No. 11-1760

United States Court of Appeals for the Fourth Circuit

The Real Truth About Obama, Inc., *Plaintiff-Appellant*

v.

Federal Election Commission and
United States Department of Justice, *Defendants-Appellees*

Appeal from the United States District Court for the
Eastern District of Virginia, Richmond Division

Reply Brief

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Argument

The Supreme Court says that when it issues a grant-vacate-remand ("GVR") order it finds "a reasonable probability that the decision below rests upon a premise that the lower court would reject given the opportunity for further consideration," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (emphasis added). *See* Appellant's Br. ("RTAO-Br.–") at 13. Appellees (collectively "FEC") say "a 'GVR order' is not a determination on the merits." Appellees' Br. ("FEC-Br.–") at 16 n.8. This does not alter the Supreme Court's finding of a reasonable probability of a different outcome, based on prescribed reconsideration in light of *Citizens United v. FEC*, 130 S. Ct. 876 (2010). *Citizens United* reasserted bright-line protection for core political speech, rejecting vague and overbroad tests, such as previously challenged 11 C.F.R. 114.15 and those now before the Court.

But FEC ignores *Citizens United*'s bright-line protection for political speech, trying instead to apply *Citizens United*'s narrow upholding of ordinary disclaimer and reporting requirements to the case at hand. *See*, *e.g.*, FEC-Br.–19-20. The challenged regulation and policy are *not* ordinary disclaimer and reporting requirements, and branding them "disclosure" does not make them constitutional. They trigger PAC-status, the burdens of which *Citizens United* pronounced "onerous" and reviewed under strict scrutiny. 130 S. Ct. at 898.

I. FEC's Alternate "Expressly Advocating" Definition Is Vague, Overbroad, Beyond Statutory Authority, and Void.

A. Standards of Review.

RTAO established that vagueness and overbreadth standards, including the unambiguously-campaign-related requirement, are part of the standards of review that must be resolved before other review may proceed and that if the FEC lacks statutory authority its regulation is unlawful. RTAO-Br.–15-16. "Only *after* determining that 11 C.F.R. 100.22(b) is *not* unconstitutionally vague and overbroad, *is* unambiguously campaign related, and is *not* beyond statutory authority would any other standard of review come into play." RTAO-Br.–16. FEC only addresses exacting versus strict scrutiny in its standards discussion, ignoring crucially the controlling analysis of *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008) (*see* RTAO-Br.–18-19). FEC-Br.–22-25.[1]

FEC argues that, though its alternate expressly advocating definition can trigger PAC burdens that *Citizens United* declared "onerous," 130 S. Ct. at 898, exacting scrutiny applies. FEC-Br.–23-25. But FEC's assertion that *Citizens United* did not apply strict scrutiny to PAC-style organizational and reporting burdens fails to

[1] FEC attempts to downplay the controlling authority of *Leake* as inapplicable because *Leake* involved an express advocacy definition that "was significantly more expansive and less precise than section 100.22(b)." FEC-Br.-41. However, FEC points to distinctions without a difference between the statutes, and *Leake*'s *analysis* controls.

deal with what *Citizens United* actually said:

> A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—*the option to form PACs does not alleviate the First Amendment problems* with § 441b. PACs are burdensome alternatives; [listing organizational and reporting burdens]."

130 S. Ct. at 897 (emphasis added). In other words, *Citizens United* considered *both* the ban *and* the PAC-option under strict scrutiny because "[l]aws that *burden* political speech"—not just those that *prohibit* political speech—"are 'subject to strict scrutiny.'" *Id.* at 898 (citation omitted) (emphasis added). And FEC failed to demonstrate, FEC-Br.–23 n.10, that *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), did not also consider *both* the PAC-option *and* the corporate expenditure ban (from which MCFL was exempted), under strict scrutiny. *See MCFL*, 479 U.S. at 256, 262.

In *Davis v. FEC*, 554 U.S. 724 (2008), the Supreme Court held—immediately after setting out the exacting-scrutiny formulation—that "*the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights*." *Id.* at 744 (emphasis added). FEC asks this Court to ignore the Supreme Court's *explanation* of its just-described, exacting-scrutiny formulation. FEC-Br.–23 n.10. But if the issue here is not resolved on vagueness and overbreadth grounds, if exacting scrutiny applies, and if a provision imposes bur-

dens that *Citizens United* pronounced "onerous," 130 S. Ct. at 898, then FEC must make a stronger showing than for a non-onerous provision, i.e., *high-level* exacting scrutiny applies, not *complaisant* exacting scrutiny. *See* RTAO-Br.–17-18.

B. Section 100.22(b) Fails the Requirement that Government Only Regulate Speech that Is Election-Influencing by Being Unambiguously Campaign Related.

RTAO established that this Circuit follows the Supreme Court in requiring that government only regulate political speech that is "unambiguously campaign related." RTAO-Br.–19-23. Under that requirement, this Court held that the Supreme Court has only recognized two types of communications that meet the requirement and strike the right "balance," i.e., magic-words express advocacy and federally defined electioneering communications. *See Leake*, 525 F.3d at 284. *Cf. New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) (employing unambiguously-campaign-related requirement); *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137 (10th Cir. 2007) (same).

FEC argues that 11 C.F.R. 100.22(b) meets the requirement because it contains the word "unambiguous." FEC-Br.–42. But this Court's unambiguously-campaign-related requirement, which limits express advocacy to magic words, *Leake*, 525 F.3d at 281, cannot be met by a non-magic-words, express-advocacy definition that simply contains "unambiguous." To say that a communication must be "unambiguous," as 100.22(b) does, says nothing about whether it is "unambig-

uously campaign related," which in *Buckley v. Valeo*, 424 U.S. 1 (1976), required that the vague terms "relative to," "advocating," and "for the purpose of influencing" be construed to reach only magic-words express advocacy. *Id.* at 42, 44 & n.52, 80-81.

RTAO challenges 100.22(b) as being overbroad in the sense in which *Buckley* expressed the concern in establishing the unambiguously-campaign-related requirement: "the relation of the information sought to the purpose of the Act [regulating elections] may be too remote," and, therefore, "impermissibly broad." *Id.* at 80 (RTAO-Br.–20). This type of overbreadth may fairly be called "*Buckley*-overbreadth." *See* RTAO-Br.–16. And under the unambiguously-campaign-related requirement, the Supreme Court has recognized two types of regulable speech that strike the right balance—magic-words express advocacy and federally defined electioneering communications, *see Leake*, 525 F.3d at 281—so anything beyond these approved types is overbroad. RTAO's reliance on these two types of overbreadth makes FEC's citation of a test for the First Amendment's "substantial overbreadth" doctrine (for facial invalidity) inapposite because it is a different overbreadth doctrine. *See* FEC-Br.–26.

C. "Express Advocacy" Requires "Magic Words."

RTAO established that "express advocacy" requires "magic words," citing controlling precedents, opinions by all of the current Supreme Court Justices (in-

cluding in *Citizens United*, 130 S. Ct. 876), and numerous cases from this and other courts. RTAO-Br.–23-32. FEC attempts to evade these authorities in several ways.

First, it employs a diversionary theme proclaimed in the heading at II.A, to the effect that Congress may require disclosure beyond magic words. FEC-Br.–28. That is not the issue here, which is what *express advocacy* means, which turns on the construction that the Supreme Court imposed on the "expenditure" definition (with "purpose of influencing" language) to avoid vagueness and overbreadth. *See Buckley*, 424 U.S. at 79-81. The construction the Supreme Court imposed was an "express words of advocacy" construction, i.e., magic words. *Id.* at 44 & n.52, 80. The fact that Congress has *extended* disclosure to "electioneering communications," with Supreme Court approval, says *nothing* about what "express advocacy" means.

Second, in the very next heading, FEC argues that *Buckley*'s magic-words express-advocacy construction was a mere statutory construction, not a constitutional requirement. *See* FEC-Br.–28 (heading at II.A.1). But as already established, the construction is of an "expenditure" definition—in the disclosure context—with the same "purpose of influencing" language that continues in the present "expenditure" definition; that definition is foundational to the meaning of "independent *expenditure*"; so FEC's regulation at 100.22(b) is beyond statutory au-

thority. *See* RTAO-Br.–32-34. FEC's argument here undercuts its argument elsewhere that it has statutory authority for 100.22(b). And the unambiguously-campaign-related requirement, *see supra*, which underlies the express-advocacy statutory construction *is* a constitutional requirement, i.e., that regulation of political speech may not be vague or reach beyond speech that is "unambiguously campaign related," *Buckley*, 424 U.S. at 80. In any event, the fact that the *same* expenditure-definition language that was at issue in *Buckley* is still used means that any mere "statutory construction" required in *Buckley* is still required now. So "independent expenditure" still means non-coordinated, magic-words express advocacy.

Third, FEC just ignores all of the opinions in which Supreme Court Justices plainly stated that the express-advocacy test is a magic-words test, *see* RTAO-Br.–23-26, including *Citizens United*, where four Justices declared that "there has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley* . . . ." 130 S. Ct. at 935 n.8 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part). Nowhere does FEC even concede that these Justices said this or try to explain that the Justices didn't really mean it. The FEC's ignoring of this and other direct, clear, repeated statements by all of the Justices to the same effect indicates that FEC has no real answer to the fact that all of the Justices have said that the express-advocacy test is a

magic-words test. This is surely central to the Supreme Court's vacatur and remand for reconsideration in light of *Citizens United*.

FEC attempts to dodge these plain statements by arguing that Justice Thomas said in *McConnell v. FEC*, 540 U.S. 93 (2003) that the Court had "'overturned' all of the courts of appeals decisions . . . that had interpreted *Buckley* as limiting government regulation to a wooden magic-words formula." FEC-Br.–30 (citation omitted). But the FEC's argument is beside the point. The issue here is whether "express advocacy" is a magic-words test, not whether government may also regulate "electioneering communications." Justice Thomas did not address that in his cited dissent, but he *did* join all of the Justices in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), in equating express advocacy with magic words. *See* RTAO-Br.–26 (citing all members of Court for proposition). Thus *WRTL-II* requires that "express advocacy" be "magic words," despite FEC's diversionary argument that *WRTL-II also* allowed regulation of electioneering communications meeting *WRTL-II*'s appeal-to-vote test. *See* FEC-Br.–31. So the holdings of the numerous lower courts that also equate express advocacy with magic words likewise remain undisturbed, *see* RTAO-Br.–26-29, and the truth of their assertion may not be assailed by distinguishing them as occurring before *McConnell*, 540 U.S. 93 (or the other meaningless distinctions FEC attempts). Thus, the FEC is simply wrong in stating that "*McConnell* and *WRTL* laid to rest the claim that

Buckley limits express advocacy to communications with magic words." FEC-Br.–30.[2]

D. Section 100.22(b) Is Beyond Statutory Authority.

RTAO established that 100.22(b) is beyond statutory authority. RTAO-Br.–32-34. As already discussed, *supra* at 6, FEC's insistence that *Buckley*'s magic-words, express-advocacy construction of the "purpose of influencing" language in the definition of independent "expenditures" that must be reported was a mere statutory construction undercuts its argument that 100.22(b) is within statutory authority. In short, the Supreme Court already imposed a constitutionally compliant *judicial* construction of the purpose-of-influencing expenditure definition, precluding FEC's "*regulatory* construction," FEC-Br.–43, of the current "expenditure" definition retaining the same language. An "independent expenditure" is an independent expenditure for a magic-words, express-advocacy communication. *See Buckley*, 424 U.S. at 80. Congress incorporated this *judicial* construction of "expenditure," 2 U.S.C. 431(9), into its "independent expenditure" definition, 2 U.S.C. 431(17), by incorporating *Buckley*'s "expressly advocating" language. FEC ignores this

[2] FEC cites *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), as authority for 100.22(b), but doesn't follow *Furgatch* in substantial and legally significant ways. *See* RTAO-Br.–30-32. FEC's concession that it didn't really follow *Furgatch*, FEC-Br.–31 n.14, undercuts its reliance on *Furgatch* as authority, and FEC's reliance on "recent rulings" to support its liberties with *Furgatch* fails, as noted in this brief.

controlling analysis, which precludes its contrary *regulatory* construction. Given Congress's incorporation of *Buckley*'s magic-words, express-advocacy construction, FEC's argument that BCRA also declared 100.22(b) unaffected means nothing. *See* FEC-Br.–43-44. After all, at the time BCRA was passed, 100.22(b) had been declared unconstitutional, *see* RTAO-Br.–26-29, and was widely considered moribund. In fact, it was not until *after McConnell* that FEC decided, erroneously, that it could enforce 100.22(b) again.[3]

E. Section 100.22(b) Is Unconstitutionally Vague and Overbroad.

RTAO established that 100.22(b) is unconstitutionally vague and overbroad. RTAO-Br.–34-42. Part of FEC's response is under a heading arguing that "*Citizens United* . . . upheld disclosure requirements for a broad range of communications that lack magic words." FEC-Br.–32 (capitalization altered). But that is not the issue here, which is whether 100.22(b) is unconstitutionally vague and overbroad. The fact that the Supreme Court has upheld disclosure for both magic-

[3] FEC's supplemental explanation and justification for its PAC-enforcement policy concedes the foregoing assertions. First, FEC noted that BCRA did not amend the "expenditure" definition, instead adding "electioneering communications" for regulation, so that "the Supreme Court's limitation of expenditures, on communications made independently of a candidate, to 'express advocacy' continues to apply." FEC, "Political Committee Status," 72 Fed. Reg. 5597 (Feb. 7, 2007) ("PAC-Status 2"). Second, FEC asserted (erroneously) that *McConnell* had freed FEC "to apply . . . 100.22(b) free of constitutional doubt." *Id.* at 5604. Thus, when BCRA left 100.22(b) alone, it left alone a moribund, unenforced regulation, which is far from saying that Congress endorsed it (which wouldn't matter anyway since under *Buckley* and other decisions 100.22(b) is unconstitutional).

words "express advocacy" *and* "electioneering communications" says nothing to whether 100.22(b) is constitutional.

Also not at issue is the "blanket exemption" from disclosure for which *Buckley* established the "reasonable probability [of] . . . harassment" test. 424 U.S. at 74. That is a separate claim, which RTAO has not asserted here, so FEC's *italicized* assertion that RTAO has not argued it is irrelevant and another misdirection. *See* FEC-Br.–32.

FEC argues that *Citizens United* both applied *WRTL-II*'s appeal-to-vote test and then approved disclosure for all electioneering communications regardless of whether they met the appeal-to-vote test. FEC-Br.–33-36. That is true, but it is not the issue here, so it is irrelevant misdirection. All of the communications at issue in *Citizens United* were subject to disclosure because they were *electioneering communications*. *See* 130 S. Ct. at 888. There is no dispute here over whether government may require disclosure of electioneering communications. But the present issue is about 100.22(b), which controls which communications are "independent expenditures," not "electioneering communications." Thus, FEC's statement—"If mandatory disclosure of [Citizens United's] ad . . . is constitutional, then inexorably so is disclosure of RTAO's 'Survivors' ad," FEC-Br.–36—mixes apples and oranges. One must be disclosed because it is an *electioneering communication*, the other ought not be subject to *independent-expenditure* reporting unless 100.22(b)

is constitutional and properly applies. FEC does this sort of mingling of concepts throughout its argument, but the issue here is whether 100.22(b) is unconstitutionally vague and overbroad.

RTAO established that *WRTL-II*'s appeal-to-vote test is vague unless limited by the brightline "electioneering communication" definition. RTAO-Br.–34-38. But FEC argues that 100.22(b) is not vague because it "tracks" *WRTL-II*'s appeal-to-vote test. FEC-Br.–44. FEC argues that "the controlling opinion . . . rejected Justice Scalia's dissenting argument that the . . . test was 'impermissibly vague.'" FEC-Br.–44 (citation omitted). But *WRTL-II* did so *because* the test was cabined by the "electioneering communication" definition, 551 U.S. at 474 n.7. *See* RTAO-Br.–34-38.

FEC tries to evade this problem in its analysis with an erroneous statement: "*WRTL*'s acknowledgment 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 the 'trigger' or with a different 'trigger.'" FEC-Br.–45-46. But *WRTL-II* did not simply "acknowledge" that the electioneering-communication definition is a "bright line." That it was a bright line needed no "acknowledgment" because that had already been established in *McConnell*, *see* 540 U.S. at 192. Rather, the controlling opinion was expressly answering the accusation that the appeal-to-vote test was unconstitutionally vague, so the statement that the test was limited by the

brightline electioneering-communication definition was made to argue that the test was *not vague*, not to "acknowledge" that the definition was a bright line. *See WRTL-II*, 551 U.S. at 474 n.7. So the controlling opinion *was acknowledging* precisely that the test *would be vague* without that "trigger." A majority of the *WRTL-II* Court held it vague absent that trigger. *Compare* 515 U.S. 474 n.7 (Roberts, C.J., joined by Alito, J.) (test non-vague *because* limited by electioneering-communication definition) *with id.* at 492 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment) (test "impermissibly vague" in all circumstances). So the appeal-to-vote test is not a free-standing test. And FEC's use of a test that has some similarities to the appeal-to-vote test, but is not limited by any comparable brightline "trigger," is unconstitutionally vague and overbroad.

FEC then argues that there is nothing about the electioneering-communication definition that makes the appeal-to-vote test not vague. FEC-Br.–46. That directly contradicts *WRTL-II*, *supra*, and it contradicts *McConnell*, which held both that the electioneering-communication definition was not vague, 540 U.S. at 192, and that "the vast majority of [electioneering-communication] ads clearly had [an electioneering] . . . purpose," *id.* at 206. FEC has a heavy burden in light of these contradictions with precedent, which burden it fails to carry. It argues that the "30- and 60-day windows" have nothing to do with the vagueness of a communication.

FEC-Br.–46. But there is more to the electioneering-communication definition than these windows, including requirements of a clearly identified candidate, targeting to the candidate's constituents, and use of broadcast media. *See* 2 U.S.C. 434(f)(3). *McConnell* endorsed the whole premise of BCRA that communications *so defined* constituted "*electioneering*" that could be subject to regulation similar to what had been imposed on magic-words, express-advocacy communications. So *WRTL-II*'s controlling opinion essentially said that if you *start* with a pool of communications so defined with brightline limits, the appeal-to-vote test was sufficiently bright *in that context* to separate electioneering communications that could be banned for corporations from those that could not be, but conversely, *without* that initial filtering, the test would be unconstitutionally vague. FEC's next argument, that "[t]he test remains the same outside the time windows," FEC-Br.–46, is nonsensical because the test would be unconstitutionally vague outside the time window, just as *WRTL-II* indicated. So the fact that 100.22(b) applies year-round, and has none of the other electioneering-communication-definition limits, excludes it from *WRTL-II*'s decision that the appeal-to-vote test is not vague.

FEC argues that application of *WRTL-II*'s appeal-to-vote "test in *Citizens United* puts to rest any claim that the standard is constitutionally deficient." FEC-Br.–44. But *WRTL-II* held that its test was *not* vague for electioneering communications—because it was limited by the electioneering-communication defini-

tion—so the application of that test in *Citizens United* to electioneering communications is unremarkable and proves nothing about 100.22(b), which is *not* limited by any such brightline definition. And the Supreme Court's use of the appeal-to-vote test, which is an objective test not turning on any reasonable-person standard, does not undermine this Court's holding in *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001), that 100.22(b) is unconstitutional because its shifts the focus from the text to the impressions of a "reasonable listener or viewer," *id.* at 391.

FEC repeatedly relies on *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011) ("*NOM*"), including for the proposition that a test similar to 100.22(b) is not vague. FEC-Br.–46. *NOM* is a First Circuit decision and this is the Fourth Circuit. *NOM* does not control here. *NOM* is simply wrong, and a petition for a writ of certiorari has been filed in that case. And there are better-reasoned Fourth Circuit decisions that control this case. Especially the analysis of *Leake* establishes the unambiguously-campaign-related requirement, under which there are two types of communications that may be regulated (magic-words express advocacy and federally defined electioneering communications), and the means for determining "major purpose" for PAC-status. 525 F.3d at 281, 287. This analysis controls here, and FEC's superficial distinction based on different wording of a statute at issue in *Leake* is the sort of distinction without a difference that

can be argued in most any case, but without legal significance. And *Leake*'s statement that the state was free to adopt statutes consistent with Supreme Court precedent, *see* FEC-Br.–41, does not mean that FEC may adopt a non-magic-words, express-advocacy test that *Leake* expressly said was not permitted and that this Court expressly held to be unconstitutional. *See supra*. Nothing in *Citizens United* or *WRTL-II* authorizes such a forbidden rule.

RTAO established that 11 C.F.R. 100.22(b) takes the same approach that the FEC took in its regulation at 11 C.F.R. 114.15, which *Citizens United* strongly repudiated. *See* RTAO-Br.–39. FEC attempts to evade this by arguing that 100.22(b) is not a balancing test and has few factors and that anyway it's like *WRTL-II*'s appeal-to-vote test. FEC-Br.–46-47. As already shown, 100.22(b) is not like *WRTL-II*'s test, and FEC fails to respond to RTAO's arguments that 100.22(b) is like rejected 114.15 because it seeks to impose maximum control over issue advocacy with a rule so vague and overbroad that speakers will be chilled from speaking absent prior FEC approval. RTAO-Br.–39.

And FEC adds that 100.22(b)'s vague phrase "electoral portion" somehow makes 100.22(b) more clear than *WRTL-II*'s appeal-to-vote test, without explaining how this is so or even what "electoral portion" means. FEC-Br.–47. And FEC even rearranges the words of 100.22(b) to come up with the non-existent phrase (which it italicizes), "*unambiguous* electoral portion," but putting "*unambiguous*"

in front of a vague term does nothing to solve the vagueness of the term. Moreover, contrary to FEC, 100.22(b)'s use of the yet-undefined and vague "electoral portion" does not make 100.22(b) "narrower than the *WRTL* test," because "*WRTL* looks to the mere 'mention' of an election and similar indicia of express advocacy." FEC-Br.–27. But here FEC steps into the very problem that it had in promulgating 114.15 by importing into *WRTL-II*'s actual appeal-to-vote test these "indicia" that *WRTL-II* merely mentioned in *applying* the test. *Citizens United* expressly took FEC to task for so converting a simple, objective test into multi-factor test. *See* 130 S. Ct. at 896. FEC can no more do that now than it could do it in 114.15, and the effort to justify 100.22(b) with the condemned approach taken in 114.15, shows the flaw of FEC's overreaching in 100.22(b).

RTAO established that 100.22(b) is unconstitutionally vague and overbroad in other ways, including its forbidden reliance on "context and proximity to an election" to be determined by forbidden discovery, an operative "advocacy" phrase that *Buckley* held vague and overbroad, and other vague terms, such as "encourages," "actions," "suggestive," and "electoral portion." *See* RTAO-Br.–39-41.

FEC tries to evade *WRTL-II*'s holding that "proximity" to an election is a forbidden consideration in determining the meaning of a communication by arguing that all electioneering communications would be near an election. *See* FEC-Br.47-48. But FEC is wrong. *WRTL-II* makes clear that the meaning of a communication

must be based on the actual *text*, i.e., the particular words chosen, not external contextual factors. *See WRTL-II*, 551 U.S. at 469 ("focusing on the substance of the communication"). *WRTL-II* did no more than follow the longstanding practice of the Supreme Court in requiring that the meaning of regulated core political speech be based on the actual *words* of the text. *See Buckley*, 424 U.S. at 44 & n.52 ("express words of advocacy required").

FEC tries to evade the vagueness of "suggestive" in 100.22(b) by arguing that it must be considered in context, FEC-Br.–49, which RTAO did and which does not save it. FEC makes no effort to counter RTAO's explanation of why the terms significantly differ, RTAO-Br.–41 n.18, other than to assert that they are really alike.

FEC makes no effort to refute RTAO's arguments concerning the vagueness of the "advocacy" phrase that *Buckley* expressly rejected, or of the use of "encourages" and "actions," *see* RTAO-Br.–41, apparently having no response and thereby conceding the vagueness of 100.22(b) because of these operative terms.

F. Applying Section 100.22(b) Highlights the Vagueness.

Two stories particularly reveal the unconstitutional vagueness and overbreadth of 100.22(b). The first story is about how the federal district judge below and FEC disagree over whether RTAO's *Change* ad is express advocacy under 100.22(b), which reveals the inherent flaw in 100.22(b). *See* RTAO-Br.–42-43. FEC tries to

evade this by arguing that the different results of the application of 100.22(b) to *Change* arise not from the regulation's vagueness but from "the narrowness and precision with which the Commission applies the test." FEC-Br.–50. This is a remarkable comment that says several things. It says that the district court doesn't apply 100.22(b) that way, but would instead ride roughshod over core political speech and speakers. It says that the FEC that created the "appeal to vote test" at 114.15 that *Citizens United* forcefully repudiated for overreaching, 130 S. Ct. at 895-96, is more protective of First Amendment rights than a federal district court. FEC asks too much and should rather settle for the obvious, that 100.22(b) is unconstitutionally vague and overbroad.

That this is so is also evident from another story, which has just arisen *within* the FEC itself. On October 21, 2011, FEC released the Statement of Reasons of Chair Cynthia L. Bauerly and Commissioners Steven T. Walther and Ellen L. Weintraub ("Statement") in Matter Under Review ("MUR") 6346, In the Matter of Cornerstone Action et al. (available at http://fec.gov/em/mur.shtml). These three FEC Commissioners state their reasons why they think that an ad is express advocacy under 100.22(b), but indicate that the three other Commissioners would not agree.[4] The Statement indicates the authors' view that the last sentence, about

[4] The Statement sets out the ad, titled *The Feeling is Mutual*, as follows:

> Bill Binnie portrays himself as a conservative. Truth is he's shockingly liberal. Binnie supports abortion to avoid the expense of disabled children. He's

"tell[ing] Binnie the feeling is mutual," means "vote against him in the primary." Statement at 4. But as the Statement indicates, the other Commissioners disagree. *Id.* The fact that FEC Commissioners—presumably all reasonable people and all equally concerned with "narrowness and precision" in applying 100.22(b)—cannot agree on the application of 100.22(b) to this ad shows the inherent unconstitutional vagueness and overbreadth of 100.22(b).

And FEC's treatment of RTAO's *Survivors* ad also shows the constitutional inadequacy of 100.22(b). In deeming the ad express advocacy, FEC points to "indicia of express advocacy" that it says *WRTL-II* made a part of the appeal-to-vote test. FEC-Br.-51. Setting aside the fact that *WRTL-II*'s test is unconstitutionally vague and overbroad outside of the electioneering-communication context, even *WRTL-II* did not make facts it discussed in *applying* its test part of the test itself. That was precisely what drew down the Supreme Court's wrath on FEC in *Citizens United*, 130 U.S. at 895-96, i.e., FEC imported these "indicia" into the test itself. They are not part of the test. Yet, FEC now seeks to import those indicia, forbidden to it in *Citizens United* for the appeal-to-vote test regulation at 114.15,

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excited about imposing gay marriage on New Hampshire. He's praised key elements of Obama's healthcare bill. He's even said that he's open to imposing a European-styled value added tax on working families. With these shockingly liberal positions, it's no wonder Bill Binnie says he doesn't like the Republican Party. Now New Hampshire Republicans can tell Binnie the feeling is mutual.

into 100.22(b), which FEC claims is justified by that appeal-to-vote test.[5]

So setting those forbidden indicia aside, is there any appeal to action that can only be interpreted as voting, which *Furgatch*, 807 F.2d 857, would require (*see* RTAO-Br.–30), or any "appeal to vote," as *WRTL-II*'s test required (*see* RTAO-Br.–30)? No. What FEC points to is "that should give everyone pause," which FEC says can only mean "'[e]veryone' should 'pause' before voting for that candidate," which FEC says means "to consider 'reject[ing]' him," a "'magic word.'" FEC-Br.-52. But FEC's speculative extrapolation of "pause" shows the unconstitutional vagueness and overbreadth of 100.22(b), if indeed it permits the FEC to insert the word "reject" where the speaker did not say it. Words have meaning, and one cannot be merely substituted for another just because FEC thinks it can see a way to link one not spoken to another the FEC provides. Indeed, this is exactly the forbidden inquiry into the speaker's intent that *WRTL-II* forbade, 551 U.S. at 467, and it is a purported intent fashioned from speculative extrapolation. *Survivors* did not even say "Pause!" or "Let's pause!"—there was no command or invitation. "Pause" is intransitive, so there is no indication of anything to be "paused." The

[5] Nowhere in any purported express-advocacy test, including 100.22(b), is there any rule indicating that saying that an incumbent politician is lying or being callous or being in any way flawed converts a communication to express-advocacy. For the FEC to indicate that it does here is to make up the rules as the FEC goes along, but still without brightline guidance. Will FEC change its mind if RTAO instead says the politician is "mistaken," "in error," "wrong," or "untruthful"? This whole approach must be rejected as unconstitutional.

"pause" is something "given" by words and ideas that precede it. In *Hamlet*, Shakespeare begins a famous passage with "[t]o be, or not to be," then considers that "in that sleep of death what dreams may come . . . [m]ust give us pause." *Hamlet*, Act iii, Scene 1. Shakespeare was calling no one to "reject" the "sleep of death," as FEC would have it, but to consider what had been said. So *Survivors* readily may be interpreted as stating that the actions of Senator Obama with respect to infanticide are of such a profound nature as to cause everyone to pause and reflect. What they think about in the predicted pause is up to them. Some will doubtless applaud, while others will not. How they proceed after the predicted pause is also up to them They have, as *WRTL-II* said of issue advocacy, been given information and educated, and whether they take cognizance of the information, including in their voting, is up to them, for they have not been invited to vote one way or the other. *See* 551 U.S. at 470. The FEC again overreaches, and its test is unconstitutionally vague and overbroad.

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

FEC again argues that its PAC-enforcement policy is not final agency action that may reviewed. FEC-Br.–53. *See also* JA–76. For the reasons previously stated by the district court, this argument should be rejected.[6]

[6] In its 2008 opinion, the district court rejected this claim as follows:

The FEC is alleging that RTAO is challenging the Explanation and Justifica-

A. Standards of review.

RTAO established that when government imposes PAC-status and -burdens, strict scrutiny applies. *See* RTAO-Br.–44-49. This is so for the same reasons discussed herein in the prior standards of review discussion. *See supra* at 2-4. FEC only cross-references its prior standards-of-review discussion. FEC-Br.–55 n.24. But it also insists that "RTAO accuses the Commission of providing *too much* information." FEC-Br.–62. RTAO's point was, and remains, the point of *Citizens United* that "[p]rolix laws chill speech for the same reason that vague laws chill speech . . . ." 130 S. Ct. at 889.

> tion set forth in 72 Fed.Reg. 5595, and that this Explanation and Justification is not final agency action because it explains why a broader regulation was *not* adopted. (Def. FEC Mem. 24.) Plaintiff's challenge to the definition of "political committee" is still valid, because the rule establishing what the FEC would consider as a "political committee" is a standard set by the FEC, even absent a definition. The U.S. District Court for the District of Columbia ruled in 2007 that the FEC was permitted to refrain from ascertaining a specific rule for "major purpose," but this does not mean the rights and obligations of parties cannot be determined from the FEC's enforcement of the term "major purpose." *See Shays v. FEC,* 511 F.Supp.2d 19, 31 (D.D.C.2007).
>
> While there is no specific definition for "major purpose," the rights and obligations of parties can still be determined from the FEC rule, as enforcement power exists through the judicial construct of the term "major purpose." Therefore, Defendant's claim that the challenged rule is not reviewable under the APA because it is not a final agency action fails.

RTAO v. FEC, No. 08-483, 2008 WL 4416282, at *9 (E.D. Va. Sept. 24, 2008) (order denying preliminary injunction).

B. *Citizens United* Declared PAC Burdens "Onerous" and Rejected PACs as Adequate Vehicles for Corporate Political Speech and Vague, Multi-Factor Tests.

RTAO established that *Citizens United* declared PAC burdens "onerous," said PACs were inadequate vehicles for corporate political speech, and rejected vague multi-factor tests of the sort that FEC employs in determining PAC-status. RTAO-Br.–49-50. FEC makes no real effort to dispute these points, except to say that its enforcement policy is supported by various decisions. *See, e.g.*, FEC-Br.–54. Of these, FEC's statement about *SpeechNow.org v. FEC*, 599 F.3d 686, 692-97 (D.C. Cir. 2010), requires a response. FEC quotes *SpeechNow* for the proposition that PAC-style administrative and reporting burdens "do[] not 'impose much of an additional burden' compared with" ordinary independent-expenditure reporting. FEC-Br.–11 (*quoting SpeechNow*, 599 F.3d at 697). What FEC fails to mention, and what is crucial on this point, is that *SpeechNow* was a PAC. So the holding is simply that PAC-style burdens are not unduly burdensome for PACs, which does not make them non-onerous for non-PACs.

C. FEC Must Prove Its Policy Only Regulates Activity that Is Election-Influencing by Being Unambiguously Campaign Related.

RTAO established that FEC must prove that it only regulates speech and activity that is unambiguously campaign related in its PAC-status enforcement policy. RTAO-Br.–50-51. FEC makes no effort to meet this burden.

D. Major Purpose Is Based on "an Empirical Judgment [that] an Organization Primarily Engages in Regulable, Election-Related Speech."

RTAO established that "major purpose" must be based on, as *Leake* put it, 525 F.3d at 287, "an empirical judgment [that] an organization primarily engages in regulable, election-related speech." RTAO-Br.–51-55. FEC makes no effort to show that its policy meets this requirement, instead stating that it considers a broad range of other activity in imposing PAC-status.

E. FEC Employs an Impermissible Major-Purpose Policy.

RTAO established that FEC's PAC-status enforcement policy is constitutionally impermissible. RTAO-Br.–55-57. As noted, FEC insists that it may decide PAC status on a range of non-regulable activities on a case-by-case basis without further guidance to groups concerned with avoiding PAC status or complying with its requirements. FEC does argue that RTAO does not point to any misapplications of its PAC-status enforcement policy. *See* FEC-Br.–58. That is not a constitutional argument and does nothing to justify FEC's policy against RTAO's constitutional arguments. It is not part of RTAO's burden to litigate other situations in trying to gain judicial relief in its own situation. However, the FEC's own description of how it applied its PAC-status enforcement policy to the organizations described in its supplemental explanations and justification ("PAC-Status 2")—based as it was on now unconstitutional 11 C.F.R. 100.57, the FEC's revival of enforcement for

the deeply flawed 11 C.F.R. 100.22(b) at issue herein, and undefined and ad-hoc factors—is highly questionable. *See* FEC, "Political Committee Status," 72 Fed. REg. 5595 (Feb. 7, 2007).

Conclusion

For the foregoing reasons, the district court's order granting summary judgment to FEC and DOJ should be reversed and the case remanded with an order to enter summary judgment for RTAO.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1760 **Caption:** The Real Truth About Obama v. FEC

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