No. 12-8078

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREE SPEECH,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the
District of Wyoming (Judge Scott W. Skavdahl)

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

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STATEMENT OF RELATED CASES

There are no prior or related appeals to this case.

GLOSSARY

AO	-	Advisory Opinion
AOR	-	Advisory Opinion Request
BCRA	-	Bipartisan Campaign Reform Act of 2002
FEC or Commission	-	Federal Election Commission
FECA	-	Federal Election Campaign Act
PAC	-	Political Committee

STATEMENT OF INTEREST

Amici curiae Campaign Legal Center and Democracy 21 are non-partisan, non-profit organizations that work to strengthen the laws governing campaign finance and political disclosure. *Amici* have participated in several of the Supreme Court cases underlying the claims herein, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010). *Amici* thus have a demonstrated interest in the issues raised here.

All parties have consented to *amici*'s participation in this case.

INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiff-appellant Free Speech (FS) was organized in February of 2010 for the stated purpose of running advertisements that discuss the positions of President Obama and other "public servants and candidates for public office" on gun rights, land rights, environmental policy, health care and free speech. *See* Complaint ¶¶ 13, 15-17; Free Speech Advisory Op. Request (AOR) 2012-11 (Feb. 29, 2012).

FS is free to spend as much money as it wishes on such independent advertisements, and to raise this money without limit from a wide range of sources, including wealthy individuals, corporations and unions. But fearing that its spending might qualify it as a federal "political committee" subject to disclosure requirements under the Federal Election Campaign Act (FECA), FS filed suit to challenge the constitutionality of the Federal Election Commission (FEC) rule

defining "express advocacy," the FEC's policy governing the determination of federal "political committee" status and the views expressed in a non-binding draft of an FEC advisory opinion on the standard for what constitutes a "solicitation." *See* Complaint, Counts 1-4 (challenging 11 C.F.R. § 100.22(b), the FEC's "major purpose" policy and FEC AO 2012-11, Draft B).

FS devotes much of its brief attempting to characterize the FEC's rules as extraordinarily burdensome, claiming they are tantamount to a "prior restraint," the "licensing laws implemented in 16th- and 17th-century England" and "an unwieldy, unconstitutional, and contradictory regulatory maze." Pl.-App. Br. 10, 34, 53-56. But as the district court found, FS's invective cannot obscure that at "the core of [its] challenges . . . are rules and policies which implement only disclosure requirements." Transcript of Telephonic Oral Ruling at 16, *Free Speech v. FEC*, No. 12-cv-127 (Oct. 3, 2012) ("Ruling").

The question before this Court is thus not whether FS can make expenditures for the speech it proposes, nor whether it can raise money without limitation, but simply whether it must provide full disclosure of its electoral advocacy to the American public. And while FS's brief is heavy on rhetoric, it contains virtually no legal authority supporting FS's attack on political transparency. To the contrary, FS instead must grapple with a recent decision by the Fourth Circuit Court of Appeals, *Real Truth About Abortion (RTAA) v. FEC*, 681 F.3d 544 (4th

Cir. 2012), *cert. denied*, No. 12-311 (Jan. 7, 2013), that rejected precisely the same arguments as FS makes here. The district court decision in this case relied heavily on *RTAA*, and the Supreme Court in January of this year declined to grant *certiorari* in *RTAA*, allowing the Fourth Circuit decision to stand.

As both the district court here and the Fourth Circuit found, FS's arguments have no merit.

First, FS's contention that the FEC rule defining "express advocacy" 11 C.F.R. § 100.22(b), is overbroad and unconstitutionally vague is contrary to all current Supreme Court precedent. FS cites only stale case law that has been called into question in recent years. *See* Pl.-App. Br. 26-27. Since its decision in *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court has maintained that Congress and the FEC may regulate communications beyond "magic words" express advocacy, and that disclosure laws in particular may extend beyond even the "functional equivalent of express advocacy." *Id.* at 190; *Citizens United*, 130 S. Ct. at 915. Furthermore, in a decision FS simply ignores, the Supreme Court in *FEC v. Wisconsin Right to Life (WRTL)*, 551 U.S. 449, 469-70 (2007) articulated a test for the "functional equivalent of express advocacy" that is virtually the same as subpart (b).

Second, with regard to the FEC's methodology for determining whether a group has a "major purpose" to influence elections, FS provides no legal authority

for its claim that the FEC impermissibly implements this standard by making an inquiry into vague and overbroad factors. The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), created the "major purpose" test to narrow the statutory definition of "political committee," but the Court in no way restricted the scope of the inquiry that the FEC may make in determining a group's "major purpose." *Id.* at 79.

Finally, FS complains about the FEC's standard for determining whether a communication solicits contributions – but can point to no agency action in this area beyond 11 C.F.R. § 100.57, a regulation that no longer exists, and Draft B of Advisory Opinion 2012-11, an opinion that was never adopted. *See* Funds Received in Response to Solicitations, Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 Fed. Reg. 13,223 (2010), *available at* http://www.fec.gov/law/cfr/ej_compilation/2010/notice_2010-08.pdf; FEC AO 2012-11, Draft B, Am. Complaint, Ex. C. There is no reviewable agency action here. *Amici* will not address this argument further, as it is self-evident that FS does not have standing to challenge a repealed rule or a draft document, and it is unclear even what legal remedy FS seeks.

For all these reasons, the district court's decision to deny FS's motion for a preliminary injunction should be affirmed.

ARGUMENT

I. The Challenged Rules All Pertain to Disclosure, and Thus Are Reviewed Under "Exacting Scrutiny."

A. The Challenged Rules Implement Only Disclosure Requirements.

FS filed suit to challenge, on an as-applied and facial basis, the FEC's definition of "expressly advocating," *see* 11 C.F.R. § 100.22(b), the FEC's policy for determining political committee status, and a draft advisory opinion pertaining to when donations given in response to solicitations will be deemed "contributions" under FECA. Today, these rules and policies implement the reporting requirements for "independent expenditures," 2 U.S.C. § 434(c), and inform determinations of political committee status, which entails registration, reporting and organizational requirements, *see* 2 U.S.C. §§ 432, 433, 434(a)(4), in the case of FS. In short, the rules and policies at issue implement only disclosure requirements.

Prior to *Citizens United* and a decision of the D.C. Circuit Court of Appeals, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), these rules had considerably broader impact.

Section 100.22(b) previously implemented the federal restrictions on corporate independent spending, *see* 2 U.S.C. § 441b. But by striking down the federal corporate spending restrictions, *Citizens United* has greatly limited the effect of Section 100.22(b): the definition no longer defines the scope of

"expenditures" prohibited under the corporate spending restrictions, but instead simply delineates which political advertisements are subject to disclosure.

Similarly, Section 100.22(b) and the FEC's "major purpose" policy govern FEC determinations of federal political committee status, and this status previously entailed disclosure, 2 U.S.C. §§ 432, 433, 434(a)(4), as well as contribution limits, 2 U.S.C. §§ 441a(a)(1), (a)(2), and restrictions on corporate and union contributions, 2 U.S.C. § 441b(a). But in *SpeechNow.org*, the D.C. Circuit invalidated the contribution limits as applied to federal political committees that make only independent expenditures and that do not coordinate expenditures with candidates or political parties. 599 F.3d at 696. Following this decision, the FEC ruled that political committees that make only independent expenditures are not bound by the federal contribution limits, nor the corporate and union contribution source restrictions. FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten). Today, potential "PAC status" for independent groups such as FS has thus lost much of its former bite. An "independent expenditure-only committee" is now subject only to disclosure requirements, including registration, reporting and organizational obligations.

B. Plaintiff's Attempts to Distinguish Between "Political Committee" Disclosure and Other Forms of Disclosure Are Unavailing.

Despite these changes in the law, FS devotes much of its brief to arguing that the disclosure requirements that attend "PAC status" are uniquely burdensome,

going so far as to assert that "PAC" disclosure requirements and the "electioneering communications" disclosure requirements are "two entirely different regulatory regimes." Pl.-App. Br. 19; *see also id.* at 19-24, 39-42.

While PAC requirements and electioneering communications requirements are not identical, *compare* 2 U.S.C. §§ 432, 433, 434(a)(4) *and* 2 U.S.C. § 434(f), this is a distinction without a difference. Both "regimes" consist only of disclosure obligations, and as such, are subject to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" *Citizens United*, 130 S. Ct. at 914, *quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted).

Indeed, it is unclear what legal import FS's proposed distinction is supposed to have in this case. The district court correctly found that "an intermediate level of scrutiny known as 'exacting scrutiny' is the appropriate standard to apply in reviewing provisions that impose disclosure requirements such as the regulation and policy here." Ruling at 17. And on appeal, FS appears to have abandoned its argument that "political committee" disclosure requirements are so burdensome as to warrant strict scrutiny. This shift is not surprising. Not a single decision following *Citizens United* supports FS's demand for strict scrutiny review. *See*, *e.g.*, *New Mexico Youth Organized (NMYO) v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (noting that that regulations that "require disclosure," in contrast to

"regulations that limit the amount of speech a group may undertake," must pass only "exacting scrutiny"); *RTAA*, 681 F.3d at 549 ("[A]n intermediate level of scrutiny known as 'exacting scrutiny' is the appropriate standard to apply in reviewing provisions that impose disclosure requirements."); *Nat'l Org. For Marriage v. Roberts*, 753 F. Supp. 2d 1217, 1222 (N.D. Fla. 2010) (noting that "instead of strict scrutiny, a standard known as 'exacting scrutiny' applies" to Florida's electioneering communications organization law), *aff'd* 2012 WL 1758607 (11th Cir. May 17, 2012); *Nat'l Org. For Marriage v. McKee*, 649 F.3d 34, 56 (1st Cir. 2011) ("Because Maine's PAC laws do not prohibit, limit, or impose any onerous burdens on speech, but merely require the maintenance and disclosure of certain financial information, we reject NOM's argument that strict scrutiny should apply."); *Human Life of Washington (HLW) v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) (noting that *Citizens United* confirms that "a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny").

But insofar as FS is still attempting to heighten this Court's review of political committee status on the basis of the purportedly "onerous" nature of such status, this effort has no support in Supreme Court precedent.[1]

[1] Plaintiff argues that "[t]he burdens of PAC status remain a heavy weight upon free speech" and thus "it must be narrowly tailored to only apply to actual political committees." Pl.-App. Br. 10. But there is no "narrow tailoring"

FS cites *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986) for the proposition that PAC status entails "myriad burdens," Pl.-App. Br. 22, and states that *Citizens United* "reinforced" this view of PAC status. Pl.-App. Br. 39-40. But the laws at issue in *MCFL* and *Citizens United* were radically different than the disclosure regulations under challenge here. As discussed in Section I.A., prior to recent judicial decisions, a political committee – even one that made only independent expenditures – was subject to not only disclosure requirements, but also contribution limits and source prohibitions. Corporate and union PACs were subject to additional restrictions, including a prohibition on the use of treasury funds to finance either political contributions or independent expenditures, 2 U.S.C. § 441b(b)(2), and restrictions on the class of individuals that the corporate or union parent could solicit for contributions, 2 U.S.C. § 441b(b)(4). Thus, it is unremarkable that earlier cases such as *MCFL* and *Citizens United* stated that political committee status "impose[d] administrative costs." *See MCFL*, 479 U.S. at 254–55; *Citizens United*, 130 S. Ct. at 898. Establishment of a corporate PAC in those cases was a highly-regulated alternative to an absolute prohibition on corporate spending.

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requirement in the Supreme Court's articulation of exacting scrutiny, *see*, *e.g.*, *Citizen United*, 130 S. Ct. at 914, *Buckley*, 424 U.S. at 64, 66, and FS's attempt to import this standard from strict scrutiny review has no basis.

The recent changes in the regulation of federal political committees were recognized by the Fourth Circuit Court of Appeals in *RTAA*. It noted that Section 100.22(b) and the Commission's "major purpose" policy today effected only disclosure requirements and that "disclosure and organizational requirements . . . are not as burdensome on speech as are limits imposed on campaign activities or limits imposed on contributions to and expenditures by campaigns." 681 F.3d at 548; *see also id.* at 552 n.3. It acknowledged that the Supreme Court in *Citizens United* had "used the word 'onerous' in describing certain PAC-style obligations and restrictions" but noted that "it did so in a context significantly different than that facing RTAA." *Id*. at 549. It highlighted, for example, that the law invalidated in *Citizens United*, 2 U.S.C. § 441b, required corporations to set up a separate PAC with segregated funds to make expenditures, and that these funds were "subject to several limitations on allowable contributions, including a prohibition on the acceptance of funds from the corporation itself." *Id*. Because PAC status for RTAA entailed none of these burdens – and, like this case, involved only reporting and registration – the discussion of political committee status in *Citizens United* and *MCFL* was inapplicable.

In short, the Supreme Court has never held that the <u>disclosure</u> requirements that attend PAC status warrant a stricter standard of scrutiny than do other forms of

disclosure. This Court should affirm the district court's decision to assess the challenged regulations and policies under exacting scrutiny.

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

FS claims that the so-called "subpart (b)" definition of express advocacy is unconstitutionally vague and overbroad, suggesting that "express advocacy" cannot extend beyond "magic words." Pl.-App. Br. 26 (arguing that FECA can constitutionally reach only "communications that include 'express words of advocacy of the election or defeat' of a clearly identified candidate"). However, this stance flies in the face of all recent Supreme Court precedent.

In *McConnell*, the Supreme Court cast doubt on the functionality of the "magic words" construction of "express advocacy." 540 U.S. at 193. *WRTL* then made clear that the state may regulate not only express advocacy, but also the "functional equivalent of express advocacy," and articulated a test for the latter that is virtually identical with subpart (b). 551 U.S. at 474 n.7. *Citizens United* cast further doubt on the "magic words" test by finding that a communication need not constitute express advocacy – or even the functional equivalent of express advocacy – to be regulable under the federal "electioneering communications" disclosure requirements. 130 S. Ct. at 915. Thus, all three cases contradict FS's suggestion that the FEC can only regulate "magic words" express advocacy and

strongly support the constitutionality of the subpart (b) test definition of express advocacy.

Furthermore, arguments almost identical to those asserted by FS have been rejected by the Fourth and Eleventh Circuits; both Courts of Appeal recognized that the *WRTL* test – and disclosure laws based on this test – are neither vague nor overbroad, but rather are consistent with all recent Supreme Court precedent.

A. The Constitutionality of the Subpart (b) Definition of "Expressly Advocating" Is Supported by *McConnell*, *WRTL* and *Citizens United*.

The debate over the 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," and consequently construed the "relative to" phrase to "apply only to expenditures for communications that in express terms 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.

More than a decade after *Buckley,* the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), concluded that "speech 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, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *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
> (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).

In the time period following the adoption of this rule but prior to the issuance of the Supreme Court decisions in *McConnell*, *WRTL* and *Citizens United*,

the courts of a few jurisdictions outside the Ninth Circuit expressed doubts as to the constitutionality of this formulation of express advocacy. All of the cases FS cites in support of its argument are drawn from this period – insofar as they are even on point. *See* Pl.-App. Br. 26 (citing *Right to Life of Duchess Co., Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *Maine Right to Life Cmte. v. FEC*, 914 F. Supp. 8, 13 (D. Maine 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997)); *id*. at 27 (*citing Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004)). But FS fails to acknowledge that the Supreme Court in *McConnell*, *WRTL* and *Citizens United* revised its analysis of "express advocacy," casting doubt on the cases cited by FS. *McConnell*, *WRTL* and *Citizens United* confirm that the First Amendment does not limit the scope of campaign finance regulation to "magic words," but rather allows regulation of a broader category of speech consisting of the "functional equivalent of express advocacy," and thus strongly support the constitutionality of subpart (b).

First, in *McConnell,* the Supreme Court explained that *Buckley's* 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 prohibited the use of corporate or union treasury funds to pay for

an "electioneering communication" – defined as any broadcast ad that refers to a clearly identified federal candidate, is targeted to the candidate's electorate and is aired within 30 days of a primary or 60 days of a general election. 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 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" funding provisions against a facial challenge.

In *WRTL*, the Court revisited Title II of BCRA in the context of a challenge to the "electioneering communication" provisions as applied to three broadcast ads that WRTL wished to air. Chief Justice Roberts, writing the controlling opinion for the Court, interpreted *McConnell* as upholding the Title II funding restrictions only insofar as "electioneering communications" contained either express advocacy or "the functional equivalent of express advocacy." 551 U.S. at 469-70. As to the latter category, "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." *Id.* (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.* at 476.

WRTL's "functional equivalent" test closely correlates to the FEC's subpart (b) standard for express advocacy. Under *WRTL,* 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 it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." There is no legal or practical difference between these tests.

Further, Chief Justice Roberts in *WRTL* specifically addressed the argument asserted by FS here that the "functional equivalent" test is unconstitutionally vague because it does not hew to the "express advocacy" test as set forth in *Buckley*. 551 U.S. at 474 n.7. The Chief Justice explained that the "magic words" standard of express advocacy formulated in *Buckley* is not "the constitutional standard for

clarity . . . in the abstract, divorced from specific statutory language," and the standard "does not dictate a constitutional test." *Id.*[2]

In light of Justice Robert's strong affirmation of his "functional equivalent" test, the fact that FEC did not issue a conclusive opinion on some of FS's proposed ads in the advisory opinion process is immaterial. Pl.-App. Br. 29-33. The FEC's partial deadlock does not make a test endorsed by the Supreme Court unconstitutionally vague. Some degree of disagreement over application of the subpart (b) test "is simply inherent in any kind of standards-based test." *RTAA*, 681 F.3d at 554. *See also Roberts*, 753 F. Supp. 2d at 1221 ("The fact that it may be difficult in some cases to determine whether these clear requirements have been met does not mean that the statute is void for vagueness.") (internal quotations omitted). Further, as the district court found, the deadlock is likely the result of "the inherent problem in an equal number of Commissioners and the unfortunate political divide" on the Commission; indeed, the unprecedented discord among the

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[2] And even insofar as subpart (b) definition includes "limited reference to external events," *see* Pl.-App. Br. 27-28, the *WRTL* Court made clear that 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[.]" 551 U.S. at 474 (internal quotations omitted). In keeping with this directive, consideration of context is permitted, but greatly limited, under the subpart (b) test ("with limited reference to external events"). Thus, contrary to FS's claims, Section 100.22(b)'s reference to "external events" does not broaden the rule beyond Chief Justice Roberts's test.

current FEC Commissioners has been widely criticized[3] for resulting in under-enforcement of the law. Ruling at 18. But it is ridiculous to suggest, as FS does here, that every time an agency suffers from ideological division, the regulations it enforces are suddenly rendered vague.

Finally, *Citizens United* reaffirmed the constitutionality of the *WRTL* test. There, the Supreme Court again reviewed the corporate funding restriction of Title II of BCRA, and in a 5-4 opinion, struck down the federal prohibition on corporate expenditures in its entirety, *see* 2 U.S.C. § 441b. 130 S. Ct. at 913. Far from questioning the validity of the *WRTL* "functional equivalent" test, the Supreme Court actually applied *WRTL*'s test to the communications at issue in *Citizens United* to determine whether they would be prohibited by 2 U.S.C. § 441b; only because it found that the communications would be prohibited, did the Court then proceed to consider the constitutionality of that prohibition. *See RTAA*, 681 F.3d at 551 (noting that by "[u]sing *Wisconsin Right to Life*'s 'functional equivalent' test" the Court concluded that *Hillary: The Movie* "qualified as the functional equivalent of express advocacy") (emphasis added).

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[3] *See also* Editorial, *The Toothless Watchdog FEC*, Wash. Post, Dec, 29, 2012, *available at* http://articles.washingtonpost.com/2012-12-29/opinions/36071872_1_recess-appointments-fec-campaign-finance; Jonathan D. Salant, *U.S. Federal Election Commission Deadlocks on Greater '12 Donor Disclosure*, Bloomberg (June 15, 2011, 4:13 PM), http://www.bloomberg.com/news/2011-06-15/u-s-federal-election-panel-considers-increased-donor-disclosure-for-2012.html.

The *Citizens United* Court also consigned the "magic words" standard for "express advocacy" to further irrelevance. In an 8-1 opinion, the Court upheld the federal disclaimer and disclosure requirements applicable to all "electioneering communications." 130 S. Ct. at 914. In so holding, the Court "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id.* at 915. Otherwise expressed, the Supreme Court not only rejected the "magic words" standard when delineating the constitutionally permissible scope of disclosure, but also found that disclosure could extend beyond speech that was the "functional equivalent of express advocacy." *Id*. *See also HLW*, 624 F.3d at 1016 ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."). The *Citizens United* decision thus directly contradicts FS's argument that the subpart (b) definition is overbroad with respect to disclosure.

In short, since the lower court decisions cited by plaintiff were decided, new Supreme Court case law – including *McConnell, WRTL* and *Citizens United* – has in effect overruled those decisions. *McConnell* made clear that the "magic words" standard was "functionally meaningless." 540 U.S. at 190. *WRTL* made clear that the state may regulate not only "magic words" express advocacy, but also the

functional equivalent of express advocacy, which it defined in a manner that closely tracked the language of subpart (b). Finally, *Citizens United* declared that for the purposes of disclosure, regulation can extend even beyond communications that meet the *WRTL* test for the "functional equivalent of express advocacy." All three cases thus strongly support the constitutionality of subpart (b), and indeed suggest that disclosure-related regulation may sweep yet more broadly.

B. Lower Court Decisions Following *Citizens United* Have Recognized the Validity of *WRTL*'s Test for the Functional Equivalent of Express Advocacy.

Following the Supreme Court's decision in *WRTL* and *Citizens United*, multiple lower courts have upheld laws based on *WRTL*'s "functional equivalent" test. FS offers no authority to the contrary.

The Fourth Circuit in *RTAA* rejected a challenge to Section 100.22(b) that is virtually identical to the one it brings here. In *RTAA*, the Court of Appeals held that the subpart (b) definition of express advocacy was neither vague nor overbroad according to recent Supreme Court decisions in *McConnell*, *WRTL* and *Citizens United*. It dismissed RTAA's overbreadth argument on grounds that the *McConnell* Court held that "Congress could permissibly regulate not only communications containing the 'magic words' of *Buckley*, but also communications that were 'the functional equivalent' of express advocacy.'" 681 F.3d at 550-51. The Court further found that *Citizens United* also suggested that

the subpart (b) test was not overbroad, noting that the Supreme Court there actually held that disclosure regulations could extend beyond the functional equivalent of express advocacy to include some issue speech. *Id.* at 551. The Court also rejected RTAA's vagueness argument, highlighting that in *WRTL*, the Supreme Court's formulated a test for the "functional equivalent of express advocacy" that is "consistent" with the "language of § 100.22(b)." *Id*. at 552.

Similarly, the Eleventh Circuit Court of Appeals recently upheld Florida's electioneering communications disclosure statute which incorporates *WRTL*'s test for the "functional equivalent of express advocacy." *National Organization for Marriage Inc. v. Sec'y*, 2012 WL 1758607 (11th Cir, May 17, 2012) (affirming *Roberts*). The plaintiff there had challenged the state's definition of "electioneering communications" on grounds that its inclusion of language drawn from the *WRTL* test rendered it vague and overbroad. *See* Fla. Stat. § 106.011(18) (defining "electioneering communications" as a communication that, *inter alia*, refers to "a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate") (emphasis added). The district court disagreed, holding that the language included in Florida's statute "provides an objective standard that was created and applied by the United States Supreme Court" in *WRTL*. 753 F. Supp. 2d at 1221. The Court also rejected the

argument that *Citizens United* cast doubt on the validity of the *WRTL* test, finding that "[f]ar from overruling *WRTL*, the Court [in *Citizens United*] embraced a straight forward application of the appeal to vote test." *Id*. at 1220.

The Tenth Circuit appears to be in accord with the consensus. FS suggests that *NMYO* limited campaign finance regulation to express advocacy, but there this Court ruled on a different issue, namely the constitutionality of a statutory definition of "political committee" that relied upon a $500 monetary spending threshold as a proxy for a more traditional "major purpose" test. *See* Pl.-App. Br. 27, 44 (citing *NMYO*, 611 F.3d 669). *NMYO* did not consider the definition of express advocacy, much less suggest that the *WRTL* test was constitutionally suspect. To the contrary, *NMYO* indicated that speech that was the "functional equivalent of express advocacy for the election or defeat of a specific candidate is unambiguously related to the campaign of a candidate and thus properly subject to regulation regardless of its origination." 611 F.3d at 676 (emphasis added). Thus, albeit in *dicta*, the Tenth Circuit has opined that disclosure may apply to speech beyond "express advocacy" and to the "functional equivalent of express advocacy." This stance puts the Tenth Circuit in concord with other appellate decisions that have upheld *WRTL*'s test for the "functional equivalent of express advocacy" – and by extension, the subpart (b) test for the same.

III. The FEC's Methodology for Determining a Group's "Major Purpose" Is Constitutional.

FS also asserts that the FEC's approach to the "major purpose" test is "unconstitutionally vague and overbroad." Pl.-App. Br. 12. The FEC, however, is simply using the standards established by the Supreme Court to determine a group's "major purpose" and evaluating factors identified as relevant by the courts to this analysis.

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 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 *Buckley* 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).

The first objection raised by FS is that in assessing whether a group must register and operate as a "political committee," the Commission has improperly expanded its "major purpose" inquiry by examining whether a group's major purpose is "federal campaign activity" or "influencing a federal election," rather than the purportedly "narrower" standard of whether the group's major purpose is the "nomination or election of a candidate." Pl.-App. Br. 13.

There is no basis for this purported distinction, however, and indeed the Supreme Court in *MCFL* used various descriptions of "major purpose" interchangeably. In exempting MCFL from the federal corporate expenditure ban, the Court acknowledged that MCFL could nevertheless be required to register and operate as a "political committee" if it met the "major purpose" test set forth in *Buckley*. Although it found that MCFL at the present was not an entity "the major purpose of which is the nomination or election of a candidate," 479 U.S. at 253 n.6, it noted that:

> [S]hould 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. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

Id. at 262 (emphasis added).

The *MCFL* Court set forth the *Buckley* standard – whether the group's major purpose is "the nomination or election of a candidate" – and then equated that test with whether the group's "major purpose may be regarded as campaign activity" or whether its "primary objective is to influence political campaigns." Thus, the Supreme Court has already used a variety of expressions to describe the "major purpose" test – many of which closely resemble the formulations that FS deems unconstitutionally vague and overbroad. The fact that the Commission may express the "major purpose" test as an inquiry into a group's "federal campaign activity" therefore not only is sufficiently tailored, but closely tracks the language of *Buckley* and *MCFL*.

Second, FS asserts that the Commission's implementation of the "major purpose" test, particularly its inquiry into a group's "central organizing purpose," is an overbroad and open-ended investigation. Again, this complaint is unwarranted.

FS argues that under Tenth Circuit precedent, the "major purpose" test takes the form of two inquiries: (1) "comparison of the organization's independent spending with overall spending," and (2) "examination of the organization's central organizational purpose." Pl.-App. Br. 44-45 (citing *Colorado Right to Life Comm., Inc. (CRTL) v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007); *NMYO*,

611 F.3d at 6780.[4] FS does not object to the first line of inquiry, but claims the FEC has taken the latter inquiry to "unconstitutional lengths," because it does not limit its review of a group's "central organizational purpose" to the group's "organizational documents" and official statements – but also examines "anything else it may find pertinent." Pl.-App. Br. at 12-13.

But this is a restriction that FS simply makes up. FS offers no authority to support this draconian limitation on the evidence the FEC may consider in assessing a group's central organizational purpose. Indeed, FS's agreement boils down to a complaint that the FEC does not limit its "major purpose" inquiry to a group's public documents, but instead seeks to corroborate the accuracy of these often self-serving pronouncements by reviewing the group's expenditures, internal

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[4] Although the two methods for "major purpose" determinations set forth in *CRTL* do not seem to conflict with the FEC's methodology, *amici* note that no Supreme Court decision has articulated the major purpose inquiry in this manner. To support its formulation of the "major purpose" inquiry, the *CRTL* Court highlighted two passages in *MCFL*: first, the Supreme Court's statement that MCFL's "central organizational purpose [wa]s issue advocacy," *MCFL*, 479 U.S. at 252 n.6, and second, its statement that "if 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," *id.* at 262. But the first statement was merely a description of MCFL: as MCFL's "central purpose" was not in dispute in the litigation, *id.* at 252 n.6, it was merely *dicta*. With respect to the second statement, as the Fourth Circuit points out, the *MCFL* Court "indicates that the amount of independent spending is a relevant factor in determining PAC status, but it does not imply that the Commission may only consider spending." *RTAA*, 681 F.3d at 557. Thus neither passage from *MCFL* highlighted by the *CRTL* Court purported to set forth an authoritative methodology for the major purpose inquiry.

statements and other evidence. Furthermore, FS does not explain why such a constriction of the "major purpose" inquiry would even remedy the allegedly vagueness of FEC's approach to the major purpose test. It is unclear, for instance, why an effort by the FEC to substantiate a group's public statements by reviewing its fundraising appeals or political advertisements would detract from the "clarity" of the major purpose test. The only apparent purpose of such a constraint would be to hamstring FEC enforcement efforts and shield groups from any attempts to verify whether their own characterization of their activities was accurate. Indeed, FS admits as much, making the extraordinary assertion that "it is an organization's right to determine its central organizational purpose, not the FEC's." Pl.-App. Br. 52. But there is no constitutional right to be free of legitimate efforts to enforce the federal disclosure requirements. The Constitution does not require the FEC to serve merely as a rubber stamp.

This Circuit certainly has not endorsed the highly circumscribed major purpose inquiry that FS urges. *See* Pl.-App. Br. 41 (arguing that the Tenth Circuit has "a long tradition of protecting political speech"). FS cities *NMYO* and *CRTL* but neither case supports its position. Both cases focused on <u>whether</u> a "major purpose" test was required to be included in a definition of "political committee," not <u>how</u> the major purpose test should be implemented. To be sure, the Tenth Circuit has appeared to approve "examination of the organization's central

organizational purpose" as one means of determining a group's major purpose. *CRTL*, 498 F.3d at 1152 (citing *MCFL*, 479 U.S. at 252, 262); *NMYO*, 611 F.3d at 678. But it has not suggested that the analysis of an organization's "central organizational purpose" must be limited to its "organizational documents" and official statements. Indeed, the Court has not addressed the process of investigating a group's "central organizational purpose" in any detail at all.

Finally, FS complains that "the factors within the FEC's inquiry are boundless and undefined." Pl.-App. Br. 13. Again, however, it provides no authority for its assertion that the consideration of factors such as the "timing of advertisements" or "whether communications identify a candidate" is impermissible. *Id*. at 47. And there is no such authority. Every court to have specifically considered the FEC's multi-factor approach has upheld it as constitutional. In *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007), the plaintiff sought a judicial determination requiring the FEC to issue a regulation governing when "527 organizations" 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 "whether there is 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.* *See also FEC v. Malenick,* 310 F. Supp. 2d. 230, 234 (D.D.C. 2004) ("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.") (quoting *FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996)). The *Shays* court approved the FEC's approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id.*

More recently, the Fourth Circuit upheld the FEC's multi-factor method for political committee determinations in *RTAA*. It found that "[a]lthough *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose." 681 F.3d at 556. It went on to note that "the necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *Id.* at 557 (citing *FEC v. Malenick*, 310 F. Supp. at 234-37; *GOPAC*, 917 F. Supp. at 859, 864-66). The Court of Appeals concluded that the FEC had "adopted a sensible approach to determining whether an organization qualifies for PAC status," *id.* at 558, highlighting that "[t]he determination of whether the election or defeat of federal candidates for office is

the major purpose of an organization, and not simply a major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others . . . ." *Id*. at 556.

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 FS apparently demands. The district court was correct in rejecting FS's challenge to the FEC's "major purpose" policy.

CONCLUSION

For the foregoing reasons, the district court's decision to deny FS's motion for preliminary injunction should be affirmed.

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I certify that no privacy redactions were required for this brief and that the digital ECF version of the foregoing is an exact copy of the written document filed with the Clerk of the Court. I further certify that the digital submission has been scanned for viruses with the most recent version of Microsoft Security Essentials, a commercial virus scanning program, and according to the program, the submission is virus-free.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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