No. 08-1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE REAL TRUTH ABOUT OBAMA, Inc.,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION, *et al*.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Virginia, Richmond Division,
Case No. 3:08-cv-00483-JS

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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No. 08-1977 Caption: The Real Truth About Obama, Inc. v. FEC, et al.

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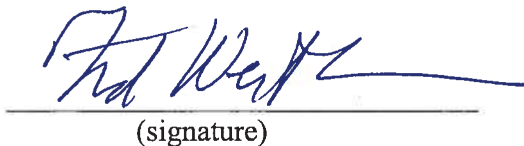

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INTERESTS OF *AMICI CURIAE*

Amici curiae Campaign Legal Center and Democracy 21 are nonpartisan organizations that work to strengthen the laws governing campaign finance. *Amici* participated in the Federal Election Commission (FEC) rulemakings that produced several of the regulations challenged in this case, as well as in litigation to defend the specific laws at issue here, including representing intervening-defendants in *McConnell v. FEC*, 540 U.S. 93 (2003) and *Wisconsin Right to Life v. FEC*, 126 S.Ct. 1016 (2006) ("*WRTL I*") and *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652 (2007) ("*WRTL II*"). *Amici* also participated in this case below. *Amici* thus have a longstanding, demonstrated interest in the issues raised by this proceeding.

INTRODUCTION & SUMMARY OF ARGUMENT

The Real Truth About Obama, Inc. (RTAO) is a "political organization" that was organized approximately three months ago under section 527 of the Internal Revenue Code. 26 U.S.C. § 527. RTAO appears to have the major purpose, indeed the sole purpose, of running broadcast ads and sponsoring other public communications sharply critical of the views of Senator Barack Obama, the Democratic Party presidential nominee.

There is, of course, nothing wrong with speech that criticizes a candidate in weeks before an election, or speech that advocates against the election of that candidate. For any of these purposes, RTAO is free to spend as much money as it

wishes, if it does so independently of any candidate or political party. The question here is not whether RTAO can engage in the speech it intends, but whether it must register as a federal "political committee" in order to do so, and abide by the contribution limits, source prohibitions and reporting requirements that apply to such committees.

The Federal Election Campaign Act (FECA) defines the term "political committee" to mean "any committee, club, association or other group of persons" which "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court narrowed this statutory definition of "political committee" to "only encompass organizations that are under the control of a candidate <u>or the major purpose of which is the nomination or election of a candidate.</u>" 424 U.S. at 79 (emphasis added). Thus, only an organization that meets both the statutory definition and the "major purpose" test is deemed a "political committee" subject to the applicable requirements of federal law.

RTAO fears that it meets the test for political committee status and, not wanting to abide by the longstanding legal requirements that apply to federal political committees, has launched a constitutional assault on the underlying FEC regulations that govern a determination of "political committee" status.

First, with regard to the statutory standard of whether it has made $1,000 in "expenditures," RTAO contends that the FEC regulation defining "express advocacy" impermissibly includes the standard of whether a communication "could only be interpreted by a reasonable person" as advocating the election or defeat of a candidate. *See* RTAO Br. at 26; *see also* 11 C.F.R. § 100.22(b).

Second, with regard to the statutory standard of whether it has received $1,000 in "contributions," RTAO contends that the FEC regulation defining "contribution" impermissibly includes the standard of whether funds are received in response to a solicitation that "indicates that any portion of the funds received will be used to support or oppose" the election of a candidate. *See* RTAO Br. at 29-35; *see also* 11 C.F.R. § 100.57(a).

Third, with regard to the *Buckley* standard of whether it has a "major purpose" to influence elections, RTAO contends that the FEC impermissibly implements this standard by making an unbounded inquiry into "vague and overbroad" factors. RTAO Br. at 36.

Relatedly, RTAO also challenges the FEC's implementation of the Supreme Court's recent decision in *WRTL II*. *See* RTAO Br. at 40-41. There, the Court held that notwithstanding a statutory prohibition, corporate and union treasury funds could be used to fund "electioneering communications" so long as the communications were not the "functional equivalent of express advocacy." *WRTL*

II, 127 S.Ct. at 2667. RTAO objects to the FEC regulation codifying this standard. *See* 11 C.F.R. § 114.15.

The district court below determined that RTAO had not demonstrated a likelihood of success on the merits of any element of its case, and properly denied RTAO's request for a preliminary injunction as to all claims. *See RTAO v. FEC*, Memorandum Opinion, No. 08-CV-483, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008) (Spencer, J.); *see also* Order, No. 08-CV-483 (E.D. Va. Sept. 11, 2008). For the reasons set forth below, this Court should affirm the district court's decision.

ARGUMENT

I. The Definition of "Expressly Advocating" at Section 100.22(b) Is Indistinguishable From the *WRTL II* Express Advocacy Test and Is Constitutional.

RTAO challenges the definition of "expressly advocating" found at 11 C.F.R. § 100.22(b), claiming that the so-called "subpart (b)" definition is "unconstitutionally vague and overbroad" because it "is not limited to magic words." RTAO Br. at 13-14, 26. However, as the district court below found, the Supreme Court made clear in both *McConnell* and *WRTL II* that the First Amendment <u>does not</u> require a "magic words" construction of the term "expenditure." *See RTAO,* 2008 WL 4416282 at *10, slip op. at 19-20; *see also McConnell*, 540 U.S. at 193 (noting the Court's "longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish

electioneering speech from a true issue ad"); *WRTL II*, 127 S.Ct. at 2669 n.7 ("*Buckley's* intermediate step of ["magic words"] statutory construction on the way to its constitutional holding does not dictate a constitutional test."). Indeed, the *WRTL II* decision, which articulated a test for the "functional equivalent of express advocacy" that is "virtually the same" as subpart (b), only further affirms the constitutionality of subpart (b). *RTAO,* 2008 WL 4416282 at *11, slip op. at 21. The district court was therefore correct in determining that RTAO was unlikely to succeed in its challenge to this regulation.

The debate over the role and scope of the "express advocacy" standard dates back to FECA's enactment. An expenditure limit originally included in FECA provided that "[n]o person may make any expenditure … relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." *Buckley*, 424 U.S. at 39. The *Buckley* Court was troubled by the vagueness of the phrase "relative to a clearly identified candidate." To cure any vagueness, the Court construed the "relative to" phrase to "apply only to expenditures for communications that <u>in express terms</u> advocate the election or defeat of a clearly identified candidate for federal office." *Id*. at 44 (emphasis added). The Court explained in a footnote that "[t]his construction would restrict the application of [the spending limit] to communications containing

express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. These phrases became known as the "magic words" of express advocacy.[1]

More than a decade after *Buckley,* the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), concluded that, "[S]peech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, <u>be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate</u>." *Id.* at 864 (emphasis added).

In 1995, the FEC codified this *Furgatch* test in subpart (b) of its regulation defining "expressly advocating." Section 100.22(b) of the FEC's regulations provides that "expressly advocating" means any communication that:

> 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

---

[1] Even as so construed, the expenditure limit was invalidated because the Court found that it served no compelling governmental interest. *Buckley*, 424 U.S. at 50. The Court subsequently imposed a similar "express advocacy" limitation on the term "expenditure" as used in 2 U.S.C. § 441b, the prohibition on the use of corporate and union treasury funds to make "expenditures." *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

(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. § 100.22(b) (emphasis added).

This Court in 2001 ruled that this subpart (b) standard "goes too far" because "it shifts the determination of what is 'express advocacy' away from the words 'in and of themselves' to the 'unpredictability of audience interpretation.'" *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001), *quoting FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1057 (4th Cir. 1997). Responding to the FEC's warning that invalidating subpart (b) would allow a flood of union and corporate money to enter federal elections, this Court said its decision was grounded in Supreme Court precedent: "If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court." *Id.*

And that is exactly what has happened. As Judge Spencer recognized below, the Supreme Court has rendered such "further review," and its decisions in *McConnell* and *WRTL II* have effectively "overturned" this Court's ruling in *Virginia Society*. Both *McConnell* and *WRTL II* confirm that the First Amendment does not limit the scope of campaign finance regulation to "magic words," and thus strongly support the constitutionality of subpart (b). *RTAO*, 2008 WL 4416282 at *10, slip op. at 21.

First, in *McConnell,* the Supreme Court explained that *Buckley's* "magic words" express advocacy test was merely an "endpoint of statutory interpretation, not a first principle of constitutional law." 540 U.S. at 190. The Court reached this conclusion in its review of Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibits the use of corporate or union treasury funds to pay for "electioneering communications" – defined as any broadcast ad that refers to a clearly identified federal candidate and is aired within 30 days of a primary or 60 days of a general election. *See* 2 U.S.C. §§ 434(f)(3), 441b(b)(2). These provisions were challenged on grounds that they regulated "'communications' that do not meet *Buckley*'s [magic words] definition of express advocacy." 540 U.S. at 190. The Court rejected this assertion, however, making clear that "the express advocacy limitation … was the product of statutory interpretation rather than a constitutional command." *Id.* at 191-92. The Court further explained that such an assertion "cannot be squared with [the Court's] longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *Id.* at 193. The Court concluded that "the unmistakable lesson from the record in this litigation . . . is that *Buckley's* magic-words requirement is functionally meaningless[,]" and "has not aided the legislative effort to combat real or apparent corruption." *Id.* at 193-94 (emphasis

added). Accordingly, the Court upheld BCRA's "electioneering communication" provisions against a facial challenge.

In *WRTL II*, the Court re-visited Title II of BCRA in the context of an as-applied challenge regarding three broadcast ads that WRTL sought to air. Chief Justice Roberts, writing the controlling opinion for the Court, interpreted *McConnell* as upholding Title II's funding restrictions only insofar as "electioneering communications" contained either express advocacy or "the functional equivalent of express advocacy." 127 S.Ct. at 2664. As to the latter category, "a court should find that an ad is the functional equivalent of express advocacy only if the ad is <u>susceptible of no reasonable interpretation other than as an appeal to vote for or against</u> a specific candidate." *Id.* at 2667 (emphasis added). Applying this test, the Court held that WRTL's ads were not the functional equivalent of express advocacy and accordingly were exempt from the funding restriction. *Id.*

Chief Justice Roberts' opinion in *WRTL II* specifically responded to Justice Scalia's contention that the "functional equivalent" test was unconstitutionally vague because it did not incorporate a "magic words" standard. *Id.* at 2669 n.7. The Chief Justice explained that the "magic words" formulation of express advocacy used in *Buckley* was not "the constitutional standard for clarity … in the abstract, divorced from specific statutory language," and that the *Buckley* "magic

words" standard was a matter of statutory construction and "does not dictate a constitutional test." *Id.*

In short, since *Virginia Society* was decided, new Supreme Court case law "has emerged virtually overruling this Court's decision." *RTAO*, 2008 WL 4416282 at *10, slip op. at 20. *McConnell* made clear that the "magic words" standard was "functionally meaningless." 540 U.S. at 190. And *WRTL II* made clear that the regulation of express advocacy is <u>not</u> limited to magic words – but may also include communications susceptible to a "reasonable interpretation" only as an appeal to vote for or against a candidate. Both cases thus strongly support the constitutionality of subpart (b).

Furthermore, as the district court noted, *WRTL II*'s "functional equivalent of express advocacy" test is "virtually the same" as the FEC's subpart (b) standard of express advocacy. *RTAO*, 2008 WL 4416282 at *11, slip op. at 21. Under *WRTL II,* an ad constitutes the functional equivalent of express advocacy if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"; under subpart (b), an ad constitutes express advocacy if "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)." There is no legal or practical difference between these tests, or how they would be applied.

If the *WRTL II* test is not unconstitutionally vague, then neither is the virtually identical subpart (b) test. Given the striking similarities between the two standards, the Supreme Court's embrace of a "susceptible of no reasonable interpretation" standard for defining the "functional equivalent of express advocacy" is a *de facto* endorsement of the constitutionality of subpart (b).

Further, the *WRTL II* Court made clear that although "contextual factors … should seldom play a significant role in the inquiry," courts "need not ignore basic background information that may be necessary to put an ad in context – such as whether an ad "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future[.]" 127 S.Ct. at 2669. So too, consideration of context is permitted, but limited, under the subpart (b) test ("with limited reference to external events").

Finally, contrary to RTAO's claims, the *WRTL II* Court in no way suggested that its test for "the functional equivalent of express advocacy" would be rendered vague or overbroad were it to be applied outside the definition of "electioneering communications." RTAO Br. at 25-28. First, as discussed above, Chief Justice Roberts specifically addressed and <u>rejected</u> concerns that the "no reasonable interpretation" test was vague, finding that it meets "the imperative for clarity in this area." 127 S. Ct. 2669 n.7. And indeed, if the standard is not vague within the pre-election period regulated by Title II, as the controlling opinion holds, it is not

vague outside that time frame either, for the time frame would only cabin the effect of vagueness, not cure it. Second, the language of the *WRTL II* test itself forecloses any overbreadth challenge, in that it subjects to the funding restrictions only those communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." But if a communication can be reasonably interpreted only as "an appeal to vote for or against a specific candidate," then it necessarily falls squarely within the zone of electioneering speech that can be constitutionally regulated. RTAO cannot credibly contend otherwise.

In sum, subpart (b) employs a standard indistinguishable from that articulated by the Supreme Court in *WRTL II*. The latter standard is necessarily constitutional – and thus so too is the former.

II. The "Solicitation" Rule at 11 C.F.R. § 100.57 Is Neither Overbroad Nor Vague.

RTAO challenges 11 C.F.R. § 100.57 as overbroad, unconstitutionally vague and in excess of the FEC's authority, because the rule does not conform to an express advocacy standard and instead relies on a "support or oppose" standard. *See* RTAO Br. at 29-35.

These contentions are without merit. The express advocacy standard has no relevance to the constitutionality of section 100.57, because that standard is a narrowing construction of the Act's definition of "expenditure," whereas section

100.57 seeks to regulate "contributions." *See Buckley*, 424 U.S. at 78-80. Further, the Supreme Court in *McConnell* made clear that "support and oppose" language is not unconstitutionally vague. It is thus correct that the district court found that RTAO was unlikely to succeed on the merits of its challenge to section 100.57. *RTAO*, 2008 WL 4416282 at *11-13, slip op. at 23-25. In so holding, the court joined the U.S. District Court of the District of Columbia, which also recently rejected a constitutional challenge to section 100.57 on overbreadth and vagueness grounds. *Id.* at *12, slip op. at 23-24, *citing EMILY's List v. FEC*, --- F. Supp.2d ---, 2008 WL 2938558 (D.D.C. July 31, 2008) (No. 05-0049) (Kollar-Kotelly, J.).

FECA authorizes the FEC to regulate "contributions" – defined broadly to include "any gift, subscription, loan, advance, or deposit of money anything of value made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. § 431(8); *see also id*. at § 441a. Section 100.57 clarifies that a donation made "in response to any communication" is a contribution "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a). The regulation curtails evasion of the Act's contribution limits and reporting requirements by ensuring that donations made in response to solicitations that "plainly seek funds 'for the purpose of influencing Federal elections'" are treated as "contributions" under the Act. *See* FEC Notice 2004-15, "Political

Committee Status," 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004). As the district court in *EMILY's List* held, section 100.57 "prevent[s] the circumvention of these contribution limits," and thereby "serve[s] the important governmental purposes of preventing corruption and the appearance of corruption." *EMILY's List*, 2008 WL 2938558 at *21, slip op. at 41.

RTAO's attempt to hold section 100.57 to an express advocacy standard, RTAO Br. at 34, is clearly contrary to Supreme Court precedent. The express advocacy standard was formulated to narrow the Act's definition of "expenditure," not its definition of "contribution," and Section 100.57 seeks to define only the latter.

Both the definition of "contribution" and the definition of "expenditure" in FECA rely on the operative phrase "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure"). *Buckley* held that this phrase raised vagueness concerns in connection to the definition of "expenditure" as applied to individuals and groups which do not have a major purpose to influence elections, *see infra* Section III, and consequently construed "expenditure" narrowly in this context to encompass "only funds used for communications that <u>expressly advocate</u> the election or defeat of a clearly identified candidate." 424 U.S. 1, 79-80 (emphasis added). By contrast, the Court found that the same phrase "<u>presents fewer</u>

[vagueness] problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). Instead of imposing an "express advocacy" construction on the definition of "contribution," the Supreme Court merely clarified that:

> Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.

Id. The *Buckley* Court thus recognized that the "general understanding" of a political contribution included both funds "provided to a candidate or political party or campaign committee" and funds "given to another person or organization that are earmarked for political purposes," so that the statutory definition of "contribution" was sufficiently clear and did not require the limiting gloss of express advocacy.

RTAO is therefore wrong in asserting that section 100.57 is vague or overbroad because it relies upon a "support or oppose" standard.[2] Section 100.57

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[2] Also unavailing is RTAO's related argument that *Buckley* construed the phrase "contributions made to other organizations or individuals but earmarked for political purposes" to reach only donations solicited expressly by an individual or organization for the purpose of either making campaign "contributions" or financing express advocacy communications. *See* RTAO Br. at 31. RTAO is simply inventing this construction of the phrase "earmarked for political purposes." The only legal support it cites for this construction is an utterly extraneous footnote

is not unconstitutional simply because it regulates solicitations that do not include express advocacy. *See FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995) (construing the phrase "contributions … earmarked for political purposes" to reach donations given in response to a solicitation that indicated that the donation "will be targeted to the election or defeat of a clearly identified candidate for federal office," even if the solicitation "does not itself constitute express advocacy") (emphasis added).

The federal district court in Washington, D.C. confirmed this analysis in its *EMILY's List* decision. The Court rejected the plaintiff's suggestion that the "support or oppose" language in section 100.57 is unconstitutionally vague because it is not "related to the express advocacy requirement." *EMILY's List*, 2008 WL 2938558 at *29, slip op. at 55. It noted that the Supreme Court in *McConnell* had dismissed a void-for-vagueness challenge to a comparable "promote, oppose, attack, support" standard in BCRA that applies to public communications by state party committees. *Id.* As the district court highlighted, the *McConnell* Court concluded that this language "'provide[d] explicit standards for those who apply them' and 'g[a]ve the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *McConnell*, 540 U.S. at 675

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in *Buckley* that does not even mention the phrase "earmarked for political purposes," but rather makes the unrelated point that the value of volunteer services, as well as certain volunteer expenditures, is exempted from the contribution limits. *See* RTAO Br. at 31, *citing Buckley*, 424 U.S. at 23 n.24.

n.64, *quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). On these grounds, the district court in *EMILY's List* found that section 100.57 "presents a clear guide for political committees as to which solicitations will trigger the receipt of contributions subject to FECA," and dismissed the constitutional challenge to the rule. *Id*., 2008 WL 2938558 at *31, slip op. at 60.[3]

[3] RTAO cites the Fourth Circuit's recent decision in *North Carolina Right to Life v. Leake (NCRL),* 525 F.3d 274 (4th Cir. 2008), for the proposition that a statute regulating speech based on a "support or oppose" standard "[i]s unconstitutionally overbroad and vague." RTAO Br. at 32-33. This characterization both distorts *NCRL*, and ignores that the North Carolina statute considered in *NCRL* is distinguishable from section 100.57.

In *NCRL*, the Fourth Circuit considered a two-prong statutory definition of the phrase "to support or oppose the nomination [or] election … of one or more clearly identified candidates," a phrase which in turn appeared in the definition of both "contribution" and "expenditure" in North Carolina campaign finance law. 525 F.3d at 280, *citing* N.C. Gen. Stat. § 163-278.14A(a); *see also* § 163-278.6(9) (defining "expenditure"); § 163-278.6(6) (defining "contribution"). The first prong defined the "support or oppose" phrase as express advocacy. N.C. Gen. Stat. § 163-278.14A(a)(1). The second prong defined this phrase more expansively as any communication that "goes beyond a mere discussion of public issues in that [it] direct[s] voters to take some action to nominate, elect, or defeat a candidate in an election." *Id*. § 163-278.14A(a)(2). This prong also authorized the regulator to consider "contextual factors" in this determination, including "the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication." *Id.* The Fourth Circuit struck down the second prong as overbroad and vague, finding that it impermissibly relied upon "how a 'reasonable person' interprets a communication in light of four 'contextual factors.'" *NCRL,* 525 F.3d at 283.

By contrast, section 100.57 examines only "the text of a communication," and "turns on the plain meaning of the words used in the communication." 69 Fed. Reg. at 68,057. The "Explanation & Justification" for the regulation makes clear

The district court below drew a similar conclusion. It held that "the case law and Supreme Court precedent make it clear that the use of 'support or oppose' is not unconstitutionally vague," and found that RTAO had not offered any legal authority to the contrary. *RTAO*, 2008 WL 4416282 at *13, slip op. at 24. This Court, for the same reasons, should likewise reject RTAO's challenge to section 100.57, and affirm the district court's decision below.

III. The FEC's "Major Purpose" Test Is Constitutional.

Next, RTAO challenges the implementation of the FEC's "major purpose" test for "political committee" status. In particular, RTAO claims that that the FEC's application of the major purpose test is unconstitutional because it is based on "ad hoc, case-by-case, analysis of vague and impermissible factors." RTAO Br. at 37. The district court was correct in rejecting RTAO's objections.

The so-called "major purpose" test was first articulated by the Supreme Court in *Buckley* in its analysis of FECA's disclosure requirements. 424 U.S. at 78-81. FECA established disclosure requirements both for individuals and for "political committees," prompting the Court to address constitutional concerns that the statutory definition of the term "political committee" was overbroad and, to the

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that the FEC will eschew reliance on "contextual factors," stating expressly that the application of section 100.57 does "not depend on reference to external events, such as the timing or targeting of a solicitation." *Id.* Hence, the concerns regarding "contextual factors" that guided the *NCRL* decision are simply not present here.

extent it incorporated the definition of "expenditure," vague as well. The Court feared that because the term "expenditure" potentially "encompass[ed] both issue discussion and advocacy of a political result," the "political committee" definition (which relies on the definition of "expenditure") might "reach groups engaged purely in issue discussion." *Id.* at 79.

The Court resolved these concerns by narrowing the definition of "political committee" to only "encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* (emphasis added). For such "major purpose" groups, the Court had no vagueness concern about the statutory definition of "expenditure" because, the Court held, "expenditures" by such groups "are, by definition, campaign related." *Id.* (emphasis added). *See also McConnell,* 540 U.S. at 170 n.64.

RTAO objects that the FEC's implementation of the "major purpose" test, as set forth in its most recent statement on the question, *see* FEC Notice 2007-3, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007), and in recent enforcement actions, is an overbroad and unbounded inquiry into "vague and overbroad" factors. RTAO Br. at 36. This complaint is unwarranted.[4]

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[4] RTAO also complains that in assessing whether a group must register as a "political committee," the FEC improperly examines whether a group's major purpose is "Federal campaign activity" rather than what RTAO calls the "narrower" test of whether the group's major purpose is the "nomination or election of a candidate," as set forth in *Buckley*. RTAO Br. at 36. As the district

The Supreme Court in *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238, 262 (1986) ("*MCFL*"), described political committees as "those groups whose primary objective is to influence political campaigns." *Id*. at 262. RTAO argues that this test must be narrowed to only two permissible inquiries. First, RTAO claims that the FEC can examine whether a group's contributions and express advocacy expenditures constitute a majority of its total disbursements. RTAO Br. at 37-38. Alternatively, RTAO states that the FEC can examine a group's "organic documents" – but only those documents – to determine if they contain an "express intention" to operate as a political committee. *Id*. at 38. According to RTAO, the FEC may make no other inquiry.

But these are limitations that RTAO simply makes up. It cites no legal support, and there is none. The test set forth by the Supreme Court is whether a group's "major purpose" or "primary objective" is "the nomination or election of a candidate" or "campaign activity" or "to influence political campaigns." The

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court held, however, "there is really no difference" between these two tests, and indeed, the Supreme Court has used the tests interchangeably. *RTAO*, 2008 WL 4416282 at *14, slip. op. at 26. RTAO admits as much. It concedes that in *MCFL*, the Supreme Court equates the *Buckley* test – whether a group's major purpose is "the nomination or election of a candidate" – with the analysis of whether the group's "major purpose may be regarded as campaign activity." RTAO Br. at 36, *quoting MCFL*, 479 U.S. at 262 (emphasis added). Thus, the FEC's formulation of the "major purpose" test as one that examines a group's "Federal campaign activity" is fully consistent with *Buckley* and *MCFL*.

Court did not limit the scope of the FEC's inquiry into a group's major purpose along the lines suggested by RTAO.

To the contrary, a federal district court in Washington, D.C. recently approved the FEC's "fact intensive approach" to this major purpose determination. *Shays v. FEC,* 511 F. Supp. 2d 19, 29 (D.D.C. 2007). There, the plaintiff sought a judicial determination requiring the FEC to issue a regulation governing when "527 organizations" (like RTAO) would be deemed political committees. The FEC defended its decision to not adopt a regulation but, instead, to make political committee status determinations through enforcement actions, arguing that the major purpose doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct," including "sufficiently extensive spending on federal campaign activity," "the content of [a group's] public statements," "internal statements of the organization," "all manner of the organization's spending" and "the organization's fundraising appeals." *Id.* The district court approved the FEC's approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id. See also FEC v. Malenick,* 310 F. Supp. 2d. 230, 234 (D.D.C. 2004), *quoting FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("An organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."); *Unity08 v. FEC*,

No. 07-CV-0053 (D.D.C. Oct. 16, 2008) (rejecting challenge to FEC determination that Unity08's "major purpose" was federal campaign activity based on group's public statements on website and in advisory opinion proceeding).

Indeed, in *NCRL,* this Court described the test as an inquiry into whether an organization has the major purpose "of supporting or opposing a candidate" and said that political committee status is "only proper if an organization primarily engages in <u>election-related speech</u>." 525 F.3d at 288 (emphasis added). The Court further said that the test is to be implemented by examining, *inter alia*, whether "the organization spends the majority of its money <u>on supporting or opposing candidates</u>." *Id.* at 289 (emphasis added). None of these formulations states or implies the kind of highly restricted inquiry which RTAO assumes.

In short, the Supreme Court in *Buckley* added the "major purpose" test to narrow statutory definition of "political committee." But neither the Supreme Court nor any lower court has constricted the scope of the inquiry that the FEC is to use in making a "major purpose" determination as narrowly as RTAO proposes. This Court should therefore affirm the district court's decision rejecting RTAO's request for a preliminary injunction on this claim.

IV. Section 114.15 of the FEC's Regulations Accurately Implements the Supreme Court's Decision in *WRTL II.*

In *WRTL II,* the Supreme Court held that the BCRA "electioneering communications" funding restriction was unconstitutional as applied to three ads

by WRTL that the Court found to be neither "express advocacy" nor the "functional equivalent of express advocacy." 127 S.Ct. at 2670. The FEC subsequently adopted a regulation, 11 C.F.R. § 114.15, to codify the as-applied *WRTL II* exemption for all similarly situated ads.

The FEC regulation is structured in four basic parts.

First, the regulation sets forth an umbrella test to define the electioneering communications that are subject to the funding prohibition under *WRTL II*: those that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a). This test is taken virtually verbatim from Chief Justice Roberts' controlling opinion in *WRTL II*: "[A] court should find that an 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.

Second, the FEC created a "safe harbor" for electioneering communications which *per se* meet the umbrella test for exemption. 11 C.F.R. § 114.15(b). An ad is within the safe harbor if it does not mention any election, candidacy, political party, opposing candidate or voting; if it does not take a position on any candidate's character, qualifications or fitness for office; if it focuses on a legislative matter and either urges a candidate to take a position or action with respect to the matter, or urges the public to adopt a position and contact a candidate

with respect to the matter; or if it proposes a commercial transaction (such as the purchase of a video).

These safe harbor standards in the regulation are derived almost entirely, and virtually verbatim, from the considerations used by the Supreme Court to conclude that WRTL's ads were not the "functional equivalent of express advocacy." Following its statement of the "no reasonable interpretation" standard, the Court said:

> Under this test, WRTL's ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

127 S.Ct. at 2667 (emphasis added).

Third, the regulation sets forth "rules of interpretation" which provide that for ads outside the safe harbor, the FEC 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). Subsection (c) then restates the same "indicia of express advocacy"

listed by the Court, *compare* 11 C.F.R. § 114.15(c)(1) *with* 127 S.Ct. at 2667, and the same indicia of "a genuine issue ad" listed by the Court, *compare* 11 C.F.R. § 114.15(c)(2) with 127 S.Ct. at 2667. The former indicia include whether an ad mentions a challenger or election and/or attacks the qualifications or fitness for office of a candidate, and the latter indicia include whether an ad focuses on a public policy issue and includes a "call to action" that is something other than voting for or against a candidate.

The regulation specifically notes that in applying the umbrella test set forth in subsection (a), "any doubt will be resolved in favor of permitting the communication." *Id.* at § 114.15(c)(3). This echoes the Court's admonition that in First Amendment issues, the "tie goes to the speaker." *WRTL II*, 127 S.Ct. at 2669.

Finally, the regulation implements *WRTL II* by restricting the FEC's review to "only the communication itself" as supplemented by "basic background information," such as whether an ad actually names a candidate or addresses a public policy issue. 11 C.F.R. § 114.15(d). This part of the rule implements the Court's caution that while the application of any test should be "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," 127 S.Ct. at 2666, "basic background information" need not be ignored where "necessary to put an ad in context." *Id.* at 2669.

RTAO's principal objection to the FEC's regulation boils down to the erroneous claim that the regulation confuses the Supreme Court's test with the Court's application of its test. RTAO Br. at 40-41.

But this is plainly wrong. It is without doubt permissible for the FEC to promulgate a regulation that codifies the *WRTL II* test, and then to elaborate in further detail how it will go about applying the test. That it what the regulation does, and it does so largely by incorporating and re-stating the very same factors that the Court itself applied in concluding that WRTL's ads were exempt. The regulation does not change the umbrella *WRTL II* test, nor narrow its protective sweep, but rather provides helpful specificity by elaborating how the FEC will apply the test. As stated by the district court below, "By doing a side-by-side comparison, it is very apparent that the FEC's regulation simply adopted the test enumerated in *WRTL* to create the electioneering communication regulation in section 114.15." 2008 WL 4416282 at *15, slip. op. at 27-28.

RTAO's more specific objections are equally meritless.

First, RTAO criticizes subsection 114.15(c) – the "rules of interpretation" provision – claiming it "demotes *WRTL II*'s appeal-to-vote test to just one of two elements to be weighed on equal terms." RTAO Br. at 43.

This is a misreading of subsection (c). That subsection is not the test for an exemption; it is simply an explanation of how the FEC will consider the various

relevant factors in assessing whether a communication meets the test for an exemption set forth in subsection (a). In doing so, subsection (c) does no more than track the analysis in *WRTL II,* where the Court considered the very same factors set forth in subsection (c): first, whether the content of the ad was "consistent with that of a genuine issue ad," and second, whether the ad "lacks indicia of express advocacy." 127 S.Ct. at 2667. That two-step analysis by the Court was in service of applying, not displacing, its umbrella test of whether an ad is "susceptible of no reasonable interpretation other than as an appeal to vote" for a candidate. Subsection (c), in setting forth the "rules of interpretation" to apply the test in subsection (a), does no more than the Court itself did, and uses the same factors and indicia used by the Court.

Second, RTAO criticizes the "indicia of express advocacy" factors in subsection (c) – including consideration of whether an ad mentions a political party, and whether an ad takes a position on a candidate's character, qualifications and fitness for office – as being both vague and "peripheral." RTAO Br. at 45. Yet these are the very same factors set forth in *WRTL II.* The Court specifically pointed to the fact that WRTL's ads "do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications or fitness for office." 127 S.Ct. at 2667 (emphasis added). For the FEC to incorporate in its regulation the very same standards used by the

Supreme Court can hardly be considered either impermissibly peripheral or unconstitutionally vague.

Third, RTAO criticizes the regulation because it "has erroneously imported the *application* of *WRTL II*'s appeal-to-vote test in the grassroots lobbying setting of that case . . . into the test itself." RTAO Br. at 46 (emphasis in original). By this, RTAO appears to mean that the regulation in subpart (c) considers whether the ad "includes a call to action" that can be understood as an appeal other than to vote for or against a candidate. 11 C.F.R. § 114.15(c)(2)(iii). According to RTAO, this impermissibly requires an ad to include an affirmative lobbying "call to action" to fall within the exemption.

Again, this is a misreading of the regulation. The subsection (c) rule does not require that an ad have a lobbying "call to action" to be exempt. It merely considers whether an ad has any such non-electoral "call to action" as one factor in support of a determination that the ad would be exempt.

In short, the FEC's regulation does no more than to re-state and codify the rule set forth in *WRTL II*, and also the standards and factors used by the Supreme Court to apply the rule. RTAO's complaints about the regulation, including its complaint about the use of "vague and overbroad factors to interpret the *WRTL II* test," RTAO Br. at 49, are, in essence, complaints about the Supreme Court's own

analysis. The district court's decision to deny preliminary relief was therefore proper and should be affirmed.

CONCLUSION

For the foregoing reasons, the challenged regulations, *see* 11 C.F.R. §§ 100.22(b), 100.57, and 114.15, and the FEC's implementation of the "major purpose" test for political committee status, do not violate the First Amendment. Accordingly, this Court should affirm the district court's decision to deny RTAO's motion for a preliminary injunction.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1977 Caption: The Real Truth About Obama, Inc. v. FEC, et al.

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