No. 08-1977

United States Court of Appeals for the Fourth Circuit

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

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

Appellant's Reply on It's Motion for Injunction Pending Appeal

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The FEC (joined by the DOJ) argues that The Real Truth About Obama ("RTAO") will have no irreparable harm because "[a]s a political committee, RTAO" can do its intended activities. FEC Opposition at 1-2. This "just be a PAC" argument is erroneous because PAC status is a constitutionally-cognizable burden as a matter of law:

> [PAC] regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. [FN7] Furthermore, such duties require a far more complex and formalized organization than many small groups could manage.

FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 254-55 (1986) ("*MCFL*") (four-Justice plurality). "When a statutory provision *burdens* First Amendment rights, it must be justified by a compelling state interest." *Id.* at 156 (court opin-

ion) (emphasis added). The "additional organizational restraints imposed" create a "significant burden." *Id.* at 266 (O'Connor, J., concurring). PAC requirements "burden expressive activity" and so "must be justified by a compelling state interest." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 258 (1990). "PACs impose well-documented and onerous burdens, particularly on small nonprofits." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2671 n.9 (2007) ("*WRTL II*") (principal opinion stating holding) (rejecting notion that "PAC alternative" was sufficient protection for First Amendment rights). Since PAC status is a per se First Amendment burden and irreparable harm, RTAO need not prove that each layer of burden imposed by PAC status is itself a harm.

The FEC misstates the standard for striking provisions facially. FEC Opposition at 4-5. In the First Amendment area, the test is not whether a provision is unconstitutional in *all* of its applications, but whether there is "substantial overbreadth." *See*, *e.g.*, *McConnell v. FEC*, 540 U.S. 93, 207 (2003). And where a provision is unconstitutionally vague, it is simply void for vagueness as a violation of the Fifth Amendment. *See*, *e.g.*, *Buckley*, 424 U.S. at 40-42 (discussing vagueness standards).

The FEC continues to argue that *McConnell* eliminated the magic-words requirement where the express-advocacy standard is employed. FEC Opposition at 5-6. This is erroneous. Both *McConnell*, 540 U.S. at 193, and *WRTL II*, 127 S. Ct.

at 2669 n.7, have affirmed that—while Congress may regulate "electioneering communications" (subject to *WRTL II*'s appeal to vote test, *id.* at 2667) *in addition to* "express advocacy"—regulable express advocacy requires the so-called "magic words," such as "vote for."[1] All that *McConnell* meant by its statement that the express-advocacy line was not constitutionally required was that the unambiguously-campaign-related requirement *also* permitted regulation of "electioneering communications," which *WRTL II* promptly limited with the appeal-to-vote test. 127 S. Ct. at 2667. *McConnell* did not eliminate the unambiguously-campaign-related requirement, nor did it eliminate the requirement that the express advocacy test, in the many places where it remains applicable, requires magic words. This Court affirms that express advocacy requires magic words, *Leake*, 525 F.3d at 281-82, and that, in this context and under the unambiguously-campaign-related requirement, government may only regulate (a) express advocacy properly defined as limited to magic words and (b) electioneering communications, as lim-

[1]In *WRTL II* the other seven justices joined Chief Justice Roberts and Justice Alito in unanimously agreeing that express advocacy requires "magic words." *See id.* at 2681 (Scalia, J., joined by Kennedy & Thomas, JJ.) (concurring in part and concurring in judgment) ("to avoid . . . 'constitutional deficiencies,' [*Buckley*] was compelled to narrow the statutory language . . . to cover only . . . magic words"); 2692 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) (*Buckley*'s "prohibition applied 'only to . . . communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office,'" i.e., "'magic words'"). The fact that the concurrence preferred the express-advocacy test as the sole test and the dissent disagreed with the express-advocacy test, did not alter the agreement by all that, where the test applies, it requires magic words.

ited by *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667:

> The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that uses *specific election-related words*. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Leake, 525 F.3d at 282-83 (emphasis added). This clear statement of the only two options absolutely forecloses any argument that *WRTL II*'s appeal-to-vote test may be removed from its electioneering-communication context, to which it is limited, and applied to justify 11 C.F.R. § 100.22(b). *Leake* recognizes no hybrids, only the two alternatives to meet the unambiguously-campaign-related requirement. This is correct because *WRTL II* itself argued that the appeal-to-vote test was not vague because, inter alia, it could only be applied to communications that already met the statutory electioneering communication definition. 127 S. Ct. at 2669 n.7. This means that the appeal-to-vote test is unconstitutionally vague and overbroad standing on its own, as it would do if used to define express advocacy.

The FEC notes that it agreed with RTAO below that *Change* was not properly express advocacy or a regulable electioneering communication, FEC Opposition at 9, but it ignores the fact that the district court has just issued an opinion (the FEC attaches it) saying that *Change* is express advocacy, which proves RTAO's argument that this reasonable-person test for express advocacy is unconstitutionally

vague.

The FEC argues as to why *Survivors* is express advocacy (and a regulable electioneering communication). FEC Opposition at 9-10. But the argument is flawed. As with the *Change* ad and the other communications that RTAO has stated its intent to do, *Survivors* focuses on a prolife issue, in this case infanticide, i.e., whether infants targeted for abortion who are born alive are entitled to the full legal protections that born-alive infants normally enjoy. Congress enacted the Born Alive Infant Protection Act to assure protection where federal law governs. Senator Obama had the opportunity to vote for a similarly-protective bill when he was an Illinois State Senator, but he voted against it thrice.

Survivors focuses on a controversy that has swirled in the national news media between Senator Obama and the National Right to Life Committee over that issue, and it attempts to set the record straight in public debate. NRLC says that Senator Obama has lied about his voting record, and Senator Obama has said that NRLC is lying. *See* Douglas Johnson and Susan T. Muskett, *National Right to Life White Paper: Barack Obama's Actions and Shifting Claims on the Protection of Born-Alive Aborted Infants—and What They Tell Us About His Thinking on Abortion* (Aug. 28, 2008) (available at http://www.nrlc.org/ObamaBAIPA/ WhitePaperAugust282008.html) ("On August 25, 2008, the independent group FactCheck.org (www.factcheck.org) issued a review of this question that con-

cluded, 'Obama's claim is wrong. In fact, by the time the HHS Committee voted on the bill, it did contain language identical to the federal act. . . . The documents from the NRLC support the group's claims that Obama is misrepresenting the contents of SB 1082.'").

Survivors is plainly the sort of "discussion of issues and candidates" for which the Supreme Court said that the First Amendment mandates protection when it identified the dissolving-distinction problem that requires the bright, speech-protective, express-advocacy line:

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

Buckley, 424 U.S. at 42.

Survivors demonstrates exactly how issue advocacy works. Issue-advocacy groups respond with public advocacy to current developments on their issues. They don't have time to await an uncertain license to speak from the FEC, even if the FEC occasionally does a hurry-up advisory opinion. They don't want to announce to the world in advance what they plan to say, by putting their intended speech up for public comment in the advisory opinion process, giving their issue-advocacy opponents an opportunity to plan a response. And they don't have to

seek prior consent or publicly expose their ads in advance because this issue advocacy is precisely the speech that the Supreme Court declared most strongly protected by the First Amendment in *Buckley*, 424 U.S. 1, and *WRTL* II, 127 S. Ct. 2652, and off limits to government regulation.

But the FEC refuses to limit itself to its permitted authority. Although *Survivors* contains none of the "magic words" that are required for express advocacy by the U.S. Supreme Court and this Court, the FEC insists that it is express advocacy. Although *Survivors* does not contain a clear call to action that can only be interpreted as an appeal to vote for or against a candidate as is required for electioneering communications to be regulated, *id.* at 2667, the FEC declares that it may be prohibited as an electioneering communication.

Although the FEC says that *Survivors* is a regulable electioneering communication, applying the proper test reveals that it is not (just as it is also not "express advocacy"). First, there simply is no clear call to action that can only be interpreted as an "appeal to vote." Absent words in the imperative mood ("Don't let him do it!") or cohortative mood ("Let's not let him do it!") there cannot be anything that can be interpreted as an "*appeal*," let alone an "appeal *to vote*." The FEC tried below to convert the familiar expression *giving one pause* into such a clear call to action. Dkt. 56 at 5. Shakespeare said, "in that sleep of death what dreams may come . . . must give us pause," *Hamlet*, Act iii, Scene 1, but it was not

an "appeal" to pause, rather an indication that profound things make us pause. *Survivors* says that "Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause." But it doesn't say "Pause!" (let alone "Stop!") or "Let's pause," as required for an "appeal." "Pause" is something "given" by ideas preceding, not something the hearer is actively called to do. It is intransitive, without indication of *what* is to be paused. There is no indication of what we should do after the pause. What we think in the pause is up to us. Some will applaud, others will not. How we proceed after the pause, is up to us. We have, as *WRTL II* said of issue advocacy, been given information and educated, and whether we take cognizance of the information, including in our voting, is up to us, for we have not been invited to vote one way or the other. 127 S. Ct. at 2667.

Second, the "ad[] may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." *Id.* at 2670. Part of "everyone" who should be given pause by the actions described in *Survivors* is Senator Obama himself. It may be sincerely hoped by RTAO that by calling attention to Senator Obama's actions he will do better next time he is called to act on this public issue. The statement that "everyone" will be given pause by the actions merely broadens the scope of the disappointment and disapproval expressed, which in turn should heighten the pressure on the incumbent politician to alter his attitudes to move

more into the mainstream.

The FEC's analysis of *Survivors* demonstrates that its regulations at 11 C.F.R. §§ 100.22(b) and 114.15 are unconstitutionally vague and overbroad, in addition to being beyond permissible authority. Here, as in all four of the challenged provisions, the FEC is engaging in a forbidden "'we'll know it when we see it approach.'" *Leake*, 525 F.3d at 290 (citation omitted). Such an approach, "simply does not provide sufficient direction to either regulators or potentially regulated entities. Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject." *Id.* The FEC must not be allowed to continue "handing out speeding tickets without 'telling anyone . . . the speed limit.'" *Id.* (citation omitted).

The FEC argues that its PAC enforcement policy is unreviewable, FEC Opposition at 10-12, but in its newly-released memorandum opinion, the district court properly explains why that argument must be rejected. What is missing from the FEC's substantive argument on this issue is *Leake*'s clear articulation that the major-purpose test must focus on "*the* major purpose," which must be determined as "an empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech." 525 F.3d at 287 (emphasis added). The FEC's PAC enforcement policy follows neither of these mandates and so is unconstitutional and beyond FEC authority.

The FEC argues that its "support or oppose" test for converting donations to FECA "contributions" under 11 C.F.R. § 100.57 is not vague and beyond its authority. FEC Opposition at 13-16. However, it is clearly unconstitutional when measured against the more specific phrase that *Buckley* held to be unconstitutionally vague and overbroad, i.e., "advocating the election or defeat of a clearly identified candidate." 424 U.S. at 42. And there is no lowered standard for vagueness, even where contributions are involved.

RTAO's harms are real, constitutionally-cognizable, serious, and irreparable. The FEC will suffer no harm, even in the midst of an election, by being confined to regulating only what it has constitutional and statutory authority to regulate.

Respectfully submitted,

/s/ James Bopp, Jr.

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Certificate of Service

I hereby certify that on September 25, 2008, I electronically filed the foregoing with the Clerk of Court using the CM\ECF System, which will send notice of such filing to the following registered CM\ECF users:

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I further certify that on September 25, 2008, I served upon the below listed non-CM/ECF participants copies of this document by First-Class Mail postage prepaid and by email at the listed addresses.

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