad. (J.A. 73-74.) And the court found that because both of RTAO's ads would constitute the functional equivalent of express advocacy under *WRTL*, "if the FEC deemed [the ads] express advocacy under § 100.22(b), that application would not be unconstitutional." (J.A. 74-75.)

As to the Commission's case-by-case methodology for making PAC status determinations, the district court noted that "ascertaining an organization's single major purpose is an inherently comparative task" requiring analysis of a variety of the entity's activities and not readily reducible to "one or two factors." (*See* J.A. 76-77.) The court also noted that the approach reflected in the Commission's Federal Register notice is consistent with the decisions of other courts that have considered how to determine political committee status. (*Id.* at 76.) The district court therefore held that the Commission's decision to conduct its analysis on a case-by-case basis, rather than promulgating a categorical regulation, is a proper means of implementing FECA's PAC disclosure provisions. (*See id.* at 76-77.)

SUMMARY OF THE ARGUMENT

RTAO's constitutional challenges to the Commission's regulatory definition of "expressly advocating" and its method of analyzing political committee status have even less merit now than they did when this Court found that RTAO's claims were unlikely to succeed. Intervening judicial decisions, including *Citizens United*, have narrowed the reach of the challenged provisions such that they now mainly implement

disclosure requirements, not any restrictions on speech. From *Buckley* through *Citizens United* and beyond, disclosure requirements have consistently been upheld under intermediate scrutiny because disclosure serves the important governmental interest of informing the public about the financing of candidate advocacy and other election activity.

The Commission's regulatory definition of express advocacy is strikingly similar to the Supreme Court's definition of the "functional equivalent" of express advocacy — a definition that *WRTL* held was not vague, and that the Court expressly applied in *Citizens United*. *WRTL*, like *McConnell* before it and several decisions from the courts of appeals after it, rejected the contention that a communication must contain "magic words" of candidate advocacy to pass constitutional muster. Indeed, an eight-Justice majority in *Citizens United* upheld mandatory disclosure for pre-election communications that contain no unambiguous electoral advocacy. The Commission's regulation is therefore a constitutionally permissible means of implementing the important disclosure requirements applicable to communications that expressly advocate the election or defeat of candidates for federal office.

The Commission's 2007 Federal Register notice regarding political committee status did not create or modify any procedures, establish any entity's rights, or contain any other determination that would constitute final agency action subject to judicial review. But even if the substance of that notice were properly before the Court, the Commission's approach faithfully and accurately implements the Supreme Court's "major purpose" test. Determining an organization's major purpose is an inherently comparative endeavor, and the Commission's Federal Register notice — along with subsequent additional information and analysis — provides substantial guidance regarding the Commission's implementation of the "major purpose" standard.

ARGUMENT

I. STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is appropriate where "'there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.'" *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 174 (4th Cir. 2009) (quoting Fed. R. Civ. P. 56(c)). This Court reviews a

grant of summary judgment *de novo*. *Okoli v. City of Baltimore*, 648 F.3d 216, 220 (4th Cir. 2011).

B. Exacting Scrutiny Applies Here Because the Challenged Restrictions Impose No Direct Restraint on Speech

In determining the level of constitutional scrutiny applicable to campaign finance regulations, the Supreme Court has long distinguished between disclosure provisions, which are subject to intermediate (sometimes referred to as "exacting") scrutiny, and expenditure limits, which are subject to strict scrutiny. *E.g., Buckley,* 424 U.S. at 64. Although "disclosure requirements may burden the ability to speak," they "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United,* 130 S. Ct. at 914 (internal quotation marks and citations omitted). Disclosure is therefore subject to "exacting scrutiny," which, unlike strict scrutiny, requires only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (quoting *Buckley,* 424 U.S. at 64, 66); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55-57 (1st Cir. 2011) (applying "substantial relation" standard and rejecting argument that strict scrutiny applies to disclosure and organizational requirements for PACs under *Citizens*

United); *SpeechNow*, 599 F.3d at 686, 696 (same); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1003-05 (9th Cir. 2010) (same), *cert. denied,* 131 S. Ct. 1477 (2011).[10]

Following *Citizens United*, section 100.22's definition of express advocacy can trigger only two legal obligations: disclosure requirements, and (in combination with the major purpose test) PAC status. *See supra* pp. 7-8; J.A. 67-68. For entities like RTAO that do not make contributions, PAC status, in turn, triggers only disclosure and organizational requirements and *no* limits on their spending or on the contributions they can receive from eligible contributors. *See supra* p. 11; J.A. 68.[11] Because these disclosure and organizational

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[10] RTAO suggests that there are different forms of "exacting scrutiny," including exacting scrutiny that is "either strict or the functional equivalent of strict scrutiny." (*See* Br. 17-18.) But the case RTAO cites for this proposition employed the same "substantial relation" test for exacting scrutiny as did *Buckley*, *Citizens United*, and all the other cases cited above. *See Davis v. FEC*, 554 U.S. 724, 744 (2008). RTAO's reliance (Br. 48-49) on *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986), is equally misplaced: The statutory provision under review there was the ban on corporate independent expenditures. Although the Court referred to the major purpose test, it was not under review; the parties did not dispute that the group's "central organizational purpose" was *not* candidate-related. 479 U.S. at 252 n.6.

[11] PACs that make contributions to candidates do not fall within the holding of *SpeechNow* and cannot receive annual contributions above $5,000 from any one person. *See supra* p. 11; 2 U.S.C. § 441a(a)(1)(C).

requirements are subject to intermediate scrutiny, *Citizens United,* 130 S. Ct. at 914; *SpeechNow*, 599 F.3d at 696, and because neither section 100.22(b) nor the Commission's political committee methodology triggers any spending limit, strict scrutiny has no application here.

RTAO nonetheless argues that strict scrutiny should apply because any entity found to be a PAC under section 100.22(b) and the Commission's methodology is subject to "an 'onerous' burden" akin to the burden to which the Supreme Court applied strict scrutiny in *Citizens United*. (Br. 18 (quoting *Citizens United*, 130 S. Ct. at 898), 46-49.)[12] RTAO's argument is off the mark. The burden at issue in *Citizens United* was that a corporation was prohibited from speaking, and its only recourse under FECA was to create a separate PAC that could accept limited contributions (none from the corporation itself) to

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According to its articles of incorporation, RTAO cannot make contributions. (J.A. 68 n.4.) In any event, contribution limits, like disclosure requirements, are subject to intermediate scrutiny. *McConnell*, 540 U.S. at 134-41; *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010).

[12] RTAO concedes that "one-time, event-driven" disclosure, such as that which section 100.22(b) triggers for independent expenditures, is not subject to strict scrutiny and "requires no complicated work." (*See* RTAO Br. 45, 47; *id.* at 17 (referring to "non-PAC-style 'disclosure'").)

finance its advertising. *See* 130 S. Ct. at 898. The Supreme Court held that this ability to create a "separate association" did not change the fact that the statute at issue in that case constituted a ban on the corporation's *own* speech, *see id.* at 897, and such bans are subject to strict scrutiny, *id.* at 898. In sharp contrast, RTAO faces no speech prohibition, and nothing in *Citizens United* states or implies that PAC disclosure provisions standing alone would be subject to strict scrutiny. *See* 130 S. Ct. at 914 (citing *Buckley*'s application of exacting scrutiny to FECA's disclosure requirements, including those applicable to political committees); *McKee*, 649 F.3d at 55-57 (discussing *Citizens United* and rejecting argument that PAC disclosure requirements trigger strict scrutiny).

In sum, the Commission's tests for express advocacy and PAC status are subject to intermediate scrutiny. And since they are both justified by an important governmental interest, they do not offend the First Amendment.

II. THE COMMISSION'S REGULATORY DEFINITION OF "EXPRESSLY ADVOCATING" IS CONSTITUTIONAL

RTAO's facial challenges include claims of both overbreadth and vagueness. A law is facially overbroad under the First Amendment only

if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens,* 130 S. Ct. 1577, 1587 (2010) (internal quotation marks and citation omitted); *see McConnell*, 540 U.S. at 207 (noting that plaintiffs bear the "heavy burden of proving" that law is overbroad "'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications'") (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)). A provision is unconstitutionally vague on its face if it fails to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and permits "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

The Commission's express advocacy regulation now operates mainly to implement disclosure requirements for communications that have far more explicitly electoral content than those for which *Citizens United* upheld disclosure, and the regulation closely follows the relevant Supreme Court precedent. The narrow definition in 11 C.F.R. § 100.22(b) is neither vague nor overbroad and comports with the Court's articulation of the "functional equivalent of express advocacy"

recognized in *WRTL* and applied in *Citizens United*. *WRTL*, 551 U.S. at 469-470; *Citizens United*, 130 S. Ct. at 889-90. Fundamentally, both section 100.22(b) and the *WRTL* test provide that any communication that can reasonably be interpreted as non-candidate-advocacy is excluded from regulation. *Compare* 11 C.F.R. § 100.22(b) ("[r]easonable minds could not differ"), *with WRTL*, 551 U.S. at 469-70 ("susceptible of no [other] reasonable interpretation").

To the extent these standards differ, section 100.22(b) is *narrower* than the *WRTL* test, as the regulation requires a communication with an "electoral portion" that is "unambiguous," 11 C.F.R. § 100.22(b)(1), while *WRTL* looks to the mere "mention" of an election and similar indicia of express advocacy, *see* 551 U.S. at 470. In addition, both the *WRTL* and Commission's tests avoid vagueness concerns by refusing to consider the subjective intent of the speaker. *Compare Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) ("[T]he subjective intent of the speaker is not a relevant consideration . . . ."), *with WRTL*, 551 U.S. at 472 ("To the extent th[e] evidence goes to WRTL's subjective intent, it is again irrelevant."); s*ee also* J.A. 69.

Thus, as this Court recognized in its first opinion in this case, section 100.22(b) "limit[s] its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*." *RTAO*, 575 F.3d at 349.

A. The Supreme Court Has Made Clear That Congress May Require Disclosure of a Broad Range of Expenditures That Goes Well Beyond "Magic Words"

1. "Express Advocacy" Is a Statutory Interpretation, Not a Constitutional Requirement

Some courts in the 1990s and early 2000s had held that a limited, "magic words" interpretation of "expressly advocating" was the outer constitutional boundary of Congress's power to regulate campaign expenditures after *Buckley*. *See, e.g., FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1052-55 (4th Cir. 1997). In BCRA, however, Congress broadened the scope of 2 U.S.C. § 441b by prohibiting corporate and union spending on "electioneering communications." 2 U.S.C. §§ 434(f)(3)(A)(i), 441b(b)(2); *see supra* pp. 5-6. BCRA also created disclosure requirements for electioneering communications that are similar to those that apply to independent expenditures: The entity paying for the communication must publicly disclose information such

as the amount of the disbursement, who made it, and who contributed over $1,000 to fund it. *See* 2 U.S.C. § 434(f)(2).

Relying on court decisions that had limited regulation to *Buckley*'s purported "magic words" restriction, a facial challenge was mounted asserting that BCRA's regulation of electioneering communications was constitutionally infirm. *See McConnell*, 540 U.S. at 190-91 (discussing *Buckley*, 424 U.S. at 44 & n.52). The Supreme Court rejected that challenge. The Court noted that *Buckley* had narrowly construed FECA to require express advocacy in certain contexts because of vagueness in the original statutory definition of "expenditure," not because the First Amendment required that construction in all circumstances. *McConnell*, 540 U.S. at 191-92. Accordingly, *McConnell* held that *Buckley's* "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *Id.* The Court therefore expressly upheld the constitutionality of prohibiting corporations from financing not only what *Buckley* termed express advocacy, but also electioneering

communications that "are the functional equivalent" of such advocacy. *See McConnell*, 540 U.S. at 189-94, 203-08.[13]

Contrary to RTAO's arguments (Br. 26-33), *McConnell* and *WRTL* laid to rest the claim that *Buckley* limits express advocacy to communications with magic words. As Justice Thomas noted in dissent in *McConnell*, the majority opinion "overturned" all of the courts of appeals decisions — including this Court's decision in *Christian Action Network*, 110 F.3d at 1049 — that had interpreted *Buckley* as limiting government regulation to a wooden magic-words formula. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting). Other cases adopting or relying on this crabbed interpretation of *Buckley*, such as *Virginia Society for Human Life, Inc. v. FEC*, were similarly revealed to be in error. *See* 263 F.3d 379, 392 (4th Cir. 2001) (citing *Buckley* and *Christian Action Network* as support for magic words "limit"). As Justice Thomas further noted, *McConnell*, 540 U.S. at 278 n.11, the only express advocacy decision that *McConnell* did not cast into doubt was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) — a case that

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[13] As discussed *supra* pp. 6-8, *Citizens United* later overturned *McConnell*'s upholding of the *financing* restrictions on electioneering communications but reaffirmed the portion of *McConnell* that had required disclosure for such communications.

rejected a magic-words limit, and from which the Commission derived the test codified at section 100.22(b). *See* 60 Fed. Reg. at 35,292-95 ("[S]ection 100.22(b) . . . incorporate[s] . . . the *Furgatch* interpretation . . . .").[14]

WRTL similarly concluded that permissible regulation was not limited to a cramped "magic words" interpretation of express advocacy. Indeed, the portion of *WRTL* on which RTAO relies affirmatively rejected the proposition, raised in Justice Scalia's partial concurrence, that the only permissible test is a magic words test:

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

WRTL, 551 U.S. at 474 n.7 (citations omitted; emphasis added).

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[14] RTAO goes to great lengths (*see* Br. 30-32) to identify minor differences between *Furgatch* and section 100.22(b), but the regulation was never intended to replicate *Furgatch* to the letter, and, in any event, the Supreme Court's more recent rulings confirm the regulation's constitutionality.

2. Although *Citizens United* Struck Down Limits on Corporations' Independent Campaign Advocacy, It Upheld Disclosure Requirements for a Broad Range of Communications That Lack Magic Words

The recent Supreme Court decisions culminating in *Citizens United* hold that disclosure requirements may reach beyond express advocacy or its functional equivalent. After clarifying that Congress could regulate beyond magic words, *McConnell* upheld BCRA's disclosure requirements for electioneering communications, 540 U.S. at 194-99, noting that such disclosure serves the "important state interests" that *Buckley* recognized in upholding disclosure requirements — interests that include "providing the electorate with information" and "deterring actual corruption and avoiding any appearance thereof." *Id.* at 196. The Court noted that the only constitutional challenges it had ever sustained to such disclosure provisions involved situations in which disclosure led to "threats, harassment, and reprisals" against individuals engaged in First Amendment activity. *See id.* at 197-98. The Court held that in the absence of evidence showing a "reasonable probability" of such incidents occurring, *id.* at 198-99 — *evidence that RTAO has never tried* to present — a constitutional challenge to disclosure of electioneering communications is "foreclose[d]." *Id.* at 197.

Subsequently, in *WRTL*, the Court upheld an as-applied challenge to BCRA's *financing* restrictions on electioneering communications that were not "the functional equivalent of express advocacy." *WRTL*, 551 U.S. at 469-470. The Chief Justice's controlling opinion held that "the functional equivalent of express advocacy" meant communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* The controlling opinion identified certain "indicia of express advocacy" that could be useful in applying this standard, such as whether the communication "mention[s] an election, candidacy, political party, or challenger" or "take[s] a position on a candidate's character, qualifications, or fitness for office." *See id.* at 470. Communications susceptible of reasonable interpretation as something other than candidate advocacy, however, were entitled to as-applied constitutional relief from BCRA's prohibition on corporate treasury financing. *Id.* at 481.

Ultimately, in *Citizens United*, the Supreme Court struck down FECA's spending prohibitions on corporate financing of independent expenditures and electioneering communications on their face. 130 S. Ct. at 913. The Court first applied the *WRTL* test to determine

whether the communications at issue were the functional equivalent of express advocacy. In one instance, the Court found that a communication — a movie — was the functional equivalent of express advocacy because it "would be understood by most viewers as an extended criticism of Senator [Hillary] Clinton's character and her fitness for the office of the Presidency." *See* 130 S. Ct. at 889-890. When viewed as a whole, the film had "no reasonable interpretation . . . other than as an appeal to vote against Senator Clinton." *Id.* at 890. In the end, after finding that the movie met the *WRTL* test and applying strict scrutiny to the spending prohibition, the Court held that the electioneering communication financing prohibition did not further the government's compelling interest in preventing actual or apparent corruption. *See id.* at 909-13.[15]

At the same time, however, the Supreme Court upheld BCRA's disclosure requirements for *all* electioneering communications — even those that are *not* the functional equivalent of express advocacy. *Id.* at 914-16. Eight Justices agreed that disclosure is "less restrictive" of

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[15] The Court's analysis of the understanding of "most viewers" appears to be broader than section 100.22(b)'s requirement that a communication is express advocacy if it "could only be interpreted by a reasonable person" as candidate advocacy.

speech than a limit on spending, *id.* at 915, and is a constitutionally permissible method of furthering the public's important interest in knowing who is responsible for pre-election communications that speak about candidates, *see id.* at 915-16. Such mandatory disclosure is therefore constitutional under *Buckley* and *McConnell*, the *Citizens United* Court held, even if the ads contain no direct candidate advocacy but "only pertain to a commercial transaction." *Id.* (citing *Buckley*, 424 U.S. at 75-76; *McConnell*, 540 U.S. at 321). As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916. In particular, when asked to confine the "disclosure requirements . . . to speech that is the functional equivalent of express advocacy," the Court flatly "reject[ed] this contention." *Id.* at 915. Instead, the Court held that the Constitution permits Congress to regulate communications that contain no words of electoral advocacy, much less any magic words. *Id.* at 914-16.

Thus, the Court in *Citizens United* upheld the electioneering communication disclosure requirements not just as to the movie about Hillary Clinton, but also as to three advertisements that were not the functional equivalent of express advocacy; these ads were less election-related than the two ads RTAO presented in this case. Indeed, one of the ads at issue in *Citizens United* was a 10-second commercial whose audio consisted, in its entirety, of the following sentence: "If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." *Citizens United v. FEC*, 530 F. Supp. 2d 274, 276 n.2 (D.D.C. 2008).[16] If mandatory disclosure of that ad — along with every other ad that is broadcast in the relevant jurisdiction and refers to a federal candidate in an impending election, *see Citizens United*, 130 S. Ct. at 915 — is constitutional, then inexorably so is disclosure of RTAO's "Survivors" ad, which says that a candidate "has been lying," is

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[16] The scripts of the other two ads were:

(1) "First, a kind word about Hillary Clinton. She looks good in a pant suit. Now, a movie about everything else."

(2) "Who is Hillary Clinton? She's continually trying to redefine herself and figure out who she is. At least with Bill Clinton he was just good time Charlie. Hillary's got an agenda. Hillary is the closest thing we have in America to a European socialist."

Citizens United, 530 F. Supp. 2d at 276 nn.3-4 (brackets, quotation marks, and visual directions omitted).

"callous[ ]," and has "a lack of character and compassion that should give everyone pause." (J.A. 57-58.) The government's "informational interest alone is sufficient," *Citizens United*, 130 S. Ct. at 915-16, to justify a regulation that mandates disclosure regarding such unambiguous campaign advocacy.[17]

Finally, *Citizens United*'s upholding of disclosure requirements for a category of communications that goes well beyond express advocacy is of a piece with the Supreme Court's long history of applying intermediate scrutiny and upholding disclosure requirements for issue advocacy. *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding lobbying disclosure laws that "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"); *Doe v. Reed*,

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[17] RTAO discusses at length (Br. 24-25) a portion of *Massachusetts Citizens for Life* in which the Supreme Court noted that *Buckley* had applied an express advocacy construction to FECA's disclosure requirements for expenditures. *See* 479 U.S. at 248-49. That uncontroversial proposition does not further RTAO's case. As *McConnell* explained and *WRTL* reiterated, "[t]he *Buckley* Court's 'express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.'" *WRTL*, 551 U.S. at 474 n.7 (quoting *McConnell*, 540 U.S. at 190). And regardless of any dispute about *Buckley*'s meaning, *Citizens United* is now the controlling decision on disclosure.

130 S. Ct. 2811, 2819-22 (2010) (upholding disclosure of names and addresses of signatories on petitions to place referenda on ballot); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (striking down restrictions on ballot-measure spending but noting that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected").

3. RTAO's Reliance on Other Legal Authorities Fails

RTAO fails to cite, let alone take into account, the most recent court of appeals decision examining express advocacy following *Citizens United*: the First Circuit's recent opinion in *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011). In *McKee*, the court expressly rejected the arguments that the *WRTL* test is no longer an effective constitutional standard after *Citizens United*, and that regulation of express advocacy is permissible only as far as a narrow reading of *Buckley*:

> [This] reading finds no support in the text of *Citizens United* . . . It is a large and unsubstantiated jump . . . to read *Citizens United* as casting doubt on the constitutionality of any statute or regulation using language similar to the [*WRTL*] test to define the scope of

> its coverage. . . . In fact, the Court itself relied on the [*WRTL*] test . . . .

Id. at 69 (citing *Citizens United*, 130 S. Ct. at 889-90). The First Circuit therefore upheld the constitutionality of a state regulation defining express advocacy as a communication that "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." *Id.* at 67. The court also noted that *Citizens United* upheld the constitutionality of FECA's disclosure provisions without any requirement that they be limited to express advocacy; to the contrary, the First Circuit observed, the Supreme Court approved mandatory disclosure even as to non-candidate "issue discussion." *Id.* at 54-55 & n.29; *see also Human Life of Wash.*, 624 F.3d at 1016 (holding that, consistent with the First Amendment, state may mandate disclosure in ballot-measure context without regard to express advocacy limitations). The First Circuit's persuasive opinion, thoroughly grounded in *Citizens United* and *WRTL*, explains precisely why RTAO's arguments here must fail.

RTAO cites a number of other cases from the courts of appeals, district courts, and state courts in putative support of its magic words argument, but its reliance on those decisions is misplaced. (Br. 26-29.)

All but four of the cited cases were decided *before WRTL* and so have no bearing on the issue here.[18] Of the four cases that post-date *WRTL*, two are district court opinions about state ballot measures,[19] and the Supreme Court has distinguished the regulation of such measures from regulation of activity related to candidate elections. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981); *Bellotti*, 435 U.S. at 787 n.26. And RTAO's assertion (Br. 28) that the Tenth Circuit limited express advocacy regulation to magic words in *New Mexico Youth Organized v. Herrera* is simply untrue: The court in that case noted that "the functional equivalent of express advocacy for the

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[18] Many of these earlier decisions also do not support the proposition for which RTAO cites them. *See*, *e.g.*, *Am. Civil Liberties Union of Nev.* v. *Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (noting that express advocacy under FECA is the *Furgatch* standard); *Ctr. for Individual Freedom* v. *Carmouche*, 449 F.3d 655, 665-666 & n.7 (5th Cir. 2006) (applying a magic-words interpretation to cure vagueness problems in state statute but noting that such an interpretation "is not constitutionally mandated").

[19] *Broward Coal. Of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, Civ. No. 4:08-445, 2009 WL 1457972, at *6 (N.D. Fla. May 22, 2009) ("[A]rguments that . . . *ballot issue speech* can be the functional equivalent of express advocacy . . . simply find no basis in *Buckley*, *McConnell*, *WRTL II*, or any other case from the Supreme Court.") (emphasis added); *Nat'l Right to Work Legal Defense & Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1145 (D. Utah 2008) ("The Utah statutes at issue . . . regulate the influencing by individuals and entities of ballot measures.").

election or defeat of a specific candidate" is regulable and nowhere restricted this category to magic words. *See* 611 F.3d 669, 676 (10th Cir. 2010).

The remaining case RTAO cites is *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), which, as this Court has already noted, *RTAO*, 575 F.3d at 349, addressed a state statute that "swe[pt] far more broadly than *WRTL*'s 'functional equivalent of express advocacy' test." *Leake*, 525 F.3d at 297. The express advocacy definition at issue in *Leake* was significantly more expansive and less precise than section 100.22(b), including such "contextual factors" as "the timing of the communication in relation to the events of the day" and "the cost of the communication." *Leake*, 525 F.3d at 298. In striking down that overbroad and vague state statute, *Leake* concluded that the state "remains free to adopt a definition of express advocacy consistent with the standards approved by *McConnell* and *WRTL*." *Id.* at 301. As *Citizens United* and *WRTL* make clear, section 100.22(b) is such a standard. *See RTAO*, 575 F.3d at 350 (quoting *Leake*).

RTAO also relies upon *Leake* to argue (Br. 20-23) that section 100.22(b) violates the First Amendment by allegedly reaching

communications that are not "unambiguously campaign related." This claim fails on the face of the regulation, which requires that "[t]he electoral portion of the communication [be] *unmistakable, unambiguous, and suggestive of only one meaning*," which is "advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b) (emphasis added). Any communication that unmistakably and unambiguously encourages the defeat of a specific candidate is, by definition, "unambiguously campaign related." Thus, even assuming *arguendo* that the Constitution were to limit disclosure to those communications that are unambiguously campaign related, section 100.22(b) would not extend beyond that limit.

In any event, there is no such constitutional requirement. *Citizens United* upheld mandatory disclosure for 10-second ads that mentioned a candidate once and contained no direct electoral advocacy. Nowhere in that opinion did the Court find that such ads were "unambiguously campaign related"; to the contrary, the Court noted that they were for commercial activity and nonetheless upheld disclosure as to them. Although *Leake* contains language describing an "unambiguously campaign related" standard, 525 F.3d at 281, the

decision ultimately affirmed the government's power to define express advocacy "consistent with the standards approved by *McConnell* and *WRTL*." *Id.* at 301. As this Court has noted, section 100.22(b) is consistent with those standards. *See RTAO*, 575 F.3d at 349.

4. Section 100.22(b) Is Within the Commission's Authority and Consistent with Congressional Intent

Finally, RTAO asserts (Br. 24, 32-34) that the Commission lacked statutory authority to promulgate section 100.22(b), but RTAO does not even mention — much less make any effort to satisfy — the required elements of such a claim. *See generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Because Congress codified the words "expressly advocating" without definition or limit, *see* 2 U.S.C. § 431(17), the Commission's regulatory construction of the statutory term is a lawful exercise of administrative interpretation. *See Chevron*, 467 U.S. at 842-45. And Congress later *explicitly* provided by statute that BCRA's amendments to FECA would not affect section 100.22(b). *See* BCRA § 201(a), 116 Stat. 89 (codified at 2 U.S.C. 434(f)(3)(A)(ii)) ("Nothing in [the definition of 'electioneering communication'] shall be construed to affect the interpretation or

application of section 100.22(b) of title 11, Code of Federal Regulations.").

RTAO's arguments about congressional intent are makeweight at best. They are directly contrary to this statutory provision that singles out the Commission's express advocacy regulation for protection.[20]

B. Section 100.22(b), Which Closely Tracks a Standard the Supreme Court Has Established and Used, Is Not Unconstitutionally Vague

Even less tenable than RTAO's claim that the government can regulate only magic words is its claim that section 100.22(b) is unconstitutionally vague. The controlling opinion in *WRTL* specifically rejected Justice Scalia's dissenting argument that the *WRTL* test was "impermissibly vague." *WRTL*, 551 U.S. at 474 n.7. And the fact that the Court applied the *WRTL* test in *Citizens United* puts to rest any claim that the standard is constitutionally deficient. The Court's repeated use of a test based on a communication's "reasonable" interpretation undermines the finding in *Virginia Society for Human*

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[20] BCRA's explicit statutory defense of section 100.22(b) also belies RTAO's unsupported assertion (Br. 34) that Congress intended to restrict the definition of independent expenditures to "magic-words express advocacy" by creating the separate category of electioneering communications.

Life that section 100.22(b) is flawed because the regulation purportedly "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer." *See* 263 F.3d at 391; *supra* pp. 33-34. The Commission's regulation is objective and sufficient for a reasonable person to understand.[21]

RTAO argues that *WRTL*'s "functional equivalent of express advocacy" test becomes vague if it is not tethered to BCRA's statutory criteria for electioneering communications, relying heavily on *WRTL*'s statement that "this test is only triggered if the speech meets the bright line requirements of [the electioneering communications definition] in the first place." (*See* Br. 34-35 (quoting *WRTL*, 551 U.S. at 474 n.7).) But *WRTL*'s acknowledgement that the statutory "trigger" for the *WRTL* test is a "bright line" requirement in no way suggests that *the test itself* would be vague absent that "trigger" or with a different

[21] The regulation's "reasonable person" test is like other objective constitutional tests. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity depends upon a "wholly objective standard" based on whether a "reasonable person" would have known of clearly established rights) (citation omitted); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("[C]onsent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

"trigger." *See* 551 U.S. at 474 n.7 (providing four reasons why the test is not vague); *see also McKee*, 649 F.3d at 70 (holding that state regulation similar to *WRTL* test and without timing requirement was not vague). Whether a communication is made within a 30- or 60-day window simply has no bearing on the vagueness of any test regarding the content of the communication itself. The test remains the same outside the time windows, and the test, as *WRTL* specifically held, is not vague.[22]

RTAO makes four other arguments as to why section 100.22(b) is unconstitutionally vague, but none has merit. First, RTAO notes (Br. 38-39) that *Citizens United* criticized 11 C.F.R. § 114.15 — an "11-factor balancing test" test, *see* 130 S. Ct. at 895, that the

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[22] RTAO relies on the district court's opinion in *Ctr. for Individual Freedom, Inc. v. Tennant*, which opined that *WRTL*'s holding was "on shaky ground, at least as to the vagueness issue," and that the Supreme Court was "fractured" on that issue. *See* __ F. Supp. 2d __, 2011 WL 2912735, at *20 (S.D.W.V. 2011), *appeals filed*, Nos. 11-1952, 11-1993 (4th Cir.); *see also id.*, at *21 n.25 (noting that "fractured" and "obscure" opinions from Supreme Court and this Circuit caused district court "some hesitation" in reaching conclusion regarding vagueness). However, all lower courts must follow controlling Supreme Court holdings. *See Citizens United*, 130 S. Ct. at 889-90 (noting that Chief Justice's opinion in *WRTL* controls, and applying *WRTL* test); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (directing lower court not to disregard Supreme Court precedent even if lower court believes that the precedent has been overruled by implication).

Commission promulgated to define permissible corporate electioneering communications after *WRTL*. However, section 100.22(b) displays none of that regulation's infirmities. *Citizens United* faulted section 114.15 because its complexity effectively required corporations to "ask [the FEC] for prior permission to speak." 130 S. Ct. at 895. The *disclosure* requirements implemented by section 100.22(b), in contrast, "do not prevent anyone from speaking." *Id.* at 914. Moreover, section 100.22(b) is not a balancing test and has only two components that could arguably be considered "factors": (1) that the communication have an "electoral portion [that is] unmistakable, unambiguous, and suggestive of only one meaning," and (2) that "reasonable minds could not differ" that the communication is candidate advocacy. 11 C.F.R. § 100.22(b)(1)-(2); *see also* J.A. 72-73 (comparing regulations). The latter language is essentially identical to the *WRTL* test, and the addition of the "*unambiguous* electoral portion" requirement only renders section 100.22(b) less vague than that already constitutional standard.

Second, RTAO claims *WRTL* held that considering a communication's "proximity to the election" is an impermissibly vague consideration. (Br. 37, 40.) But *WRTL* said no such thing. The

controlling opinion held that the timing of speech cannot be used as a proxy for determining the speaker's intent, 551 U.S. at 472 — which, as noted *supra* pp. 27-28, 44-45, is also an impermissible consideration under section 100.22(b). But otherwise *WRTL* simply observed that, by statutory definition, *all* electioneering communications are made near an election, so taking their proximity into account would overinclusively imply that they all are candidate advocacy. *See* 551 U.S. at 472.

In contrast, section 100.22(b) and the disclosure provisions it implements are not restricted to narrow pre-election windows, and it would defy common sense to assess whether a communication is express advocacy without even considering, for example, if it is made during an election year. Such "limited contextual factors" as the date of the broadcast are thus objective and relevant to any determination of express advocacy, as *WRTL* itself held. 551 U.S. at 474 ("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 . . . .") (internal quotation marks omitted); *see also* J.A. 69-70.

Third, RTAO selects individual words from the regulation, omits the surrounding text, and then suggests that these words (out of context) are vague. (*See* Br. 37, 41.) For example, RTAO states that the word "suggestive" is vague, at least in comparison to the word "susceptible," which is the corresponding term in the *WRTL* test. (*Id.* at 41 & n.18.) Perhaps, if it stood alone, "suggestive" could be vague. But the word does not stand alone, and the complete phrase in which it appears — "unmistakable, unambiguous, and suggestive of only one meaning," 11 C.F.R. § 100.22(b) — cannot be deemed unconstitutionally vague in light of *WRTL*'s essentially identical test: "susceptible of no [other] reasonable interpretation." 551 U.S. at 469-70. There is no meaningful difference between these phrases that would render the regulation more vague than the test embraced by the Court in *WRTL*. *See RTAO*, 575 F.3d at 349 (comparing text of regulation and *WRTL*); J.A. 69 (same).

Fourth, RTAO claims (Br. 43) that section 100.22(b) is vague because the district court held RTAO's "Change" ad to be the functional equivalent of express advocacy (J.A. 74), while the Commission has stated that the ad does not meet that narrow standard. Although the

purpose of "Change" may well have been to influence the presidential election, the advertiser's subjective intent is not a permissible consideration, *WRTL*, 551 U.S. at 468, and the content of the ad reasonably can be viewed on its face as encouraging viewers to educate themselves about then-Senator Obama's position on abortion. (*See* J.A. 57 (text of ad: "[W]hat is the real truth about . . . Obama's position on abortion? . . . To learn more real truth about Obama, visit [website]").) Even ads that are highly critical of candidates' positions on issues do not necessarily constitute express advocacy. *See Buckley*, 424 U.S. at 42. Because reasonable minds could differ about whether "Change" encourages electoral action versus "some other kind of action," 11 C.F.R. § 100.22(b)(2), the Commission respectfully disagrees with the district court's determination.

But that disagreement does not arise from any vagueness in the test; instead, it is the product of the narrowness and precision with which the Commission applies the test. Moreover, a regulatory standard is not unconstitutionally vague simply because there are close questions that may result when it is applied. *See United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (rejecting vagueness challenge to

Federal Corrupt Practices Act and noting that "[w]herever the law draws a line there will be cases very near each other on opposite sides"). In any event, "Change" indisputably falls within the category of candidate-related communications as to which *Citizens United* held that disclosure may be mandated. *See* 130 S. Ct. at 915.

In contrast, there can be no debate that "Survivors" is express advocacy and lawfully regulated as such under section 100.22(b). (J.A. 74-75.) First, the ad criticizes then-Senator Obama's character, saying that he has shown "callousness" and "a lack of character and compassion." Such character attacks are among what *WRTL* called "indicia of express advocacy." *See* 551 U.S. at 470 (holding that indicia include "tak[ing] a position on a candidate's character"). Second, "Survivors" refers to the candidate's political party, another mark of express advocacy. *Id.* ("mention[ing] an election . . . political party, or challenger"). Third, the ad attacks the candidate personally by saying that he "has been lying" for years. Fourth, "Survivors" characterizes the candidate's alleged record on the abortion issue as "horrendous" and uses this as evidence of his alleged "callousness" and "lack of character and compassion." *See id.* at 470 n.6 (distinguishing WRTL's ads from

those that "condemn[ ] [a candidate's] record on a particular issue"). Fifth, unlike issue advocacy, "Survivors" does not implore listeners to take action relative to any public policy on abortion. *See id.* at 470 ("[G]enuine issue ad[s] . . . exhort the public to adopt [a] position, and urge the public to contact public officials . . . ."). Finally, and most importantly, "Survivors" says that "Obama's callousness . . . reveals a lack of character and compassion *that should give everyone pause*" (emphasis added). Because the phrase "give everyone pause" is explicitly linked to the candidate's character, not to any action on public policy, there is only one reasonable interpretation of that phrase: "Everyone" should "pause" before voting for that candidate.

To ask listeners to hesitate before supporting a candidate is equivalent to asking them to consider "reject[ing]" him — one of the "magic words" of express advocacy listed in *Buckley*, 424 U.S. at 44 n.52. *See also McKee*, 649 F.3d at 70 (noting that "no other reasonable meaning" test is "is certainly as clear, if not more so, as words such as 'support' . . . that the Supreme Court has held non-vague"). Indeed, the ad emphasizes not only that abortion opponents should reject the

candidate, but also that "*everyone*," regardless of any position on abortion, should hesitate because the candidate has character flaws.

Thus, "[r]easonable minds could not differ" that "Survivors" encouraged listeners not to vote for then-Senator Obama. This is express advocacy under section 100.22(b), and its regulation is constitutionally permissible under *WRTL* and *Citizens United*.

III. THE COMMISSION'S FEDERAL REGISTER NOTICE ABOUT HOW IT DETERMINES PAC STATUS IS NOT FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW

RTAO challenges a Federal Register notice in which the Commission provided guidance as to how it determines whether the major purpose test for political committee status has been met. 72 Fed. Reg. 5595 (Feb. 7, 2007). But the Administrative Procedure Act ("APA") provides that courts may hear challenges only to "final agency action."[23] 5 U.S.C. 704. Final agency action consummates the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002) (holding

[23] The Commission raised this issue during the first appeal in this case, but the Court did not address it. *See* 575 F.3d at 350-51. The Commission renewed the argument below. (J.A. 76 n.6.)

publication of report not final agency action); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004).

The purpose of the Federal Register notice that RTAO challenges was to explain the Commission's decisions *not* to promulgate a revised definition of "political committee" and *not* to single out for regulation all entities that are "political organizations" under section 527 of the Internal Revenue Code. *See* 72 Fed. Reg. at 5595, 5598.

Thus, the notice neither establishes a binding norm nor decides any entity's legal status. It does not create a new regulation or change past policy. It simply explains how the Commission's prior enforcement actions provide guidance to organizations about the Commission's application of the major purpose test. *See* 72 Fed. Reg. at 5604. Such an explanation is not final agency action subject to review under the APA.

IV. THE COMMISSION'S METHOD OF APPLYING THE MAJOR PURPOSE TEST IS CONSTITUTIONAL AND CONSISTENT WITH EVERY JUDICIAL DECISION ON THAT SUBJECT

Even if reviewable, the Commission's case-by-case approach to determining political committee status is constitutional. Nothing has undermined its validity since this Court preliminarily concluded RTAO

was unlikely to succeed on the merits of its claim because the Commission's analysis of the major purpose test was properly "adopted from Supreme Court jurisprudence" and consistent with "the positions taken by the courts." 575 F.3d at 351. *See Koerber v. FEC*, 583 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission's approach to determining political committee status, and noting that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose").[24]

As explained *supra* p. 8, FECA's definition of a "political committee" includes any organization that makes more than $1,000 in expenditures or receives more than $1,000 in contributions. 2 U.S.C. § 431(4)(A). In *Buckley*, however, the Supreme Court narrowed the reach of FECA's political committee requirements to organizations controlled by a candidate or whose major purpose is the nomination or election of candidates. *Buckley*, 424 U.S. at 79. The activities of "'political committees' so construed can be assumed to fall within the

[24] RTAO's erroneous argument (Br. 44-49) that the Commission's application of the major purpose test is subject to strict scrutiny because of the purportedly "onerous" burdens that FECA imposes on PACs is refuted *supra* pp. 24-25.

core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*; *McConnell*, 540 U.S. at 170 n.64. With that construction in place, FECA's disclosure requirements for political committees "directly serve substantial governmental interests." *See Buckley*, 424 U.S. at 68; *see also SpeechNow*, 599 F.3d at 696.

For decades, the Commission has determined on a case-by-case basis whether an organization's major purpose is the nomination or election of candidates. *See* 72 Fed. Reg. at 5596 ("[S]ince [FECA's] enactment in 1971, the determination of political committee status has taken place on a case-by-case basis."). To make that determination, the Commission has consulted sources such as the group's public statements, fundraising appeals, government filings (*e.g.*, IRS notices), charters, and bylaws. *See id.* at 5601, 5605 (describing sources). Because no two groups are exactly alike, the Commission's analysis has frequently turned on a group's specific activities, such as spending on a particular election or issue-advocacy campaign. *See id.* at 5601-02, 5605.

Courts have endorsed the Commission's examination of these factors and have relied on the very *same* factors to make their own

major purpose determinations. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."); *id.* at 864, 866 (description of organization's meetings attended by national leaders; reference to organization's "Political Strategy Campaign Plan and Budget").

In light of this history of major purpose determinations turning on highly fact-specific examinations, the Commission decided in 2007 not to promulgate a rule classifying section 527 organizations as political committees *per se*. *See supra* pp. 9-11. Instead of creating categorical regulations that might have led to overbroad or underinclusive PAC determinations, *see* 72 Fed. Reg. at 5598-5601 (analyzing differences between political organizations under tax law and PACs under FECA), the Commission, in an exercise of discretion, decided to continue its practice of implementing the major purpose test on a case-by-case basis.

See id. at 5595-5602. The Commission then "discusse[d] several recently resolved administrative matters that provide considerable guidance to all organizations regarding . . . political committee status." *Id.* at 5595; *see* 5601-5606 (discussing matters).

It is well-settled that agencies have general discretion to administer the law through individual adjudications rather than by promulgating categorical rules. *See, e.g., SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency."); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 292-95 (1974) (relying upon *Chenery* in leaving up to Board whether to proceed by rulemaking or adjudication). And the Commission's specific decision to make PAC status determinations on a case-by-case basis was challenged and expressly upheld in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007).

Despite thirty-five years' worth of enforcement history — some of which the Federal Register notice describes in great detail — RTAO does not argue that the Commission has *ever* misapplied the major purpose test. Nor does RTAO claim that its own status has been

improperly determined, as the Commission has never asserted that RTAO is a PAC. Also, there is no indication in the factual record of this case that RTAO has actually paid for any independent expenditures or otherwise met the statutory criteria for PAC status, much less the major purpose test.[25] Instead, RTAO argues (Br. 52-53) that the Commission's case-by-case analytical method is, in the abstract, unconstitutionally vague, and that the only permissible means of implementing the major purpose test is to ask whether an organization spends more than half of its funds on two things: magic-words express

[25] The Commission generally considers the major purpose test only after determining that an organization has either made more than $1,000 in expenditures or received more than $1,000 in contributions. *See* 72 Fed. Reg. at 5603-04. The *Shays* court criticized this aspect of the Commission's approach for being too *narrow* and potentially excluding some organizations whose major purpose might be considered the election of candidates; the court believed that the express advocacy analysis is unnecessary for groups whose major purpose is known to be campaign-related. *See* 511 F. Supp. 2d at 26-27. Although the Commission disagrees with that interpretation, the Commission recognizes that its own approach may tend to limit the number of organizations that qualify as political committees. RTAO ignores this limiting aspect of the Commission's methodology. *Cf. Akins v. FEC*, 101 F.3d 731, 741-42 (D.C. Cir. 1997) (en banc) (D.C. Circuit would not have applied major purpose test if organization made more than $1,000 in contributions), *vacated on other grounds*, 524 U.S. 11 (1998).

advocacy or contributions to candidates.[26]

Neither law nor logic supports RTAO's confined interpretation of the *Buckley* test. RTAO relies primarily (Br. 51-53) on *Massachusetts Citizens for Life*, 479 U.S. 238 ("*MCFL*"), and *Colo. Right to Life Comm., Inc.* v. *Coffman*, 498 F.3d 1137 (10th Cir. 2007). But the scope of the major purpose test was not at issue in *MCFL*, where it was "undisputed" that the plaintiff's "central organizational purpose" was not candidate-related. 479 U.S. at 252 n.6. The Court's statement that MCFL 's "independent spending" could theoretically "become so extensive that the organization's major purpose may be regarded as campaign activity," *id.* at 262, neither states nor implies that express advocacy communications are the only kind of "campaign activity" that can satisfy the major purpose test. Nor did the opinion create a rigid test equating "extensive" with more than fifty percent of an

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[26] RTAO repeatedly attempts to elide the statutory PAC criterion of making $1,000 in expenditures with the major purpose test. Most starkly, RTAO correctly notes that electioneering communications do not count towards "statutory PAC status" (Br. 53), but then immediately pivots from this to an uncited assertion that "electioneering communications may not count toward major purpose" (Br. 54), as if those two inquiries were interchangeable. They are not. *See Buckley*, 424 U.S. at 79 (noting statutory criteria and imposing additional construction of major purpose requirement).

organization's total spending.[27] *See RTAO*, 575 F.3d at 351 ("[I]n [*MCFL*], the Court examined *the entire record* to conclude that the plaintiff did not satisfy 'the major purpose' test.") (emphasis in original). As *Coffman* notes, *MCFL* "suggested two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; *or* (2) comparison of the organization's independent [express advocacy] spending with overall spending." *Coffman*, 498 F.3d at 1152 (emphasis added); *see also Herrera*, 611 F.3d at 678 (citing *Colo. Right to Life*).[28] Because the Commission applies the major purpose test precisely by examining an "organization's central organizational purpose," the Commission's approach is entirely consistent with the Tenth Circuit's understanding of the major purpose

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[27] While RTAO cannot identify any errors in the Commission's actual application of the major purpose test, RTAO's proposal to require that fifty percent of an organization's spending be express advocacy would be underinclusive. For example, an organization that spends a total of $20,001 — $10,000 on magic words express advocacy and $10,001 on rent — would be a major-purpose group but would fail RTAO's wooden test.

[28] The Tenth Circuit's statement, 498 F.3d at 1152, that *MCFL* equated "independent spending" with "express advocacy" is not supported by *MCFL* itself. *See* 479 U.S. at 262 (referring to "MCFL's independent spending" without limiting such spending to express advocacy).

test. *See also Shays*, 511 F. Supp. 2d at 26-31 (upholding Commission's approach to major purpose test).[29]

The Commission's extensive explanation of its methodology, moreover, distinguishes this case from *Leake*, where the Court struck down a state statute that "provide[d] absolutely no direction as to how North Carolina determines an organization's 'major purposes,'" and that was implemented by a state agency applying "unannounced criteria." 525 F.3d at 289-90. In contrast, the Commission has publicly explained its analysis and listed its criteria in the Federal Register, *see* 72 Fed. Reg. at 5601-06, and it continues to provide guidance on a case-by-case basis. Indeed, so much guidance appears in the Commission's Federal Register notices, advisory opinions, and website that RTAO accuses the Commission of providing *too much* information. (*See* Br. 46-47 (describing FEC guidance materials), 55-57 (describing factors Commission applies in major purpose determinations).)

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[29] RTAO proposes that the major purpose test could also be satisfied if the "entity's organic documents" demonstrate "an express intention to operate as a political committee, *e.g.*, by being designated as a 'separate segregated fund.'" (Br. 52.) But such a "test" would be meaningless, for an entity designated as a separate segregated fund has, by definition, already chosen to be a PAC. *See* 2 U.S.C. § 431(4)(B). The major purpose test is therefore irrelevant to such entities.

Finally, RTAO raises a variety of unsubstantiated assertions that the Commission's PAC determinations "chill" First Amendment activity and result in investigations so burdensome that they can even "shut down an organization." (*See* Br. 54, 56.) But "disclosure requirements . . . do not prevent anyone from speaking," *Citizens United,* 130 S. Ct. at 914 (internal quotation marks omitted), and the Commission can discern a group's "major purpose" without conducting an intrusive investigation. Sources such as the group's public statements and publicly available government filings often provide the relevant facts. *See supra* pp. 56-57 (describing sources of information). For example, before even opening an investigation in one matter, the FEC concluded that an organization was not a PAC based on the group's public description of its purpose and the scant record of contributions. FEC Matter Under Review 4867, *Tribal Alliance for Sovereignty*, Factual and Legal Analysis at 12 (Dec. 11, 1998) (available at http://eqs.nictusa.com/eqsdocsMUR/0000428F.pdf). And when more information is necessary, the Commission's balanced enforcement mechanisms, as crafted by Congress, provide specific "procedures purposely designed to ensure fairness . . . to respondents." *Perot v.*

FEC, 97 F.3d 553, 559 (D.C. Cir. 1996). The Commission, for example, does not even *begin* to investigate potential violations of the Act unless at least four of its members have voted to find reason to believe that the law has been violated. *See* 2 U.S.C. § 437g(a)(2).

RTAO's speculative and generalized objections to agency investigations do not obviate the need for proper enforcement of the nation's laws. *Cf. FTC v. Std. Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (agency proceedings are "part of the social burden of living under government") (internal quotation marks omitted).

More fundamentally, the primary obligation of PACs that make no contributions is disclosure, which is not significantly more burdensome than the independent expenditure reporting requirements that *Citizens United* upheld. Indeed, relying upon *Citizens United*, the D.C. Circuit recently upheld the organizational and reporting requirements for political committees that make only independent expenditures, noting that the additional reporting requirements "are minimal" and the organizational requirements do not "impose much of an additional burden" when compared to independent expenditure reporting. *See SpeechNow*, 599 F.3d at 697-98. Given *Citizens United*'s upholding of

disclosure requirements made by entities that are *not* political committees for a category of communications that covers far more than express advocacy, RTAO's claim about the potential burdens of PAC determination and status is even weaker than it was when this Court denied preliminary relief. (*See* J.A. 77-79.)

CONCLUSION

Three decades of judicial opinions indisputably establish the importance of the government's interest in ensuring that the American public has access to information regarding the financing of candidate advocacy and other campaign activity. The Commission's regulatory definition of express advocacy and the agency's approach to determining political committee status implement Congress's statutory directives in this area narrowly and transparently. Nothing in the Constitution prohibits these reasonable means of increasing the quality of information reaching citizens and furthering the First Amendment goal of promoting an informed public.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,147 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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