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.** _____

Preliminary Injunction Brief

The Real Truth About Obama, Inc. ("RTAO") wants to do constitutionally-protected "issue advocacy," also known as "political speech." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2659 (2007) ("*WRTL II*").[1] "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 2667.

RTAO will not make any "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" under *Buckley v. Valeo*, 424 U.S. 1, 44 (1976), nor will any of its activities be coordinated with any candidate. RTAO, therefore, is an issue-advocacy "527" organization,[2] not an organization properly subject to the

[1]The cited opinion is by Chief Justice Roberts, joined by Justice Alito. As the controlling *WRTL II* opinion, the principal opinion states the holding of the Court and will herein simply be referred to as *WRTL II*. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (citation omitted)).

[2]A "527" organization is one that is nonprofit as a "political organization" under 26 U.S.C. § 527. An issue-advocacy 527, like RTAO, is not a "political committee" ("PAC") under the Federal Election Campaign Act ("FECA"). *See* 2 U.S.C. § 434(4) (PAC definition). Being a 527 does not make an organization a PAC. For an organization to become a PAC, it must (1) meet the statutory trigger of $1,000 of "contributions" received or "expenditures" made and (2) be "under the control of a candidate or [have the major purpose of . . . nominati[ng] or electi[ng]

"political committee" ("PAC") requirements in the Federal Election Campaign Act ("FECA"), as amended by the Bipartisan Campaign Reform Act ("BCRA"). Furthermore, its communications are not properly subject to the corporate prohibitions imposed on "independent expenditures" and "electioneering communications" under FECA.

A preliminary injunction is required to protect the First and Fifth amendment rights of RTAO to engage in its issue advocacy, which is constitutionally-protected core political speech, without being burdened by the vague and overbroad regulations and the challenged enforcement policy. As shall be shown, controlling precedents in this Court, the Fourth Circuit, and the United States Supreme Court mandate injunctive relief for RTAO.

Facts

The facts are set out in detail in the *Verified Complaint*, *id.* at ¶¶ 1-2, 5-26, so an abbreviated version is offered here. RTAO is an issue-advocacy 527 corporation. It is not a PAC because its Articles of Incorporation prohibit it from making FECA "contributions" or "independent expenditures" that would trigger statutory PAC status. It also not a PAC because its Articles establish that its major purpose is issue advocacy, not the regulable campaign activities that could make its major purpose the nomination or election of candidates under the major-purpose test of *Buckley*, 424 U.S. at 79. Yet RTAO has a reasonable belief that it will be deemed a PAC by the FEC and DOJ because of (**a**) the FEC's recent use of two of the challenged provisions (11 C.F.R. §§ 100.22(b) and 100.57) and the FEC's enforcement policy concerning PAC status, *see* FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC Status 2*") (emphasizing

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. . . candidate[s]." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). The FEC has expressly recognized that "section 527 tax status does not determine whether an organization is a political committee under FECA." FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5997 (supplemental explanation and justification) ("*PAC Status 2*").

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*.

RTAO wants to put its *Change* ad, *see Verified Complaint* at ¶ 16, on its website and to broadcast it as a radio advertisement in such a manner that the broadcasts will qualify as "electioneering communications" under 2 U.S.C. § 434(f)(3). 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* Exhibit A (Projects Proposal with postcard scripts). In order to raise funds, RTAO intends to use a communication that is set out in the *Verified Complaint* at ¶ 19. RTAO intends to raise more than $1,000 with this fundraising communication and to disburse more than $1,000 both to broadcast *Change* and to place it before the public on RTAO's website.

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 the 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 *Change* an "independent expenditure;" (**b**) a vague and overbroad rule deeming donations to be "contribu-

tions," if made pursuant to a solicitation for activity to "support or oppose" a candidate, 11 C.F.R. § 100.57; and (**c**) a vague and overbroad enforcement policy for imposing PAC status, including the determination of a group's major purpose. *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC Status 1*"); *PAC Status 2*, 72 Fed. Reg. 5595.

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. RTAO's chill is heightened by the DOJ's recent declaration that investigations and criminal prosecutions of "knowing and willful" violations of these FECA provisions by 527 corporations is 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.

Consequently, RTAO reasonably fears, if it proceeds with its intended activities: (**a**) that *Change* (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 for making a forbidden corporate independent expenditure, failing to place a disclaimer on it, and failing to file an independent expenditure report; (**b**) that, if RTAO is deemed to be a PAC, under the FEC's enforcement policy on "political committees" and because either the publication of

Change will be considered an "expenditure" (as a result of § 100.22(b)) or receipts from the fundraising communication will be considered "contributions" (as a result of § 100.57), RTAO will be in violation of FECA for failure to abide by numerous PAC requirements, including placing disclaimers on *Change* 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 failure 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.

RTAO also reasonably fears, if it proceeds to broadcast *Change*, that it will have broadcast a prohibited electioneering communication because the FEC's rule at 11 C.F.R. § 114.15, creating an exception to the corporate prohibition on electioneering communications, 2 U.S.C. § 441b, is vague and overbroad and RTAO cannot be sure that *Change* is a protected communication under the FEC's rule, although it believes that it is protected under *WRTL II*'s appeal-to-vote test. 127 S. Ct. at 2667 (an ad may be prohibited as an electioneering communication only if it both meets the statutory definition and "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). In fact, it is impossible to tell whether the FEC might deem *Change* to be a prohibited electioneering communication, under 11 C.F.R. § 114.15, or a prohibited express-advocacy independent expenditure, under 11 C.F.R. § 100.22(b), when *Change* is run during blackout periods, because the regulatory tests are similar and similarly vague. So RTAO will not proceed with its plan to broadcast *Change* during electioneering communication blackout periods unless it receives the judicial relief requested herein.

RTAO's chill is irreparable harm because it is the loss of First Amendment rights. There is no adequate remedy at law.

Argument

RTAO readily meets all of the preliminary injunction criteria. The Fourth Circuit follows the usual requirement of four factors—likelihood of success on the merits, irreparable harm, a balancing of harms, and the public interest—as follows:

> [I]n this circuit the trial court standard for interlocutory injunctive relief is the balance-of-hardship test. Whenever a district court has before it a Rule 65(a) motion, although it may properly consider the four general factors enumerated in Airport . . . , it should give them the relative emphasis required by the Sinclair rule: The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

Blackwelder Furniture Company of Statesville v. Seilig Manufacturing Company, 550 F.2d 189, 196 (4th Cir. 1999) ("*Blackwelder*").[3]

The current motion should be considered in light of *WRTL II,* in which WRTL was denied a preliminary injunction allowing it to run its 2004 anti-filibuster grassroots lobbying ads. *See WRTL II*, 127 S. Ct. at 2661. Yet the four-Justice *WRTL II* dissent argued that a preliminary injunction was the proper remedy in these situations:

> Although WRTL contends that the as-applied remedy has proven to be "[i]nadequate" because such challenges cannot be litigated quickly enough to avoid being mooted, Brief for Appellee 65-66, nothing prevents an advertiser from obtaining a preliminary injunction if it can qualify for one, and WRTL does not point to any evidence that district courts have been unable to rule on any such matters in a timely way.

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[3]*Blackwelder* recited the factors in *Airport Comm. of Forsyth Co., N.C. v. CAB*, 296 F.2d 95, 96 (4th Cir. 1961) as follows: "1) Has the petitioner made a strong showing that it is likely to prevail upon the merits? 2) Has the petitioner shown that without such relief it will suffer irreparable injury? 3) Would the issuance of the injunction substantially harm other interested parties? 4) Wherein lies the public interest?" *Blackwelder*, 550 F.2d at 193.

127 S. Ct. at 2704 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.). The necessary implications of this argument is that there should have been a *real* possibility of obtaining a preliminary injunction in the situation that WRTL faced then and that there should be such a possibility in the situation that RTAO now faces. That means that all four preliminary-injunction elements must be *capable* of being met in this situation. So the FEC and DOJ must not be permitted to trump a preliminary injunction by merely asserting that they are always injured if they are unable to enforce a statute, no matter how questionable its constitutionality.

In light of *WRTL II*, it is clear that WRTL's ads *were* fully constitutionally protected issue advocacy and WRTL *should* have been allowed to run them in 2004 when it sought judicial relief to do so. It is now clear that WRTL was irreparably harmed, the FEC (and others) would not have been harmed, and the public interest would have been served if WRTL's ads had been run. While determining the likelihood of success on the merits is necessarily predictive—so that actual success does not necessarily establish that there was an ascertainable likelihood of success at the time the preliminary injunction motion was decided—WRTL succeeded on arguments grounded in the same constitutional analysis applied in the present case. So the likelihood of success is now easy to ascertain in the present case. RTAO's irreparable harm is also clear in light of *WRTL II*. *See infra* Part II. In view of the high likelihood of success on the merits and the clear and serious irreparable harm, RTAO should only need to make a more modest showing as to concerns about harm to the FEC or others and about promoting the public interest. However, in light of the high likelihood of success on the merits, harm to the FEC, DOJ, or others is highly unlikely, and a benefit to the public is very likely if a preliminary injunction is granted. And *WRTL II* made clear that any doubts about protecting issue advocacy should be resolved in favor of speech, not censorship. 127 S. Ct. at 2659, 2667, 2669 n.7, 2674.

I. RTAO Has Likely Success on the Merits.

RTAO has a high likelihood of success on the merits in light of controlling precedents in this Court, the Fourth Circuit, and the U.S. Supreme Court. In particular, the Fourth Circuit's recent decision in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), readily establishes RTAO's likely success on the merits.

A. The Unambiguously-Campaign-Related Requirement Analysis Controls.

In *Leake*, the Fourth Circuit recognized that the unambiguously-campaign-related requirement, as set out below, controls this case. *Id.* at 282-83, 287-88. RTAO does not want to engage in what *WRTL II* called "campaign speech, or 'express advocacy,' but [rather] speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office." *Id.* at 2659. *WRTL II* also called issue advocacy "political speech," *id.* at 2659, and held that in drawing lines in the First Amendment area courts must "err on the side of protecting political speech rather than suppressing it." *Id.* "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 2667. *WRTL II* reaffirmed strong constitutional protection for issue advocacy and the speech-protective analysis that it had articulated in *Buckley*, 424 U.S. 1. This *Buckley-WRTL II* analysis controls here.

The applicable *Buckley* analytic key is its unambiguously-campaign-related requirement, 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 when independent expenditures for communications may be subjected to non-PAC disclosure

requirements, *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 also employed an unambiguously-campaign-related analysis to construe "contributions" as limited to "funds provided to a candidate or political party or campaign committee," 424 U.S. at 23 n.24 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign."), which analysis also controls here. And *WRTL II* also 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 analysis also controls here.

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*." *Id.* (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).[4]

The reason for the unambiguously-campaign-related requirement and its derivative express-advocacy, appeal-to-vote, contribution and major-purpose tests is twofold. First, since the only

[4]This requirement reaffirms and clarifies an earlier formulation of the unambiguously-campaign-related requirement where the Court established the standard of review as requiring both "exacting scrutiny" (i.e., strict scrutiny) and "*also* . . . that there be a 'relevant correlation' [footnote omitted] or 'substantial relation' [footnote omitted] between the governmental interest and the information required to be disclosed." *Id.* at 64 (emphasis added). This "relevant correlation" or "substantial relation" was applied by the Court to require that regulated activity must be "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.

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. *See also id.* at 66 (interest in providing disclosure information to the public is only as to "political *campaign* money'" (emphasis added; citation omitted). Second, the people's core political speech, in their sovereign, self-government role, must not be burdened. The Court 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":

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

Id. at 42 (emphasis added). 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:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between *discussion, laudation, general advocacy*, and *solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (emphasis added).

The Supreme Court later reiterated the express-advocacy and major-purpose tests in imposing the express-advocacy construction on the prohibition on corporate and union "independent

expenditures"[5] at 2 U.S.C. § 441b in *MCFL*. 479 U.S. at 249. *MCFL* reiterated that PAC status may not be imposed unless an organization's major purpose is nominating or electing candidates, *id.* at 253, 262, calculated on the basis of its "independent spending." *Id.* at 262.

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.").

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

> 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. *Leake* also held that the unambiguously-campaign-related requirement mandates a narrow major-purpose test for determining PAC status. *Id.* at 287-90. Applying this controlling *Buckley-WRTL II* analysis readily reveals that the challenged regulations and enforcement policy at issue here are unconstitutional, beyond the statutory authority of the FEC, and, thereby,

[5]"Independent expenditures" are now for communications "expressly advocating the election or defeat of a clearly identified candidate." U.S.C. § 431(17).

void under the Administrative Procedure Act, 5 U.S.C. § 706, and that RTAO has likely success on the merits.

B. 11 C.F.R. § 100.22(b) ("Expressly Advocating" Definition) Is Void.

The definition of "expressly advocating" at 11 C.F.R. § 100.22(b) is important in this context because it is part of the definition of "independent expenditure" at 2 U.S.C. § 434(17). Corporations (RTAO is incorporated) are prohibited from making independent expenditures (with certain inapplicable exceptions), and making such expenditures can trigger PAC status under 2 U.S.C. § 434(4) (PAC definition). Also, independent expenditures must include prescribed disclaimer language, 11 C.F.R. § 110.10, and reports must be timely filed when independent expenditures are made. 11 C.F.R. §§ 104.4, 109.10. Serious penalties follow noncompliance. 2 U.S.C. §§ 437g(a)(4), 437g(a)(6), 437g(d).

The FEC has created a primary and secondary definition of "expressly advocating" at 11 C.F.R. § 100.22. The primary definition, at paragraph (a), generally follows the Supreme Court's requirement in *Buckley*, 424 U.S. 44 n.52, that government may only regulate "independent expenditures" in this context if they are for communications that contain "express words of advocacy of election or defeat, such as 'vote for.'" *See also id.* at 80 ("expenditures" subject to disclosure require same express-advocacy construction); *MCFL*, 479 U.S. at 249 (express advocacy requirement extended to 2 U.S.C. § 441b, the corporate prohibition on independent expenditures at issue here). The secondary definition, at § 100.22(b), strays from the unambiguously-campaign-related requirement and its mandated "magic words" in an effort to expand the reach of "express advocacy." The FEC's secondary definition of "expressly advocating" follows:

> **Sec. 100.22 Expressly advocating (2 U.S.C. 431(17)).**
> Expressly advocating means any communication that . . . (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be

interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(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.

This regulation violates the unambiguously-campaign-related requirement and is unconstitutionally vague and overbroad in violation of the First and Fifth Amendments to the U.S. Constitution. It has been held unconstitutional by this Court as incompatible with the Supreme Court's express-advocacy test. *See Virginia Society for Human Life v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000), which was affirmed in relevant part by *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001).

Both *McConnell v. FEC*, 540 U.S. 93, 193 (2003), and *WRTL II*, 127 S. Ct. at 2669 n.7, have affirmed that "express advocacy" requires the so-called "magic words," such as "vote for."[6] Yet the FEC recently insisted (in enforcement actions against 527s) that it "was able to apply the alternative test set forth in 11 CFR 100.22(b) free of constitutional doubt based on *McConnell*'s statement that a 'magic words' test was not constitutionally required . . . ." FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5604 (Feb. 7, 2007) ("*Political Status 2*"). That was wrong in light of *McConnell*'s recognition that express-advocacy independent expenditures required "magic words," *supra*, and any doubt on that subject was laid to rest by *WRTL II*. *Supra.*

[6]In *WRTL II* the other seven justices joined Chief Justice Roberts and Justice Alito in unanimously agreeing that express advocacy requires "magic words." *See id.* at 2681 (Scalia, J., joined by Kennedy & Thomas, JJ.) (concurring in part and concurring in judgment) ("to avoid . . . 'constitutional deficiencies,' [*Buckley*] was compelled to narrow the statutory language . . . to cover only . . . magic words"); 2692 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) (*Buckley*'s "prohibition applied 'only to . . . communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office,'" i.e., "'magic words'").

The Fourth Circuit affirms that express advocacy requires magic words, *Leake*, 525 F.3d at 281-82, and that, in this context, under the unambiguously-campaign-related requirement government may only regulate (a) express advocacy properly defined as limited to magic words and (b) electioneering communications, as limited by *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667:

> Pursuant to their power to regulate elections, legislatures may establish . . . laws . . . 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."

Leake, 525 F.3d at 282-83 (emphasis added).

As a result, the regulation at § 100.22(b) goes beyond any permissible construction of express advocacy, is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority . . ." of the FEC. It is, therefore, void under 5 U.S.C. § 706.

C. 11 C.F.R. § 100.57 (Converting Donations to "Contributions") Is Void.

The FEC has created a regulation that converts donations into FECA "contributions" based on vague and overbroad criteria. Classification of a donation as a "contribution" is significant because, inter alia, contributions received can trigger PAC status under 2 U.S.C. § 434(4) (PAC definition) and contributions require disclosure. *See*, *e.g.*, 11 C.F.R. §§ 104.3, 104.8. Serious penalties follow noncompliance. 11 C.F.R. § 100.57(a) is as follows:

> **Sec. 100.57 Funds received in response to solicitations.**
> (a) Treatment as contributions. A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.

As noted above, *Buckley* already employed an unambiguously-campaign-related analysis to construe "contribution" to avoid the vagueness and overbreadth problems it had identified in the

dissolving-distinction problem. *See supra.* It restricted the scope of "contribution" to "funds provided to a candidate or political party or campaign committee." 424 U.S. at 23 n.24. But 11 C.F.R. § 100.57(a) reaches beyond that approved scope of the statute in an attempt to create contributions where they would not otherwise exist.

In *PAC Status 1*, 69 Fed. Reg. at 68057, the FEC attempted to justify its regulation under the authority of *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) ("*SEF*"). In *SEF*, the Court found that a 1984 letter solicited "contributions," because it said "your special election-year contribution today will help us communicate your views to hundreds of thousands of members of the *voting public*, letting them know why Ronald Reagan and his anti-people policies *must* be stopped." *Id.* at 289 an 295 (first emphasis added by court; second in original). The FEC claimed this as authority for its rule deeming donations to be FECA "contributions," if a solicitation indicates that any part will be used to support/oppose candidates. 69 Fed. Reg. at 68057.

But *SEF* does not justify § 100.57(a). For a "contribution" to exist here, (a) the solicitation must meet the unambiguously-campaign-related requirement by soliciting funds to make "contributions" or to expressly advocate the election or defeat of a candidate, in order to avoid unconstitutional vagueness and overbreadth, and (b) there must be corresponding regulable political expenditures by the entity. Section 100.57(a) fails both requirements, most obviously by requiring that the solicitation need only be for activity that "support[s] or oppose[s]" a candidate. The solicitation in *SEF*, however, contained words of express advocacy and solicited funds to publicly communicate that express advocacy, as set forth above and, thus, does not support the FEC's "support or oppose" test. As a result, the regulation is unconstitutionally vague and overbroad. *See Leake*, 525 F.3d at 280, 285 (holding statute regulating speech "to support or oppose the nomination or election of one or more clearly identified candidates" to be "unconstitutionally

overbroad and vague"). *See also North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (striking down a law containing a support/oppose test and other flaws as unconstitutionally vague and overbroad), *cert. denied*, 528 U.S. 1153 (2000); *Cole v. Richardson*, 405 U.S. 676, 678-85 (1972) (Court treated required oaths to support one's country and "oppose" its enemies as harmless "amenities" merely requiring compliance with other laws, but explained that "oppose" would be vague in other contexts); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 279 (1971) (held "support" unconstitutionally vague). Only the requirement that the solicitation seek funds to make "contributions" or engaging in express advocacy would cure this vagueness. *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-65 (5th Cir. 2006) ("*CFIF*") (imposing express-advocacy construction to save law requiring reporting and disclosure of payments "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person" from overbreadth and vagueness); *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("*McConnell*[, 540 U.S. 93,] '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.' *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004)."); *Anderson v. Spear*, 356 F.3d 651, 663 (6th Cir. 2004) (imposing express-advocacy construction on "electioneering" definition that targeted "solicitation of votes for or against any candidate or question on the ballot in any manner" to save it from overbreadth and vagueness).

In addition, *Buckley* construed the definition of "contribution," 2 U.S.C. § 431(8) ("anything of value made by any person for the purpose of influencing any election for Federal office")—in a manner consistent with the unambiguously-campaign-related requirement—to encompass only

"funds provided to a candidate or political party or campaign committee." 424 U.S. at 23 n.24. The FEC regulation construes "contribution," however, to include donations that are not "funds provided to a candidate or political party or campaign committee." *Id.* Because *Buckley* has authoritatively construed the definition of "contribution" and established a constitutional limit on its application, the FEC regulation at 11 C.F.R. § 100.57 is beyond the FEC's statutory authority.

Because the regulation at § 100.57 goes beyond any permissible construction of contribution, it is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority . . ." of the FEC, it is void under 5 U.S.C. § 706.

D. The FEC's Enforcement Policy on PAC Status, Including Its Major-Purpose Test Policy, Is Void.

The FEC's enforcement policy regarding PAC status is set out in two FEC policy 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 components of its enforcement policy, 72 Fed. Reg. at 5602-05, and, as a result, any flaws in those regulations are also fatal to the FEC's PAC status enforcement policy.

The major-purpose test is the third element of the FEC's PAC status enforcement policy. In *PAC Status 2*, the FEC explained that, after having initiated a rulemaking proceeding, it declined to adopt a rule for the major-purpose test, declaring 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 the 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 identified the "major purpose" at issue in its major-purpose test as being "*Federal campaign activity*," *id.* at 5605 (emphasis added), not the narrower "*nomination or election of a candidate*," which *Buckley* required as "the major purpose." 424 U.S. at 79 (emphasis added). While *MCFL* used "campaign *advocacy*," 479 U.S. at 252 (plurality opinion) (emphasis added), to "further the *election* of candidates," *id.* at 253 (plurality opinion) (emphasis added), and "campaign activity," *id.* at 262 (majority opinion), when speaking of the purpose at issue in the major-purpose test, it did so solely as synonyms for *Buckley*'s "nomination or election" requirement, which it cited and quoted. *MCFL*, 479 U.S. at 252 n.6 (citing *Buckley*, 424 U.S. at 79). There is no authority for the FEC's reformulation of the major-purpose test to focus on "Federal campaign *activity*."

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 concerns 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 in this core First Amendment area.

Under the major-purpose test set out in *Buckley*, 424 U.S. at 79, however, 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 ("[O]n this record . . . 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 and 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, the FEC's enforcement policy that does not comply with this construction is beyond the FEC's statutory authority.

Because the FEC's enforcement policy for determination of PAC status goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity received a "contribution" or 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.

E. 11 C.F.R. § 114.15 (*WRTL II*'s Appeal-to-Vote Test) Is Void.

The FEC has created a multi-factor test at 11 C.F.R. § 114.15 (*see Verified Complaint* at ¶ 55), purporting to implement *WRTL II*'s appeal-to-vote test for whether a corporate "electioneering communication"[7] may be prohibited. *WRTL II*'s test is as follows: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. *WRTL II* also provided instructions on how litigation must be conducted in this area expeditiously and without burden to challengers:

> To safeguard this liberty, the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. 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." In short, it must give the benefit of any doubt to protecting rather than stifling speech.

Id. at 2666-67 (citations omitted).

After stating its appeal-to-vote test, *WRTL II* then proceeded to *apply* the test to a specific grassroots lobbying context and addressing arguments made by the parties in briefing, e.g., regarding "indicia of express advocacy." But none of this *application* was part of the *test*. That the

[7]An "electioneering communication" is essentially a "targeted" ad identifying a candidate that is broadcast within 30 and 60 days before primaries (and conventions) and general elections. 2 U.S.C. § 434(f)(3).

appeal-to-vote standard set out above is the sole test is confirmed by *WRTL II*'s restatement of the test as follows: "Because WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy . . . ." *Id.* at 2670. Notably, none of the language of the *application* of the test shows up in this restatement of the test, just as it was not present in the original statement of the appeal-to-vote test.

But *WRTL II* did make a part of the test the requirement that the nature of an ad be determined from its actual text, not from any surrounding context or from any effort to discern the intent behind the ad or the effect of the ad upon an election. *Id.* at 2665, 2669. Of course, whenever a regulation "burdens political speech, it is subject to strict scrutiny." *Id.* at 2664. And defendants may not be heard to argue that RTAO should just run its ads at different times, or not name a candidate, or use a different medium to avoid the "electioneering communication" definition, or use a PAC. *Id.* at 2671 n.9.

Finally, it is vital to take a step back and see the big picture of what *WRTL II* said, namely, that "issue advocacy," also called "political speech," *id.* at 2659, is constitutionally protected: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *Id.* at 2669. "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 2667. RTAO is an issue-advocacy 527 that makes neither "contributions" nor "independent expenditures" and its ads convey information and educate on public policy issues without making any appeal to vote—just as WRTL's ads did. Such issue advocacy is constitutionally protected from prohibition. Any rule that does not protect such issue advocacy is unconstitutional.

Turning to § 114.15(a), it might at first appear that the FEC is setting out *WRTL II*'s appeal-to-vote test as the primary test in the regulation. But more careful examination reveals that *WRTL II*'s test is never permitted to stand alone, as the Fourth Circuit allowed the test to do in *Leake*. 525 F.3d at 282. Rather, two other FEC tests replace the actual *WRTL II* appeal-to-vote test. First, the FEC offers the "safe harbor" test in paragraph (b), which is not at issue here because *Change* identifies Senator Obama as a Democrat and the ad neither has a grassroots lobbying "focus[]" nor "proposes a commercial transaction." Second, the FEC offers its "rules of interpretation" in paragraph (c), which says that this subsection controls if an ad does not fit the safe harbor. As shall be seen, the rules-of-interpretation test is a balancing test that demotes *WRTL II*'s appeal-to-vote test to just one of two elements to be weighed on equal terms. So the FEC's test purporting to implement *WRTL II*'s appeal-to-vote test is not that test at all, but rather a choice between (1) the FEC's safe-harbor test or (2) the FEC's rules-of-interpretation test. Since *Change* is not protected from prohibition by the safe-harbor test, it is forced into evaluation under the rules-of-interpretation test.

The rules-of-interpretation test, in paragraph (c), is a "balanc[ing]" test that is itself made up of two tests: (1) an indicia-of-express-advocacy test and (2) a restatement of *WRTL II*'s appeal-to-vote test, now demoted to being but one of two equipoised tests on a scale:

> the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

11 C.F.R. § 114.15(c). Note that this rules-of-interpretation test restates *WRTL II*'s appeal-to-vote twice, once as factor to be considered equally with, and after, determining whether there are any "indicia of advocacy" and again as the end-product of what is to be determined (with the whole

test purporting to interpret § 114.15(a), which is yet another statement of *WRTL II*'s appeal-to-vote test). When a constitutional test is employed as part of a statutory test to determine whether the constitutional test is met, the statutory test is inherently vague. When a constitutional test is demoted to being but one of two factors to determine whether a statutory test is met, the statutory test is overbroad.

The FEC then lists factors to put into the balanced pans on the scale. For the indicia-of-express-advocacy test, the FEC lists the following factors that will (or may—the rule provides no guidance as to what weight each factor is given in relation to others) cause a communication to be considered express advocacy:

> (1) A communication includes *indicia of express advocacy* if it:
> (i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or
> (ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

11 C.F.R. § 114.15(c) (emphasis added). It may be recalled that the U.S. Supreme Court actually requires the magic words, such as "vote for," before there can be express advocacy, *see infra*, and *WRTL II* requires that there be an unambiguous "appeal to vote" for the "functional equivalent of express advocacy." 127 S. Ct. at 2667. But nothing in this indicia-of-express-advocacy test contains any clear call to action that can only be interpreted as the unambiguous "appeal to vote" of *WRTL II*. Rather than focusing on the "appeal to vote," which is central to *WRTL II*'s test, the factors here are all peripheral and could be present in a wide range of constitutionally-protected issue advocacy. For example, why would merely mentioning an incumbent politician's party identification—as RTAO's *Change* ad does—indicate that the ad is (or might be) express advocacy? And the FEC does not define what it means to take positions on character, qualifications, and fitness for office, which

is an exceedingly vague standard that chills the very robust issue-advocacy "political speech" that *WRTL II* expressly protected.

For the appeal-to-vote test side of the scale, the FEC lists the following factors indicating that the ad might have some other interpretation than as an appeal to vote:

> (2) *Content that would support a determination* that a communication has an interpretation *other than as an appeal to vote* for or against a clearly identified Federal candidate includes content that:
>
> (i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or
>
> (ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or
>
> (iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

11 C.F.R. § 114.15(c) (emphasis added). Clearly, the FEC has erroneously imported the *application* of *WRTL II*'s appeal-to-vote test in the grassroots lobbying setting of that case, 127 S. Ct. at 2667, into the test itself. While the FEC has studiously avoided the central requirement of *WRTL II*'s test—that there be some clear *call to action* that can only be interpreted as an unambiguous "appeal to vote," albeit without the magic words[8]—it is willing to take note of "a call to action or other appeal" that "urges an action" so long as such a call, appeal, or urging is not imported into

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[8]An example of how there could be a clear call to action that could be interpreted as an appeal to vote without the magic words, is in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). While *Furgatch* created an express-advocacy test (on which 11 C.F.R. § 100.22(b) is based) that is moribund after the recognition by all of the Supreme Court Justices in *WRTL II* that express advocacy requires the magic words, *see supra*, it is useful for its formulation of the sort of appeal-to-vote requirement that *WRTL II* mandates:

> speech may only be termed 'advocacy' if it presents a *clear plea for action*, and thus speech that is merely informative is not covered by the Act. Finally, it *must be clear what action is advocated*. Speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it *encourages a vote* for or against a candidate . . . .

Furgatch, 807 F.2d at 864 (emphasis added). *Furgatch* found such a "clear plea for action" in "Don't let him do it!" *Id.* at 864-65. *Change* lacks a call to action. It "is merely informative." *Id.* at 864.

the appeal-to-vote test itself, where it belongs. *WRTL II* clearly indicated that if an ad *lacked* "appeal to vote" language it was not the regulable "functional equivalent of express advocacy." *WRTL II* did not say that it must have some *other* appeal. Rather, *WRTL II* said that "[i]ssue advocacy conveys information and educates." *Id.* Issue advocacy need do no more in order to be constitutionally protected.

The FEC's rule does recite that all doubts about whether the test it sets out in § 114.15(a) must be resolved in favor of free speech (a *WRTL II* requirement): "(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication." § 114.15(c)(3). But when it is recalled that paragraph (a) is only interpreted through the filter of the FEC's rules-of-interpretation test (unless the safe-harbor test is met), it is then easy to see that the FEC is not saying what *WRTL II* said. *WRTL II* was applying the all-ties-go-to-free-speech rule to the appeal-to-vote test itself. 127 S. Ct. at 2667. The FEC is applying it in a balancing test where the FEC has already made its indicia-of-express-advocacy test equal to the appeal-to-vote test and has skewed what might be called its indicia-of-issue-advocacy test with faulty requirements, *see supra*, so the "doubt" in the FEC's test is far away from the locus of the test in *WRTL II*, i.e., the question of whether there is some clear plea for action that can only be interpreted as a call to vote.

By contrast, the Fourth Circuit restated *WRTL II*'s test simply as *WRTL II* stated it, *Leake*, 525 F.3d at 282, without employing any of the "indicia of express advocacy" and other factors that the FEC imported into its rule from *WRTL II*'s *application* of the actual test in the context of grassroots lobbying, *WRTL II*, 127 S. Ct. at 2667, which factors are inapplicable in other contexts. As the Fourth Circuit put it:

> The Supreme Court has identified two categories of communication as being unambiguously campaign related. . . . 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. *Leake* declared that "for any test to meet the 'functional equivalent' standard, it must 'eschew "the open-ended rough-and-tumble of factors,"' which invite burdensome discovery and lengthy litigation." *Id.* at 282 (citation omitted). It reiterated this point: "*WRTL* specifically counseled against the use of factor-based standards to define the boundaries of regulable speech, since such standards typically lead to disputes over their meaning and therefore litigation." *Id.* at 283 (citation omitted). So the regulation's use of convoluted and inaccurate factors is inconsistent with how *Leake* mandates that *WRTL II* be read. And the unambiguously-campaign-related requirement, which *Leake* recognized as a constitutional mandate in this area, 525 F.3d at 282, renders § 114.15 unconstitutional because it employs vague and overbroad factors to interpret the *WRTL II* test, including, as set out above, restating the *WRTL II* test itself (twice) as but part of the factors to consider in determining whether a communication meets the *WRTL II* test.

WRTL II limited the scope of the statutory "electioneering communications" prohibited by 2 U.S.C. § 441b, but 11 C.F.R. § 114.15 rejects this limitation. Because *WRTL II's* appeal-to-vote test is an authoritative construction to the extent of the corporate prohibition on "electioneering communications," and a constitutional limit on the application of the electioneering communication prohibition, the rule is beyond the FEC's statutory authority.

Because the regulation at 11 C.F.R. § 114.15 goes beyond any permissible construction of *WRTL II*'s appeal-to-vote test, is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority . . ." of the FEC, it is void under 5 U.S.C. § 706.

II. RTAO Has Irreparable Harm.

Since RTAO has established a high likelihood of success on the merits, its showing as to irreparable harm should be decreased. *See Blackwelder*, 550 F.2d at 196 ("The decision to grant or deny a preliminary injunction depends upon a "flexible interplay" among all the factors considered.") But RTAO clearly has irreparable harm as a result of its chilled speech. Self-censorship "[i]s a harm that can be realized even without actual prosecution." *American Bookseller's Ass'n*, 484 U.S. at 393. "Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[w]here 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 now, while public interest is focused on him in unusual way, so that this is the most effective time to engage in RTAO's planned issue advocacy. These opportunities are being lost day by day, and there is no remedy at law.

III. The Balance of Harms Favors RTAO.

RTAO has demonstrated both probable success on the merits and a clear irreparable injury, so a preliminary injunction should issue. But the balance of hardships also tips in RTAO's favor. 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 the 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 numerous campaign-finance laws and regulations that will remain in effect that will adequately protect the governmental interests that the Supreme Court has identified in this area to the extent that they regulate only activity that meets the unambiguously-campaign-related requirement and the derivative express-advocacy test, "contribution" construction, major-purpose test, and appeal-to-vote test.

IV. The Public Interest Favors RTAO.

The public interest analysis also follows the high likelihood of success that has been shown and favors RTAO. 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. And it has an interest, in the First Amendment context, in receiving RTAO's speech. An injunction serves these interests.

Conclusion

For the foregoing reasons a preliminary injunction should issue and no security should be required, or it should be nominal, since Defendants have no monetary stake.

Respectfully submitted,

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Certificate of Service

I certify that on July ___, 2008, the foregoing document was served by certified mail on the persons identified below. In addition, a courtesy copy was sent by email to the FEC at tduncan@fec.gov, dkolker@fec.gov, and kdeeley@fec.gov, and a courtesy copy was sent by FedEx overnight service to General Mukasey.

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