No. 08-1977

United States Court of Appeals for the Fourth Circuit

The Real Truth About Obama, Inc., *Plaintiff-Appellant*

v.

Federal Election Commission and
United States Department of Justice, *Defendants-Appellees*

Appeal from the United States District Court for the
Eastern District of Virginia, Richmond Division

Appellant's Brief

James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434
Lead Counsel for Plaintiff-Appellant

Michael Boos
LAW OFFICE OF MICHAEL BOOS
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030
703/691-7717
Counsel for Plaintiff-Appellant

Table of Contents

Table of Authorities.. iii

Jurisdiction.. 1

Issues. 1

Case. 2

Facts. 3

Summary of Argument. 13

Argument. 15

I. RTAO Has Likely Success on the Merits.. 19

A. The Unambiguously-Campaign-Related Requirement Analysis Controls.. 20

B. 11 C.F.R. § 100.22(b) ("Expressly Advocating" Definition) Is Void.. 24

C. 11 C.F.R. § 100.57 (Converting Donations to "Contributions") Is Void.. 29

D. The FEC's Enforcement Policy on PAC Status, Including Its Major-Purpose Test Policy, Is Void.. 35

E. 11 C.F.R. § 114.15 (*WRTL II*'s Appeal-to-Vote Test) Is Void.. 39

II. RTAO Has Irreparable Harm.. 52

III. The Balance of Harms Favors RTAO.. 53

IV. The Public Interest Favors RTAO.. 54

Conclusion. 55

Oral Argument. 56

Addendum. 57

Addendum Contents

11 C.F.R. § 100.22(b) ("expressly advocating" definition). 57

11 C.F.R. § 100.57 ("contribution" solicitation provision). 57

11 C.F.R. § 114.15 (test to determine which "electioneering" communications may be prohibited to corporations). 57-59

Table of Authorities

Cases

American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004). 34

Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004). 34

Blackwelder Furniture Company of Statesville v. Seilig Manufacturing Company, 550 F.2d 189 (4th Cir. 1999).. . . . . 16, 52

Buckley v. Valeo, 424 U.S. 1 (1976). . . . . *passim*

Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006) . . . 34

Center for Individual Freedom v. Ireland, No. 1:08-190 (S.D. W. Va. April 22, 2008) 19, 53-55

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006) 53

Cole v. Richardson, 405 U.S. 676 (1972). 32

Cramp v. Board of Public Instruction, 368 U.S. 278 (1971). 32

Dixon v. Edwards, 290 F.3d 699 (4th Cir. 2002)... 16

Elrod v. Burns, 427 U.S. 347 (1976).. 53

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987). 47

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). 5, 26, 36, 37, 38

FEC v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995).. . . . . 30, 31

FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007) . . . . *passim*

Giovani Carandola Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2002).. . . . . 15, 17

Marks v. United States, 430 U.S. 188 (1977) 3

McConnell v. FEC, 540 U.S. 93 (2003). 24, 27, 28, 34

National Right to Work Legal Defense and Education Fund v. Herbert, No. 2:07-cv-809, 2008 WL 4181336(D. Utah Sep. 8, 2008). 24

North Carolina Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999) 32

North Carolina Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008) . . . . . . *passim*

Ohio Right to Life Society v. Ohio Elections Comm'n, No. 2:08-cv-492 (S.D. Oh. Sep. 5, 2008).. . . . . 19, 54, 55

Virginia Carolina Tools v. International Tool Supply, 984 F.2d 113 (4th Cir. 1993) 16

Virginia Society for Human Life v. FEC, 83 F. Supp. 2d 668 (E.D. Va. 2000). . . 26

Virginia v. American Bookseller's Ass'n, 484 U.S. 383 (1988). 52

West Virginians for Life v. Smith, 919 F. Supp. 954 (D. W. Va. 1996). 53, 55

Constitution, Statutes & Rules

11 C.F.R. § 100.5.. 5

11 C.F.R. § 100.22(b). 1

11 C.F.R. § 100.57.. 1

11 C.F.R. § 104.3.. 30

11 C.F.R. § 104.4.. 25

11 C.F.R. § 104.8.. 30

11 C.F.R. § 109.10.. 25

11 C.F.R. § 110.10. 25

11 C.F.R. § 114.4. 7

11 C.F.R. § 114.15. 1

2 U.S.C. § 431. . . . . 2, 4

2 U.S.C. § 431(4). 5, 12, 25, 30

2 U.S.C. § 431(17). 22, 25

2 U.S.C. § 434(f)(3). 8, 40

2 U.S.C. § 437g(a)(4). 25

2 U.S.C. § 437g(a)(6). 25

2 U.S.C. § 437g(d). 25

2 U.S.C. § 441b(a). 7, 26, 38, 49

5 U.S.C. § 702. 1

5 U.S.C. § 706. . . . . 1, 2, 4, 24, 39

26 U.S.C. § 527. 5

28 U.S.C. § 1292(a)(1). 1

28 U.S.C. § 1331. 1

28 U.S.C. § 2201. 1

28 U.S.C. § 2202. 1

N.C. Gen. Stat. § 163-278.14A(a) (2007). 33

U.S. Const. amend. I. . . . . *passim*

U.S. Const. amend. V. . . . . *passim*

Other Authorities

James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Campbell L. Rev. 353 (2007). 41

FEC Advisory Opinion 2005-13. 9

FEC, "Internet Communications," 71 Fed. Reg. 18589 (Apr. 12, 2006). 7

FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) .. . 9, 30, 35

FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007). . 6, 7, 9, 27, 35-37

Douglas Johnson & Susan T. Muskett, *National Right to Life White Paper: Barack Obama's Actions and Shifting Claims on the Protection of Born-Alive Aborted Infants—and What They Tell Us About His Thinking on Abortion* (Aug. 28, 2008). 51

Letter from Fred Wertheimer, President, Democracy 21, to Michael Mukasey, Attorney General (May 22, 2008). 10

Letter from John C. Keeney, Deputy Assistant Attorney General, to Fred Wertheimer, President, Democracy 21 (June 26, 2008). 10

Jurisdiction

The district court had jurisdiction over all issues on appeal under 28 U.S.C. § 1331 as a case arising under the First and Fifth Amendments, the Federal Election Campaign Act ("FECA"), the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-06, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. This Court has jurisdiction over the September 11, 2008 denial, JA–94, of two motions for preliminary injunction. 28 U.S.C. § 1292(a)(1). Notice of appeal was filed September 12. JA–96.

Issues

Generally, whether the district court abused its discretion, by applying the wrong legal standards, in denying two motions for preliminary injunction that would have protected the ability of The Real Truth About Obama, Inc. ("RTAO") to engage in issue advocacy concerning the positions of a prominent public figure on a public policy issue currently subject to intense public debate. Specifically, whether a preliminary injunction should be granted, facially and as applied to RTAO's immediately intended activities, with respect to 11 C.F.R. § 100.22(b) ("expressly advocating" definition); 11 C.F.R. § 100.57 ("contribution" solicitation provision); the Federal Election Commission's ("FEC") enforcement policy regulating determination of "political committee" ("PAC") status; and 11 C.F.R.

§ 114.15 (test determining prohibited "electioneering communications"). The underlying issue is whether these regulations and policy are unconstitutionally overbroad, void for vagueness, and contrary to law, as they violate the First and Fifth Amendments of the U.S. Constitution and exceed statutory authority under FECA, 2 U.S.C. § 431 et seq., and should be declared void under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706.

Case

On July 30, 2008, RTAO filed its complaint (JA–11), first motion for preliminary injunction, motion to consolidate the hearing on the preliminary injunction with the hearing on the merits, and motion to expedite addressing an ad titled *Change*, which it intended to post on its website and broadcast, and a fundraising solicitation that it intended to distribute to raise funds for its issue advocacy. On August 20, RTAO filed another preliminary injunction motion concerning the *Survivors* ad that it intended to post on its website and broadcast. On September 8, RTAO moved to consolidate the hearings on the two preliminary injunctions. On September 10, a hearing was held on the preliminary injunction motions. On September 11, the district court issued an order consolidating the hearings on the two preliminary injunction motions, denying both preliminary injunction motions, denying the motion to consolidate the preliminary injunction and merits hearings,

and denying the motion to expedite. JA–94. On September 12, RTAO noticed appeal of the denials of preliminary injunction. JA–96. On September 24, the district court issued its Memorandum Opinion on the denials of preliminary injunction, deciding that RTAO had standing but had failed to prove entitlement to a preliminary injunction. JA–98.

Facts[1]

This is a pre-enforcement, as-applied and facial challenge to three FEC regulations and an FEC enforcement policy that restrict RTAO's constitutionally-protected "issue advocacy," also known as "political speech." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2659 (2007) ("*WRTL II*").[2] "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

---

[1]RTAO's Facts are taken from its *Verified Complaint* (JA–11) and the *Affidavit of Kevin Allen* (JA–92). The facts are stated prospectively as they were presented to the district court, but at the end of the Facts section notice will be taken of the FEC's, Department of Justice's ("DOJ"), and district court's positions on RTAO's intended ads and solicitation letter. Since the DOJ essentially joined the FEC's briefing below, "FEC" will be used herein to indicate both unless context indicates otherwise.

[2]This opinion, *WRTL II* (Roberts, C.J., & Alito, J.), states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977) (concurrence on narrowest grounds).

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, not an organization properly subject to the PAC requirements in 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. JA–11.

RTAO seeks a judgment (**a**) declaring that 11 C.F.R. §§ 100.22(b) ("expressly advocating" definition), 100.57 ("contribution" solicitation provision), and 114.15 (*WRTL II*'s appeal-to-vote test), as well as the FEC's enforcement policy for determining PAC status, including interpreting and applying the major-purpose test, *see Buckley*, 424 U.S. at 79, are unconstitutionally overbroad, void for vagueness, and contrary to law, as they violate the First and Fifth Amendments of the Constitution of the United States and exceed the FEC's statutory authority under FECA, 2 U.S.C. § 431 et seq.; (**b**) declaring the regulations and the enforcement policy void and setting them aside under the APA, 5 U.S.C. § 706; and (**c**) preliminarily and permanently enjoining the FEC and DOJ from enforcing FECA based on the regulations and policy, both facially and as applied to RTAO and its intended activities set out herein. JA–12.

RTAO is a nonstock, nonprofit, Virginia corporation, with its principal place

of business in Richmond, Virginia. JA–12. FEC is the federal government agency with enforcement authority over FECA. Purporting to act pursuant to its statutory responsibility, the FEC promulgated the regulations and adopted the enforcement policy at issue in this case. JA–12-13. DOJ is an executive department of the government of the United States, with the Attorney General as its head. DOJ controls all criminal prosecutions and civil suits in which the United States has an interest, including criminal enforcement authority over FECA laws applicable here. JA–13.

RTAO was incorporated in July 2008. It is nonprofit under 26 U.S.C. § 527, which means that it is classified under the Internal Revenue Code as a "political organization" that may receive donations and make disbursements for certain identified political purposes without having to pay corporate income taxes. JA–13.

It is not a FECA "political committee" because none of its communications will qualify as either a "contribution" or "expenditure" aggregating more than $1,000 during a calendar year, which is a trigger requirement for PAC status under 2 U.S.C. § 431(4). *See also* 11 C.F.R. § 100.5 (PAC definition). JA–13.

It is also not a PAC because, even if it reaches the $1,000 trigger, RTAO does not meet the constitutionally-required major-purpose test. *See Buckley*, 424 U.S. at 79 (limiting PAC status to "organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate" because "[t]hey are, by definition, *campaign related*" (emphasis added)); *FEC v.*

Massachusetts Citizens for Life, 479 U.S. 238, 253 (1986) ("*MCFL*"); and *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (test is "*the* major purpose," not "*a* major purpose," and determination is made on "whether an organization primarily engages in regulable, election-related speech"). JA–13-14.

RTAO's purposes are stated in its Articles of Incorporaion:

> The specific and primary purposes for which this corporation is formed and for which it shall be exclusively administered and operated are to receive, administer and expend funds in connection with the following:
>
> 1. To provide accurate and truthful information about the public policy positions of Senator Barack Obama;
>
> 2. To engage in non-partisan voter education, registration and get out the voter activities in conjunction with federal elections;
>
> 3. To engage in any activities related to federal elections that are authorized by and are consistent with Section 527 of the Internal Revenue Code except that the corporation shall not:
>
> (a) expressly advocate the election or defeat of any clearly identified candidate for public office, or
>
> (b) make any contribution to any candidate for public office; and
>
> 4. To engage in any and all lawful activities incidental to the foregoing purposes except as restricted herein.

JA–14.

However, 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 (§§ 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 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*. JA–14-15.

RTAO's Articles forbid it from making express advocacy communications and contributions to candidates, *see infra*, and, as a corporation, it is forbidden from making "independent expenditures," 2 U.S.C. § 431(17) ("independent expenditure" definition), by 2 U.S.C. § 441b(a) (prohibition on corporate "contribution[s] or expenditure[s] in connection with any election"), as limited to expenditures for express advocacy by *MCFL*. 479 U.S. at 249. This prohibition on corporate express advocacy communications extends to a corporation's website and emails. *See* FEC, "Internet Communications," 71 Fed. Reg. 18589 (Apr. 12, 2006); 11 C.F.R. § 114.4 ("Disbursements for communications beyond the restricted class in connection with a Federal election."). JA–14-15.

One of the ways that RTAO intends to provide accurate and truthful information about the public policy positions of Senator Obama is by creating a website at www.therealtruthaboutobama.com, where accurate statements about his public policy positions will be stated and documented. JA–15, 33.

RTAO intends to produce audio ads titled *Change* and *Survivors* and place

them on its website. JA–15-16, 92-93.

RTAO also intends to broadcast *Change* and *Survivors* as radio advertisements on the Rush Limbaugh and Sean Hannity radio programs in heartland states during "electioneering communication" blackout periods sixty days before the general election (Sep. 5-Nov. 4, 2008), so *Change* and *Survivors* will meet the electioneering communication definition at 2 U.S.C. § 434(f)(3). JA–16, 93.

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. JA–16, 33.

In order to raise money for funding its website and content, the production of *Change* and *Survivors*, employing persons knowledgeable about Internet viral marketing, and broadcasting the ads, RTAO will need to raise funds by telling potential donors about itself and its projects. One of the ways that RTAO intends to raise funds is by using a fundraising communication. JA–16-17.

RTAO intends to raise more than $1,000 with this fundraising communication and to disburse more than $1,000 both to broadcast *Change* and *Survivors* and to

place them before the public on RTAO's website. JA–17.

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 under (**a**) a rule defining "express advocacy" in a vague and overbroad manner, 11 C.F.R. § 100.22(b) (broad, contextual express-advocacy test); (**b**) a vague and overbroad rule deeming donations to be "contributions" if made pursuant to a solicitation for activity to "support or oppose" a candidate, § 100.57; and (**c**) a vague and overbroad approach to determining whether an organization meets *Buckley*'s major-purpose test for imposing PAC status. *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC Status 1*"); *PAC Status 2*, 72 Fed. Reg. 5595. JA–18.

RTAO is also chilled from proceeding because, if RTAO is subsequently deemed to have been a PAC while doing its intended activities, then it 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. JA–18.

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 was a priority, *see* Letter from John C. Keeney, Deputy Assistant Attorney General, to Fred Wertheimer, President, Democracy 21 (June 26, 2008) (JA–39), 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) (JA–40). JA–18.

Consequently, RTAO reasonably fears, if it proceeds with its intended activities: (**a**) that *Change* and *Survivors* (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 its ads, and failing to file independent expenditure reports; (**b**) that, if RTAO is deemed to be a PAC, under the FEC's PAC enforcement policy and because either the publication of its ads will be considered an "expenditure" (under § 100.22(b)) or the fundraising communication will be considered a "contribution" (under § 100.57), RTAO will be in violation of FECA for failure to abide by numerous PAC requirements, including placing disclaimers on its ads and RTAO's website, failure to register and report as a PAC, failure to use federal funds for fundraising, failure to abide by limits on

contributions to PACs, and 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. JA–18-19, 93.

RTAO also reasonably fears, if it proceeds to broadcast *Change* and *Survivors*, that it will have broadcast prohibited electioneering communications because the FEC's rule at 11 C.F.R. § 114.15 (creating an exception to the electioneering communication prohibition, 2 U.S.C. § 441b) is vague and overbroad and RTAO cannot be sure that its ads are protected communications under the FEC's rule, although it believes that they are 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* and *Survivors* to be prohibited electioneering communications, 11 C.F.R. § 114.15, or prohibited express-advocacy independent expenditures, 11 C.F.R. § 100.22(b), because the tests are similar and vague. So RTAO will not proceed with its plan to broadcast *Change* and *Survivors* during electioneering communication blackout periods unless it receives the judicial relief requested herein. JA–19-20, 93.

In addition to the activities set out in the *Verified Complaint* and *Second Motion for Preliminary Injunction*, RTAO would like to participate in materially similar activities in the future, including broadcasting ads materially similar to *Change* and *Survivors* and using solicitations materially similar to that included in the *Verified Complaint*. JA–91.

RTAO's chill is irreparable harm because it is the loss of First Amendment rights. There is no adequate remedy at law. JA–20.

The preceding facts were stated essentially as they were set before the district court. In opposing the first preliminary injunction motion, the FEC took the position that *Change* is neither express advocacy under 11 C.F.R. § 100.22(b) nor a prohibited electioneering communication under 11 C.F.R. § 114.15, *see* Dkt. 31 at 12-13, 27, and that the fundraising communication would not solicit "contributions" under 11 C.F.R. § 100.57. Dkt. 31 at 17-18.Thus, the FEC took the position that there could be no possibility that RTAO would trigger the $1,000 "expenditure" or "contribution" thresholds for PAC status under 2 U.S.C. § 431(4) and the case was nonjusticiable. Dkt. 31 at 1. However, the FEC decided that *Survivors* is prohibited both as express advocacy and an electioneering communication. Dkt. 56 at 4-6. Despite the FEC's position that *Change* was not express advocacy, the district court decided that "it is clear that reasonable people could not differ that [*Change*] is promoting the defeat of Senator Obama," JA–110, so it would be ex-

press advocacy under 11 C.F.R. § 100.22(b).

Summary of Argument

In denying a preliminary injunction, the district court abused its discretion by failing to follow U.S. Supreme Court precedents and this Court's interpretation of them in *Leake*, 525 F.3d 274, and so must be reversed. *Leake* recognized that, in order to "cabin" the government to its "power to regulate elections," the Supreme Court "demarcat[ed] a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate.'" *Id.* at 281 (*quoting Buckley*, 424 U.S. at 80).

As to regulating communications, only two options have been approved under the unambiguously-campaign-related requirement: (1) magic-words express advocacy and (2) electioneering communications that both meet the statutory definition and are regulable under *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667. *Leake*, 525 F.3d at 281-82. The appeal-to-vote test is not a free-floating test that may be used apart from the statutory "electioneering communication" definition, *id.* at 282, so it may not be applied to define "express advocacy," which requires magic words. *Id.* at 281. Since the FEC's express-advocacy definition at 11 C.F.R.

§ 100.22(b) is not limited to magic words, it is unconstitutional and beyond FEC authority.

Since the unambiguously-campaign-related requirement applies to all campaign-finance regulation, *Leake*, 525 F.3d at 281, defining a regulable "contribution" based on whether the solicitation "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 (emphasis added), violates this requirement. *Buckley*'s rejection of a more-specific phrase, "advocating the election or defeat of a candidate," as vague and overbroad absent the express-advocacy construction, 424 U.S. at 42, 43, readily shows that the "support or oppose" test of § 100.57 is likewise vague and overbroad. The regulation is unconstitutional and beyond FEC authority.

As to determining PAC status, *Leake* recognized (1) that the unambiguously-campaign-related requirement applies, 525 F.3d at 287, (2) that the Supreme Court's major-purpose test for determining which groups may properly be deemed PACs, *Buckley*, 424 U.S. at 79 ("under the control of a candidate or the major purpose of which is the nomination or election of a candidate"), is based on "*the* major purpose" of the entity, *Leake*, 525 F.3d at 287, and (3) that determining *the* major purpose requires "an empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech." *Id.* (emphasis added). Since

the FEC's PAC enforcement policy reaches beyond this permissible scope, and is vague and overbroad, adopting a forbidden "'we'll know it when we see it approach,'" *id.* at 290 (citation omitted), it is unconstitutional and beyond FEC authority.

In *Leake* this Court recognized *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667, to be precisely as *WRTL II* stated it, i.e., "as [whether] an 'electioneering communication' . . . 'is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" 525 F.3d at 283 (citations omitted). The test, as recognized in *Leake*, was not watered down, as 11 C.F.R. § 114.15 does, by demoting the actual *WRTL II* test to merely a *part* of the FEC's test for determining whether a communication is regulable and by mandating "indicia" for interpretation that are not part of the test itself. *Leake* rightly warned that the electioneering communication "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 283 (citation omitted). Under such scrutiny, it is clear that the FEC's test is unconstitutional and beyond the FEC's authority.

Argument

This Court reviews the district court's denial of a preliminary injunction for

abuse of discretion, *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002), accepting "the court's findings of fact absent clear error, but review[ing] its legal conclusions *de novo*." *Id*. (citation omitted). When the district court's decision "'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance,'" this Court reviews the district court's decision *de novo*. *Virginia Carolina Tools v. International Tool Supply*, 984 F.2d 113, 116 (4th Cir. 1993) (citation omitted). "[A] mistake of law by a district court is per se an abuse of discretion." *Dixon v. Edwards*, 290 F.3d 699, 718 (4th Cir. 2002). Here the facts are established, the issues are legal, and the court below applied the wrong legal standards, failing to follow the controlling precedents, *Leake*, *Buckley*, and *WRTL II*. It abused its discretion.

RTAO meets the preliminary injunction criteria—likelihood of success on the merits, irreparable harm, a balancing of harms, and the public interest. *Blackwelder Furniture Company of Statesville v. Seilig Manufacturing Company*, 550 F.2d 189, 196 (4th Cir. 1999) ("*Blackwelder*").[3] "All four factors do not weigh equally, however; the first two dominate." *Virginia Carolina Tools*, 984 F.2d at 120. In First Amendment cases, irreparable harm is "'inseparably linked'" to the

[3] *Blackwelder* recited the factors 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 (citation omitted).

likelihood of success on the merits, *Bason*, 303 F.3d at 511 (citation omitted), so the irreparable harm determination cannot be made until it has been determined whether the plaintiff has a likelihood of success on the merits. *Id.*

This case 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.

127 S. Ct. at 2704 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.). The necessary implications of the dissent's statement and the Court's holding 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 all preliminary injunctions by merely asserting, e.g., that they are always injured if they are unable to enforce a regulation, no matter how

questionable its authority.

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.

A federal district court in this Circuit recently issued a preliminary injunction limiting West Virginia to regulation of (1) communications that contain "magic words" express advocacy and (2) "electioneering communications" defined like the federal model as upheld in *WRTL II*. *See Center for Individual Freedom v. Ireland*, No. 1:08-190 (S.D. W. Va. April 22, 2008) (Dkt. 38; order granting prelim. inj.) ("*CFIF*") (cited documents available on PACER). Another district court recently issued a preliminary injunction restricting the scope of Ohio's "electioneering communication" regime to the realm permitted by *WRTL II* and protecting proposed communications. *Ohio Right to Life Society v. Ohio Elections Comm'n*, No. 2:08-cv-492 (S.D. Oh. Sep. 5, 2008) (Dkt. 40; op. and order granting prelim. inj.).

But until lower courts uniformly provide expeditious relief and decide preliminary injunction motions based on the bright lines mandated by the First Amendment, *Buckley*, *WRTL II*, and *Leake*, there will be failures to timely defend the First Amendment right to engage in issue advocacy. The FEC concedes that RTAO's *Change* ad and fundraising communication are constitutionally-protected, Dkt. 31, yet the court below did not issue the needed relief even as to them.

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 and the U.S. Supreme Court. In particular, *Leake*, 525 F.3d 274, readily establishes RTAO's likely success on the merits.

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

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 employed an unambiguously-campaign-related analysis to limit "contributions" to "funds provided to a candidate or political party or campaign committee" or specifically "earmarked for political purposes," by which *Buckley* clearly meant *regulable* political purposes, i.e., express-advocacy "independent expenditures" or "contributions," 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."). 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."

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).

The reason for the unambiguously-campaign-related requirement and its derivative express-advocacy, contribution, major-purpose, and appeal-to-vote tests is twofold. First, since the only authority to regulate core political speech in this context is the authority to regulate elections, *see id.* at 13 ("constitutional power of Congress to regulate . . . elections is well established"), any restriction must be "unambiguously campaign related." *Id.* at 81. *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. *Buckley* noted a dissolving-distinction problem as requiring a bright, speech-protective line between (1) "discussion of issues and candidates" and (2) "advocacy of election or defeat of candidates." *Id.* at 42. The Court elaborated further on the necessity of the bright line—between (1) "discussion, laudation, [and] general advocacy" and (2) "solicitation"—to protect issue advocacy*Id.* at 43 (emphasis added).

The Supreme Court reiterated the express-advocacy and major-purpose tests in imposing the express-advocacy construction on the prohibition on corporate "independent expenditures,"[4] 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

[4]"Independent expenditures" are now for communications "expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17).

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*, this Court 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-Leake* analysis[5] readily reveals that the challenged regulations and enforcement policy at issue here are unconstitutional, beyond the statutory authority of the FEC, and, thereby, 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 FEC declared that *Change* is *not* express advocacy under 11 C.F.R. § 100.22(b). Dkt. 31 at 12-13, 27. The district court declared that it *is*: "it is clear that reasonable people could not differ that this advertisement is promoting the defeat of Senator Obama." JA–110. This disagreement illustrates the unconstitutionality of this vague, overbroad, unauthorized regulation and its reasonable-person test. But under *this* Court's holding in *Leake*, 525 F.3d at 282-83, neither

[5] Another federal district court recently followed *Leake* in holding that the unambiguously-campaign-related requirement is a threshold test for all campaign-finance regulation; that legislatures may only regulate magic-words express-advocacy communications or statutory electioneering communications that are subject to regulation under the appeal-to-vote test; that *Buckley* construed "contribution" to include donations made directly to a candidate and coordinated expenditures; that *McConnell v. FEC*, 540 U.S. 93 (2003), did not reject the "magic words" test and thereby vitiate the unambiguously-campaign-related requirement; that a "political issues expenditure" definition was unconstitutional for not being restricted to express advocacy; that compelled PAC status imposes substantial burdens; and that *Buckley* permitted PAC status to only be imposed on groups controlled by a candidate or with *the* major purpose of nominating or electing candidates. *See National Right to Work Legal Defense and Education Fund v. Herbert*, No. 2:07-cv-809, 2008 WL 4181336(D. Utah Sep. 8, 2008).

Change nor *Survivors* is express advocacy because neither contains the requisite magic words to be deemed express advocacy. And the district court thought that *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667, is a free-floating test that can be employed beyond the context of communications meeting the statutory "electioneering communications" definition to justify 11 C.F.R. § 100.22(b), which is contrary to *WRTL II*, 127 S. Ct. at 2669 n.7 (test is vague beyond "electioneering communication" context), and *Leake*, 525 F.2d at 282-83.

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. § 431(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. at 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). 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":

> 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 in this Circuit 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), *aff'd in relevant part*, 263 F.3d 379 (4th Cir. 2001). The mere fact that the definition contains the word "unambiguous" does not mean that it meets the unambiguously-campaign-related requirement, which is a constitutionally-mandated principle that

is applied by the Supreme Court in specific *tests*, i.e., the express-advocacy test, the major-purpose test, the appeal-to-vote test, and in *Buckley*'s construction of "contribution." *See supra.*

Both *McConnell*, 540 U.S. at 193, and *WRTL II*, 127 S. Ct. at 2669 n.7, have affirmed that—while Congress may regulate "electioneering communications" (subject to *WRTL II*'s appeal to vote test, *id.* at 2667) *in addition to* "express advocacy"—regulable 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 require "magic words," *supra*, and any doubt on that subject was laid to rest by *WRTL II*.

---

[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 fact that the concurrence preferred the express-advocacy test as the sole test and the dissent disagreed with the express-advocacy test, did not alter the agreement by all that, where the test applies, it requires magic words.

Supra. So all that *McConnell* meant by its statement that the express-advocacy line was not constitutionally required was that the unambiguously-campaign-related requirement *also* permitted regulation of "electioneering communications," which *WRTL II* promptly limited with the appeal-to-vote test. 127 S. Ct. at 2667. *McConnell* did not eliminate the unambiguously-campaign-related requirement, nor did it eliminate the requirement that the express advocacy test, in the many places where it remains applicable, requires magic words.

This Court affirms that express advocacy requires magic words, *Leake*, 525 F.3d at 281-82, and that, in this context and 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:

> 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). This clear statement of the only two options absolutely forecloses any argument that *WRTL II*'s appeal-to-vote test may be removed from its electioneering-communication context, to which it is limited, and applied to justify 11 C.F.R. § 100.22(b). *Leake* recognizes no hybrids, only the

two alternatives to meet the unambiguously-campaign-related requirement. This is correct because *WRTL II* itself argued that the appeal-to-vote test was not vague because, inter alia, it could only be applied to communications that already met the statutory electioneering communication definition. 127 S. Ct. at 2669 n.7. This means that the appeal-to-vote test is unconstitutionally vague and overbroad standing on its own, as it would do if used to define express advocacy.

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. And the district court applied the wrong standard in denying a preliminary injunction as to this provision because under the proper *Leake* standard the provision must be declared void and unconstitutional and enjoined.

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

RTAO fears that its fundraising communication (JA–16-17) will ultimately be deemed express advocacy under 11 C.F.R. § 100.57(a) by the FEC or a court compelling the FEC to bring an enforcement action on a complaint concerning this solicitation. The FEC says that the communication does not solicit "contributions," but the vague and overbroad "support or oppose" test provides no security or predictability for future fundraising, and the provision violates both the unambiguously-campaign-related requirement and the requirement of high preci-

sion where regulations touch on First Amendment activities.

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. § 431(4) and contributions require disclosure. *See*, *e.g.*, 11 C.F.R. §§ 104.3, 104.8. Serious penalties follow noncompliance. The regulation, 11 C.F.R. § 100.57(a), follows:

> 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." 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 or oppose" candidates. 69 Fed. Reg. at 68057. But *SEF* does not justify § 100.57(a), even if it applied in this Circuit. For a "contribution" to exist here, (1) 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, *see Buckley*, 424 U.S. at 23 n.24 ("earmarked for political purposes" must be construed consistently with the Supreme Court's narrowing of such vague and overbroad terms to reach only regulable activities meeting the unambiguously-campaign-related requirement), in order to avoid unconstitutional vagueness and overbreadth, and (2) there must be corresponding *regulable* political disbursements by the entity. *Id.* (money cannot be "*for* political purposes" if it is used otherwise). 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. Thus, the

regulation is overbroad and void for reaching beyond the approved scope of *Buckley* and *SEF*.

Since the unambiguously-campaign-related requirement applies to all campaign-finance regulation, *Leake*, 525 F.3d at 281, defining a regulable "contribution" based on whether the solicitation "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 (emphasis added), violates this requirement. *Buckley*'s rejection of the more-specific phrase "advocating the election or defeat of a candidate" as vague and overbroad absent the express-advocacy construction, 424 U.S. at 42, 43, readily shows that the "support or oppose" test of § 100.57 is likewise vague and overbroad.[7]

The district court tried to downgrade the required specificity that *Buckley* required[8] by arguing that *Buckley* did not require "the term 'contribution' [to be] as

---

[7] *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, but focusing on another vague phrase, "to influence or attempt to influence," in striking it down), *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).

[8] "The test is whether the language of [a regulation] affords the '(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms.'" 424 U.S. at 41 (citation omitted). "'Because First Amendment freedoms need breathing space to survive, government may regulate in the

narrowly tailored as 'expenditure.'" JA–119. This fails because the standard of scrutiny for a *non-vague* contribution *limitation* has nothing to do with the strict standard required where vague terms are included in any campaign-finance regulation, including one converting donations to FECA "contributions." *See Buckley*, 424 U.S. at 77-78 (recognizing unconstitutional vagueness in "contribution" definition and giving it a saving construction).

Leake dealt with "whether North Carolina's method for determining if a communication 'supports or opposes the nomination or election of one or more clearly identified candidates' unconstitutionally regulates issue advocacy," 525 F.3d at 280, and upheld an express-advocacy definition of "supports or opposes" while striking down another more akin to the FEC express-advocacy test at 11 C.F.R. § 100.22(b). 525 F.3d at 280, 285. This is the context of its statement that the state "remain[ed] free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of one or more clearly identified candidates.' *See* N.C. Gen. Stat. § 163-278.14A(a) (2007)." 525 F.3d at 301. The portion that *Leake* cited as permissible was the express-advocacy definition, and it was in no way approving "support or oppose" as defined in any way other than express advocacy. "Support or oppose" is unconstitutional absent some such saving definition.

---

area only with narrow specificity.'" *Id.* at 41 n.48 (citation omitted).

Only reading this provision to require that the solicitation seek funds to make "contributions" or engage in express advocacy would cure this vagueness. Saving constructions employing the express-advocacy construction remain an option where laws are readily susceptible of a saving construction, which this one is not. *See Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-65 (5th Cir. 2006) (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* 'left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.'" (citation omitted)); *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).

Because the regulation at § 100.57 goes beyond any constitutionally-permissible interpretation of "contribution," it is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority . . ." of the FEC, so it is void under

5 U.S.C. § 706. And the district court applied the wrong standard in denying a preliminary injunction as to this provision because under the proper *Leake* unambiguously-campaign-related requirement the provision must be declared void and unconstitutional and enjoined.

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

RTAO fears that it will be ultimately be deemed a PAC, under the FEC's PAC enforcement policy, by the FEC or a court compelling the FEC to bring an enforcement action on a complaint concerning RTAO. The FEC says that *Change* and the fundraising letter won't trigger PAC status, but it does not argue the same for *Survivors*.

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 elements of its policy, 72 Fed. Reg. at 5602-05, so the flaws in those regulations (*supra*) are fatal to the policy.

The major-purpose test is the third element of the 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 organiza-

tion'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. And the district court applied the wrong standard in denying a preliminary injunction as to this enforcement policy provision because under the proper *Leake* standard, 525 F.3d at 287 ("whether an organization primarily engages in regulable, election-related speech"), the enforcement policy must be declared void and unconstitutional and enjoined for considering non-regulable activity.

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

RTAO fears that *Change* and *Survivors* will ultimately be deemed regulable electioneering communications under 11 C.F.R. § 114.15 by the FEC or a court compelling the FEC to bring an enforcement action on a complaint concerning these ads. The FEC says that *Change* is not regulable, but that *Survivors* is. In its discussion of 11 C.F.R. § 100.22(b), the district court said that "reasonable people could not differ that [*Change*] is promoting the defeat of Senator Obama," JA–110, but the court did not indicate whether it thought that *Change* would also qualify as a regulable electioneering communication under 11 C.F.R. 114.15.

The FEC has created a multi-factor test at 11 C.F.R. § 114.15, purporting to implement *WRTL II*'s appeal-to-vote test for whether a corporate "electioneering

communication"[9] 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 in a grassroots lobbying context and address arguments made by the parties in briefing, e.g., regarding "indicia of express advocacy." *See infra.* But none of this *application* was part of the *test*. That the appeal-to-vote test 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

---

[9] "Electioneering communications" are targeted ads identifying candidates broadcast 30 and 60 days before primary and general elections. 2 U.S.C. § 434(f)(3).

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.

That *WRTL II*'s use of language about indica of express advocacy and issue advocacy was merely addressing standards advanced by the parties and amici curiae is readily seen in an article by present RTAO counsel, who were WRTL's counsel, setting out the tests proposed by parties and amici curiae in *WRTL II* to distinguish genuine from sham issue ads. *See* James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Campbell L. Rev. 353 (2007) (available at http://law. campbell.edu/lawreview/articles/29-3-353.pdf) ("*Distinguishing*"). In this article, published contemporaneously with the *WRTL II* Supreme Court briefing, the authors set out the "PBA Ad Test" as a useful test that the Court could adopt for the grassroots lobbying context, and the test contained such indicia. *Id.* at 386-87. The authors also set out the PBA Ad Test in their brief, showing how WRTL's ads met the test. *See* Brief for Appellee at 55-59, *WRTL II*, 127 S. Ct. 2652 (Nos. 06-969 & 06-970). But *WRTL II* did *not* adopt that test, nor any of several others proposed by the prime sponsors of BCRA, campaign finance reform groups, amici curiae, and the FEC in a rulemaking. *See Distinguishing*, 29 Campbell L. Rev. at 406-12 (collecting tests proposed and before the Supreme

Court for possible selection). *WRTL II* leapfrogged over these tests, which were focused on the grassroots-lobbying context, and stated the more broadly-applicable, more speech-protective appeal-to-vote test. If *WRTL II* had given WRTL what it asked for, then the FEC's test with its indicia would be more appropriate, but the FEC has fashioned its "indicia" test from the tests that *WRTL II* rejected, including the FEC's proposals in a rulemaking, *id.* at 408, in favor of the appeal-to-vote test. After *WRTL II*, the FEC may not adopt rules rejected in *WRTL II*.

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" 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. 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 this Court 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* and *Survivors* identify Senator Obama as a Democrat and the ads neither have a grassroots lobbying "focus[]" nor "propose[] 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 RTAO's ads are not protected from prohibition by the safe-harbor test, they are 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 re-statement 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. A communication lacking any clear call to action—i.e., something in the imperative ("Don't let him do it!") or cohortative mood ("Let's not let him do it!")—that can only be interpreted as a call to vote simply cannot be interpreted as an "appeal to vote." But nothing in this indicia-of-express-advocacy test contains such a clear call to action. 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, qualifi-

cations, and fitness for office, which is an exceedingly vague standard that chills the very robust issue-advocacy "political speech" that *WRTL II* expressly protected. 127 S. Ct. at 2659, 2673.

For the appeal-to-vote test side of the scale, the FEC lists 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). 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, in which *WRTL II* simply responded to tests proposed by the parties and amici, into the test itself, which was broader and more speech protective than any of the tests proposed by the parties and amici. *See supra.* 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 un-

ambiguous “appeal to vote,” albeit without the magic words[10]—it is willing to take note of “a call to action or other appeal” (*supra*) that “urges an action” (*supra*) so long as such a call, appeal, or urging is not imported into 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 recites 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

---

[10]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* and *Survivors* lack a call to action, being “merely informative.” *Id.* at 864.

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 its indicia-of-issue-advocacy test with faulty requirements, *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.

In contrast, this Court 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 this Court 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 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. *See supra*.

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.

Although the FEC says that *Survivors* is a regulable electioneering communication, applying the proper test reveals that it is not (just as it is also not "express advocacy"). First, there simply is no clear call to action that can only be interpreted as an "appeal to vote." Absent words in the imperative mood ("Don't let him do it!") or cohortative mood ("Let's not let him do it!") there cannot be anything that can be interpreted as an "*appeal*," let alone an "appeal *to vote*." The FEC tried below to convert the familiar expression *giving one pause* into such a clear call to action. Dkt. 56 at 5. Shakespeare said, "in that sleep of death what dreams may come . . . must give us pause," *Hamlet*, Act iii, Scene 1, but it was not an "appeal" to pause, rather an indication that profound things make us pause. *Survivors* says that "Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause." But it doesn't say "Pause!" (let alone "Stop!") or "Let's pause," as required for an "appeal." "Pause" is something "given" by ideas preceding, not something the hearer is actively called to do. It is intransitive, without indication of *what* is to be paused. There is no indication of what we should do after the pause. What we think in the pause is up to us. Some will applaud, others will not. How we proceed after the pause, is up to us. We have, as *WRTL II* said of issue advocacy, been given information and educated, and whether we take cognizance of the information, including in our voting, is up to us, for we have not been

invited to vote one way or the other. 127 S. Ct. at 2667.

Second, the "ad[] may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." *Id.* at 2670. Part of "everyone" who should be given pause by the actions described in *Survivors* is Senator Obama himself. It may be sincerely hoped by RTAO that by calling attention to Senator Obama's actions he will do better next time he is called to act on this public issue. The statement that "everyone" will be given pause by the actions merely broadens the scope of the disappointment and disapproval expressed, which in turn should heighten the pressure on the incumbent politician to alter his attitudes to move more into the mainstream. Finally, *Survivors* focuses on a controversy that has swirled in the national news media between Senator Obama and the National Right to Life Committee over the abortion-infanticide issue, and it attempts to set the record straight in public debate. NRLC says that Senator Obama has lied about his voting record, and Senator Obama has said that NRLC is lying. *See* Douglas Johnson & Susan T. Muskett, *National Right to Life White Paper: Barack Obama's Actions and Shifting Claims on the Protection of Born-Alive Aborted Infants—and What They Tell Us About His Thinking on Abortion* (Aug. 28, 2008) (available at http://www.nrlc.org/ObamaBAIPA/ WhitePaperAugust282008.html). *Survivors* is plainly the sort of "discussion of issues and candidates" for which the Supreme Court said that the First Amendment mandates protection when it identi-

fied the dissolving-distinction problem that requires the bright, speech-protective, express-advocacy line. *Buckley*, 424 U.S. at 42.

In sum, because the regulation at 11 C.F.R. § 114.15 goes beyond any permissible construction of a regulable "electioneering communication" and *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. And the district court applied the wrong standard in denying a preliminary injunction as to this provision because under the proper unambiguously-campaign-related requirement, which has been recognized in *Leake* and was applied by *WRTL II* to create the appeal-to-vote test, the provision must be declared void and unconstitutional and enjoined.

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." *Virginia v. American Bookseller's Ass'n*, 484 U.S. 383, 393 (1988). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Elrod 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) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."); *CFIF*, No. 1:08-190, slip. op. at 13 (S.D. W. Va. April 22, 2008) (Dkt. 37; mem. op. granting prelim. inj.) ("chill, standing alone, constitutes irreparable injury" (*citing West Virginians for Life v. Smith*, 919 F. Supp. 954 (D. W. Va. 1996)). RTAO wants to speak about the public policy views of an incumbent politician now, while public interest is focused on the issue in an unusual way, so that this is the most effective time to engage in RTAO's planned issue advocacy. 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.

As another district court held recently in issuing a preliminary injunction limiting the reach of Ohio's "electioneering communication" law, "'if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere to its enjoinment.'" *Ohio Right to Life*, No. 2:08-cv-492, slip op. at 23 (S.D. Oh. Sep. 5, 2008) (op. and order granting prelim. inj.) (citation omitted). *See also CFIF*, No. 1:08-190, slip. op. at 13 (S.D. W. Va. April 22, 2008) (Dkt. 37; mem. op. granting prelim. inj.) ("carefully tailored injunction will not unduly restrict the defendants' power to regulate the election process in legitimate ways"). Certainly the FEC can have no harm as to an injunction protecting the *Change* ad and the fundraising letter for it has argued that those are permissible under its regulations and no harm flows from them under the FEC's PAC status policy. Dkt. 31.

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. It has a First Amendment interest in receiving RTAO's speech. An injunction serves these interests. "[I]ssuance of a preliminary injunction will serve the public interest because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Ohio Right to Life*, No. 2:08-cv-492, op. at 23 (citation omitted).

> Protection of freedom of speech in a democratic society is of critical public interest. *See West Virginians for Life, Inc.*, 919 F. Supp. at 960. In this case, it appears that several provisions . . . are vague, and consequently chill the public's right to speak on political matters. Accordingly, the court finds that the public has a strong interest in having the challenged laws enjoined or clarified.

CFIF, No. 1:08-190, slip. op. at 14 (S.D. W. Va. April 22, 2008) (Dkt. 37; mem. op. granting prelim. inj.).

Conclusion

For the foregoing reasons the district court's denial of a preliminary injunction should be reversed and this case remanded with instructions to issue a preliminary injunction and to require no security because Defendants have no monetary stake.

Oral Argument

RTAO requests oral argument, due to the complex nature of the issues.

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434

Michael Boos
LAW OFFICE OF MICHAEL BOOS
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030
703/691-7717

Addendum

11 C.F.R. § 100.22(b):

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.

11 C.F.R. § 100.57(a):

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.

11 C.F.R. § 114.15:

§ 114.15 Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) *Permissible electioneering communications.* Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) *Safe harbor.* An electioneering communication is permissible under paragraph (a) of this section if it:

(1) Does not mention any election, candidacy, political party, op-

posing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or 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.

(c) *Rules of interpretation.* If an electioneering communication does not qualify for the safe harbor in paragraph (b) of this section, 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.

(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.

(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 can-

didate or political party.

(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication.

(d) *Information permissibly considered.* In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.

Certificate of Service

I hereby certify that on September 25, 2008, I electronically filed the foregoing with the Clerk of Court using the CM\ECF System, which will send notice of such filing to the following registered CM\ECF users:

Eric Fleisig-Greene
U.S. DEPARTMENT OF JUSTICE

Debra Jean Prillaman
OFFICE OF U.S. ATTORNEY

Adav Noti
David Kolker
FEDERAL ELECTION COMMISSION

I further certify that on September 25, 2008, I served upon the below listed non-CM/ECF participants copies of this document by First-Class Mail postage prepaid and by email at the listed addresses.

John R. Griffiths
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone:(202) 514-4652
Fax: (202) 616-8460
John.Griffiths@usdoj.gov

Audra Anne Hale-Maddox
ahale-maddox@fec.gov
Thomasenia P. Duncan
tduncan@fec.gov
Kevin Deeley, kdeeley@fec.gov
Holly Baker, hbaker@fec.gov
Vivien Clair, vclair@fec.gov
Seth Nesin, snesin@fec.gov
Claire Rajan, crajan@fec.gov
Federal Election Commission
999 E Street NW
Washington, DC 20463

/s/ ____________________
James Bopp, Jr