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

THE REAL TRUTH ABOUT OBAMA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:08-cv-00483-JRS
	)	
FEDERAL ELECTION COMMISSION and UNITED STATES DEPARTMENT OF JUSTICE,	)	OPPOSITION TO SECOND PRELIMINARY INJUNCTION
	)	
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S SECOND PRELIMINARY INJUNCTION MOTION

Following the Commission's demonstration that plaintiff The Real Truth About Obama, Inc.'s ("RTAO") rush to the courthouse was unnecessary, plaintiff has filed a second motion for preliminary injunction with new factual allegations in an apparent attempt to address the jurisdictional deficiencies of the complaint and initial preliminary injunction motion. Although plaintiff's new draft advertisement is, in fact, a campaign advertisement within the meaning of federal campaign finance law, plaintiff still has not demonstrated that it will suffer any irreparable harm by complying with reporting requirements and contribution limits during the pendency of this action or demonstrated that two of its causes of actions are properly before the Court. In any event, the provisions at issue here are constitutional, both as applied to plaintiff's new advertisement and facially.

I. BACKGROUND

The Commission incorporates by reference the factual and legal background set forth in the Commission's opposition to RTAO's first preliminary injunction motion. (FEC's Mem. in Opp. to Pl.'s Mot. for Prelim. Inj. ("First P.I. Opp.") at 1-5.)

In its second preliminary injunction motion and affidavit, RTAO alleges that it has "developed" an advertisement entitled *Survivors*. (Allen Aff. ¶ 3.) This ad states that Senator Barack Obama "has been lying" about his voting history, thereby demonstrating "callousness" and "a lack of character and compassion that should give everyone pause." (*Id*.) RTAO allegedly intends to broadcast *Survivors* on the radio "in heartland states" during the sixty-day period preceding the 2008 general election. (*Id*. ¶ 4.) Plaintiff's affidavit does not allege that RTAO has taken any concrete steps towards creating or distributing the ad. RTAO also does not provide evidence that it has raised or spent any money in relation to its advertising, or that it has identified any potential donors or specific donations that it would like to accept to fund its activities.

II. RTAO HAS NOT MET ITS BURDEN FOR A PRELIMINARY INJUNCTION

A. Plaintiff Fails To Demonstrate Irreparable Harm

As the Commission explained in its first opposition memorandum, RTAO has not met its burden of demonstrating that it will suffer irreparable harm without the requested temporary relief. (First P.I. Opp. at 8-10.) Plaintiff's new motion does not strengthen its case. Even though the *Survivors* advertisement is express advocacy, *see infra* Part II.C.1, the ad would trigger political committee status only if RTAO's major purpose is federal campaign activity. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *Political Committee Status*, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007). In turn, even if RTAO were a political committee, there is no evidence in the record that RTAO would suffer any irreparable harm were it to comply with the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-55. As a political committee, RTAO could pay directly for unlimited express advocacy and electioneering communications, provided that the funds used for these activities were contributed by individuals or other political committees in increments of $5,000 or less. *See* 2 U.S.C. § 441a(a)(1)(C),(2)(C). Alternatively, RTAO's

planned activities would be permissible if funded from a "separate segregated fund" established and maintained by RTAO and comprising contributions made by individuals at or under the $5,000 limit. *See* 2 U.S.C. §§ 441b(b)(2)(C), 431(4)(b), 441a(a)(1)(C). RTAO's complaint and affidavits do not allege that RTAO intends to accept corporate contributions or contributions from individuals in excess of $5,000, or that it would suffer burdensome reprisals against its members if it were to comply with the Act's reporting requirements while this action is pending.[1] (*See* First P.I. Opp. at 9). Thus, RTAO has entirely failed to meet its burden of establishing that actual, irreparable harm will ensue absent a preliminary injunction. RTAO's failure is fatal to its motion for preliminary injunction. (*Id.* at 8-10).

B. The Balance Of Harms Weighs In Favor Of The Commission

For the reasons set forth in the Commission's first opposition memorandum (First P.I. Opp. at 10-11), the balance of harms weighs against entry of a preliminary injunction.

C. RTAO Is Unlikely To Succeed On The Merits

1. RTAO Is Not Likely To Succeed On The Merits Of Its Challenge To The Definition Of Express Advocacy In 11 C.F.R. § 100.22(b)

RTAO alleges that the Commission's regulatory definition of express advocacy, 11 C.F.R. § 100.22(b), is unconstitutionally overbroad — both facially and as applied to RTAO's *Survivors* ad — and unconstitutionally vague on its face. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications," *Wash. State Grange v.*

[1] In its reply brief in support of its first preliminary injunction motion, RTAO states that it has "received" a $10,000 donation from an individual. (Pl.'s Reply in Supp. of Prelim. Inj. Mot. at 20.) Such an assertion in a brief — unsupported by RTAO's verified complaint or any of its affidavits — is not evidence. Regardless, RTAO has not shown that retaining only $5,000 of this alleged $10,000 donation would affect the organization's ability to advertise, or, more generally, that RTAO is unable to raise sufficient funds within the permissible limits.

Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739 (1987)), or, at a minimum, that the regulations apply to a substantial amount of protected speech and a substantial amount relative to legitimate applications of the statute (*see* First P.I. Opp. at 11).

The Commission's application of section 100.22(b) to the advertisements at issue in this case demonstrates the precision of the regulatory definition of express advocacy, as well as the care that the Commission takes in narrowly applying it. In its first opposition memorandum, the Commission explained why RTAO's *Change* ad is not express advocacy under section 100.22(b). Specifically, that ad is not express advocacy because, *inter alia*:

(1) a reasonable person could conclude that the ad encouraged listeners to seek information regarding Senator Obama's position on abortion;

(2) the ad was devoted to speech regarding abortion as a public policy issue;

(3) the ad contained only indirect and oblique references to the presidential campaign; and

(4) the ad did not question Senator Obama's leadership qualities.

(*See* First P.I. Opp. at 12 & n.5.) The Commission then noted that the lack of any express advocacy in this case at that time rendered RTAO's challenge to the regulation nonjusticiable. (*Id*. at 6, 12-13.)

In response, RTAO now seeks to establish Article III jurisdiction by "develop[ing]" an advertisement that falls within the definition of 11 C.F.R. § 100.22(b). (*See* Allen Aff. ¶ 3.) Indeed, the new ad does contain express advocacy, including almost all of the elements of express advocacy that the Commission noted were absent from *Change*. First, *Survivors* directly criticizes Senator Obama's character, saying that he has demonstrated "callousness" and "a lack

of character and compassion." These character attacks are precisely what the Supreme Court has called "indicia of express advocacy." *See FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL*") (holding that "indicia of express advocacy" includes "tak[ing] a position on a candidate's character, qualifications, or fitness for office").[2] Second, *Survivors* says that Senator Obama "has been lying" for years — another statement that attacks the candidate personally. Third, to the extent that *Survivors* mentions abortion as an issue, it explicitly characterizes Obama's alleged voting record as "horrendous" and uses it as evidence for the ad's ultimate conclusion regarding Senator Obama's "callousness" and "lack of character and compassion." This is in contrast with *Change*, which contained no explicit characterizations of the positions on abortion-related issues attributed to Senator Obama and did not use the referenced positions to attack his character overtly. Fourth, *Survivors* does not implore listeners to take action relative to any public policy on abortion, nor does it refer them to a source of additional information on such policies. Finally, and most importantly, *Survivors* says that "Obama's callousness . . . reveals a lack of character and compassion *that should give everyone pause*" (emphasis added). Because the ad makes no appeal for action on any public policy, and because the phrase "give pause" is explicitly linked to Senator Obama's character, there is only one reasonable interpretation of that phrase: "Everyone" should "pause" before voting for Senator Obama, who "lack[s] character and compassion" and "has been lying." To ask listeners to defer action or hesitate before supporting a candidate is to expressly advocate against that candidate. Indeed, the ad's use of the word "everyone" emphasizes not only that abortion opponents should reject Senator Obama because of his "horrendous" views, but also that

[2] Like *Change*, *Survivors* refers to Senator Obama's political party, which is another mark of express advocacy. *WRTL*, 127 S. Ct. at 2667 ("mention[ing] an election, candidacy, political party, or challenger").

"*everyone*," regardless of his or her position on abortion, should hesitate because Senator Obama has demonstrated various character flaws. Thus, "[w]hen taken as a whole," "[r]easonable minds could not differ as to whether" *Survivors* encourages listeners not to vote for Senator Obama. RTAO's new ad is therefore express advocacy under section 100.22(b) and can constitutionally be regulated as a campaign expenditure.

The Commission also incorporates here its prior response to RTAO's facial overbreadth and vagueness challenges. (First P.I. Opp. at 13-17.) RTAO's supplemental advertisement demonstrates neither overbreadth nor vagueness of section 100.22(b), and the regulation is entirely consistent with *Buckley*, *McConnell v. FEC*, 540 U.S. 93 (2003), and *WRTL*. In addition to the reasons discussed in the Commission's prior memorandum, the Commission's analysis of *Change* and *Survivors* acutely demonstrates why the regulation is neither overbroad nor vague. The *Change* ad contained nuanced text that was subject to multiple interpretations, and the Commission therefore analyzed the ad in accordance with its regulation to ensure that if reasonable minds could differ about whether the ad encourages an electoral result, then it is not express advocacy. In contrast, the *Survivors* ad is "unmistakable" and "unambiguous," containing the express advocacy that *Change* omitted. In other words, the Commission applies the same regulatory criteria to both ads but reaches different results because of the distinct elements of their texts. There is no vagueness here, and the Commission's narrow application of its regulation is fully consistent with *WRTL's* teaching that any "tie goes to the speaker," *WRTL*, 127 S. Ct. at 2669. RTAO, like all other advertisers, can determine from the regulation and the

Commission's precedent whether a given communication is or is not express advocacy. (*See* First P.I. Opp. at 17 n.8.)[3]

2. RTAO Is Not Likely To Succeed On The Merits Of Its Challenge To 11 C.F.R. § 114.15

For substantially the same reasons that *Survivors* is express advocacy under 11 C.F.R. § 100.22(b), it also qualifies as the functional equivalent of express advocacy under 11 C.F.R. § 114.15(a). *See supra* Part II.C.1. Specifically, the ad contains multiple indicia of express advocacy (*i.e.*, repeated critiques of a candidate's character, as well as a reference to the candidate's political party), and it lacks the indicia of a "genuine issue ad" because it does not "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, [or] urge the public to contact public officials with respect to the matter." *WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(c). Indeed, the ad explicitly "condemn[s Senator Obama's] record on a particular issue," the precise distinction that Chief Justice Roberts drew between the ads at issue in *WRTL* and the hypothetical Jane Doe ad that formed part of the holding in *McConnell*. *See WRTL*, 127 S. Ct. at 2667 n.6. RTAO's ad "is susceptible of no reasonable interpretation other than as an appeal to vote . . . against a specific candidate." *WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(c).

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[3] Advertisers have the option of requesting an advisory opinion from the Commission as to any given communication. 2 U.S.C. § 437f(a). The Commission is required by law to respond to such a request within sixty days. 2 U.S.C. § 437f(a)(1). When necessary, the Commission expedites its response to an urgent request for an advisory opinion, providing an answer in well under sixty days. *See, e.g.*, FEC Advisory Opinion 2006-16, http://saos.nictusa.com/aodocs/2006-16.pdf (May 10, 2006) (issued in 16 days); FEC Advisory Opinion 2007-03, http://saos.nictusa.com/aodocs/2007-03.pdf (Mar. 1, 2007) (issued in 28 days); FEC Advisory Opinion 2008-09, http://saos.nictusa.com/aodocs/AO 2008-09 final.pdf (Aug 21, 2008) (issued in 27 days); *see also* Press Release, *FEC Releases Draft Advisory Opinion Under Expedited Process* (May 4, 2006), http://www.fec.gov/press/press2006/20060504detertao.html (explaining expedited process for issuance of an advisory opinion).

Because *Survivors* satisfies the test for the functional equivalence of express advocacy under *WRTL*, the application of FECA's corporate financing restrictions to the ad is constitutional. *See WRTL*, 127 S. Ct. at 2664 ("[FECA] survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent."). And because the Commission's regulatory criteria for making this determination are essentially identical to the language of *WRTL* itself, section 114.15 is neither vague nor overbroad on its face. (*See* First P.I. Opp. at 28-30.)

3. RTAO Is Not Likely To Succeed On The Merits Of Its Challenge To The Regulation Regarding Solicitations Or The Commission's Analysis Of Political Committee Status

Although RTAO now allegedly intends to make more than $1,000 in expenditures, thus meeting one of the statutory criteria for "political committee," 2 U.S.C. § 431(4)(A), RTAO still has not shown that there is any final agency action regarding political committee status under review here. The Administrative Procedure Act does not provide for judicial review of the principles discussed in the Commission's explanation of its decision *not* to promulgate a regulation broadly defining political committee status (*see* First P.I. Opp. at 23-24), and, in any event, the Commission's approach to enforcement is constitutional and properly within the Commission's discretion (*id.* at 24-26).

Plaintiff's complaint and first preliminary injunction motion also challenged a Commission regulation governing solicitations, 11 C.F.R. § 100.57(a). This regulation is not directly implicated by RTAO's second preliminary injunction motion, and so it remains nonjusticiable for the reasons stated in the Commission's first opposition memorandum. (First P.I. Opp. at 18.)

III. CONCLUSION

For the foregoing reasons, RTAO's second motion for preliminary injunction should be denied.

Respectfully submitted,

/s/
Audra Hale-Maddox, Attorney, ahale-maddox@fec.gov
VA Bar No. 46929
Thomasenia P. Duncan,* General Counsel, tduncan@fec.gov
David B. Kolker,* Associate General Counsel, dkolker@fec.gov
Kevin Deeley,* Assistant General Counsel, kdeeley@fec.gov
Harry Summers,* Assistant General Counsel, hsummers@fec.gov
Adav Noti,* Attorney, anoti@fec.gov
COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260
* *pro hac vice*

September 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Michael Boos, michael.boos@gte.net
Attorney & Counselor at Law
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030

James Bopp, Jr., jboppjr@aol.com
Barry Alan Bostrom, bbostrom@bopplaw.com
Clayton James Callen, ccallen@bopplaw.com
Richard Eugene Coleson, rcoleson@bopplaw.com
Bopp, Coleson and Bostrom
1 South 6th St.
Terre Haute, IN 47807-3510

John Richard Griffiths, john.griffiths@usdoj.gov
United States Department of Justice
Civil Division, Federal Programs Branch
Post Office Box 883
Washington, DC 20044

Debra Jean Prillaman, debra.prillaman@usdoj.gov
Office Of The U.S. Attorney
600 East Main Street, Suite 1800
Richmond, VA 23219

/s/
Audra Hale-Maddox
VA Bar No. 46929
COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260
ahale-maddox@fec.gov