No. 08-1977

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE REAL TRUTH ABOUT OBAMA, Plaintiff-Appellant,
v.
FEDERAL ELECTION COMMISSION, et al., Defendants-Appellees.

FEDERAL ELECTION COMMISSION'S OPPOSITION TO APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL

Appellee Federal Election Commission ("Commission") opposes the motion of appellant The Real Truth About Obama ("RTAO") for an injunction pending appeal. RTAO cannot demonstrate that it is likely to prevail on the merits of its appeal by showing that the district court abused its discretion in declining to enter a preliminary injunction against the enforcement of several important campaign finance regulations. RTAO also cannot demonstrate any irreparable harm absent an injunction, while the Commission and the public would be substantially injured by suspending the relevant regulations at the height of the election season.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

RTAO is a Virginia organization holding tax-exempt status under 26 U.S.C. § 527. RTAO alleges that it intends to produce and broadcast two radio advertisements, entitled *Change* and *Survivors*. *Survivors* states, *inter alia*, that Senator Barack Obama "has been lying" about his voting history, thereby demonstrating "callousness" and "a lack of character and compassion that should give everyone pause." RTAO allegedly intends to broadcast these ads during the

sixty-day period preceding the 2008 general election, although RTAO does not allege that it has actually produced either ad. RTAO also does not allege that it has raised or spent any money. RTAO has drafted one fundraising communication, but it does not allege that it has ever sent this letter to anyone.

One week after incorporating, RTAO filed its complaint on July 30, 2008, and contemporaneously filed a motion for a preliminary injunction challenging three of the Commission's regulations and a policy as unconstitutional on their face and as applied to *Change*. On August 20, RTAO filed a second motion for a preliminary injunction, which sought to enjoin the Commission's enforcement of its regulations against *Survivors*. The district court held oral argument on the preliminary injunction motions on September 10, denied those injunctions the next day, and issued its memorandum opinion on September 24.

II. ARGUMENT

A. Standard of Review

A party moving for a stay or injunction under Fed. R. App. P. 8(a)

> must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). To demonstrate a likelihood of success on the merits of its appeal, RTAO must show that this Court is likely to find that the district court abused its discretion in denying RTAO's preliminary injunction motions. *See*

MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001).

B. RTAO Has Not Demonstrated Irreparable Harm

RTAO's failure to demonstrate irreparable harm is dispositive because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted). RTAO fears that its fundraising and advertising will qualify the organization as a "political committee," but RTAO will not suffer any irreparable harm even if it must comply with the rules applicable to such groups.[1] As a political committee, RTAO could pay for unlimited independent campaign advocacy, including express advocacy and electioneering communications. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985). Thus, if RTAO is a political committee, FECA will not limit its speech. Moreover, RTAO has not alleged or shown that its fundraising would be harmed, let alone irreparably harmed, by abiding by the $5,000 limit per contributor on contributions to political committees.

Nor has RTAO alleged — much less demonstrated — any irreparable harm arising from the reporting requirements for political committees. Proof of such harm would require evidence of actual danger or reprisals against its members, and

[1] Under the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-55 ("FECA"), an organization that receives $1,000 in contributions or makes $1,000 in expenditures in a year is a "political committee." 2 U.S.C. § 431(4)(A). Political committees must register with the Commission and file periodic reports of their receipts and disbursements for disclosure to the public. *See* 2 U.S.C. §§ 433, 434. No person may contribute more than $5,000 per calendar year to any one political committee. 2 U.S.C. § 441a(a)(1)(C).

no such evidence is before the Court. *See Buckley v. Valeo*, 424 U.S. 1, 69 (1976) (noting evidence of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility") (citation omitted); *McConnell v. FEC*, 540 U.S. 93, 198-99 (2003) (discussing "threats, harassment, and reprisals" in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982)). Thus, RTAO fails to make even a rudimentary showing of irreparable harm, let alone the "clear" or "strong" showing required in this Circuit. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 284 (4th Cir. 1983).

RTAO conclusorily alleges that its speech is being chilled, but a mere allegation of harm under the First Amendment does not demonstrate irreparable harm for entry of a preliminary injunction. *See Smith v. Frye*, 488 F.3d 263, 271 (4th Cir.), *cert. denied*, 128 S. Ct. 653 (2007) (holding that harm allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod* [*v. Burns*, 427 U.S. 347 (1976) (plurality)]"); *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (holding *Elrod* applicable only when "First Amendment rights were totally denied"). Here, any alleged chill on RTAO's speech is groundless because FECA imposes no limits on political committees' spending for speech of any kind.

C. RTAO Is Unlikely to Succeed on the Merits of Its Appeal

"[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that

no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications," *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739 (1987)); *cf. McConnell*, 540 U.S. at 207 (discussing standard for facial challenges). RTAO cannot meet this burden.

1. Express Advocacy

Contrary to RTAO's allegations, the Commission's regulatory definition of "expressly advocating" is constitutional, both facially and as applied to RTAO's proposed radio ads. Under 11 C.F.R. § 100.22(b), the definition of "expressly advocating" includes a communication that

> [w]hen taken as a 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.

RTAO argues that this regulation violates the First Amendment because (1) it allegedly regulates communications that are not "unambiguously campaign related," and (2) it does not comport with a narrow interpretation of "magic words" express advocacy. The former claim fails on the face of the regulation, which requires that "[t]he electoral portion of the communication [be] unmistakable, *unambiguous*, and suggestive of only one meaning," which is "advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R.

§ 100.22(b) (emphasis added). Thus, assuming *arguendo* that the Constitution were to prohibit regulation of financing for communications that are not unambiguously campaign related, section 100.22(b) would not extend beyond that limit.

RTAO's argument that the regulation of express advocacy is constitutionally limited to "magic words" of advocacy was laid to rest in *McConnell*. In that case, the plaintiffs challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-115, argued that *Buckley* had found communications containing "magic words" to be the outer constitutional boundary of Congress's power to regulate in this area. *See McConnell*, 540 U.S. at 190-91. The Supreme Court rejected this argument, noting that *Buckley* had imposed the express advocacy requirement because of the vagueness of the original statutory text of FECA. *McConnell*, 540 U.S. at 191-92. Accordingly, *McConnell* held that *Buckley*'s "express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id*.

As Justice Thomas noted in dissent, *McConnell*'s holding "overturned" all of the Court of Appeals decisions — including this Court's ruling in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997) — that had read *Buckley* as limiting regulation to magic words. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting). Other cases relying on this interpretation of *Buckley*, such as *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*"), were similarly revealed to be in error. *See id*. at 392 (citing *Buckley* and *Christian*

Action Network as support for magic words "limit"). As Justice Thomas further noted, the only express-advocacy decision that *McConnell* did not cast into doubt was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) — the case from which the Commission derived the test codified at section 100.22(b). *See* 60 Fed. Reg. at 35,292-95 (July 6, 1995).

Section 100.22(b) is also consistent with the Supreme Court's holding in *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"). In that case, the Court reiterated *McConnell*'s upholding of restrictions on certain communications that are "the functional equivalent of express advocacy," *i.e.*, that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667. This constitutional standard is similar to the test in section 100.22(b): Both tests narrowly inquire whether there is any reasonable way to interpret a communication as non-candidate-advocacy and, if so, do not restrict the financing of the communication. Because *WRTL*'s constitutional test is, by definition, not unconstitutionally vague, the test in section 100.22(b) must also satisfy any vagueness concerns.[2]

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[2] In addition, both tests avoid vagueness concerns by refusing to consider the subjective intent of the speaker. *Compare* 60 Fed. Reg. at 35,295 ("[T]he subjective intent of the speaker is not a relevant consideration . . . .") *with WRTL*, 127 S. Ct. at 2668 ("To the extent th[e] evidence goes to WRTL's subjective intent, it is again irrelevant."). *WRTL's* adoption of a test based on a "reasonable" interpretation also undermines *VSHL's* holding that section 100.22(b) is flawed because the regulation purportedly turns on "the overall impressions of the hypothetical, reasonable listener or viewer." *VSHL*, 263 F.3d at 391.

RTAO nonetheless claims (Mot. at 12) that *WRTL* "affirmed that 'express advocacy' requires 'magic words.'" But the portion of *WRTL* that RTAO cites affirmatively rejected the proposition, raised in Justice Scalia's partial concurrence, that the only permissible constitutional standard is a magic words test:

> Justice Scalia concludes that "[i]f a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." We are not so sure. The question in *Buckley* was how a particular statutory provision could be construed to avoid vagueness concerns, . . . *Buckley*'s intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test.

WRTL, 127 S. Ct. at 2669 n.7 (citations omitted); *see also id*. at 2692-96 (Souter, J., dissenting).

RTAO relies heavily upon *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), which invalidated a state definition of express advocacy. The definition at issue in *Leake*, however, was significantly broader and less precise than section 100.22(b), and it included several "contextual factors." *Leake*, 525 F.3d at 298. As this Court noted, the statute "swe[pt] far more broadly than *WRTL*'s 'functional equivalent of express advocacy' test," *id*. at 297, unlike section 100.22(b). And this Court concluded that the state "remains free to adopt a definition of express advocacy consistent with the standards approved by *McConnell* and *WRTL*." *Id*. at 301. Because section 100.22(b) is consistent with both *McConnell* and *WRTL*, it does not bear the infirmities present in *Leake*.

RTAO also challenges the application of section 100.22(b) to its two radio

ads. Regarding *Change*, the Commission agreed with RTAO before the district court that the ad was not express advocacy. *Survivors*, however, contains numerous elements of express advocacy. First, *Survivors* criticizes Senator Obama's character, saying that he has shown "callousness" and "a lack of character and compassion." Such character attacks are among what the Supreme Court has called "indicia of express advocacy." *See WRTL*, 127 S. Ct. at 2667 (holding that indicia include "tak[ing] a position on a candidate's character"). Second, *Survivors* refers to Senator Obama's political party, another mark of express advocacy. *Id.* ("mention[ing] an election . . . political party, or challenger"). Third, the ad attacks the candidate personally by saying that he "has been lying" for years. Fourth, *Survivors* characterizes Senator Obama's alleged record on the abortion issue as "horrendous" and uses this as evidence for his alleged "callousness" and "lack of character and compassion." *See id.* at 2667 n.6 (distinguishing WRTL's ads from those that "condemn[ ] [a candidate's] record on a particular issue"). Fifth, unlike issue advocacy, *Survivors* does not implore listeners to take action relative to any public policy on abortion. *See id*. at 2667 ("genuine issue ads . . . exhort the public to adopt [a] position, and urge the public to contact public officials"). Finally, and most importantly, *Survivors* says that "Obama's callousness . . . reveals a lack of character and compassion *that should give everyone pause*" (emphasis added). Because the phrase "give everyone pause" is explicitly linked to Senator Obama's character, not action on public policy, there is only one reasonable interpretation of

that phrase: "Everyone" should "pause" before voting for Senator Obama. To ask listeners to hesitate before supporting a candidate is equivalent to "reject[ing]" him — one of the examples of words of express advocacy listed in *Buckley*, 424 U.S. at 44 n.52. Indeed, the ad emphasizes not only that abortion opponents should reject Senator Obama, but also that "*everyone*," regardless of any position on abortion, should hesitate because Senator Obama has character flaws. Thus, "[r]easonable minds could not differ as to whether" *Survivors* encourages listeners not to vote for Senator Obama, so the ad can be regulated constitutionally as express advocacy.

In sum, the Commission's application of section 100.22(b) to RTAO's ads demonstrates the regulation's precision and the Commission's narrow construction of it. Because reasonable minds could differ about whether *Change* encourages an electoral result, the Commission has explained that it is not express advocacy under the regulation. Thus, the Commission's precise application is fully consistent with *WRTL's* teaching that any "tie goes to the speaker." *WRTL*, 127 S. Ct. at 2669. In contrast, *Survivors* is "unmistakable" and "unambiguous," and thus regulable as express advocacy. RTAO, like other advertisers, can determine from the regulation and the Commission's precedent whether a given communication is or is not express advocacy.

2. Political Committee Status

Buckley held that defining political committees "only in terms of amount of annual 'contributions' and 'expenditures'" might reach "groups engaged purely in

issue discussion." 424 U.S. at 79. *Buckley* therefore narrowly construed FECA's political committee provisions to apply only to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id*. Under the statute as thus limited, a non-candidate organization must register as a political committee and be subject to contribution limits only if the entity crosses the $1,000 threshold of contributions or expenditures and its "major purpose" is the nomination or election of candidates.

RTAO challenges the Commission's explanation of how it determines whether the major purpose test for political committee status has been met, as noted in an Explanation and Justification ("E&J") published in the Federal Register. 72 Fed. Reg. 5595 (Feb. 7, 2007). The Commission issued this E&J to explain its decision *not* to promulgate a regulation singling out section 527 organizations. *See id*. But because this explanation binds no one and does not constitute final agency action, RTAO's claim is not reviewable under the APA. Courts may only hear APA suits based on "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "Final" agency action consummates the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002) (holding publication of report not final agency action); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004). In contrast, the E&J explains why a

broad regulation was *not* created; it does not purport to create a new rule, establish a binding norm, or decide anyone's legal status. Rather, it simply explains how the Commission's enforcement actions provide guidance to organizations about the major purpose test. 72 Fed. Reg. at 5604. This guidance is not final agency action subject to APA review, and RTAO cites no authority to the contrary.

Even if reviewable, the Commission's approach to political committee status is constitutional. The Supreme Court, not the Commission, established the major purpose test. *Buckley*, 424 U.S. at 79; *see also McConnell*, 540 U.S. at 170 n.64. RTAO's claim appears to focus on the Commission's implementation of that test, but the Commission's approach is not unconstitutionally vague or overbroad. The assessment of an organization's "major" purpose is an inherently comparative analysis and thus requires understanding an organization's overall activities. In enforcement decisions, the Commission considers a variety of factors to determine an organization's major purpose, including the organization's public statements, representations made in government filings, statements made to potential donors, internal governing documents, and the proportionate amount of spending on election-related activity. *See* 72 Fed. Reg. at 5605. Courts have endorsed the use of these factors. *See, e.g.*, *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering, *inter alia*, organization's statements in brochures, fax alerts sent to potential and actual contributors, and spending to influence federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859, 864-66 (D.D.C. 1996)

("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."). In numerous administrative enforcement proceedings and advisory opinions, the Commission has examined these and other factors to determine whether organizations satisfy the major purpose test. *See* 72 Fed. Reg. at 5605-06. RTAO cannot provide a single case in which the Commission incorrectly determined the major purpose of an organization. Thus, there is no legal or factual basis for RTAO's claim that the Commission's political committee analysis is unconstitutionally overbroad or vague.

3. Contributions in Response to Solicitations

FECA does not provide specific guidance as to when a donation is made "for the purpose of influencing any election" and thus constitutes a "contribution." 2 U.S.C. § 431(8)(A)(i). Accordingly, the Commission promulgated 11 C.F.R. § 100.57, which specifies that a "deposit of money . . . made by any person in response to any communication is a contribution . . . if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a); 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004). Section 100.57 reasonably interprets FECA to ensure that money donated in response to an appeal to help influence federal elections will not evade the Act's contribution limits and undermine their anti-corruption objective. *See* 72 Fed. Reg. at 5602.

As the Commission explained before the district court, section 100.57 does not apply to RTAO's proposed solicitation letter; thus, RTAO can demonstrate neither irreparable harm nor an Article III case or controversy concerning this regulation. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991). In any event, RTAO is not likely to succeed on the merits of its facial challenge: The regulation is well within the Commission's authority, "gives 'fair notice to those to whom [it] is directed,'" *McConnell*, 540 U.S. at 223, and is not arbitrary and capricious.

Buckley found that the definitions of "contribution" and "expenditure" raise different constitutional concerns. Limits on contributions entail "only a marginal restriction upon the contributor's ability to engage in free communication," 424 U.S. at 20-21, and will be upheld if they are "closely drawn to match a sufficiently important interest," *McConnell*, 540 U.S. at 136 (citations and quotation marks omitted). In particular, *Buckley* found it unnecessary to narrowly construe "contribution" as it did "expenditure," and instead stated that the term includes

> not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but *earmarked for political purposes*, but also all expenditures placed in cooperation with . . . a candidate . . . .

424 U.S. at 78 (emphasis added). *Buckley* did not, as RTAO suggests, employ an "unambiguously-campaign-related" analysis for contributions. *Id*. at 24 n.24, 78. Because RTAO's challenge to section 100.57 rests heavily on this mistake, RTAO has little likelihood of success on the merits. Indeed, the regulation's requirement

that a solicitation must seek funds to "support or oppose the election of a . . . candidate" is plainly narrower than *Buckley's* "earmarked for political purposes."

When the Commission promulgated section 100.57, it relied in part on *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995), which had addressed whether a mailing sent by a nonprofit issue advocacy group constituted solicitation of "contributions" in the context of a disclaimer requirement. The court held that "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of" FECA's solicitation disclosure requirements if it "contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id*. at 295. More recently, the constitutionality of 11 C.F.R. § 100.57 was upheld against a facial challenge in *EMILY's List v. FEC*, Civ. No. 05-0049, 2008 WL 2938558 (D.D.C. July 21, 2008); *see also* 362 F. Supp. 2d 43 (D.D.C. 2005), *aff'd*, 2005 WL 3804998 (D.C. Cir. 2005). The court specifically rejected the argument that the use of "support or oppose" made the regulation unconstitutionally vague.

> [T]he Supreme Court rejected just such a claim in *McConnell*, stating that "[t]he words 'promote,' '*oppose*,' 'attack,' and '*support*' … 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"

2008 WL 2938558, at *29 (emphasis by the court; citations omitted); *see also Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 166 P.3d 1174, 1183-84 & nn.8-9 (Wash. 2007) (en banc), *cert. denied*, 128 S. Ct. 2898 (2008)

(holding that "the phrase 'in support of, or opposition to, any candidate' in the definition of 'political committee'" is not unconstitutionally vague).

In sum, the solicitation regulation causes RTAO no harm, and RTAO misunderstands the Supreme Court's explanation of "contribution"; the authorities cited above confirm the constitutionality of the "support or oppose" standard.

4. Corporation-Funded Electioneering Communications

FECA prohibits corporations from funding "any applicable electioneering communication," which is defined in the context of a presidential campaign as a "broadcast . . . communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before a general election or thirty days before a primary or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i). The Supreme Court has upheld the constitutionality of this financing restriction "to the extent that the [communications] … are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08; *WRTL*, 127 S. Ct. at 2667.

Chief Justice Roberts' controlling opinion in *WRTL* defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667. The opinion then listed indicia of genuine issue ads and express advocacy and analyzed the ads at issue:

> First, [the ads'] content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks

> indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. Shortly thereafter, the Commission promulgated a regulation to codify the controlling opinion, using, essentially verbatim, the same criteria that the Chief Justice used. *See* 11 C.F.R. § 114.15. Section 114.15 straightforwardly implements *WRTL*, providing additional guidance without exceeding the constitutional boundary described in that decision. Tracking the language of *WRTL*, section 114.15 states that a corporation may fund an electioneering communication "unless 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(a); *WRTL*, 127 S. Ct. at 2667. For additional clarity, two safe harbor provisions for lobbying messages and commercial advertisements supplement the general exemption. 11 C.F.R. § 114.15(b). The regulation also adheres to *WRTL*'s teaching that when there is doubt about a communication's meaning, the "tie goes to the speaker," 127 S. Ct. at 2669; the regulation's rule of interpretation states that in "interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication," 11 C.F.R. § 114.15(c)(3).

RTAO challenges section 114.15 both facially and as applied to *Change* and *Survivors*. As to *Change*, the Commission agreed with RTAO before the district court that the ad qualifies for the general exemption set out in section 114.15(a).

As to *Survivors*, for substantially the same reasons that it is express advocacy under 11 C.F.R. § 100.22(b), it is also regulable as the functional equivalent of express advocacy under 11 C.F.R. § 114.15(a). *See supra* Part II.C.1. Indeed, the ad explicitly "condemn[s Senator Obama's] record on a particular issue," the precise distinction that Chief Justice Roberts drew between the ads at issue in *WRTL* and a hypothetical candidate ad analyzed in *McConnell*. *See WRTL*, 127 S. Ct. at 2667 n.6. Because RTAO's ad "is susceptible of no reasonable interpretation other than as an appeal to vote . . . against a specific candidate," *WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(c), the application of FECA's financing restrictions to the ad is constitutional.

The Commission's regulatory criteria for making this determination are essentially identical to the criteria set out in *WRTL*; thus, section 114.15 is neither vague nor overbroad. Contrary to RTAO's inaccurate description of section 114.15(c), the regulation does not "demote" the Supreme Court's standard. As explained above, section 114.15 contains only one standard, the one articulated by the Court itself: A corporation can pay for an electioneering communication "unless 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(a). The rules of interpretation articulated in section 114.15(c) come directly from the Court's analysis in *WRTL*. *See WRTL*, 127 S. Ct. at 2667. Thus, contrary to RTAO's accusation, the Commission has not given short shrift to

the Court's fundamental test by listing and considering indicia of express advocacy. That is precisely what the Supreme Court did in *WRTL*.

Finally, RTAO argues that *Leake* somehow supports its position that section 114.15 is void. It does not. *Leake* struck down a state law provision because it relied on open-ended factors such as "'[the] essential nature [of the communication],' 'the timing of the communication in relation to events of the day,' 'the distribution of the communication to a significant number of registered voters for that candidate's election,' and 'the cost of the communication.'" 525 F.3d at 283-84. These sorts of factors are excluded from consideration under section 114.15(d) ("[T]he Commission may consider only the communication itself and basic background information …."). In sum, because section 114.15 is derived from and consistent with the Supreme Court's analysis in *WRTL*, it is neither overbroad nor vague nor in excess of the FEC's statutory authority.

D. The Commission and Public Would Be Harmed by an Injunction

Enjoining the Commission from enforcing its regulations would substantially injure the Commission and harm the public, whose interests the Commission is charged with protecting. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); see also *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). The imminent

harm to the public if the Commission is not permitted to enforce its regulations far outweighs RTAO's speculative fear. In these key months leading up to the national election, halting enforcement of the challenged regulations could undermine the public's confidence in the federal campaign financing system. The regulations and policy at issue implement longstanding limits on corporate influence in federal elections and ensure that political committees abide by contribution limits and disclose their receipts and disbursements to the public. These limits and disclosure requirements serve compelling government interests in preventing corruption, educating the public, and facilitating the Commission's enforcement of the law. Thus, enjoining application of the challenged provisions could confuse political actors, allow improper use of corporate funds in the election process, sanction excessive campaign contributions, and deprive the public of important information.

III. CONCLUSION

For the foregoing reasons, RTAO's motion should be denied.

Respectfully submitted,

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September 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2008, I will electronically file the foregoing using the Court's CM/ECF system, which will then send a notification of such filing to the following:

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