United States District Court
Eastern District of Virginia
Richmond Division

The Real Truth About Obama, Inc. *Plaintiff*, *v.* **Federal Election Commission** and **United States Department of Justice**, *Defendants*.	Case No. **3:08-cv-00483-JRS**

Brief in Support of Preliminary Injunction and Summary Judgment

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The posture here is unique. This is a remand of the appeal of an order (Doc. 65) denying two motions (Doc. 3, 53) for *preliminary injunction* in *Real Truth About Obama, Inc. v. FEC*, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008) ("*RTAO*"), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated and remanded*, 130 S. Ct. 2371 (2010).[1]

There are two issues relating to the preliminary-injunction remand because the Supreme Court's vacation and remand responded to two distinct certiorari petition issues: (1) "[w]hether the First Amendment requires speech-protective preliminary-injunction standards for issue advocacy" and (2) "[w]hether RTAO had likely success on the merits (and so met the other preliminary-injunction standards) . . . ." Cert. Pet. at i, *RTAO*, 130 S. Ct. 2371 (No. 09-724) (available at www.jamesmadisoncenter.org). The Fourth Circuit reissued its holding that the preliminary-injunction standards of *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), replace contrary Fourth Circuit standards, but it neither addressed speech-protective standards in the free-speech context nor their application, leaving both to this Court in light of the Supreme Court's strong political speech protection in *Citizens United v. FEC*, 130 S. Ct. 876 ("*Citizens*"). Thus, as RTAO files its Motion for Preliminary Injunction and Summary Judgment herewith, it respectfully asserts that this Court should expressly recognize the special protections for free speech in the preliminary-injunction context and apply them to grant RTAO's preliminary injunction motion.

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[1] The Supreme Court granted certiorari, vacated judgment, and "remanded . . . for . . . consideration in light of *Citizens United v.* [*FEC*, 130 S.Ct. 876 (2010)] . . . and the Solicitor General's suggestion of mootness." 130 S. Ct. 2371. The Fourth Circuit "reissue[d] Parts I and II of its earlier opinion . . . , stating the facts and articulating the standard for . . . preliminary injunctions" and, "[o]n the remaining issues, . . . remand[ed] . . . for consideration of . . . *Citizens United* and the . . . new suggestion of mootness." 607 F.3d 355 (4th Cir. 2010) (per curiam).

RTAO also moves for summary judgment, but it does so to accommodate opposing counsel, expedite case resolution, and conserve resources for Court and parties. Because the questions are legal and there are no genuine disputes as to material facts, the Court should resolve the merits of the case on summary judgment. But the preliminary injunction motion should not be postponed and denied as moot after summary judgment is decided. That would ignore the nature of the remand, which is to reconsider and apply the preliminary-injunction standards applicable in the free-speech context.

RTAO's alternative would be to move only for preliminary injunction, resist the government's summary judgment motion, and then later move for summary judgment. FEC counsel has discouraged this bifurcated approach in conversations with RTAO's counsel, and RTAO is being responsive in taking the present approach. But RTAO believes that it should not be penalized for being accommodating by not receiving a full explication of the speech-protective preliminary-injunction standards and their application. So RTAO respectfully prays first for a grant of preliminary injunction with an opinion recognizing the free-speech context, in keeping with the remand, followed by a grant of summary judgment for RTAO. RTAO has also moved for consolidation of the hearings for preliminary injunction with the hearing on the merits, i.e., the summary judgment hearing, which should be granted for reasons of expedition and conservation.

The Supreme Court's reference in its remand order to "the Solicitor General's suggestion of mootness," 130 S. Ct. 2371, referred specifically to two comments, The first was that

> Petitioner's remaining challenges, to 11 C.F.R. 100.57 and 114.15, are moot. In light of the decisions in *Citizens United* and *EMILY's List*[*v. FEC*, 581 F.3d 1 (D.C. Cir. 2009)], the Commission has announced that it will no longer enforce those regulations.

Br. Resp'ts at 24, *RTAO*, 130 S. Ct. 2371. The second was in the Conclusion:

> With respect to petitioner's challenges to 11 C.F.R. 100.57 and 114.15, the petition for a

> writ of certiorari should be granted, the judgment of the court of appeal should be vacated, and the case should be remanded with instructions to dismiss those claims as moot.

Id. at 25. RTAO responded in its Reply to Brief in Opposition:

> FEC will not enforce 11 C.F.R. 100.57 and 114.15. (Opp'n 5-7.) The former is unconstitutional and beyond statutory authority. *EMILY's List v. FEC*, 581 F.3d 1, 17-18, 21-22 (D.C. Cir. 2009). The latter was "precisely what *WRTL*[*-II*[2]] sought to avoid," *Citizens*, 130 S. Ct. at 895-96, and lacks function after *Citizens* held corporate speech prohibitions unconstitutional. *Claims regarding these are moot and should be handled as FEC suggests.* (Opp'n 25.)

Reply Br. at 1 n.1, *RTAO*, 130 S. Ct. 2371 (emphasis added). Consequently, the challenges to those regulations, Counts 2 and 4, are not pursed here. But Counts 1 and 3 are not moot or the Supreme Court would not have granted certiorari and remanded for their reconsideration as to preliminary-injunction standards in the free-expression context and their application.[3]

Material Facts as to Which There Is No Dispute[4]

1. Plaintiff RTAO is a nonstock, nonprofit, Virginia corporation whose principal place of business was Richmond, Virginia (Am. V. Compl. ¶ 5), but now is Fredericksburg, Virginia. *See* https://cisiweb.scc.virginia.gov/z_container.aspx (searchable).

2. Defendant FEC is the federal government agency with enforcement authority over the Federal Election Campaign Act ("FECA") (2 U.S.C. 431 et seq.). Its headquarters are located in

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[2] *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (controlling opinion by Roberts, C.J., joined by Alito, J.). The controlling opinion ("*WRTL-II*") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

[3] RTAO expressly addressed mootness, including the statement that "RTAO would like to do materially similar future activities, so the need for a preliminary injunction is capable of repetition yet evading review." Cert. Pet. at 6, *RTAO*, 130 S. Ct. 2371.

[4] As this case is on remand for reconsideration of the preliminary-injunction ruling, the facts are provided here generally as originally set out in the amended verified complaint (Doc. 86) and the Allen affidavit (Doc. 53-2) with the original tense preserved. Some facts have been deleted as to 11 C.F.R. 100.57 and 114.15 and because *Citizens* struck the corporate prohibition on independent expenditures and electioneering communications. While some facts contain time-bound information, RTAO has verified its intent to do materially-similar future activity.

Washington, D.C. FEC promulgated the regulation and adopted the enforcement policy at issue in this case. (Am. V. Compl. ¶ 6.)

3. Defendant DOJ is an executive department of the United States government, with the Attorney General as its head. It's headquarters are in Washington, D.C. It has control over all criminal prosecutions and civil suits in which the United States has an interest, including criminal enforcement authority over the applicable federal laws at issue in this case. (Am. V. Compl. ¶ 7.)

4. RTAO was incorporated in July 2008. (Am. V. Compl. ¶ 8.) It is nonprofit under 26 U.S.C. 527, which means that it is classified under the Internal Revenue Code as a "political organization" that may receive donations and make disbursements for certain identified political purposes without having to pay corporate income taxes. (Am. V. Compl. ¶ 9.)

5. It is not properly a "political committee" ("PAC") under FECA because none of its communications should qualify as either a "contribution" or "expenditure," aggregating more than $1,000 during a calendar year, which is a trigger requirement for PAC status under 2 U.S.C. 431. *See also* 11 C.F.R. 100.5 (PAC definition). (Am. V. Compl. ¶ 10.)

6. It is also not properly a PAC because, even if it were to reach the $1,000 contribution or expenditure threshold to trigger statutory PAC status under FECA, RTAO does not meet the constitutionally required "major purpose" test. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (limiting imposed PAC burdens to "organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate" because "[t]hey are, by definition, *campaign related*" (emphasis added)). (Am. V. Compl. ¶ 11.)

7. As set out in its Articles of Incorporation, RTAO's purposes are as follows:

> The specific and primary purposes for which this corporation is formed and for which it shall be exclusively administered and operated are to receive, administer and expend funds in connection with the following:

1. To provide accurate and truthful information about the public policy positions of Senator Barack Obama;

2. To engage in non-partisan voter education, registration and get out the voter activities in conjunction with federal elections;

3. To engage in any activities related to federal elections that are authorized by and are consistent with Section 527 of the Internal Revenue Code except that the corporation shall not:

(a) expressly advocate the election or defeat of any clearly identified candidate for public office, or

(b) make any contribution to any candidate for public office; and

4. To engage in any and all lawful activities incidental to the foregoing purposes except as restricted herein. (Am. V. Compl. ¶ 12.)

8. However, RTAO has a reasonable belief that it will be deemed a PAC by FEC and DOJ because of (**a**) FEC's use of the challenged provision at 11 C.F.R. 100.22(b) (along with the sort of approach taken by 11 C.F.R. 100.57, which is no longer enforced but is the type of consideration employed by FEC PAC-status policy) and FEC's enforcement policy concerning PAC status, *see* FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC-Status 2*") (emphasizing the need for "flexibility" in determining PAC status based on a wide range of factors in a case-by-case analysis of "major purpose"), to deem several 527 organizations to be PACs and in violation of FECA, *see id.* at 5605 (listing Matters Under Review ("MURs") in which this occurred); and (**b**) the similar nature of RTAO and its planned activities to some of those in the MURs cited in *PAC-Status 2*. (Am. V. Compl. ¶ 13.)[5]

9. One of the ways that RTAO intends to provide accurate and truthful information about the public policy positions of Senator Obama is by creating a website at www.therealtruthaboutobama.com, where accurate statements about his public policy positions will be stated and docu-

[5] Paragraph 14 of the complaint set out the corporate prohibition on independent expenditures at 2 U.S.C. 441b, which was struck in *Citizens*, and is no longer relevant as to a prohibition. But the "expressly advocating" definition at 11 C.F.R. 100.22(b) remains relevant because independent expenditures over a thousand dollars trigger statutory PAC status, 2 U.S.C. 431(4), and require prescribed disclaimers, 2 U.S.C. 441d.

mented. *See* Complaint Exhibit A. (Am. V. Compl. ¶ 15.)

10. RTAO intends to produce an audio ad entitled "*Change*" and place it on its website, which states the following:

> (Woman's voice) Just what is the real truth about Democrat Barack Obama's position on abortion?
>
> (Obama-like voice) Change. Here is how I would like to change America . . . about abortion:
>
> - Make taxpayers pay for all 1.2 million abortions performed in America each year
> - Make sure that minor girls' abortions are kept secret from their parents
> - Make partial-birth abortion legal
> - Give Planned Parenthood lots more money to support abortion
> - Change current federal and state laws so that babies who survive abortions will die soon after they are born
> - Appoint more liberal Justices on the U.S. Supreme Court.
>
> One thing I would *not* change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.
>
> (Woman's voice). Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?
>
> To learn more real truth about Obama, visit www.The RealTruthAboutObama.com. Paid for by The Real Truth About Obama. (Am. V. Compl. ¶ 16.)

11. RTAO intends to produce another audio ad entitled "*Survivors*" and place it on its website, which states the following:

> **NURSE:** The abortion was supposed to kill him, but he was born alive. I couldn't bear to follow hospital policy and leave him on a cold counter to die, so I held and rocked him for 45 minutes until he took his last breath.
>
> **MALE VOICE:** As an Illinois Democratic State Senator, Barack Obama voted three times to deny lifesaving medical treatment to living, breathing babies who survive abortions. For four years, Obama has tried to cover-up his horrendous votes by saying the bills didn't have clarifying language he favored. Obama has been lying. Illinois documents from the very committee Obama chaired show he voted against a bill that did contain the clarifying language he says he favors.
>
> Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause.
>
> Paid for by The Real Truth About Obama, Inc. (Am. V. Compl. ¶ 17; Allen Aff. ¶¶ 3, 5.)

12. RTAO also intends to broadcast *Change* and *Survivors* (collectively "Ads") as radio advertisements on the Rush Limbaugh and Sean Hannity radio programs in heartland states during

"electioneering communication" blackout periods thirty days before the Democratic National Convention (July 29-Aug. 28, 2008) and sixty days before the general election (Sept. 5-Nov. 4, 2008), so the Ads will meet the electioneering communication definition at 2 U.S.C. 434(f)(3). (Am. V. Compl. ¶ 18; Allen Aff. ¶ 4.)

13. RTAO also intends to create on its website digital postcards setting out Senator Obama's public policy positions on abortion, and viewers will be able to send these postcards to friends from within the website. One of the planned postcards will be similar to the *Change* ad, except it will be done in first person and "signed" by "Barack Obamabortion." The postcards will be designed to be the sort of catchy, edgy, entertaining items that are popular for circulation on the Internet. *See* Complaint Exhibit A. (Am. V. Compl. ¶ 19.)

14. In order to raise money for funding its website and content, the production of the Ads, the employment of persons knowledgeable about Internet viral marketing, and the broadcasting of the Ads, RTAO will need to raise funds by telling potential donors about itself and its projects. One of the ways that RTAO intends to raise funds is by use of the following communication:

> Dear x,
>
> I need your help. We're launching a new project to let the public know the real truth about the public policy positions of Senator Barack Obama.
>
> Most people are unaware of his radical pro-abortion views. For example, when he was a state senator in Illinois, he voted against a state bill like the federal Born Alive Infant Protection Act. That bill merely required that, if an abortionist was trying to abort a baby and the baby was born alive, then the abortionist would have to treat that baby as any other newborn would be treated. Under this law, the baby would be bundled off to the newborn nursery for care, instead of being left on a cold table in a back room until dead. It seems like everyone would support such a law, but, as an Illinois State Senator, Obama did not. There are lots of other examples of his radical support for abortion, and we need to get the word out. That's where you come in.
>
> A new organization has just been formed to spearhead this important public-information effort. It's called The Real Truth About Obama. We plan to do some advertising. Since we're not a PAC, there won't be any "vote for" or "vote against" type of ads—just the truth, compellingly told.
>
> A central planned project is directed at the world of the Internet. We've already re-

> served www.TheRealTruthAboutObama.com to set up a website. Here's the exciting part. The website will feature a weekly postcard "signed" by "Barack Obamabortion." Like that? While you are visiting the website, you can send the postcard by email to anyone you designate. What could be easier?! And the postcards will be done in a catchy, memorable manner—the sort of thing that zips around the Internet. Each postcard will feature well-documented facts about Obama's views on abortion.
>
> The postcards will also send people to the website for more real truth about Obama, but we also plan to do a radio ad to do that, too. This radio ad will give the real truth about Obama's abortion position—all properly documented, of course. Notice the "Truth" part of our name.
>
> Of course it takes money to develop, host, and maintain a hot-topic website, and to hire the people who specialize in getting things noticed on the Internet (it's called viral marketing). So we need your help. We need for you to send us money. As much as you can donate. Right away. We need to get the word out. We know how. We're ready to roll. Now we need you.
>
> Your friend for truth,
> x
>
> P.S.—Please send your check today. Time is of the essence. Please send the largest gift you can invest in this vital project. Together we can get the word out. (Am. V. Compl. ¶ 20.)

15. RTAO intends to raise more than $1,000 with this fundraising communication and to disburse more than $1,000 both to broadcast the Ads and to place them before the public on RTAO's website. (Am. V. Compl. ¶ 21.)

16. However, RTAO is chilled from proceeding with these activities because it reasonably believes that it will be subject to an FEC and DOJ investigation and a possible enforcement action potentially resulting in civil and criminal penalties, based on the fact that FEC has deemed 527s to be PACs, based on (**a**) a rule defining "express advocacy" in a vague and overbroad manner, 11 C.F.R. 100.22(b) (broad, contextual express-advocacy test), that may make the Ads "independent expenditures" and (**b**) a vague and overbroad approach to determining whether an organization meets *Buckley*'s major-purpose test for imposing PAC status. *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC-Status 1*"); *PAC-Status 2*, 72 Fed. Reg. 5595.[6] (Am. V. Compl. ¶ 22; Allen Aff. ¶ 6.)

[6] Some FEC 527 enforcement was based on now-unenforced 11 C.F.R. 100.57.

17. RTAO is also chilled from proceeding because, if Defendants subsequently deem RTAO to have been a PAC while doing its intended activities, then RTAO would have been required to use "federal funds" (funds raised subject to federal source and amount restrictions) to send out the fundraising communication, *see* FEC Advisory Opinion 2005-13 at 1 (Emily's List), and RTAO would be in violation for not having used federal funds for the fundraising communication. (Am. V. Compl. ¶ 23.)

18. RTAO's chill is heightened by the DOJ's declaration that investigations and criminal prosecutions of "knowing and willful" violations of these FECA provisions by 527 corporations was a priority, *see* Letter from John C. Keeney, Deputy Assistant Attorney General, to Fred Wertheimer, President, Democracy 21 (June 26, 2008), Complaint Exhibit B, which was in response to a Democracy 21 letter to the Attorney General encouraging such enforcement in light of the FEC's own enforcement actions against 527 groups based on these same challenged provisions. *See* Letter from Fred Wertheimer, President, Democracy 21, to Michael Mukasey, Attorney General (May 22, 2008). Complaint Exhibit C. (Am. V. Compl. ¶ 24.)

19. Consequently, RTAO reasonably fears, if it proceeds with its intended activities: (**a**) that the Ads (both on RTAO's website and as broadcast) will be deemed express advocacy under 11 C.F.R. 100.22(b) and, if RTAO is not deemed a PAC, it will be in violation of FECA failing to place disclaimers on them and failing to file an independent expenditure report; (**b**) that, if RTAO is deemed to be a PAC under FEC's enforcement policy on "political committees" and because publication of the Ads will be considered an "expenditure" (under 100.22(b)), RTAO will be in violation of FECA for failure to abide by numerous PAC requirements, including placing disclaimers on the Ads and RTAO's website, failure to register and report as a PAC, failure to use federal funds for fundraising, failure to abide by limits on contributions to PACs, and fail-

ure to abide by the source limitations imposed on PACs; and (**c**) in any event, that RTAO will suffer an intrusive and burdensome investigation and, possibly, an enforcement action, potentially leading to civil and criminal penalties. So RTAO will not proceed with its intended activities unless it receives the judicial relief requested herein. (Am. V. Compl. ¶ 25; Allen Aff. ¶ 6.)

20. In addition to the activities set out herein, RTAO intends to participate in materially similar activities in the future, including broadcasting ads materially similar to *Change* and *Survivors*. (Am. V. Compl. ¶ 27; Allen Aff. ¶ 7.) RTAO's chill is irreparable harm because it is the loss of First Amendment rights, and there is no adequate remedy at law. (Am. V. Compl. ¶ 28.)

Argument

I. Speech-Protective Preliminary-Injunction Standards Apply.

Articulating and applying speech-protective preliminary-injunction standards is essential to this remand. Recognition of such standards for future preliminary injunctions is central to RTAO's challenge, as was set before the Supreme Court:

> Preliminary-injunction denials deprive issue-advocacy groups of timely opportunities to advocate their issues. RTAO wanted to talk about a politician's public-policy position during hot public debate on a subject when public attention was focused so as to make the communication uniquely effective. While this case is not moot because it is capable of repetition yet evading review, *see WRTL-II*, 551 U.S. at 461-64, the particular public teachable moment was lost. Where issue-advocacy involves time-sensitive issues, preliminary-injunction denials effectively decide the case. For example, in *WRTL-II*, WRTL was denied a preliminary injunction, which deprived it of the timely opportunity to advocate against judicial-nominee filibusters, 551 U.S. at 460. The 2007 vindication of WRTL's right to run its 2004 ads did not repair the deprivation when most timely. Recognizing this problem, *WRTL-II* set speech-protective standards for future as-applied challenges to assure expeditious decisions. *See id.* at 467-69.[7] These and other speech-protective standards should be incorporated into the preliminary-injunction standard.

Cert. Pet. at 11-12, *RTAO*, 130 S. Ct. 2371. RTAO asserted that "standards should be articulated

[7] The dissent agreed that preliminary injunctions are available, 551 U.S. at 353, meaning that the standard must be *capable* of being met.

so issue-advocacy groups may advocate when public interest is high, as the First Amendment requires." *Id.* at 14.

A. *WRTL-II* and *Citizens* Reasserted Robust Protection for Issue Advocacy and Groups.

The preliminary-injunction appeal here was "remanded . . . for . . . consideration in light of *Citizens*." *RTAO*, 130 S. Ct. 2371. To the extent that *McConnell v. FEC*, 540 U.S. 93 (2003), might have been deemed a diminution of Supreme Court protection for issue advocacy and issue-advocacy groups, that part of *McConnell* is dead because *Citizens* expressly overruled it, 130 S. Ct. at 914 (*overruling McConnell*, 540 U.S. at 203-09). And *WRTL-II*, 551 U.S. 449, and *Citizens* forcefully reasserted robust protection for political speech, including the necessity of bright-line, speech-protective tests—which has special urgency in the preliminary-injunction context.

WRTL-II held that "because [the challenged "electioneering communication"[8] ban] burdens political speech, it is subject to strict scrutiny. . . . Under strict scrutiny, the *Government* must prove that applying [it] to [plaintiff]'s ads furthers a compelling interest and is narrowly tailored to achieve that interest." 551 U.S. at 464-65 (emphasis in original; citations omitted). *WRTL-II* expressly rejected any considerations of intent and effect, *id.* at 465-69, 472, context (other than basic background information), *id.* at 472-74, or proximity to an election, *id.* at 472-73, for determining whether a communication is protected issue advocacy (i.e., "political speech," *id.* at 481) or regulable electioneering (i.e., "campaign speech," *id.*). It defined issue advocacy as informing the public without appealing for a vote: "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose— uninvited by the ad—to factor it into their voting decisions." *Id.* at 470.

[8] Electioneering communications are essentially non-express-advocacy, targeted communications mentioning candidates in 30- and 60-day periods before primary and general elections. *See* 2 U.S.C. 434(f)(3). *McConnell* facially upheld the ban. 540 U.S. at 207.

WRTL-II limited the reach of the ban on corporate electioneering communications to those containing an "appeal to vote" and mandated speech-protective standards for issue-advocacy cases. *WRTL-II*, 551 U.S. at 469-70, 467-69. *See infra* (speech-protective standards discussed).

Citizens went even further than protecting *issue* advocacy, it overruled the foundation for banning corporate *express* advocacy and electioneering communications in *McConnell*, 540 U.S. at 914, and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). The *Citizens* Court was motivated in large part by FEC's refusal to protect issue advocacy under *WRTL-II*'s appeal-to-vote test in its regulation at 11 C.F.R. 114.15, 130 S. Ct. at 896 ("This is precisely what *WRTL* sought to avoid."), which failure RTAO explained here in arguing likely success on the merits in its first preliminary-injunction brief. (Doc. 4 at 20-26.) *Citizens* emphasized "the primary importance of speech itself to the integrity of the election process" and that "[a]s additional rules are created for regulating political speech, any speech arguably within their reach is chilled." 130 S. Ct. at 895. It then declared that FEC had turned the Court's "objective 'appeal to vote' test" into "a two-part, 11-factor balancing test" that "function[ed] as the equivalent of a prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." *Id.* at 895-96. That repudiated vague and overbroad approach is precisely what FEC used in enacting 11 C.F.R. 100.22(b) and FEC's PAC-status enforcement policy (as well as in promulgating 11 C.F.R. §§ 100.57 and 114.15, which FEC has abandoned).

B. *Winter* Standards Require Speech-Protective Application.

Because this is a preliminary-injunction remand, the Supreme Court's preliminary-injunction standards apply: "A plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the merits, that he is *likely* to suffer irreparable harm in the absence of preliminary

relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 129 S. Ct. at 374 (emphasis added). In "characteriz[ing] . . . injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *id.* at 375-76, *Winter* cited *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). *Mazurek* applied the "clear showing" requirement to "the burden of persuasion," *id.*, which is *ordinarily* on the plaintiff.

While a preliminary injunction may be generally an "extraordinary remedy," it is not "extraordinary" where free speech is at issue, *see, e.g.*, *Ashcroft v. ACLU*, 524 U.S. 656 (2004), (no abuse of discretion in granting preliminary injunction against enforcement of Child Online Protection Act). And the generally "extraordinary" nature of preliminary injunctions does not heighten *Winter*'s "likely" standards, i.e., movants must show *likely* merits success, not *extraordinarily likely* merits success. While a "clear showing" is required to meet the burden of persuasion, that requirement is incorporated in the "likely" standard, i.e., movants need only show that they are *likely* to succeed on the merits, not that they are *clearly likely* to succeed on the merits. "Likely" denotes "probable" and "likelihood" denotes "probability . . . [but] something less than reasonably certain." Black's Law Dictionary 834 (5th ed. 1979). And "probable" means "[h]aving more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." *Id.* at 1081. The Supreme Court deliberately chose the word "likely" as its standard—without modifiers—and not something higher, though it had the clear opportunity in *Winter*. In fact, the Court reiterated the "likely" standard with *emphasis*: "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 129 S. Ct. at 375 (emphasis in original). So "likely" is the standard.

But *Winter*'s statements are not the end of the matter because *other* authorities require speech-protective application of these standards in free-speech cases—especially for issue advocacy and issue-advocacy groups. One change in the preliminary-injunction standard in free-speech cases is that the *government* bears the burden of persuasion (after the plaintiff places a burden on free speech at issue). In such cases, the *government* must make *Mazurek*'s "clear showing." This was made clear in *Ashcroft*, 524 U.S. 656, which noted the usual burden on "plaintiffs [to] demonstrate[] that they are likely to prevail on the merits" and have "irreparable injury," but then noted the shifted burden in a free-speech case: "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than [the challenged provision]." *Id.* at 666 (citations omitted). The Supreme Court has reaffirmed this shifted burden: "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). *Gonzales* rejected the "[t]he Government argu[ment] that, although it would bear the burden of demonstrating a compelling interest as part of its affirmative defense at trial on the merits, [plaintiff] should have borne the burden of disproving the asserted compelling interests at the hearing on the preliminary injunction." *Id.* "This argument is foreclosed by . . . *Ashcroft*." *Id.* (citation omitted).[9] So in the present case, the *Government* has the burden of persuasion to constitutionally justify 11 C.F.R. 100.22(b) and FEC's PAC-status enforcement policy, and if it fails then a preliminary injunction should issue. *See also Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 968 (8th Cir. 1999) (placing preliminary-injunction burden on state to justify stat-

[9] A Fourth Circuit district court, in a situation similar to the present one, recognized that in strict-scrutiny cases the preliminary-injunction burden shifts to the government. *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 783-84 (S.D. W. Va. 2009) ("*CFIF*").

ute). If the evidence and arguments are equipoised, a preliminary injunction must issue because the government has the burden. And regardless of the burden, all ties and benefits of the doubt go to free speech. *WRTL-II*, 551 U.S. at 469, 474 n.7, 482.

Another speech-protective change required in constitutional-rights cases is application of the Supremacy Clause. U.S. Const. art. VI. If it is likely that a challenged provision violates First Amendment rights of expressive association[10]—which determination already includes examining asserted government interests under strict scrutiny—then the preliminary-injunction analysis is over except for formally recognizing that loss of First Amendment rights is irreparable harm, that balancing harms favors constitutional rights, and that the public interest is always in protecting the "supreme Law of the Land." *Id.*[11] The government may not be heard to argue that it has an

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[10] Nothing in *Winter* alters the necessity of considering likely merits success first in First Amendment cases. *See W. Va. Assoc. of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (in First Amendment context, irreparable harm depends on likely merits success); *Newsom ex rel. Newsom v. Albermarle County Sch. Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003) (same); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2001) (same).

[11] *See Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) ("There appears to be no dispute over the appellants' entitlement to relief under the other criteria if their First Amendment rights were violated" (*citing Elrod v. Burns*, 427 U.S. 347, 369-73 (1976)); *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2010) (likely success prong is "most important . . . and often determinative in First Amendment cases"); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (likely merits success in First Amendment case established irreparable harm and favorable equities balance and public interest); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) (When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary."). As put recently by a federal court in a First Amendment preliminary-injunction decision:

> The violation of an individual's constitutional guarantees is intolerable and undoubtably causes irreparable injury. The Supreme Court has recognized that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 372; *see also Newson v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). If [the challenged provision] does in fact violate Plaintiffs' constitutional freedom of association or speech, allowing its continued operation would cause Plaintiffs irreparable harm.

enforcement interest, that duly-enacted laws must be presumed constitutional, that there will be a 'wild west' scenario shortly before an election,[12] that the status quo must be preserved,[13] or the like if the First Amendment prescribes liberty. Such interests asserted for balancing harms or determining public interest are not cognizable if they were inadequate to defeat a determination of

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Foster v. Dilger, slip op. at 4-5, No. 3:10-cb-00041-DCR (E.D. Ky. Sept. 9, 2010) (memorandum and order granting preliminary injunction). Regarding balance of harms: "The harm and difficulty of changing a regulation cannot be said to outweigh the violation of constitutional rights it perpetuates. It would be far worse that an election continue under an unconstitutional regime than the Registry experience difficulty of expense in altering that regime." *Id.* at 14. And regarding public interest: "'It is in the public interest not to perpetuate the unconstitutional application of a statute.'" *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982); *see also G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1999) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). *Foster*, slip op. at 14, No. 3:10-cb-00041-DCR (E.D. Ky. Sept. 9, 2010).

[12] The *CFIF* court expressly rejected this argument: "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *CFIF*, 613 F. Supp. 2d at 807.

[13] The notion that a free-speech and association plaintiff cannot get preliminary injunctive relief because of the status quo was recently rejected by a federal court:

> There is a threshold issue of whether a preliminary injunction is proper to grant the relief Plaintiffs request. The purpose of a preliminary injunction is to preserve the status quo between the parties pending a final determination on the merits. *Merrill Lynch, Pierce, Fenner & Smith v. Grall*, 836 F. Supp. 428, 431-432 (W.D. Mich. 1993) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). In this case, the status quo is the operation and enforcement of [the challenged contribution limit]. It could be argued that enjoining enforcement of the statute would be improper because doing so would disrupt the status quo rather than preserve it. However, the Sixth Circuit has held that "[t]oo much concern with the status quo may lead a court into error." *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978). There is no "particular magic" in the phrase "status quo." *Id.* "The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Id.* If the current status quo is the cause of the irreparable injury, the Court should alter the status quo to prevent the injury. *Id.* In doing so, the Court returns to the "last uncontested status quo between the parties." *Id.* (citing *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190 (9th Cir. 1953)). Here, there is no bar to the Court granting a preliminary injunction because it would disrupt the "status quo."

Foster v. Dilger, slip op. at 3-4, No. 3:10-cb-00041-DCR (E.D. Ky. Sept. 9, 2010) (memorandum and order granting preliminary injunction).

likely success on the merits. The First Amendment trumps all such interests.

Another change required in free-speech cases is acquiescence to controlling authorities mandating how issue-advocacy cases must be decided, which mandates apply in the preliminary-injunction context just at they do at other litigation stages. *WRTL-II* mandated speech-protective standards for litigation in order to protect issue advocacy. It expressly rejected any intent-and-effect test for regulating issue advocacy because "the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other . . . would afford '"no security for free discussion."'" 551 U.S. at 467 (citations omitted). Rather,

> [t]he test to distinguish constitutionally protected political speech from speech that . . . may [be] proscribe[d] should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"

Id. (citations omitted). The regulation and enforcement policy challenged here provide no "safe harbor" because both rely on indistinct lines. The constitutional requirement is that there be bright, protective lines promoting robust issue advocacy. *WRTL-II* then prescribed how challenges to issue-advocacy restrictions must be conducted:

> To safeguard this liberty [of issue advocacy], the proper standard for an as-applied challenge . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. See *Buckley*, [424 U.S.] at 43-44. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. See *Virginia v. Hicks,* 539 U.S. 113, 119 (2003). And it must eschew "the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 547 (1995). In short, it must give the benefit of any doubt to protecting rather than stifling speech. See *New York Times Co. v. Sullivan,* [376 U.S. 254,] 269-270 [(1964)].

Citizens reiterated part of this statement, 130 S. Ct. at 896, and declared that "the FEC's "business is to censor" and that the First Amendment is "[p]remised on mistrust of governmental power, *id.* at 896, 898. *WRTL-II* said that the fact that an ad is run near an election does not mean

it is regulable electioneering. 551 U.S. at 472 ("If this were enough to prove that an ad is the functional equivalent of express advocacy, then [the electioneering-communication prohibition] would be constitutional in all of its applications."). *Citizens* also recognized that challenges to campaign-finance laws would, by their nature, be brought near elections,[14] These principles answer common arguments made, and interests asserted, by government entities in the context of preliminary injunctions sought in First Amendment free speech and association cases brought near elections. For example, the fact that a challenge is brought near an election has no bearing on whether the challenged provision is likely unconstitutional and, therefore, no bearing on whether a preliminary injunction should issue. Bringing a challenge near an election may not be held against a plaintiff in a preliminary-injunction analysis because that is naturally when such challenges arise. And every effort should be made, including at the preliminary-injunction stage, to quickly resolve suits without burdensome litigation in a way that promotes robust public debate on issues of the day.

The government also must *prove* its interests, e.g., that the public-interest would be served by denying the preliminary injunction because a 'wild west' scenario is likely to ensue. The government must provide proof, not speculation. *See Gonzales*, 546 U.S. at 430 ("strict scrutiny" rejects "categorical approach"). The government "must do more than simply posit the existence

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[14] As *Citizens* put it:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on . . . .

130 S. Ct. at 895.

of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (internal citation omitted).

From the foregoing, it should be clear that the following Fourth Circuit (now-vacated) characterization of the locus and nature of the preliminary-injunction burden, in the opinion then before the Supreme Court, was simply wrong:

> Notwithstanding the numerous Supreme Court opinions on the subject, the regulation of speech related to political campaigns remains a difficult and complicated area of law that is still developing. And for that reason, as well as the stringent preliminary injunction standard, Real Truth bears a heavy burden in showing its likelihood of success. Any relaxation of its burden, for example to require that Real Truth show only a *possibility* that it will eventually prevail, would be inadequate.[15] *See Winter,* 129 S.Ct. at 375-76. (emphasis in original).

575 F.3d at 349, *vacated*, 130 S. Ct. 2371. RTAO does *not* have the burden of persuasion; the government has it. There is no authority (the Fourth Circuit cited none and this statement remains vacated) for the proposition that the difficulty and complicated nature of the law (which in reality is quite simple if *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), is simply followed), makes the *Winter* standard of "likely" merits success any heavier. "Likely" remains "likely" whatever the complexity of the law. In fact, *WRTL-II* mandates that where doubts exist they must be resolved in favor of free speech, 551 U.S. at 469, 474 n.7, 482, so complexity in the law would favor RTAO, not the government. And the *Winter* standard is what the Supreme Court said it is—a "likely" test in four parts—regardless of modifiers attached to it, so calling it "stringent" does not alter the standard (and in any event that modifier is vacated).

As presented to the Supreme Court (slightly modified) in RTAO's certiorari petition, at 12-14, the following principles govern preliminary injunctions in addition to *Winter*'s standards:

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[15] RTAO sought no relaxation of "likely" to "possib[ly]," so that statement does not apply.

(1) the requirements of "likely" success and irreparable harm are not made "stringent" (i.e., "*highly* likely") by the required "clear showing" of likelihood;

(2) the preliminary-injunction burden is not heavier with "a difficult and complicated area of law that is still developing";

(3) the preliminary-injunction burden follows the merits burden, i.e., the government must justify restrictions;

(4) the government must prove that alleged harms are *real*, not speculative;

(5) likelihood of success should be considered first because other preliminary-injunction elements follow (violating free speech is irreparable harm and the balance of equities and public interest favor upholding constitutional rights);

(6) *WRTL-II*'s streamlined procedures and protective rules must be reflected in preliminary-injunction decisions involving issue advocacy near elections, *see* 551 U.S. at 478;

(7) standards involving issue advocacy must reflect that "the people are sovereign," *Buckley*, 424 U.S. at 14, there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted), and the First Amendment mandates a "freedom of speech" presumption;

(8) this free-speech presumption means that the status quo in a prohibitory injunction is the state of the law *before* the challenged provision regulating speech;

(9) where the unambiguously-campaign-related requirement is at issue, *see infra*, the government always has the burden of meeting that threshold burden before meeting the burden imposed by the required scrutiny;

(10) because strict scrutiny is the antithesis of deference or presumed constitutionality, these are not afforded to speech regulation;

(11) in determining the balance of harms and public interest, "[w]here the First Amendment is implicated, the tie goes to the speaker," *WRTL-II*, 551 U.S. at 474;

(12) agencies have no per se interest in restricting or regulating speech; their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond the agency's interest when balancing harms;

(13) the fact that issue-advocacy cases may occur near elections favors the plaintiffs in the preliminary-injunction balancing because issue advocacy is most important when public interest is highest: "a group can certainly choose to run an issue ad to coincide with public interest" without election proximity indicating "electioneering," *WRTL-II*, 551 U.S. at 473;

(14) likely unconstitutional laws may not operate just because an election is near.

Applying *Winter*'s preliminary-injunction standard with these essential speech-protective corollaries in the First Amendment free speech and association context readily results in a preliminary-injunction decision favoring RTAO.

II. RTAO Has Likely Merits Success.

After FEC's decision not to enforce two challenged provisions herein because of adverse holdings,[16] only two remain: the alternate definition of "expressly advocating" at 11 C.F.R. 100.22(b) and FEC's PAC-status enforcement policy. Just as FEC could not justify its abandoned regulations, Defendants (collectively "Government") are unable to meet their burden of justifying the remaining regulation and policy, so RTAO has likely merits success.

A. 11 C.F.R. 100.22(b) Is Vague, Overbroad, Beyond Statutory Authority, and Void.

RTAO challenges 11 C.F.R. 100.22(b)—FEC's alternate, non-magic-words, express-advo-

[16] The regulation at 11 C.F.R. 100.57 was held unconstitutional in *EMILY's List*, 581 F.3d 1 , and the Supreme Court held that 11 C.F.R. 114.15 was "precisely what *WRTL* sought to avoid," *Citizens*, 130 S. Ct. at 895-96.

cacy definition—as vague, overbroad, beyond statutory authority, and void under the Administrative Procedure Act ("APA"), 5 U.S.C. 706.[17] FEC's "expressly advocating" definition defines part of the "independent expenditure" definition, i.e., a non-coordinated "expenditure . . . expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. 431(17). Independent expenditures require reporting and disclaimers, 2 U.S.C. §§ 434(c) and 441d, and can trigger PAC status, 2 U.S.C. 431(4) (PAC definition), which is a particular concern of RTAO.

The appellate panel affirmed this Court's holding that RTAO lacked a reasonable likelihood of success on the merits because it said that the definition is similar to *WRTL-II*'s appeal-to-vote test. 575 F.3d at 349. That judgment was vacated and the preliminary-injunction appeal remanded for reconsideration in light of *Citizens*. *See supra*.

Standard of review. The standard of review is strict scrutiny, but it is actually unnecessary to decide it because *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*"), declared Section 100.22(b) unconstitutional without articulating the level of scrutiny by simply identifying subpart (b) as inconsistent with *Buckley* (as it remains). *VSHL*, 263 F.3d at 390-93. *Leake* employed a similar analysis (by identifying the Supreme Court's two approved ways to regulate speech and holding North Carolina's approach inconsistent) in rejecting a two-part definition for regulating speech where the first part captured magic-words express advocacy and the second tried to capture more speech, just as FEC attempts with 11 C.F.R. 100.22(b).

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[17] Subpart (a) of Section 100.22 defines "expressly advocating" with the Supreme Court's magic-words approach. *See infra*. Subpart (b) uses this vague, overbroad and unauthorized test:

> When taken as whole . . . 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 (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.

Leake, 525 F.3d at 280-86. The *Leake* dissent rightly identified the majority's scrutiny as strict because it employed *WRTL-II*'s appeal-to-vote test, "developed in the strict scrutiny context, to strike down portions of North Carolina's contribution, disclosure, and political committee regulations." *Id.* at 311. That same scrutiny applies here because the applicability of *WRTL-II*'s test is central and because 11 C.F.R. 100.22(b) "burdens political speech." *WRTL-II*, 551 U.S. at 464 (collecting cases). Since Subsection (b) can trigger PAC status, 2 U.S.C. 431(4) (PAC definition), strict scrutiny applies because provisions imposing PAC status require strict scrutiny. *See Citizens*, 130 S. Ct. at 898. *See also infra* at 36. Moreover, *Leake* mandates that because application of *WRTL-II*'s appeal-to-vote test, "in particular, has the potential to trammel vital political speech," it "warrants *careful* judicial scrutiny." 525 F.3d at 283 (emphasis added).

Unambiguously-campaign-related requirement. In addition to bearing the burden of justifying its regulation under strict scrutiny, the Government must bear the threshold burden of demonstrating that its regulation and enforcement policy meet the unambiguously-campaign-related requirement established by *Buckley*, 424 U.S. at 79-81, from which the Court derived two tests that govern this case: (1) the major-purpose test, which determines which groups may be treated as "political committees," *id.* at 79 ("organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate"), and (2) the express-advocacy test, which determines which communications may be treated as "independent expenditures," *id.* at 80 ("[W]e construe 'expenditure' . . . to reach only funds used for communications that expressly advocate [footnote omitted] the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*." (emphasis added)).

Buckley's unambiguously-campaign-related requirement asks whether "the *relation* of the

information sought to the purpose of the Act [regulating elections] *may be too remote*," and, therefore, "*impermissibly broad*." *Buckley*, 424 U.S. 80 (emphasis added). The Court required that government restrict its election-related laws to reach only First Amendment activities that are "*unambiguously related* to the campaign of a particular federal candidate," *id.* (emphasis added), in short, "*unambiguously campaign related*," *id.* at 81 (emphasis added).

The reason for the unambiguously-campaign-related requirement is twofold. First, since the only authority to regulate core political speech in this context is the authority to regulate elections, *see id.* at 13 ("constitutional power of Congress to regulate . . . elections is well established"), any restriction must be "unambiguously campaign related." *Id.* at 81. Second, core political speech must not be burdened. *Buckley* noted a dissolving-distinction problem as requiring a bright, speech-protective line between (1) "discussion of issues and candidates" and (2) "advocacy of election or defeat of candidates." *Id.* at 42. The Court elaborated further on the necessity of the bright line—between (1) "discussion, laudation, [and] general advocacy" and (2) "solicitation"—to protect issue advocacy. *Id.* at 43 (emphasis added).[18, 19]

In *Leake*, the Fourth Circuit recognized this unambiguously-campaign-related requirement as the controlling analysis and as requiring a magic-word express-advocacy test for independent expenditures and a narrow appeal-to vote test, applying *only* to electioneering communications:

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[18] *Buckley* applied the unambiguously-campaign-related requirement to (1) expenditure limitations, *id.* at 42-44; (2) PAC status and disclosure, *id.* at 79; (3) non-PAC disclosure of contributions and independent expenditures, *id.* at 79-81; and (4) contributions. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.").

[19] *FEC v. Massachusetts Citizens for* Life, 479 U.S. 238 (1986) ("*MCFL*"), employed the unambiguously-campaign-related requirement in imposing the express-advocacy construction on "expenditures" barred by 2 U.S.C. 441b, 479 U.S. at 249, and in reiterating that the only groups subject to imposed PAC status are those controlled by candidates or whose major purpose is nominating or electing candidates, *id.* at 253, 262.

> Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that *uses specific election-related words*. Second, "the functional equivalent of express advocacy," *defined as an "electioneering communication"* that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This latter category, in particular, has the potential to trammel vital political speech, and thus regulation of speech as "the functional equivalent of express advocacy" warrants careful judicial scrutiny.

525 F.3d at 282-83 (emphasis added).[20] Given *Leake*'s holding, 11 C.F.R. 100.22(b) fails as a matter of law in this Circuit.[21] *Leake* also held that the unambiguously-campaign-related requirement mandates a narrow major-purpose test for determining PAC status. *Id.* at 287-90. Applying these holdings[22] readily reveals that the challenged regulations and enforcement policy at issue here are unconstitutionally vague and overbroad, beyond statutory authority, and void under the APA, 5 U.S.C. 706, and that RTAO has likely success on the merits.

In meeting its burden of persuasion, the Government must as a *threshold* matter prove that the challenged provision and enforcement policy capture only activity that is unambiguously campaign related because *Buckley* treated the requirement as a threshold consideration. *See*

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[20] Thus, *Leake* recognized that *WRTL-II* applied an unambiguously-campaign-related requirement when it created its appeal-to-vote test to protect issue advocacy from prohibition as an "electioneering communication"—which test applies *only* to electioneering communications.

[21] Any argument from the mere inclusion of the word "ambiguous" in FEC's alternate express-advocacy definition ("electoral portion . . . is . . . unambiguous") fails to satisfy *Leake*'s unambiguously-campaign-related requirement because (a) the requirement's application is already settled by *Leake* (requires magic words) and (b) "unambiguous" modifies "electoral portion," not "campaign related," which entirely alters the meaning.

[22] The Tenth Circuit has joined the Fourth Circuit in recognizing the unambiguously-campaign-related requirement, *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010), as have the courts in *Broward Coal. of Condos., Homeowners Ass'ns and Cmty. Orgs., Inc. v. Browning*, No. 4:08cv445, 2009 WL 1457972, at *5 (N.D. Fla. May 22, 2009) (order granting summary judgment) (recognizing and same two categories of regulable speech as recognized in *Leake*), *CFIF*, 613 F. Supp. 2d at 785, and *National Right to Work Legal Def. and Educ. Found. v. Herbert*, 581 F. Supp. 2d 1132, 1141-42, 1144 (D. Utah 2008) (same).

Buckley, 424 U.S. at 44-48 (applying express-advocacy construction because of unambiguously-campaign-related requirement before applying appropriate scrutiny). Preliminary-injunction burdens "track the burdens at trial." *Gonzales*, 546 U.S. at 429.

"[C]onsideration in light of *Citizens*." The Supreme Court "remanded . . . for . . . consideration in light of *Citizens*." 130 S. Ct. 2371. What in *Citizens* illumines this reconsideration? Two things, at least, in addition to its general reassertion of protection for issue advocacy and issue-advocacy groups. *See supra* at I.A.

First, the Supreme Court surely had in mind the clear statement of the *Citizens* dissent that "express advocacy" requires "magic words": "If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, *there has been little doubt about what counts as express advocacy since the 'magic words' test* of *Buckley v. Valeo,* 424 U.S. 1, 44, n. 52 (1976) *(per curiam)*." *Citizens*, 130 S. Ct. at 935 n.8 (Stevens, J., joined by Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (emphasis added). *See also id.* at 956 (equating express advocacy with "magic words"). This statement directly applies to FEC's non-magic-words alternate definition, and it is a reiteration of what the Justices have been reaffirming since *McConnell* about express advocacy. This alone proves that an express-advocacy definition is unconstitutional unless it conforms to the definition given by the Court when it created "express advocacy" as a term of art in *Buckley* and clearly defined it as requiring "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,'" 424 U.S. at 44 n.52, which term of art was then incorporated by Congress in the "independent expenditure" definition. Express advocacy is "limited to communications that include explicit words of advocacy of election or defeat of a candidate" and "appl[ies] only to expenditures for communications that in

express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 43-44. The Court reiterated in *MCFL*, 479 U.S. 238, that "a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." *Id.* at 249 (citation omitted). *McConnell* repeatedly equated "express advocacy" with "magic words." *See* 540 U.S. at 126, 191-93, 217-19. So *McConnell*'s hyperbolic "functionally meaningless" statement about the express-advocacy line, *id.* at 193, did not *eliminate* "express advocacy" as a category of regulated speech requiring "magic words," rather *McConnell* used that analysis to *add* regulation of "electioneering communications" to *ongoing* regulation of magic-words express advocacy. Post-*McConnell*, equation of express advocacy with magic words continues. In *WRTL-II*, all members of the Court equated "express advocacy" with "magic words." *See* 551 U.S. at 474 n.7 (Alito, C.J., joined by Alito, J.), 495 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in judgment), 513 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). And now, as noted above, the *Citizens* dissent has done the same, adding Justice Sotomayor's voice to the unanimous pronouncement.

The Fourth Circuit itself held Section 100.22(b) unconstitutional for not requiring magic words, *VSHL*, 263 F.3d at 329,[23] and other decisions held that express advocacy requires magic words, *see Leake*, 525 F.3d at 283 (requires "specific election-related words"); *FEC v. Christian*

[23] The First Circuit has also determined that Subsection (b) is invalid as an overly-broad restriction on free speech. *See Maine Right to Life v. FEC,* 98 F.3d 1 (1st Cir. 1996). *See* also *Right to Life of Duchess County, lnc. v. FEC,* 6 F. Supp.2d 248, 253-54 (S.D.N.Y. 1998) (same). The Eighth Circuit held that a state regulation with a definition of express advocacy identical to Subsection (b) would likely not withstand a constitutional challenge. *See Iowa Right to Life Committee,* 187 F.3d 963. And *Leake*, 525 F.3d at 280-86, held a statute similar to Subsection (b) unconstitutional. Other courts have rejected *Furgatch*-style definitions. *See Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Gov. Gray Davis Comm. v. American Taxpayers Alliance*, 102 Cal. App. 4th 449 (Cal. Ct. App. 2002); *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266 (Colo. App. 2001); *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000).

Action Network, 110 F.3d 1049, 1062 (4th Cir. 1997) ("*CAN-II*") (same). These holdings directly control this case. Other circuits have held that express advocacy requires a magic-words test. *See Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991); *FEC v. Central Long Island Tax Reform,* 616 F.2d 45, 53 (2d Cir.1980); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 664-65 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651, 664 (6th Cir. 2004); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *Iowa Right to Life Committee*, 187 F.3d 963 (striking definition patterned on 11 C.F.R. 100.22(b)); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003)[24].[25] And post-*McConnell* other courts have joined *Leake* in holding that the only two types of (non-PAC) speech that are regulable are magic-words express advocacy and federally-defined electioneering communications meeting *WRTL-II*'s appeal-to-vote test. *See Herrera*, 611 F.3d at 676; *Browning*, No. 4:08cv445, 2009 WL 1457972, at *5; *Herbert*, 581 F. Supp. 2d at 1144.

Section 100.22(b) is also beyond statutory authority. The regulation cites as authority 2 U.S.C. 431(17), the "independent expenditure" definition, which regulates only "an expenditure by a person [] expressly advocating the election or defeat of a clearly identified candidate." That definition implements the magic-words, express-advocacy constructions in *Buckley*, 424 U.S. 44, 80, and *MCFL*, 479 U.S. at 249. There is no congressional authority anywhere for FEC to inter-

MCFL [24] This decision recognized that even *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), on which FEC relied for the challenged regulation,"presumed express advocacy must contain some explicit *words* of advocacy." *Getman*, 328 F.3d at 1098. *See also American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("'*McConnell* left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest'" (citation omitted)).

[25] State supreme courts have also held that "express advocacy" requires "magic words." *See Brownsburg Area Patrons Affecting Change*, 714 N.E. 2d 135; *Osterberg v. Peca*, 12 S.W. 3d 31 (Tex. 2000).

pret "expressly advocating" other than as requiring magic words. Congress has only regulated two types of non-PAC campaign-related speech: (1) "independent expenditures," 2 U.S.C. 431(17), for which it employed *Buckley*'s and *MCFL*'s magic-words "expressly advocating" as a term of art with fixed meaning following the Supreme Court's constructions of "expenditure" in those cases to require magic-words express advocacy, and (2) "electioneering communications," 2 U.S.C. 434(f)(3) which it defined as essentially targeted, broadcast ads identifying candidates 30 and 60 days before primaries and general elections respectively. Neither definition contains an appeal-to-vote test, so Congress has not asserted its authority to regulate under that test (especially in the independent-expenditure context), but *WRTL-II* did limit the electioneering-communication prohibition to communications with *WRTL-II*'s appeal to vote (before *Citizens* made the test unnecessary). Congress has nowhere sought to regulate any hybrid of these, only magic-words independent expenditures and bright-line electioneering communications (for which the appeal-to-vote test no longer functions). Moreover, the only "expenditure" that FEC may regulate by statute is one "for the purpose of influencing any election for Federal office," 2 U.S.C. 431(9), and it was precisely to such "for the purpose of influencing" language that *Buckley* gave "expenditure" an express-advocacy construction to preserve it from vagueness and overbreadth. 424 U.S. at 77, 80.

Furthermore, for both statutory and constitutional reasons, it is simply illogical to assert that any sort of "functional *equivalent* of express advocacy," *WRTL-II*, 551 U.S. at 469 (emphasis added), can be a *type* of express advocacy. If they were the same, Congress would have included electioneering-communication within the independent-expenditure definition, which it did not, and *McConnell* and *WRTL-II* would have simply said that an electioneering communication was a type of independent expenditure, rather than identifying some of it as "equivalent." And *WRTL-*

II made it clear, in response to Justice Scalia's vagueness accusation, that the appeal-to-vote test was not vague because it was anchored by the statutory electioneering-communication definition:

> Justice SCALIA thinks our test impermissibly vague. . . . [W]e agree with Justice SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. . . . And keep in mind this test is only triggered if the speech meets the brightline requirements of [the electioneering-communication definition] in the first place.

551 U.S. at 474 n.7 (emphasis in original). Conversely, absent the anchor of electioneering-communication definition's temporal and modal limitations, *WRTL-II* clearly indicates that Justice Scalia would be correct, i.e., the appeal-to-vote test *would* be unconstitutional vague and overbroad if released from its mooring. Neither the notion of "functional equivalence," which was narrowed by *WRTL-II*'s appeal-to-vote test, nor the appeal-to-vote test itself is a free-floating test that Congress or FEC may apply elsewhere. So Congress could not have enacted a hybrid of an express-advocacy test with the appeal-to-vote test had it wanted to, which it did not. Consequently, 11 C.F.R. 100.22(b) is beyond statutory and constitutional authority.

In the face of all this authority declaring that "express advocacy" is a magic-words standard, the FEC justifies Section 100.22(b) based on the express-advocacy test in *Furgatch*, 807 F.2d 857. FEC, "Express Advocacy . . . ," 60 Fed. Reg. 35291, 35294 (July 6, 1995) (explanation & justification). But Subsection (b) does not even follow *Furgatch*'s mandate that "speech may only be termed 'advocacy' if it presents a clear *plea for action*, and . . . it must be clear what action is advocated[, i.e.,] . . . a vote for or against a candidate . . . "[26] 807 F.2d at 864. Section 100.22(b) contains no clear-plea-for-action requirement that must be to "vote." Absent this cen-

[26] *Furgatch* applied this to an anti-Nixon ad that proclaimed "DON'T LET HIM DO IT!" where the only way to "[not] let him do it" was to vote against him. The Ninth Circuit decided that there was a "clear plea for action" and the action solicited was "a vote for or against a candidate" so the communication at issue fit the test.

tral element of *Furgatch*, FEC cannot assert that its test is identical to *Furgatch*'s test. Anyway, it does not control here. In *CAN-II*, 110 F.3d 1049, the Fourth Circuit noted *Buckley*'s and *MCFL*'s requirement of magic words for express advocacy, interpreted the *Furgatch* test,[27] then expressly rejected FEC's assertion that it followed *Furgatch* in promulgating Section 100.22(b):

> Contrary to its assertions, the Commission's regulatory definition of "express advocacy" does not parallel this test. According to the FEC:
>
> > [l]ike the first prong in *Furgatch,* the Commission's regulation requires the "electoral portion of the communication [to be] unmistakable, unambiguous, and suggestive of only one meaning" (11 C.F.R. § 100.22(b)(1)). Like the second and third prongs, the Commission's regulation requires that "[r]easonable 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)(2)). Appellant's Reply Br. at 9 (footnote omitted). It is plain that the FEC has simply selected certain words and phrases from *Furgatch* that give the FEC the broadest possible authority to regulate political speech (*i.e.,* "unmistakable," "unambiguous," "suggestive of only one meaning," "encourage[ment]", 807 F.2d at 864), and ignored those portions of *Furgatch,* quoted above, which focus on the words and text of the message.

1054 n.5. In this circuit, the FEC cannot succeed in arguing that Section 100.22(b) follows *Furgatch*. That has already been authoritatively rejected. In fact, *CAN-II* awarded attorney's fees against FEC for asserting its baseless position in defense of Section 100.22(b). 110 F.3d at 1064.

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[27] The Fourth Circuit's extended interpretation of what *Furgatch* required included this:

> Indeed, the simple holding of *Furgatch* was that, *in those instances where political communications do include an explicit directive to voters to take some course of action,* but that course of action is unclear, "context"—including the timing of the communication in relation to the events of the day—may be considered in determining whether the action urged is the election or defeat of a particular candidate for public office.

Id. at 1054 (emphasis in original). And the Fourth Circuit expressly noted that the following FEC representation in opposing certiorari for *Furgatch* was inconsistent with Section 100.22(b):

> "The court of appeals' assessment of Mr. Furgatch's advertisement under [the "express advocacy'] standard turns upon the particular facts of this case, and thus does not necessarily indicate how courts will assess other communications in other circumstances. Such a fact-dependent determination does not warrant plenary review by this Court, particularly since the Court discussed the proper application of the express advocacy standard only last Term in *FEC v. Massachusetts Citizens for Life, Inc. [*479 U.S. at 248-50] 107 S.Ct. at 623, and applied it in a manner consistent with that of the court of appeals in this case."

CAN-II, 110 F.3d at 1054 (citation omitted). *MCFL*'s magic-words test controls.

So *Citizens* highlights that all current Supreme Court Justices agree with the numerous courts holding that "express advocacy" itself requires magic words, despite the fact that "electioneering communications" may be regulated under a different standard. Accordingly, nothing has altered the controlling Fourth Circuit holdings that express advocacy requires explicit words expressly advocating the election or defeat of a clearly identified candidate.

Second, in remanding for reconsideration in light of *Citizens*, the Supreme Court clearly had in mind its forceful repudiation of FEC's approach to regulation in 11 C.F.R. 114.15, which was based on the same sort of subjective, balancing, speech-chilling, FEC-empowering, ad hoc, we-know-it-when-we-see-it approach taken by FEC in both 11 C.F.R. 100.22(b) and its PAC-status enforcement policy, *see infra*. Before the Supreme Court in this case, FEC expressly relied on its interpretation (articulated in now-abandoned 11 C.F.R. 114.15) of *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70, insisting that *WRTL-II*'s context-sensitive *application* of the appeal-to-vote test was a part of the test itself. Br. Resp'ts at 15-16, *RTAO*, 130 S. Ct. 2371 ("To the extent the standards differ, Section 100.22(b) is narrower than the *WRTL* test, as the regulation requires an 'unambiguous' electoral portion, 11 C.F.R. 100.22(b)(1), while the lead opinion in *WRTL* looks to the 'mention' of an election and similar 'indicia of express advocacy.'"). Taking note of what *Citizens* said about the FEC's approach to its appeal-to-vote test in 11 C.F.R. 114.15 should remove all doubt that the FEC may not take the same approach with regard to 11 C.F.R. 100.22(b) and its PAC-status enforcement policy.

The *Citizens* repudiation of 11 C.F.R. 114.15 is too lengthy to reproduce here, but bears review, *see* 130 S. Ct. at 895-96. *Citizens* noted that FEC reduced the Court's objective, protective test into a subjective, unprotective rule. It reduced the appeal-to-vote test to a mere *part* of FEC's "two-part, 11-factor balancing test," as *Citizens* described it. *Id.* at 895. FEC made details of the

application of the appeal-to-vote test to particular grassroots lobbying ads a part of Section 114.15. Ignoring *WRTL-II*'s reassertion of strong constitutional protection for issue advocacy, FEC imposed maximum control over it. FEC made a rule so vague and overbroad that *Citizens* declared it like a prior restraint for compelling speakers to seek advisory opinions before daring to speak. *Id.* at 895-96. And *Citizens* noted that many persons could not afford the protracted litigation necessary to dispute FEC's de facto licensing scheme (including the discovery that FEC insisted on in *Citizens* despite *WRTL*'s mandate of "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation"). *Id.* FEC became the arbiter of what persons could say. FEC did "precisely what *WRTL* sought to avoid," *Citizens* concluded. *Id.* at 896. It chilled political speech.

FEC's alternate express advocacy test at 11 C.F.R. 100.22(b) takes the same vague and overbroad approach. It requires examination of an undefined "electoral portion." It allows "limited reference to external events, such as the proximity of an election," though *WRTL-II* expressly eschewed more than the most general and basic contextual considerations and expressly said that "proximity to an election" could not determine the meaning of a communication. 551 U.S. at 472-74.[28] It relies on a "reasonable person" standard, while *WRTL-II* required an objective stan

[28] There cannot be express-advocacy criteria that were forbidden in applying *WRTL-II*'s appeal-to-vote test. *WRTL-II* said that ads meeting its test were the functional equivalents of express advocacy to which *McConnell* alluded. 551 U.S. at 469-70. *WRTL-II* also said that context and proximity to an election could not be used in determining whether an ad fell within the test, but that the test must look to the substance of the communication itself. *Id.* at 469, 472-74. *WRTL-II* repudiated the context-and-proximity approach FEC and Intervenors took in their effort to prove that WRTL's ads were the functional equivalent of express advocacy, along with the burdensome discovery imposed on WRTL in an effort to establish contextual factors. Yet Section100.22(b) embraces context and proximity to an election as criteria for express advocacy (the supposed equivalent), to be determined by burdensome investigations in enforcement actions and by burdensome discovery in litigation. "Such litigation constitutes a severe burden on political speech." *WRTL-II*, 551 U.S. at 468 n.5. If such severe burdens are unconstitutional in applying the appeal-to-vote test, then *WRTL-II*'s declaration of equivalence mandates that these bur-

dard based on the meaning of the actual words and not what some hypothetical person might think the ad in general and in context might mean. *Id.* at 469-70. It relies on the operative phrase "advocacy of the election or defeat of . . . candidates, though *Buckley* expressly held that the phrase "'advocating the election or defeat of' a candidate " is unconstitutionally vague and overbroad absent the express-advocacy construction. 424 U.S. at 42, 44. Other vague and overbroad terms in Subsection (b), such as "encourages," "actions,"[29] and "suggestive,"[30] further diminish the constitutionality of, and statutory authority for, this regulation. As a result, would-be speakers, enforcers, and courts are unable to tell what is permitted. Speech is impermissibly chilled. The alternative express advocacy test applies year-round, includes non-broadcast communications, and does not require targeting, so its vagueness is not mitigated by being confined to communications otherwise meeting the brightline electioneering communication definition. And the other saving graces of *WRTL-II*'s appeal-to-vote test and the mandated procedures for as-applied challenges are wholly absent from the way in which the Commission has been apply-

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dens are necessarily unconstitutional in applying the express advocacy test. If *WRTL-II* eschewed context-and-proximity criteria and mandated focus on the substance of the communication in applying its test, then the declared equivalence mandates that the same criteria be employed for determining express advocacy. Therefore, Section 100.22(b) cannot stand.

[29] *Buckley* specifically defined expressly advocating election or defeat as encouraging a *vote* for against someone, not as encouraging *actions* to elect or defeat. *Buckley*, 424 U.S. at 44 n.52. Substituting "actions" introduces vagueness and broadens the activity encompassed, all without precedential authority.

[30] *WRTL-II*'s appeal-to-vote test employed the term "susceptible," 551 U.S. at 469-70 ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"), which clearly indicates that the communication at issue must only be capable of one meaning in order to be restricted. This formulation favors liberty of expression. By contrast, "suggestive" takes the issue away from the clear meaning of the text to what a communication might suggest. It is too vague for use in restricting First Amendment activity, where bright lines are required to protect speakers and chill would-be censors and those who would file complaints to invoke the powers of censorship. It favors suppression of expression. "In drawing that line [between campaign advocacy and issue advocacy], the First Amendment requires us to err on the side of protecting speech rather than suppressing it." *WRTL-II*, 551 U.S. at 457.

ing its alternative express advocacy test. Just as it did to WRTL in *WRTL II*, the Commission has sought to establish express advocacy by engaging in wide-ranging discovery into intent and effect.[31] It has broadly employed often marginal contextual factors. It has insisted that if an issue is a campaign issue it is essentially foreclosed as a communication topic for non-campaign speakers, absent FECA compliance. Both *WRTL-II* and *Citizens* foreclose such speech-chilling regulation.

Application to Ads. Applying Section 100.22(b)'s reasonable-person standard to RTAO's proposed Ads readily demonstrates its flaws. In opposing the first preliminary injunction motion, FEC insisted that *Change* was neither express advocacy under 11 C.F.R. 100.22(b) nor a prohibited electioneering communication under 11 C.F.R. 114.15. So FEC insisted that RTAO would not trigger the $1,000 "expenditure" threshold for PAC status under 2 U.S.C. 431(4) and the case was nonjusticiable in part. (FEC Answer ¶¶ 22-24.) But FEC decided that *Survivors* was prohibited both as express advocacy (§ 100.22(b)) and an electioneering communication (§ 114.15). (FEC Answer ¶¶ 22, 25.) Despite FEC's position that *Change* was not express advocacy, this Court decided that "it is clear that reasonable people could not differ that [*Change*] is promoting the defeat of Senator Obama," so it would be express advocacy under Section 100.22(b). (Doc. 77 at 13; *see also id.* at 15 n.3 ("clearly both are expressly advocating the defeat of Senator Obama").) Since RTAO believes both this Court and the FEC are comprised of reasonable persons, the fact that they view an ad differently readily reveals a clear problem with the test itself. The test is badly flawed in many respects and is unconstitutionally vague and overbroad, beyond

[31] Examples of FEC's application of Section 100.22(b) with relevant analysis can be found in James Bopp, Jr. & Richard E. Coleson, Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communications) at 15-24 (Sept. 28, 2007) (available at http://www.fec.gov/pdf/nprm/electioneering_comm/2007/james_madison_center_for_free_speech_eccomment16.pdf).

statutory authority, and void.

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

RTAO challenges FEC's no-rule PAC-status enforcement policy because RTAO, as an issue-advocacy 527, reasonably fears that it will be deemed a PAC—by FEC or a court compelling FEC to bring an enforcement action on a complaint. The policy is set out in two statements: *PAC-Status 1*, 69 Fed. Reg. 68056, and *PAC-Status 2*, 72 Fed. Reg. 5595. *PAC-Status 2* cited 11 C.F.R. §§ 100.22(b) and 100.57 as central elements of its policy, 72 Fed. Reg. at 5602-05, so the flaws in those regulations (*supra*) negatively affect the policy. The major-purpose test is the third element of the enforcement policy. *See infra*.

Standard of review. Strict scrutiny applies to any provision imposing PAC status. *See Citizens*, 130 S. Ct. at 898 (strict scrutiny applied to imposed PAC burdens); *Austin*, 494 U.S. 652, 658 (1990) ("must be justified by a compelling state interest"), *overturned on other grounds*, *Citizens*, 130 S. Ct. at 913; *MCFL*, 479 U.S. at 263 (same). The Government bears the preliminary-injunction burden of justifying this enforcement policy. *Gonzales*, 546 U.S. at 429.

Unambiguously-campaign-related requirement. *Buckley* held that PAC-status could only be imposed groups "under the control of a candidate or the major purpose of which is the nomination or election of a candidate" because "[t]hey are, *by definition, campaign related*." 424 U.S. at 79 (emphasis added). *Leake* held that the unambiguously-campaign-related requirement applies to PAC-status rules and that it mandates a *narrow* major-purpose test for determining PAC status. 525 F.3d at 287-90. Consequently, the Government bears the threshold burden of demonstrating that its PAC-status policy only captures groups with *Buckley*'s major purpose under a permissible interpretation of the major-purpose test.

Permissibly determining major purpose. Under *Buckley*'s major-purpose test, 424 U.S. at

79, PAC status may be determined by either an entity's expenditures, *MCFL*, 479 U.S. at U.S. at 262 (major-purpose calculation looks at express-advocacy independent expenditures in relation to total expenditures: "should 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"); *Leake*, 525 F.3d at 287 ("an empirical judgment as to whether an organization primarily engages in regulable, election-related speech"), or by the organization's central purpose revealed in its organic documents. *MCFL*, 249 U.S. at 252 n.6 ("MCFL['s] . . . central organizational purpose is issue advocacy."). Thus, the first test for major purpose requires a comparison of the entity's total disbursements for a year with its unambiguously-campaign-related, regulable expenditures, so that only the amount of true political "contributions" and "expenditures" would be counted. The second test requires an examination of the entity's organic documents to determine if there was an express intention to operate as a political committee, *e.g.*, by being designated as a "separate segregated fund" (an internal "PAC") under 2 U.S.C. 441b(2)(c). Because *Buckley's* and *MCFL's* major-purpose test is an authoritative construction of the definition of "political committee," and a constitutional limit on the application of the political committee requirements of FECA, FEC's enforcement policy that does not comply with this construction is beyond FEC's statutory authority.

The Tenth Circuit agrees with the foregoing analysis:

> In *MCFL,* the Court suggested two methods to determine an organization's "major purpose": (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates. 479 U.S. at 252 n. 6 (noting that MCFL's "central organizational purpose [wa]s issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates"); *see id.* at 262 (noting that "should 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"). Thus, under FECA, any group

> that (1) spends more than $1,000 in a year, and (2) has as its "major purpose" the influencing of a federal election, should be considered a political committee. As a political committee, the group must adhere to certain registration, organizational, recordkeeping, reporting, and disclosure requirements. *See MCFL,* 479 U.S. at 254 ("[M]ore extensive requirements and more stringent restrictions . . . may create a disincentive for such organizations to engage in political speech.").

Colorado Right to Life Committee v. Coffman, 498 F.3d 1137, 1152 (10th Cir. 2007). *See also Herrera*, 611 F.3d at 678 (same two methods). *Leake*'s requirement that major purpose be determined based on "regulable, election-related speech," 525 F.3d at 287, would agree with the Tenth Circuit that only "expenditures for express advocacy or contributions to candidates" would be cognizable in calculating major purpose. Notably, Congress did not even include "electioneering communications" as a trigger for PAC status—only "contributions" and independent "expenditures," 2 U.S.C. 431(4), so Congress did not even assert an interest in counting electioneering communications toward statutory PAC status. This is reasonable because, as *WRTL-II* makes clear, the electioneering-communication definition sweeps in genuine issue advocacy along with campaign speech, which could be filtered out (only in the electioneering-communication context) by the appeal-to-vote test, 551 U.S. at 469-70, which in any event no longer plays any role in federal election law. *A fortiori*, if even electioneering communications may not count toward major purpose, then *non*-regulable speech and activities may clearly not be counted.

The reason for such a bright line is threefold. First, groups must be easily able to determine whether their activities put them at risk for the onerous burdens of PAC status, or else they will be chilled by vague and overbroad standards from constitutionally protected core political speech. Second, enforcement agencies and those who might complain to them need bright lines to prevent selective enforcement risks and the burden of having to defend against frivolous complaints (often by political rivals for perceived advantage by partially or fully disabling an oppo-

nent). Third, if a PAC-status enforcement policy is dependent on fact-intensive investigations based on overbroad, ambiguous criteria, the investigation itself becomes an unconstitutional burden on expressive association. Under the approved method described by *MCFL* and the Tenth Circuit, *supra*, if an opponent complains that a group really has the major purpose of nominating or electing candidates, the group can quickly clear itself by submitting a few, readily available documents showing its annual expenditures and its regulable federal contributions and expenditures from which simple arithmetic will show if the regulable, campaign-related speech comprises more than fifty percent of the group's annual expenditures. Nor can FEC argue, as it did in *MCFL*, that there will be inadequate disclosure, because *MCFL* already decided that regular disclosure of contributions and independent expenditures supplies all of the information the government needs from groups lacking *Buckley*'s major purpose. 479 U.S. at 262. It is the *nature* of the group, determined by the major-purpose test, that determines whether a group may be treated like a PAC, not the amount of its contributions and independent expenditures. And that nature is determined with a *proper* major-purpose test. But that is not FEC's approach, as set out in its chilling and unauthorized PAC-status enforcement policy.

FEC's impermissible major-purpose policy. In *PAC-Status 2*, after having initiated a rulemaking proceeding, FEC declared its refusal to adopt the sort of rule set out above (or any rule) for the major-purpose test, insisting that "the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct." *Id.* at 5601. Instead, it set out its vague and overbroad enforcement policy regulating major purpose, requiring FEC to engage in "a fact intensive inquiry," in order to weigh various vague and overbroad factors with undisclosed weight, requiring "investigations into the conduct of specific organizations that may reach well beyond publicly available statements," including all an organization's "spending on Federal

campaign activity" (but not limited to spending on regulable activity) and other spending, and public and non-public statements, including statements to potential donors. *Id.*

PAC-Status 2 also indicated that the FEC would consider other factors in its ad hoc, totality-of-the-circumstances, major-purpose test when it discussed its application of the policy to some 527 organizations in previous investigations. 72 Fed. Reg. at 5603-04. These included the fact that an entity spent much of its money "on advertisements directed to Presidential *battleground States* and direct mail *attacking* or expressly advocating," *id.* at 5605 (emphasis added), the fact that groups ceased activity after an election, *id.*, and the fact that they didn't make disbursements in state and local races. *Id.* In addition, the FEC thought that it could determine a 527 group's major purpose from internal planning documents and budgets, *id.*, which would normally be protected by First Amendment privacy and were only obtained because the organization was subjected to a burdensome, intrusive investigation. Major purpose was even based on a private thank-you letter to a donor, *after* the donation had already been made. *Id.*

PAC-Status 2, therefore, sets out an enforcement policy based on an ad hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-ranging, intrusive, and burdensome investigations (often begun when a complaint is filed by a political or ideological rival) that, in themselves, can shut down an organization, without adequate bright lines to protect issue advocacy and issue-advocacy groups in this core First Amendment area. Because FEC's policy goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity made an "expenditure," is unconstitutionally vague and overbroad, and is "in excess of the statutory . . . authority . . ." of the FEC, it is void under 5 U.S.C. 706.

"[C]onsideration in light of *Citizens*. What in *Citizens* illumines this reconsideration? *Citi-*

zens forcefully repudiated FEC's appeal-to-vote-test rule at 11 C.F.R. 114.15, *see supra*, which was based on the same sort of vague and overbroad, ad-hoc approach taken by FEC in its PAC-status enforcement policy. If Section 114.15 was "precisely what *WRTL* sought to avoid," *Citizens*, 130 S. Ct. at 896, then FEC's PAC-status enforcement policy was precisely what *Buckley* and *MCFL* sought to avoid. As the Fourth Circuit put it—in striking down similar vague and overbroad standards regulating (1) communications, under a contextual, reasonable-person standard, *Leake*, 525 F.3d at 280-82, and (2) PACs, under a provision that "provid[es] insufficient direction to speakers and leaving regulators free to operate without even the guidance of discernable, neutral criteria," *id.* at 290—the government "is essentially handing out speeding tickets without 'telling anyone . . . the speed limit,'" *id.* at 290 (citation omitted). Such an approach is "dangerous" to "political speech," *id.*, as stated next, *id.*:

> is nowhere so dangerous as when protected political speech is involved. [The challenged provision]'s "we'll know it when we see it approach" simply does not provide sufficient direction to either regulators or potentially regulated entities. Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject.

III. RTAO Meets the Other Preliminary-Injunction Elements.

RTAO clearly has irreparable harm as a result of its chilled speech. *See supra*, notes 10-11 and accompanying text. Self-censorship "[i]s a harm that can be realized even without actual prosecution." *Virginia v. American Bookseller's Ass'n*, 484 U.S. 383, 393 (1988). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.") RTAO wants to speak about the public policy views of an incumbent politician when public interest is focused on

the issue in an unusual way, so that this is the most effective time to engage in RTAO's planned issue advocacy. Losing such an opportunity is irreparable harm.

The balance of hardships also tips in RTAO's favor. *See supra*, notes 10-11 and accompanying text. RTAO's hardship is the irreparable loss of First Amendment rights to engage in core political speech in the form of highly-protected issue advocacy at the most opportune time in terms of public interest. Defendants' interest in enforcing FEC's regulations and policy is substantially reduced by the showing of the high probability of success on the merits. Clearly, if the challenged provisions are unconstitutional, Defendants have *no* cognizable interest in enforcing them. Moreover, there remain campaign-finance laws and regulations that will adequately protect the government's informational interest to the extent that they regulate only activity that meets the unambiguously-campaign-related requirement and the derivative express-advocacy and major-purpose tests. As another district court held recently in issuing a preliminary injunction limiting the reach of Ohio's "electioneering communication" law, "'if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere to its enjoinment.'" *Ohio Right to Life*, No. 2:08-cv-492, slip op. at 23 (S.D. Oh. Sep. 5, 2008) (op. and order granting prelim. inj.) (citation omitted). *See also CFIF*, No. 1:08-190, slip. op. at 13 (S.D. W. Va. April 22, 2008) (Dkt. 37; mem. op. granting prelim. inj.) ("carefully tailored injunction will not unduly restrict the defendants' power to regulate the election process in legitimate ways"). "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario . . . . Rather, such a finding will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *CFIF*, 613 F. Supp. 2d at 807. Moreover, "It is difficult to fathom any harm to Defendants . . . as it is simply their responsibility to enforce the law, whatever it says." *Id.*

The public interest analysis also follows the high likelihood of success that has been shown and favors RTAO. *See supra*, notes 10-11 and accompanying text. The public has an interest in its representative government entities promulgating and enforcing constitutional regulations and policies. It has an interest in promoting core political speech. It has a First Amendment interest in receiving RTAO's speech. An injunction serves these interests. "[I]ssuance of a preliminary injunction will serve the public interest because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Ohio Right to Life*, No. 2:08-cv-492, op. at 23 (citation omitted). "Moreover, even if the candidate Defendants do suffer some legally cognizable harm, it pales in comparison to violating the First Amendment rights of other citizens." *CFIF*, 613 F. Supp. 2d at 807. Even where election "disruption is a concern, it is overshadowed by the necessary vindication of First Amendment rights." *Id.* at 808.

IV. RTAO Is Entitled to Summary Judgment.

RTAO is entitled to summary judgment after this Court has "[re]consider[ed the denial of the preliminary injunction] in light of *Citizens*." 130 S. Ct. 2371. There are no genuine issues as to material fact and RTAO is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). RTAO has demonstrated not only that it is "likely" to succeed on the merits of its two claims but that 11 C.F.R. 100.22(b) and FEC's PAC-status enforcement policy are unconstitutionally vague and overbroad, beyond statutory and constitutional authority, and void under the APA.

Conclusion

For the foregoing reasons a preliminary injunction should issue and no security should be required, or it should be nominal, since the Government has no monetary stake. And after a preliminary injunction is issued, summary judgment should be granted to RTAO.

Respectfully submitted,

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