UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REAL TRUTH ABOUT OBAMA, Inc., Plaintiff, v. FEDERAL ELECTION COMMISSION, *et al*. Defendants.	No. 3:08-cv-00483 Assigned to Judge James Spencer

MEMORANDUM OF CAMPAIGN LEGAL CENTER
AND DEMOCRACY 21 AS *AMICI CURIAE* IN OPPOSITION
TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION & SUMMARY OF ARGUMENT

"The Real Truth About Obama, Inc." (RTAO) is a group that has registered with the Internal Revenue Service as a "political organization" under section 527 of the Internal Revenue Code. 26 U.S.C. § 527. *See* Complt. ¶ 9. In order to qualify as such, RTAO must be "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" for the function of "influencing … the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office … or the election of Presidential or Vice Presidential electors…." *Id.* § 527(e)(1), (2) (emphasis added).[1]

Indeed, RTAO – which was formed just two weeks ago – appears to have the major purpose, indeed the sole purpose, of running broadcast ads and sponsoring other public communications sharply critical of the views and positions of Senator Barack Obama, the presumptive Democratic Party nominee for President. The one ad script proffered by RTAO, Complt. at ¶ 16 ("Change"), characterizes in extreme terms (and in an "Obama-like voice") what it represents as how Obama "would like to change America … about abortion." It concludes by telling the listener "now you know the real truth about Obama's position on abortion," and then plays off the Obama campaign's own campaign slogan, by asking, "Is this the change that you can believe in?" *Id.* RTAO plans to run this ad in "the heartland states" in the immediate pre-election period this Fall. *See* Complt. Ex. A at 1 (Project 2).

There is, of course, nothing wrong with such speech that satirizes or criticizes a candidate in the days and weeks before an election, or speech that advocates – directly or indirectly – against the election of that candidate. For any of these purposes, RTAO is free to spend as much

[1] In *McConnell v. FEC,* 540 U.S. 93 (2003), the Supreme Court pertinently observed that "Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity." 540 U.S. at 174 n.67. The Court noted that 527 groups "by definition engage in partisan political activity." *Id.* at 177.

money as it wishes, so long as it does so independently of any candidate or political party. The question, however, is not whether RTAO can engage in the speech it intends, but whether it must register as a federal "political committee" in order to do so, and abide by the contribution limits, source prohibitions and reporting requirements that apply to such committees.

The Federal Election Campaign Act (FECA) defines the term "political committee" to mean "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a). The Act, in turn, defines "expenditure" and "contribution" to encompass any spending or fundraising, respectively, "for the purpose of influencing any election for Federal office." *Id.* §§ 431(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure"). In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court narrowed this statutory definition of "political committee" by construing the term to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79 (emphasis added). *See also McConnell,* 540 U.S. at 170 n.64 (restating the "major purpose" test for political committee status). Thus, only an organization that meets both the "major purpose" test and the statutory definition is deemed a "political committee" subject to the applicable requirements of federal law.

RTAO fears that it meets the test for political committee status and, not wanting to abide by the longstanding legal requirements for federal political committees, launches a constitutional assault on the underlying Federal Election Commission (FEC) regulations that govern a determination of "political committee" status, interposing an objection to every step of the test.

First, RTAO contends that the FEC's regulation defining the "express advocacy" component of "expenditure" impermissibly includes the standard of whether "reasonable minds could not differ" on whether the communication "encourages actions to elect or defeat" a candidate. 11 C.F.R. § 100.22(b).

Second, RTAO contends that the FEC regulation defining "contribution" impermissibly includes the standard of whether funds are received in response to a solicitation that "indicates that any portion of the funds received will be used to support or oppose" the election of a candidate. 11 C.F.R. § 100.57(a).

And third, RTAO contends that the FEC standard of examining whether a group has a "major purpose" to engage in "Federal campaign activity" is an impermissibly broad construction of the "major purpose" test set forth in *Buckley*.

As a separate matter, but relatedly, RTAO also challenges the FEC's implementation of the Supreme Court's recent decision in *FEC v. Wisconsin Right to Life,* 127 S. Ct. 2652 (2007) ("*WRTL II*"). There, in a test applicable to RTAO's spending even if it is not a political committee, the Court held that, notwithstanding a statutory prohibition, corporate and union treasury funds could be used to fund "electioneering communications" so long as the communications were not the "functional equivalent of express advocacy." RTAO objects to the FEC regulation codifying this standard. 11 C.F.R. § 114.15.

For the reasons set forth below, the Court should reject all elements of RTAO's challenge. And because RTAO has not demonstrated a likelihood of success on the merits of its claims, *see Scotts Co. v. United Industries Corp.*, 315 F.3d 264, 271 (4th Cir. 2002), the Court should deny RTAO's request for a preliminary injunction.

ARGUMENT

I. Plaintiff's Attempt to Create an "Unambiguously Campaign Related" Test Lacks Any Legal Basis and Should Be Rejected.

RTAO asserts that the threshold test in the review of campaign finance regulation is whether the regulated speech is "unambiguously related to the campaign of a particular federal candidate." *See* RTAO Preliminary Injunction Brief ("RTAO PI Br.") at 9. RTAO also claims that this threshold "test" entails a number of additional constitutional standards, including the "major purpose" test, a stringent "magic words"-style express advocacy standard, and a narrow construction of the term "contribution" to include only donations to a "candidate or political party or campaign committee." *See* PI Br. 8, 9, 12, 14-15. According to RTAO, the challenged regulations, *see* 11 C.F.R. §§ 100.22(b), 100.57, 114.15, and the FEC's implementation of the "major purpose" standard fail the "campaign related" test and the additional standards allegedly derived from such test, and therefore violate the First Amendment.

The problem with RTAO's argument is that it is based on a fiction. The "unambiguously campaign related" language appeared in *Buckley,* but was merely incidental to the Supreme Court's discussion of its narrowing construction of the term "expenditure" to encompass only express advocacy. 424 U.S. at 79-80.[2] The phrase certainly was not adopted as an independent constitutional test, and has not even been mentioned, much less applied in any subsequent Supreme Court case. Moreover, this phrase in no way establishes or even provides support for

[2] Reviewing the context in which the language "unambiguously campaign related" appeared in *Buckley* illustrates the ancillary nature of the phrase. To address "serious problems of vagueness," the *Buckley* Court construed the term "expenditure" in FECA as to non-"major purpose" groups to reach only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 76, 80; *see also infra* Section VI. The Court then stated that "this reading is directed precisely to that spending that is *unambiguously related* to the campaign of a particular federal candidate." *Id*. at 80 (emphasis added). It is clear that the only constitutional "test" created by the *Buckley* Court in this passage was the express advocacy standard, and the "unambiguously campaign related" language was simply a description of this standard, not a stand-alone constitutional command.

RTAO's claim that a "magic words"-style express advocacy standard or a narrow construction of the term "contribution" is constitutionally mandated. *See also infra* Section II, III.

The "unambiguously campaign related" test is simply RTAO's attempt to replace the Supreme Court's actual system for reviewing speech-related regulation with a test more to its liking. The Supreme Court, however, does not employ a "campaign related" test but, rather, applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. For instance, expenditure limits, as the most burdensome campaign finance regulations, are subject to strict scrutiny and reviewed for whether they are "narrowly tailored" to "further[] a compelling interest." *WRTL II*, 127 S. Ct. at 2664; *see also Buckley*, 424 U.S. at 44-45. Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisfy the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted). Disclosure requirements, the "least restrictive" requirements, *Buckley*, 424 U.S at 68, are subject to only an intermediate standard of review, namely that there exist a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. at 64 (internal footnotes omitted).

The Supreme Court's analysis of laws regulating speech thus bears little resemblance to plaintiff's "unambiguously campaign related" standard. This court should reject the plaintiff's invented test, and adhere to the established multi-level system for judicial review of speech-related regulation.

II. The Definition of "Expressly Advocating" at 11 C.F.R. § 100.22(b) Is Indistinguishable From the *WRTL II* Express Advocacy Test and Is Constitutional.

RTAO challenges the definition of "expressly advocating" found at 11 C.F.R. § 100.22(b), claiming that the so-called "subpart (b)" definition is "unconstitutionally vague and overbroad." RTAO PI Br. at 13; *see also* Compl. at ¶¶ 27-33. RTAO misconstrues the Supreme Court's decisions as requiring a "magic words" construction of the term "expenditure" when, in fact, the Court made clear in both *McConnell* and *WRTL II* that the First Amendment does not require that test. *See McConnell*, 540 U.S. at 193 (noting the Court's "longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad"); *see also WRTL II*, 127 S. Ct. at 2669 n.7 ("*Buckley's* intermediate step of ["magic words"] statutory construction on the way to its constitutional holding does not dictate a constitutional test.").

On the contrary, the Court's decision in *WRTL II*, which defined the "functional equivalent" of express advocacy standard in terms strikingly close to the terms used in the subpart (b) regulation, can be read only as affirming the constitutionality of subpart (b). Indeed, the Court's standard and the FEC's standard, as a practical and legal matter, are indistinguishable.

The debate over the role and scope of the "express advocacy" standard dates back to the enactment of FECA. An expenditure limit originally included in FECA provided that "[n]o person may make any expenditure … relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." *Buckley*, 424 U.S. at 39 (emphasis added). The *Buckley* Court was troubled by the vagueness of the phrase "relative to a clearly identified candidate." In order to preserve the expenditure limit from invalidation on

vagueness grounds, the Court construed the phrase to "apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id*. at 44 (emphasis added). The Court explained in a footnote that "[t]his construction would restrict the application of [the spending limit] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. These phrases became known as the "magic words" of express advocacy.[3]

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

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

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

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[3] Notwithstanding the Court's narrowing construction of the independent expenditure limit, it nonetheless invalidated the provision on the ground that it failed to serve any substantial government interest. *Buckley*, 424 U.S. at 51.

Further, as explained in Section IV, *infra*, the *Buckley* Court found it unnecessary to narrowly construe the term "expenditure" in the context of "political committee" disclosure requirements because "expenditures" by such groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.* at 79. *See also Shays v. FEC,* 511 F. Supp. 2d 19, 26-27 (D.D.C. 2007) (explaining that no express advocacy test is required for "major purpose" political committees).

> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

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

This Court subsequently held that the subpart (b) standard impermissibly "trips over the *Buckley* test" "[b]y allowing the FEC to regulate advocacy based upon the understandings of the audience rather than the actual message of the advocate." *Virginia Society for Human Life v. FEC*, 83 F. Supp. 2d 668, 677 (E.D. Va. 2000) *aff'd* 263 F.3d 379 (4th Cir. 2001). A number of other lower courts have held similarly. *See, e.g., Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996) (*per curiam*) (adopting district court opinion); *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996) (*per curiam*) (adopting district court opinion).

However, since this Court's decision in *Virginia Society for Human Life* and the other cases cited above invalidating subpart (b), two intervening Supreme Court opinions have made clear that the First Amendment does not require that regulation extend no further than "magic words," and thus strongly support the constitutionality of subpart (b). In its 2003 decision reviewing the Bipartisan Campaign Reform Act of 2002 (BCRA), the Supreme Court explained that *Buckley's* "magic words" test had effectively become the legal line separating "express advocacy" from "issue advocacy." *McConnell*, 540 U.S. at 126. But, the Court said:

> While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to "vote against Jane Doe" and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think." Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words.

Id. at 126-27 (footnotes omitted).

The Court in *McConnell* reviewed the provisions of Title II of BCRA, which prohibit the use of corporate or union treasury funds to pay for "electioneering communication" – defined as any broadcast ad that refers to a clearly identified federal candidate and is aired within 30 days of a primary or 60 days of a general election. *See* 2 U.S.C. §§ 434(f)(3) (definition), 441b(b)(2) (funding prohibition). These provisions were challenged on the ground that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." 540 U.S. at 190. The Court rejected this assertion, making clear that "the express advocacy limitation … was the product of statutory interpretation rather than a constitutional command," and that the Court had not suggested that "a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id*. at 192. The Court also rejected the notion that the First Amendment "erects a rigid barrier between express advocacy and so-called issue advocacy," and explained that such a notion "cannot be squared with [the Court's] longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *Id.* at 193. The Court concluded that "the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley's* magic-words requirement is functionally meaningless[,]" and "has not aided the legislative effort to combat real or apparent corruption." *Id.* at 193-94 (emphasis added).

The Court accordingly rejected the claim that the BCRA "electioneering communication" provisions are overbroad, reasoning that the "argument fails to the extent that the issue ads broadcast during the thirty- and sixty-day periods preceding federal primary and general elections are the functional equivalent of express advocacy[,]" and finding that the "vast

majority" of ads in the legislative record met this standard. *Id*. at 206. Accordingly, the Court upheld BCRA's "electioneering communication" provisions against a facial challenge.

In *WRTL II,* the Court re-visited these provisions of BCRA, this time in the context of an as-applied challenge regarding three broadcast ads that Wisconsin Right to Life sought to air. Chief Justice Roberts, writing the controlling opinion for the Court, held that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667 (emphasis added). Applying this test by balancing the "indicia of express advocacy" in the ads versus their characteristics as "genuine issue ads," the Court held that WRTL's ads were not the functional equivalent of express advocacy and accordingly were exempt from the funding restriction. *Id.*

The *WRTL II* Court's "functional equivalent of express advocacy" test is indistinguishable from the FEC's subpart (b) standard of express advocacy. Under *WRTL II,* an ad constitutes the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"; under subpart (b), an ad constitutes express advocacy if "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)." There is no legal or practical difference between these tests, or how they would be applied.

If the *WRTL II* test – crafted by the Chief Justice's controlling opinion itself – is not unconstitutionally vague, then neither is the virtually identical subpart (b) test. Given the striking similarities between the two standards, the Court's embrace of a "susceptible of no reasonable interpretation" standard for defining the "functional equivalent of express advocacy"

serves as a *de facto* endorsement of the constitutionality of subpart (b)'s "could only be interpreted by a reasonable person" standard.

The plurality opinion in *WRTL II* described its test as being "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *WRTL II,* 127 S. Ct. at 2666. As if to stress this point, the plurality opinion specifically defends its test against Justice Scalia's attack on its vagueness. *Id.* at 2669 n.7. The footnote points out that the "no reasonable interpretation" standard satisfies the "imperative for clarity in this area." *Id.* The footnote also argues that the "magic words" formulation of express advocacy used in *Buckley* was not "the constitutional standard for clarity … in the abstract, divorced from specific statutory language," and that the *Buckley* "magic words" standard was a matter of statutory construction and "does not dictate a constitutional test." *Id.*

Further, the *WRTL II* Court made clear that although "contextual factors … should seldom play a significant role in the inquiry," 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[.]" 127 S. Ct. at 2669. Similarly, consideration of context is permitted, but similarly limited, under the subpart (b) test ("with limited reference to external events").

In short, *McConnell* makes clear that the "magic words" test was an "endpoint of statutory interpretation, not a first principle of constitutional law." 540 U.S. at 190. And *WRTL II* makes even clearer that the regulation of express advocacy is <u>not</u> limited to magic words – but may also include communications susceptible to a "reasonable interpretation" only as an appeal

to vote for or against a candidate. Both cases strongly support the constitutionality of subpart (b).

Further, *McConnell* and *WRTL II* both supersede the reasoning in *Virginia Society for Human Life* that finds fatal fault in subpart (b) for relying on a "reasonable person" test. *See Virginia Society for Human Life*, 263 F.3d at 391-92 (criticizing the regulation's incorporation of the "reasonable listener"); *see also* 83 F. Supp. 2d at 677 (criticizing the regulation's consideration of "the understandings of the audience"). The test used by the Supreme Court in *WRTL II* is explicitly based on what constitutes a "reasonable interpretation" of an ad. *See WRTL II*, 127 S. Ct. at 2667. This is no different than the "reasonable person" standard in subpart (b).

Finally, RTAO misconstrues the Fourth Circuit's recent decision in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRL*"). RTAO PI Br. at 14. Rather than requiring magic words, the *NCRL* Court explicitly (and necessarily) recognized the constitutionality of the *WRTL II* "reasonable interpretation" test for the functional equivalent of express advocacy. The Fourth Circuit characterized the *WRTL II* standard as "sufficiently 'protective of political speech' to allow legislators to regulate beyond *Buckley's* 'magic words' approach." *NCRL*, 525 F. 3d at 282 (emphasis added), *quoting WRTL II*, 127 S. Ct. at 2669 n.7.

In sum, subpart (b) employs a standard indistinguishable from that articulated by the Supreme Court in *WRTL II*. If the latter standard is constitutional – as surely it must be – then so too is the former.

III. The "Solicitation" Rule at 11 C.F.R. § 100.57 Is Neither Overbroad Nor Vague.

RTAO challenges 11 C.F.R. § 100.57 as overbroad, unconstitutionally vague and in excess of the FEC's authority, because the rule does not conform to an express advocacy standard and attempts to regulate donations that are not "unambiguously campaign related." *See*

Compl. at ¶¶ 34-39; RTAO PI Br. at 14-17. These contentions are wholly without merit. The express advocacy standard has no relevance to the constitutionality of section 100.57, because that standard serves as a narrowing construction of the Act's definition of "expenditure," whereas section 100.57 seeks to regulate "contributions." *See Buckley*, 424 U.S. at 78-80. The "unambiguously campaign related" language is a standard entirely of plaintiff's invention. *See supra* Section I. It is thus unsurprising, and correct, that the U.S. District Court of the District of Columbia, less than a month ago, dismissed a similar constitutional challenge to section 100.57, rejecting overbreadth and vagueness arguments almost identical to those asserted by RTAO here. *EMILY's List v. FEC*, --- F. Supp.2d ---, 2008 WL 2938558 (D.D.C. July 31, 2008) (No. 05-0049) (Kollar-Kotelly, J.).

FECA authorizes the FEC to regulate "contributions" – defined broadly to include "any gift, subscription, loan, advance, or deposit of money anything of value made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. § 431(8); *see also id*. at § 441a. Prior to passage of BCRA and the adoption of the challenged rule, the FEC regulations implementing this broad definition did little more than to simply repeat the language of the statutory definition. *See*, *e.g.*, 11 C.F.R. § 100.52(a). No FEC regulation specifically addressed the circumstances under which a solicitation of funds would result in a "contribution." The courts and the Commission simply applied the general statutory standard, *i.e.* "for the purpose of influencing any election for Federal office," to determine whether a particular communication should be treated as a solicitation of contributions. *See, e.g., FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) ("*SEF*").

Section 100.57, adopted in 2004, clarifies that a donation made "in response to any communication" is a contribution "if the communication indicates that any portion of the funds

received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a). It thus curtails evasion of the Act's contribution limits and reporting requirements by ensuring that donations made in response to solicitations that "plainly seek funds 'for the purpose of influencing Federal elections'" are treated as "contributions" under the Act. *See* FEC Notice 2004-15, "Political Committee Status," 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004). As the district court in *EMILY's List* held, section 100.57 "prevent[s] the circumvention of these contribution limits," and thereby "serve[s] the important governmental purposes of preventing corruption and the appearance of corruption." *EMILY's List*, 2008 WL 2938558 at 21, slip op. at 41.

RTAO's attempt to hold section 100.57 to an express advocacy standard, RTAO PI Br. at 15, is clearly contrary to Supreme Court precedent. The express advocacy standard was formulated to narrow the Act's definition of "expenditure," not its definition of "contribution." As section 100.57 seeks to define only the latter, the express advocacy standard has no bearing on the rule's validity.

Both the definition of "contribution" and the definition of "expenditure" in FECA rely on the operative phrase "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure"). The *Buckley* Court held that this phrase raised vagueness concerns in connection to the definition of "expenditure" as applied to individuals and non-major purpose groups, *see supra* Section II, and consequently construed "expenditure" narrowly for individuals and non-major purpose groups to encompass "only funds used for communications that <u>expressly advocate</u> the election or defeat of a clearly identified candidate." 424 U.S. 1, 79-80 (emphasis added). By contrast, the Court found that the same phrase "<u>presents fewer problems in connection with the definition of a contribution</u>

because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). Instead of imposing an "express advocacy" construction on the definition of "contribution," the Supreme Court merely clarified that:

> Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.

Id. The *Buckley* Court thus recognized that in the bounds of the "general understanding" of a political contribution*, i.e.* funds "provided to a candidate or political party or campaign committee" or "given to another person or organization that are earmarked for political purposes," the statutory definition of "contribution" was sufficiently clear and did not require the limiting gloss of express advocacy.

RTAO is therefore wrong in asserting that the language in section 100.57 is vague or overbroad because it encompasses solicitations that do not constitute express advocacy. Compl. at ¶ 36. Indeed, because *Buckley* approved the statutory definition of "contribution" – unlike the definition of "expenditure" – the FEC was not obliged to provide any more guidance than it provided in its original regulations, which had merely repeated the broad statutory language of the definition.

Further, the Second Circuit expressly rejected the express advocacy argument in *SEF*, the decision from which section 100.57 was drawn. *See* 69 Fed. Reg. 68,057. In *SEF*, the Second Circuit considered a disclaimer requirement in the pre-BCRA Act applicable to any "direct mailing" that "solicit[s] any contribution." In considering this requirement, the court clarified when such mailings would be deemed to be soliciting "contributions," which in turn required the court to "give content to the phrase 'earmarked for political purposes'" set forth in *Buckley*. 65 F.3d at 294. The Second Circuit concluded that "contributions … earmarked for political

purposes" would result from a solicitation that "made plain" that any funds received in response would "be used to advocate the defeat or success of a clearly identified candidate at the polls." *Id*. at 295. Consequently, such a solicitation would be subject to the disclaimer requirement. The Second Circuit also made clear that its conclusion did not turn on whether the solicitation in question constituted express advocacy. *Id*. at 290, 295. It explained that, "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of" the disclaimer provision "if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id*. at 295.[4]

The federal district court in Washington, DC drew a similar conclusion in its recent decision in *EMILY's List v. FEC*. The Court rejected the plaintiff's suggestion that the "support or oppose" language in section 100.57 was unconstitutionally vague because it is not "related to the express advocacy requirement." *EMILY's List*, 2008 WL 2938558 at 29, slip op. at 55. It noted that the Supreme Court in *McConnell* had dismissed a void-for-vagueness challenge to a comparable "promote, oppose, attack, support" standard in BCRA that applies to public communications by state party committees. *Id*. The *McConnell* Court concluded that this language "'provide[d] explicit standards for those who apply them' and 'g[a]ve the person of

[4] RTAO attempts to distinguish the *SEF* decision by claiming that the solicitations at issue there "contained words of express advocacy and solicited funds to publicly communicate that express advocacy." RTAO PI Br. at 15. First, the argument is pure speculation as the Second Circuit did not rule upon whether the *SEF* solicitation constituted express advocacy. Moreover, the point is irrelevant, because in any event, the Second Circuit explicitly held that a "contribution" would arise from a solicitation that "indicat[ed] that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office … [e]ven if [the]communication does not itself constitute express advocacy." 65 F.3d at 295 (emphasis added).

ordinary intelligence a reasonable opportunity to know what is prohibited.'" *McConnell*, 540 U.S. at 675 n.64, *quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).[5]

The court in *EMILY's List* also pointed out that the FEC had provided extensive guidance regarding the application of section 100.57 in its "Explanation and Justification" (E&J) for the rule, including numerous examples of solicitations that would and would not be regulated. *EMILY's List*, 2008 WL 2938558 at 30, slip op. at 58, *citing* 69 Fed. Reg. at 68,057. Finally, *EMILY's List* quoted *McConnell* for the proposition that "should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification, *see* 2 U.S.C. §

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[5] RTAO cites the Fourth Circuit's recent decision in *NCRL v. Leake* for the proposition that a "statute regulating speech 'to support or oppose the nomination or election of one or more clearly identified candidates' [i]s unconstitutionally overbroad and vague." RTAO PI Br. 15-16. This characterization both distorts *NCRL*, and ignores that the North Carolina statute considered by Fourth Circuit is distinguishable from section 100.57. The differences between the North Carolina statute and section 100.57 render the analysis in *NCRL* inapplicable here.

In *NCRL*, the Fourth Circuit considered a two-prong statutory definition of the phrase "to support or oppose the nomination [or] election … of one or more clearly identified candidates," a phrase which in turn appeared in the definition of both "contribution" and "expenditure" in North Carolina campaign finance law. 525 F.3d at 280, *citing* N.C. Gen. Stat. § 163-278.14A(a); *see also* § 163-278.6(9) (defining "expenditure"); § 163-278.6(6) (defining "contribution"). The first prong defined the "support or oppose" phrase as express advocacy. N.C. Gen. Stat. § 163-278.14A(a)(1). The second prong defined this phrase more expansively. It stated that a communication would be deemed to support or oppose a candidate if it "goes beyond a mere discussion of public issues in that [it] direct[s] voters to take some action to nominate, elect, or defeat a candidate in an election." *Id*. § 163-278.14A(a)(2). This prong also authorized the regulator to consider "contextual factors" in making this determination, including "the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication." *Id*. The Fourth Circuit struck down the second prong of the definition as overbroad and unconstitutionally vague, finding that it impermissibly relied upon "how a 'reasonable person' interprets a communication in light of four 'contextual factors.'" *NCRL,* 525 F.3d at 283.

By contrast, section 100.57 examines only "the text of a communication," and "turns on the plain meaning of the words used in the communication." 69 Fed. Reg. at 68,057. The FEC's "Explanation & Justification" (E&J) for the regulation makes clear that the FEC eschews reliance on "contextual factors," stating expressly that the application of section 100.57 does "not depend on reference to external events, such as the timing or targeting of a solicitation." *Id*. Hence, the concerns regarding "contextual factors" that guided the *NCRL* decision are simply not present here. Because section 100.57 considers only the language of the solicitation itself, it "leaves the group issuing the communication with complete control over whether its communications will trigger new section 100.57." *Id*.

437f(a)(1), and thereby remove any doubt there may be as to the meaning of the law." *EMILY's List*, 2008 WL 2938558 at 31, slip op. at 58-59, *quoting* 540 U.S. at 675 n.64 (internal citations omitted). On these bases, the district court in *EMILY's List* found that section 100.57 "presents a clear guide for political committees as to which solicitations will trigger the receipt of contributions subject to FECA," and dismissed the constitutional challenge to the rule. *Id*., 2008 WL 2938558 at 31, slip op. at 60. This Court, for the same reasons, should likewise dismiss RTAO's challenge here.

Also unavailing is RTAO's argument that section 100.57 is overbroad and in excess of the FEC's statutory authority because it reaches beyond "funds provided to a candidate or political party or campaign committee," and therefore regulates donations that are not "campaign related." Compl. at ¶ 37; RTAO PI Br. at 16-17. RTAO's assertion that the Supreme Court construed the definition of "contribution" to apply only to such funds is a blatant misrepresentation of the *Buckley* decision. To be sure, the *Buckley* Court recognized that the term "contribution" should be construed consistently with the "general understanding of what constitutes a political contribution," but this construction covered not only "contributions made directly or indirectly to a candidate, political party, or campaign committee" but also "contributions made to other organizations or individuals but earmarked for political purposes." 424 U.S. at 78; *see also id*. at 24. Plaintiff simply elides over the second part of this construction, which describes precisely the type of donations that section 100.57 seeks to capture.

Indeed, the Second Circuit in *SEF* expended considerable effort to define the scope of "contributions made to other organizations or individuals but earmarked for political purposes." 65 F.3d at 294-95 (citing *Buckley*, 424 U.S at 24, 78). As outlined earlier, it held that funds

donated in response to "solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate" would fall into this category of "contributions." *Id*. at 295. Again, these are precisely the donations that section 100.57 seeks to regulate as "contributions." Regulation of these donations therefore falls squarely within the FEC's statutory mandate, and moreover, is necessary to effectuate the purposes of FECA and to prevent circumvention of its contribution limits.

IV. The FEC's "Major Purpose" Test Is Constitutional.

Next, RTAO challenges the implementation of the FEC's "major purpose" test for "political committee" status. In particular, RTAO claims that the FEC's focus on "Federal campaign activity," rather than on activity relating solely to the "nomination or election of a candidate," renders the test impermissibly overbroad. RTAO PI Br. at 18. Additionally, RTAO alleges that the FEC's application of the major purpose test is unconstitutional because it is based on "ad hoc, case-by-case, analysis of vague and impermissible factors." *Id.* at 19.

RTAO's objections on both counts are misplaced.

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

The Court resolved these concerns by narrowing the definition of "political committee" to only "encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79 (emphasis added). For such "major purpose" groups, the Court had no vagueness concern about the statutory "for the purpose of influencing" standard because, the Court held, "expenditures" by such groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related."[6] *Id.* (emphasis added).[7] *See also McConnell,* 540 U.S. at 170 n.64 (restating the "major purpose" test).

The first objection raised by RTAO is that in assessing whether a group must register and operate as a "political committee," the Commission has improperly expanded its "major purpose" inquiry by examining whether a group's major purpose is "Federal campaign activity" rather than what RTAO calls the "narrower" standard of whether the group's major purpose is the "nomination or election of a candidate." RTAO PI Br. at 18.

There is no basis for this purported distinction, and indeed, the Supreme Court has used the tests interchangeably. In *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986) ("*MCFL*"), the Court held that a non-profit ideological corporation was not subject to the ban on express advocacy expenditures that applies to business corporations. *See* 2 U.S.C. § 441b. The

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[6] By comparison, "when the maker of the expenditure is not within these categories – when it is an individual other than a candidate or a group other than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80 (emphasis added).

[7] As a section 527 "political organization" that is "organized and operated primarily" for the purpose of influencing elections, 26 U.S.C. § 527(e) – in other words, as a "major purpose" entity – the definition of "expenditure" that is applicable to RTAO is not limited by the "express advocacy" standard in any event. As the Supreme Court said in *Buckley,* the statutory "for the purpose of influencing" definition applies to a group like RTAO, whose spending is, "by definition, campaign related." But even if an express advocacy test is used, the subpart (b) standard is surely permissible for such a group whose spending "can be assumed to fall within the core area sought to be addressed by Congress."

Court noted, however, that MCFL could be required to register and operate as a "political committee" if it met the "major purpose" test set forth in *Buckley*. According to the Court, "it is undisputed on this record that MCFL" is not an entity "the major purpose of which is the nomination or election of a candidate." *Id.* at 253 n.6. But, the Court noted that:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

Id. at 262 (emphasis added).

Thus, the *MCFL* Court set forth the *Buckley* standard – whether the group's major purpose is "the nomination or election of a candidate" – and then equated that test to whether the group's "major purpose may be regarded as campaign activity." The distinction RTAO draws between the two standards simply does not exist. RTAO admits as much when it notes that the two tests set forth in *MCFL* are "synonyms" for each other. RTAO PI Br. at 18. Thus, the Commission's formulation of the "major purpose" test as one that examines a group's "Federal campaign activity" is fully permissible under *Buckley* and *MCFL*.

In addition, RTAO objects that the Commission's implementation of the "major purpose" test, as set forth in its most recent statement on the question, *see* FEC Notice 2007-3, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007), and in recent enforcement actions, is an overbroad and unbounded inquiry into "vague and impermissible" factors. RTAO PI Br. at 19. Again, this complaint is unwarranted.

The Supreme Court in *MCFL* described political committees as "those groups whose primary objective is to influence political campaigns." 479 U.S. at 262. RTAO argues that as a constitutional matter, this test must be narrowed to only two permissible inquiries. First, RTAO

claims that the FEC can examine whether a group's contributions and express advocacy expenditures constitute a majority of its total disbursements. RTAO PI Br. at 19. Alternatively, RTAO states that the FEC can examine a group's "organic documents" – but only those documents – to determine if they contain an "express intention" to operate as a political committee. *Id*. According to RTAO, it is impermissible for the FEC to make any other inquiry.

But these are limitations that RTAO simply makes up. It cites no support in the law for them, and there is none. The test set forth by the Supreme Court is whether a group's "major purpose" or "primary objective" is "the nomination or election of a candidate" or "campaign activity" or "to influence political campaigns." The Court did not limit the scope of the inquiry, along the lines suggested by RTAO, about how this "major purpose" determination is to be made.

To the contrary, a federal district court in Washington, DC recently approved the FEC's "fact intensive approach" to this major purpose determination. *Shays v. FEC,* 511 F. Supp. 2d 19, 29 (D.D.C. 2007). There, the plaintiff sought a judicial determination to require the FEC to issue a regulation on the standards for political committee status of section 527 "political organizations" (such as RTAO). The FEC defended its decision to not adopt a regulation but, instead, to make political committee status determinations through enforcement actions, arguing that the major purpose doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct," including "whether there is sufficiently extensive spending on federal campaign activity," "the content of [a group's] public statements," "internal statements of the organization," "all manner of the organization's spending" and "the organization's fundraising appeals." *Id.* The district court approved the FEC's approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id.*; *see also FEC v.*

Malenick, 310 F. Supp. 2d. 230, 234 (D.D.C. 2004), *quoting FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("An organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.").

Indeed, in *NCRL v. Leake*, the Fourth Circuit described the test as an inquiry into whether an organization has the major purpose "of supporting or opposing a candidate" and said that political committee status is "only proper if an organization primarily engages in election-related speech." 525 F.3d at 288 (emphasis added). The court further said that the test is to be implemented by examining, *inter alia*, whether "the organization spends the majority of its money on supporting or opposing candidates." *Id.* at 289 (emphasis added). None of these formulations states or implies the kind of highly restricted inquiry which RTAO assumes.[8]

In short, the Supreme Court in *Buckley* added the "major purpose" test as a gloss on the statutory definition of "political committee" in order to narrow the sweep of the statutory standard. But neither the Supreme Court nor any lower court has constricted the scope of the inquiry that the Commission is to use in making a "major purpose" determination as narrowly as RTAO here proposes. This Court should reject RTAO's arguments and uphold the FEC's implementation of the major purpose standard.

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[8] In *NCRL,* the Fourth Circuit disapproved a North Carolina law which established the test for political committee status as whether a group had "a" major purpose to influence campaigns. The court held the appropriate test under *Buckley* is to decide whether a group has "the" major purpose to influence campaigns. 525 F.3d at 289-90. There is no conflict between the *NCRL* ruling and the rule as applied by the FEC – which also uses a test of "the" major purpose. *See* 72 Fed. Reg. at 5601 ("Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity.") (emphasis added).

The Fourth Circuit also suggested that the major purpose test could be implemented by reviewing an organization's bylaws or other statements expressing its primary purpose, or by reviewing how it spends a majority of its funds. 525 F.3d at 289. But the Fourth Circuit expressly did not reach NCRL's suggestion – the same claim made here by RTAO – that these were the only permissible inquiries: "While this standard would be constitutional, we need not determine in this case whether it is the only manner in which North Carolina can apply the teachings of *Buckley.*" *Id.* at 289 n.6.

V. Section 114.15 of the FEC's Regulations Accurately Implements the Supreme Court's Decision in *WRTL II.*

In *WRTL II,* the Supreme Court held that the BCRA funding restriction for "electioneering communications" was unconstitutional as applied to three ads by WRTL that the Court found to be neither "express advocacy" nor the "functional equivalent of express advocacy." 127 S. Ct. at 2670. The Court explained at some length why it concluded that the WRTL ads were not the "functional equivalent of express advocacy" and were therefore exempt from the funding restriction. *Id.* at 2667. The FEC subsequently conducted a rulemaking and adopted a regulation, 11 C.F.R. § 114.15, to codify the as-applied *WRTL II* exemption for all similarly situated ads.

The FEC regulation is structured in four basic parts.

First, the regulation sets forth an umbrella test to define the electioneering communications that are subject to the funding prohibition under *WRTL II*: those that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a). This test is taken virtually verbatim from Chief Justice Roberts' controlling opinion in *WRTL II*: "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667.

Second, the Commission created a "safe harbor" for certain electioneering communications which *per se* meet the umbrella test for exemption. 11 C.F.R. § 114.15(b). An ad is within the safe harbor if it does not mention any election, candidacy, political party, opposing candidate or voting; if it does not take a position on any candidate's character, qualifications or fitness for office; if it focuses on a legislative matter and either urges a

candidate to take a position or action with respect to the matter, or urges the public to adopt a position and contact a candidate with respect to the matter; or if it proposes a commercial transaction (such as the purchase of a book or video).

These safe harbor standards are derived almost entirely, and virtually verbatim, from the considerations used by the Supreme Court to conclude that the WRTL ads were not the "functional equivalent of express advocacy." Following its statement of the "no reasonable interpretation" standard set forth above, the Court said:

> Under this test, WRTL's ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

127 S. Ct. at 2667 (emphasis added).

Third, the regulation sets forth "rules of interpretation" which provide that for ads outside the safe harbor, the Commission will "consider" "whether the communication includes any indicia of express advocacy" and "whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate" in order to "determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(c). Subsection (c) then lists factors (similar to those listed in the safe harbor provision) that restate the same "indicia of express advocacy" listed by the Court, *compare* 11 C.F.R. § 114.15(c)(1) *with* 127 S. Ct. at 2667, and the same indicia of "a genuine issue ad" listed by the Court, *compare* 11 C.F.R. § 114.15(c)(2) with 127 S. Ct. at 2667. The former indicia include whether an ad mentions a challenger or election and/or attacks the qualifications or fitness for office of a

candidate, and the latter indicia include whether an ad focuses on a public policy issue and includes a "call to action" that is something other than voting for or against a candidate.

The regulation specifically notes that in applying the umbrella test set forth in subsection (a), "any doubt will be resolved in favor of permitting the communication." *Id.* at § 114.15(c)(3). This echoes the Court's admonition that in First Amendment issues, the "tie goes to the speaker." *WRTL II*, 127 S. Ct. at 2669.

Finally, the regulation implements the Court's analysis in *WRTL II* by restricting the Commission's review to "only the communication itself" as supplemented by the "basic background information" necessary to put the communication "in context," such as whether an ad actually names a candidate or addresses a public policy issue. 11 C.F.R. § 114.15(d). This part of the rule implements the Court's caution that while the application of any test should be "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," 127 S. Ct. at 2666, "basic background information" need not be ignored where "necessary to put an ad in context." *Id.* at 2669.

RTAO complains at length about the FEC's regulation. Principally, its objection boils down to the erroneous claim that the regulation confuses the Court's test with the Court's application of its test. RTAO PI Br. at 20.

But this is plainly wrong. It is without doubt permissible for the FEC to promulgate a regulation that codifies the *WRTL II* test, and then to elaborate – in detail and with some precision – how it will go about applying the test. That it what the regulation does, and it does so largely by incorporating and re-stating the very same indicia and factors that the Court itself applied in reaching its conclusion that the WRTL ads were exempt. The regulation does not change the umbrella *WRTL II* rule set forth in section 114.15(a), nor narrow its protective sweep,

but rather it provides helpful specificity in elaborating on how the FEC will apply the test. And indeed, the regulation does so mostly by codifying the same factors that the Court considered in applying the same test. The FEC's regulation is clearly consistent with and permissible under the Court's decision in *WRTL II*.

RTAO's more specific objections are equally meritless.

First, RTAO criticizes subsection 114.15(c) – the "rules of interpretation" provision – because, according to RTAO, it "demotes *WRTL II*'s appeal-to-vote test to just one of two elements to be weighed on equal terms." RTAO PI Br. at 22.

This is a misreading of subsection (c). That subsection is not the test for an exemption; it is simply an explanation of how the FEC will consider the various relevant factors in assessing whether a communication meets the test for an exemption set forth in subsection (a). In doing so, subsection (c) does no more than track the analysis in *WRTL II,* where the Court considered the very same factors set forth in subsection (c): first, whether the content of the ad was "consistent with that of a genuine issue ad," 127 S. Ct. at 2667, and second, whether the ad "lacks indicia of express advocacy." *Id.* That two-step analysis by the Court was in service of applying, not displacing, its umbrella test of whether an ad is "susceptible of no reasonable interpretation other than as an appeal to vote" for a candidate. Subsection (c), in setting forth the "rules of interpretation" to apply the test in subsection (a), does no more, and uses the same factors and indicia used by the Court.

Second, RTAO criticizes the "indicia of express advocacy" factors in subsection (c) – including consideration of whether an ad mentions a political party, and whether an ad takes a position on a candidate's character, qualifications and fitness for office – as being both "peripheral" and "exceedingly vague." RTAO PI Br. at 24. Yet these are the very same factors

set forth by the Court in *WRTL II*. The Court specifically pointed to the fact that the WRTL ads "do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications or fitness for office." 127 S. Ct. at 2667 (emphasis added). For the FEC to incorporate in its regulation the very same standards used by the Supreme Court can hardly be considered either impermissibly peripheral or unconstitutionally vague.

Third, RTAO criticizes the regulation because it "has erroneously imported the *application* of *WRTL II*'s appeal-to-vote test in the grassroots lobbying setting of that case into the test itself." RTAO PI Br. at 24 (emphasis in original). By this, RTAO appears to mean that the regulation in subpart (c) considers whether the ad "includes a call to action" that can be understood as an appeal other than to vote for or against a candidate. 11 C.F.R. § 114.15(c)(2)(iii). According to RTAO, this impermissibly requires an affirmative lobbying "call to action" in order for an ad to fall within the exemption.

Again, this is a misreading of the regulation. The subsection (c) rule does not require that an ad have a lobbying "call to action" in order to be exempt. It merely considers whether an ad has any such non-electoral "call to action" as one factor in support of a determination that an ad would qualify for exemption.

Finally, RTAO complains that the subsection (c) provision – which requires that "any doubt will be resolved in favor of permitting the communication," 11 C.F.R. § 114.15(c)(3) – applies only to the "rules of interpretation," not to the "appeal to vote" test itself. RTAO PI Br. at 25. Again, this is a clear misreading of the regulation, which states that "[i]n interpreting a communication under paragraph (a)," any doubt is resolved in favor of granting the exemption.

This makes clear that the "resolving doubt" provision applies directly to the underlying "appeal to vote" test in subparagraph (a).

In short, the Commission's regulation does no more than to codify the rule set forth by the Supreme Court, and then to codify the standards and factors used by the Court to apply the rule. RTAO's complaints about the regulation, including its complaint about the use of "vague and overbroad factors to interpret the *WRTL II* test," RTAO PI Br. at 26, are, in essence, complaints about the Supreme Court's own analysis. For this, this Court can provide no relief.

CONCLUSION

For the foregoing reasons, the challenged regulations, *see* 11 C.F.R. §§ 100.22(b), 100.57, and 114.15, and the FEC's implementation of the "major purpose" test for political committee status, do not violate the First Amendment. Accordingly, this Court should find that RTAO is unlikely to succeed on the merits of its challenge to these regulations, and deny RTAO's motion for a preliminary injunction.

Respectfully submitted,

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