**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**RICHMOND DIVISION**

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| THE REAL TRUTH ABOUT OBAMA, Inc.,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION, *et al*.<br><br>Defendants. | No. 3:08-cv-00483<br><br>Judge James R. Spencer |

**MEMORANDUM OF CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION**


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**Statutes and Regulations:**



**Miscellaneous Resources:**

## INTRODUCTION & SUMMARY OF ARGUMENT

The Real Truth About Obama, Inc. (RTAO) was organized shortly before the 2008 election for the stated purpose of running broadcast ads and sponsoring other public communications to criticize then-Senator Barack Obama, the Democratic Party presidential nominee.

RTAO was free to spend as much money as it wished on such activities, provided that it did so independently of any candidate or political party. But fearing that it might qualify as a federal "political committee," subject to contribution limits, source prohibitions and comprehensive disclosure requirements under the Federal Election Campaign Act (FECA), RTAO brought this case to challenge several rules governing the FEC's determination of federal political committee status. *See* Am. Complaint (filed Oct. 16, 2008), Counts 1-3 (challenging 11 C.F.R. 100.22(b), 11 C.F.R. 100.57 and the FEC's "major purpose" policy). *See also* Am. Complaint, at Count 4 (challenging rule implementing corporate expenditure restrictions, 11 C.F.R. 114.15).

However, since the initiation of this case, intervening judicial decisions, most notably, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), have radically reshaped the landscape of campaign finance law. *See* Section I.A. *infra*. As a result, only RTAO's claims challenging 11 C.F.R. 100.22(b) and the FEC's implementation of the "major purpose" test remain live. Furthermore, due to the recent judicial rulings, this rule and policy presently affect RTAO only insofar as they trigger disclosure obligations if RTAO makes "independent expenditures" or is deemed a federal political committee. *See* 2 U.S.C. § 434(c) (reporting requirements for "independent expenditures"); 2 U.S.C. §§ 432, 433, 434(a)(4) (federal political committee reporting and organizational requirements).

The question that thus remains is not whether RTAO can make expenditures for the speech it proposes, nor whether it must abide by contribution limits and source requirements, but rather whether it must provide comprehensive disclosure of its election advocacy to the American public. There is no support in either the federal campaign finance law or judicial precedent for RTAO's attempt to evade its disclosure obligations under FECA. In this year alone, the Supreme Court has twice upheld, by overwhelming 8-1 votes, laws requiring political disclosure, reiterating that such "transparency" "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916; *see also Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding Washington state law authorizing disclosure of ballot referenda petitions). RTAO's remaining challenges to 11 C.F.R. 100.22(b) and the FEC's "major purpose" policy have no merit and should be rejected.

First, as a threshold matter, RTAO's argument that strict scrutiny should apply to this Court's review of 11 C.F.R. 100.22(b) and the FEC's "major purpose" policy has no basis. Although RTAO asserts that this rule and policy govern determinations of "PAC status" and therefore require strict scrutiny, "PAC status" in this case entails only registration, reporting and other disclosure requirements. The Supreme Court has made clear that disclosure laws are subject not to strict scrutiny, but rather only to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizen United*, 130 S. Ct. at 914, *quoting Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (internal citations omitted).

Second, RTAO'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 recent Supreme Court

precedent in this area. The Supreme Court has reiterated in a series of cases that Congress and the FEC may regulate communications that do not constitute "magic words" express advocacy, and that disclosure laws in particular may regulate beyond even the "functional equivalent of express advocacy." *McConnell v. FEC*, 540 U.S. 93, 190 (2003); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007); *Citizen United*, 130 S. Ct. at 915.

Finally, with regard to the Supreme Court standard of whether it has a "major purpose" to influence elections, RTAO provides no legal authority for its claim that the FEC impermissibly implements this standard by making an inquiry into "vague and overbroad factors." Brief in Support of Summary Judgment and Preliminary Injunction (filed Sept. 20, 2010) ("Pl. Br.") at 39. The Supreme Court in *Buckley v. Valeo* 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." *Buckley*, 424 U.S. at 79.

This court correctly determined that RTAO had not demonstrated a likelihood of success on the merits of its case in its initial consideration of RTAO's request for a preliminary injunction. *See RTAO v. FEC*, No. 3:08-cv-483, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008), *aff'd*, 575 F.3d 342 (4th Cir. 2009) (vacated for consideration of mootness by 130 S. Ct. 2371 (2010)). For the reasons set forth below, this Court should affirm the reasoning of its earlier decision, and grant summary judgment to the FEC on all remaining claims in this matter.

## ARGUMENT

### I. Strict Scrutiny Is Not Applicable to This Court's Review of Section 100.22(b) or the FEC's "Major Purpose" Test.

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

RTAO's challenge has contracted greatly in scope. Its case now concerns only the federal disclosure requirements that are applicable to "independent expenditures" and that accompany federal political committee status. As such, the case is governed not by strict scrutiny, but rather only by "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" *Citizen United*, 130 S. Ct. at 914, *quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted).

RTAO originally filed suit to challenge three FEC rules, *see* 11 C.F.R. 114.15, 100.57 and 100.22(b), and the FEC's policy for determining a group's "major purpose." *See* Am. Complaint, Counts 1-4. The challenged rules implemented the federal restrictions on corporate independent spending, *see* 11 C.F.R. 114.15 and 100.22(b), and governed FEC determinations of federal political committee status, *see* 11 C.F.R. 100.57 and 100.22(b). Federal political committee status, in turn, entailed disclosure, 2 U.S.C. §§ 432, 433, 434(a)(4), 441d, as well as contribution limits, 2 U.S.C. §§ 441a(a)(1), 441a(a)(2), and source prohibitions, 2 U.S.C. § 441b(a).

Intervening judicial decisions and FEC rulings have mooted two of RTAO's claims, as well as narrowed the scope of its remaining claims.

First, by striking down the federal corporate spending restrictions, *see* 2 U.S.C. § 441(b), *Citizens United* has mooted RTAO's challenge to the rules governing the FEC's

implementation of these restrictions. *See also* FEC Statement on the Supreme Court's Decision in Citizens United v. FEC (Feb. 5, 2010), at http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml. RTAO agrees that its challenge to 11 C.F.R. 114.15 has been mooted. Pl. Br. at 2-3. However, *Citizens United* also moots RTAO's challenge to 11 C.F.R. 100.22(b) insofar as this provision defined the scope of "expenditures" that were covered by the now-invalidated corporate spending restrictions.

Second, as RTAO acknowledges, its challenge to 11 C.F.R. 100.57 is also moot in light of *EMILY'S List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), which found this rule unconstitutional, albeit on grounds not asserted by plaintiff in this action. Pl. Br. at 2-3. The rule has been repealed by the FEC. *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.

Lastly, in addition to mooting RTAO's challenge to these rules, subsequent case law has also greatly narrowed the scope of regulation to which certain federal political committees are subject under FECA. In a recent decision, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), the *en banc* D.C. Circuit Court of Appeals invalidated the federal contribution limits as applied to federal political committees that make only independent expenditures and do not contribute to candidates or political parties. The FEC clarified the impact of this decision by issuing two advisory opinions confirming that political committees that make only independent expenditures are not bound by the federal contribution limits, and in addition, are not subject to the corporate and union contribution source restrictions. *See* FEC

AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten). Since the filing of this case, potential "PAC status" for independent groups such as RTAO[1] has thus lost much of its bite. An "independent expenditure committee" is now subject only to disclosure requirements, including registration, reporting and organizational obligations. 2 U.S.C. §§ 432, 433, 434(a)(4).

Despite these developments, RTAO contends that strict scrutiny applies to this Court's review of its remaining challenges to 11 C.F.R. 100.22(b) and the FEC's "major purpose" policy. *See* Pl. Br. 22-23, 36. However, the subpart (b) definition affects RTAO only insofar as it would trigger the federal disclosure requirements applicable to independent expenditures, 2 U.S.C. §§ 434(c), 441d, or would inform FEC determinations of political committee status. Similarly, the FEC's "major purpose" policy affects RTAO only insofar as it governs determinations of political committee status, which, as explained above, would only trigger registration, reporting and organization requirements with respect to an independent group like RTAO.[2]

Because the challenged rules and policy therefore give rise only to disclosure obligations in this case, the correct standard of review is not strict scrutiny, but rather the more relaxed "exacting scrutiny" standard.

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[1] RTAO has stated an intention to engage only in independent communications, *see* Pl. Br. 4-8. Its Articles of Incorporation also prohibit RTAO from "mak[ing] any contribution to any candidate or public office." Am. Compl. ¶ 12. If RTAO was found to be a political committee, it therefore would not be subject to the federal contribution limits or source restrictions pursuant to *SpeechNow.org v. FEC* and the FEC's subsequent advisory opinions.

[2] Even if a determination that RTAO was a federal political committee entailed contribution limits or source restrictions – which it would not – restrictions on contributions are <u>not</u> subject to strict scrutiny. Because contribution restrictions, unlike expenditure limits, still "permit[] the symbolic expression of support evidenced by a contribution" and do not "in any way infringe the contributor's freedom to discuss candidates and issues," *see McConnell*, 540 U.S. at 135, they warrant "less rigorous" review. *Id*. at 137.

### B. There Is No Basis for the Application of Strict Scrutiny.

In an attempt to heighten the standard of scrutiny applicable to the challenged rules, RTAO argues that both 11 C.F.R. 100.22(b) and the FEC's "major purpose" policy can trigger "PAC status," and that laws imposing PAC status require strict scrutiny. Pl. Br. at 23. But "PAC status," in itself, is not a substantive regulation. Because the only substantive regulation triggered by "PAC status" in this case is disclosure, strict scrutiny is inappropriate.

The Supreme Court applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. Expenditure restrictions, as the most burdensome campaign finance regulations, are subject to strict scrutiny and reviewed for whether they are "narrowly tailored" to "further[] a compelling interest." *WRTL II*, 127 S. Ct. at 2664; *see also Buckley*, 424 U.S. at 44-45. Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisfy the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted). Disclosure requirements, the "least restrictive" campaign finance regulations, *Buckley*, 424 U.S at 68, are subject to "exacting scrutiny," which requires only that there exist a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. at 64 (internal footnotes omitted). Indeed, the Supreme Court has twice reaffirmed in this year that "exacting scrutiny" applies to political disclosure requirements in both the sphere of campaign finance law and in the context of ballot referenda. *See Citizens United*, 130 S. Ct. at 914 ("The Court has subjected [disclosure] requirements to 'exacting scrutiny,'…."); *Reed*, 130 S.

Ct. at 2818 (finding that disclosure law relating to ballot referenda petitions was subject only to "exacting scrutiny").[3]

Pursuant to this analytical framework, if political committee status is connected to a restriction on expenditures, then the imposition of this status may require review under strict scrutiny. If, on the other hand, "PAC status" entails only registration and reporting requirements, then the provisions governing this status would be reviewed under only "exacting scrutiny."

This principle is well illustrated by the D.C. Circuit's decision in *SpeechNow.org v. FEC*. There, the Court of Appeals reviewed both the contribution limits connected to federal political committee status, and the registration, reporting and organizational requirements connected to such status. It struck down the contribution limits as applied to "independent expenditure committees" after reviewing such limits under the intermediate scrutiny appropriate for contribution limits. 599 F.3d at 692 (noting that contribution limits must be "closely drawn to serve a sufficiently important interest") (citing *Davis v. FEC*, 128 S. Ct. 2759, 2772 n.7 (2008)). By contrast, the Court of Appeals upheld the political committee disclosure requirements under a more relaxed standard, stating that "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation'" to the requirements." *Id*. at 696. The appropriate standard of scrutiny thus turned on the nature of the substantive regulation associated with political committee status, not "PAC

[3] Lest there was any doubt as to the meaning of "exacting scrutiny" in the review of disclosure laws, the Supreme Court in *Doe v. Reed* stated explicitly that in applying "exacting scrutiny" to the challenged ballot referenda disclosure law, the Court was *not* applying strict scrutiny. 130 S. Ct. at 2820 n.2.

status" itself, as plaintiffs contend.[4] And neither the contribution limits nor the disclosure requirements applicable to political committees warranted strict scrutiny review.

RTAO offers no legal authority to the contrary. The cases it cites in support of strict scrutiny either did not review political disclosure requirements, or if they did, applied only "exacting scrutiny" to such disclosure. *See* Pl. Br. at 36, *citing Citizens United*, 130 S. Ct. at 898; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) (overturned on other grounds); *FEC v. Massachusetts Citizens for Life (MCFL),* 479 U.S. 238, 263 (1986). Instead, the cited cases focused on the constitutionality of federal or state laws that prohibited corporate independent expenditures except through a strictly-regulated separate segregated fund (or "PAC"):

- *Citizens United* reviewed 2 U.S.C. § 441, the federal restriction on the expenditure of corporate and union treasury funds for independent expenditures. 130 S. Ct. at 898. In its review of the federal electioneering communications disclosure requirements, however, the Supreme Court applied exacting scrutiny. *Id.* at 914.

- *Austin* reviewed a Michigan law which prohibited corporations from using general treasury funds for independent expenditures in connection with state candidate elections. 494 U.S. at 654-55.

- *MCFL* reviewed the federal corporate expenditure restriction, 2 U.S.C. § 441, as applied to an ideological not-for-profit corporation.[5] 479 U.S. at 241.

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[4] This has also been the approach of a number of courts that have heard challenges post-*Citizens United* to disclosure-related requirements accompanying state political committee or "political fund" status. *See Minnesota Concerned Citizens for Life, et al. v. Swanson et al.*, 0:10-cv-02938-DWF-JSM, slip op. at 22 (D. Minn. Sept. 20, 2010) (noting that state "political fund" registration and reporting requirements were "not a ban, but rather a disclosure law" and that "[a]ccordingly, the law will be reviewed under 'exacting scrutiny'"); *National Organization of Marriage, et al. v. McKee, et al.*, No. 09-538-B-H, slip op. at 25 (D. Maine Aug. 19, 2010) (finding that "the Supreme Court has made clear that when election-related speech is not prohibited, but simply carries consequences such as these PAC-type requirements, courts must apply 'exacting scrutiny' to the law").

[5] In *MCFL*, the plaintiff group did not challenge the federal political committee disclosure requirements. 479 U.S. at 241. The Supreme Court thus had no reason to analyze the constitutionality of these disclosure requirements, or to determine the correct standard of scrutiny.

Because the substantive laws challenged in these cases were expenditure restrictions, the most burdensome of campaign finance regulations, strict scrutiny was appropriate. Here, however, an expenditure restriction is not at issue, and the review of such restrictions in *Citizens United*, *Austin* and *MCFL* has no relevance to this action.

RTAO tries to bridge the obvious disparity between its cited cases and the instant matter by suggesting that all deal with "provisions imposing PAC status." Pl. Br. at 36. But its attempt to equate corporate expenditure bans with the federal political committee disclosure requirements is untenable. *Citizens United*, *Austin* and *MCFL* reviewed laws that prohibited corporate expenditures to influence an election and allowed corporate participation

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The *MCFL* Court, however, did discuss the federal political committee disclosure requirements in its review of an argument advanced by the FEC to defend the federal corporate expenditure restriction – namely, that MCFL's speech was not unconstitutionally burdened by 2 U.S.C. § 441b because MCFL could establish a corporate PAC to fund political ads. *See* 479 U.S. at 252-56. The Court rejected this argument for several reasons, first and foremost because federal law allowed a corporate PAC to fund its "campaign advocacy" only with limited contributions from a restricted group of permissible donors. *Id.* at 252; *see* 2 U.S.C. § 441b(b)(4)(A). This, in the Court's view, was no substitute for allowing corporations to spend their general treasury funds on political advertising.

The *MCFL* Court also recognized that the FEC's proffered solution to MCFL's complaint (*i.e.*, formation of a political committee) would impose greater disclosure burdens on MCFL than would the litigation outcome MCFL sought (*i.e.*, permission to spend corporate treasury funds on express advocacy). But the Court was clearly and appropriately focused on whether corporations like MCFL would have greater disclosure burdens than unincorporated groups, because only corporations were required by federal law to create political committees to participate in federal elections. After surveying federal disclosure laws, the Court declared "[i]t is evident from this survey that [, because it is incorporated,] MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated." *Id.* at 254 (emphasis added). Consequently, the Court rejected the FEC's argument that MCFL's ability to form a political committee eliminated any burdens that would otherwise result from the ban on corporate expenditures for political ads. *Id.* at 255.

The Court's discussion of the federal political committee disclosure requirements was thus in the context of determining whether MCFL's option to form a PAC would eliminate or reduce the burden of the federal restrictions on corporate expenditures. Although the Court ultimately decided that the "PAC option" was not sufficiently protective of speech in this context, it in no way suggested that the political committee disclosure requirements in themselves were unconstitutional or deserving of strict scrutiny.

in elections only through the formation of a political committee (or "PAC"), that was "a separate association from the corporation." *Citizens United*, 130 S. Ct. at 897; *see also* 2 U.S.C. § 441b(b). Under federal law, corporate PACs were subject to federal contribution limits, *see* 2 U.S.C. § 441a(a)(5), and could solicit these limited contributions only from the corporation's restricted class of officers, employees and shareholders. 2 U.S.C. § 441b(b)(4); 11 C.F.R. 114.5-114.8. The "PAC option" in these cases was thus a highly-regulated alternative to an absolute prohibition on corporate spending. In this case, by contrast, "PAC status" means nothing more than registration, reporting and organizational requirements. 2 U.S.C. §§ 432, 433, 434(a)(4). Plaintiff's facile attempt to label both expenditure restrictions and disclosure obligations "PAC requirements" does not justify application of strict scrutiny to the regulations at issue here.

Indeed, the U.S. Court of Appeals Ninth Circuit very recently rejected a similar argument in *Human Life of Washington (HLW) v. Brumsickle*, No. 2:08-cv-00590 (9th Cir. Oct. 12, 2010). There, HLW challenged Washington State's public disclosure law that required groups that supported or opposed candidates or ballot propositions to register as political committees and to satisfy detailed reporting and organizational requirements. *HLW*, slip op. at 9-11. Although the challenged law thus "imposed PAC status," in the words of RTAO, the Court of Appeals rejected HLW's assertion that strict scrutiny applied. It noted that "confusion" had "emerged" in the Ninth Circuit regarding to the scrutiny applicable to political disclosure laws because the Ninth Circuit had incorrectly interpreted the Supreme Court's *MCFL* decision as applying strict scrutiny to the federal political committee disclosure requirements. *Id.* at 24-26. But, as the Court of Appeals noted, "recent Supreme Court decisions have eliminated the apparent confusion as to the standard of review

applicable in disclosure cases." *Id.* at 28. The Ninth Circuit concluded that the Supreme Court rulings in *Citizens United* and *Reed* removed all doubt regarding the correct degree of scrutiny for PAC disclosure obligations by confirming that "a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest." *Id*. at 28-29 (emphasis added).

As the Ninth Circuit did in *HLW*, this Court should follow the clear guidance of *Buckley*, *Citizens United* and *Reed* and apply exacting scrutiny to the challenged rules and policy.

## II. 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 "express advocacy requires magic words." Pl. Br. at 26 (internal quotations omitted). However, as this court has already found, the Supreme Court made clear in both *McConnell* and *WRTL II* that the First Amendment does not require a "magic words" construction of the term "expenditure." *See RTAO,* 2008 WL 4416282 at *10; *see also McConnell*, 540 U.S. at 193; *WRTL II*, 127 S. Ct. at 2669 n.7. Further confirming the validity of 11 C.F.R. 100.22(b), the *WRTL II* decision articulated a test for the "functional equivalent of express advocacy" that is "virtually the same" as subpart (b). *RTAO,* 2008 WL 4416282 at *11, slip op. at 21. *See also Real Truth About Obama v. FEC*, 575 F.3d 342, 349 (4th Cir. 2009) (vacated for consideration of mootness by 130 S. Ct. 2371 (2010)).

The Supreme Court's subsequent decision in *Citizens United* in no way alters this analysis. *Citizens United* did not require a "magic word" construction of "express advocacy,"

nor did it question the *WRTL II* test for the "functional equivalent of express advocacy." Indeed, if anything, *Citizen 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. This court's original decision that RTAO was unlikely to succeed in its challenge to this regulation was therefore correct, and remains correct today.

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 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.[6]

[6] 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,

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, 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).

The Fourth Circuit 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, the Circuit Court said its decision was grounded in Supreme Court precedent: "If change is to

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the prohibition on the use of corporate and union treasury funds to make "expenditures." *See MCFL*, 479 U.S. 238 (1986).

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 this court has already recognized, the Supreme Court has rendered such "further review," and its decisions in *McConnell* and *WRTL II* have effectively "overturned" the Fourth Circuit 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. Further, far from undercutting the holdings of *McConnell* and *WRTL II*, *Citizens United* has provided further support for principle that campaign finance regulation is not limited to "magic words" express advocacy.

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 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 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 susceptible of no reasonable interpretation other than as an appeal to vote for or against 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.*

*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. *See also RTAO*, 575 F.3d at 349 (noting that the "language [of Subpart (b)] corresponds to the definition of the functional equivalent of express advocacy given in *Wisconsin Right to Life*."). 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.

And 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.*[7]

*Citizens United* did not break with the reasoning of *McConnell* and *WRTL II* with respect to the scope of regulable speech. 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. But because the Court ruled broadly that all corporate expenditures, including expenditures for express advocacy, are protected by the First Amendment, the Court had no reason to consider – or to narrow – the scope of "express advocacy." Nor did the Court question the validity of the *WRTL II* test for "the functional equivalent of express advocacy."

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[7] 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." Pl. Br. at 29-30. First, as discussed above, Chief Justice Roberts specifically addressed and rejected 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.

To the contrary, the Supreme Court actually applied the *WRTL II* test to the communications at issue in *Citizens United* to determine whether they would be prohibited by 2 U.S.C. § 441b. 130 S. Ct. at 888-90.[8]

Indeed, far from requiring a "magic words" test for "express advocacy" or "expenditure," the Supreme Court in *Citizens United* instead consigned this test to further irrelevance. In an 8-1 opinion, the Court upheld the federal disclaimer and disclosure requirements applicable to all "electioneering communications." *Id.* 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" test 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*, No. 2:08-cv-00590, slip op. at 57 ("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 RTAO's argument that the subpart (b) definition is overbroad with respect to disclosure.

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[8] The Supreme Court applied the *WRTL II* test to Citizens United's film, *Hillary: The Movie*, to determine how broadly the Court would have to rule in order to decide the case. Had *Hillary* not met *WRTL II*'s test for the "functional equivalent of express advocacy," then the film would not have been prohibited by 2 U.S.C. § 441b, and the case could have been resolved on these "narrower grounds." 130 S.Ct. at 888. The Court ultimately found that "under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy," *id.* at 890, and thereby considered itself bound to consider the broader question of "whether *Austin* should be overruled." *Id.* at 888. The fact that the *Citizens United* Court applied the *WRTL II* test without difficulty, however, belies RTAO's argument that this test is unconstitutionally vague or unworkable.

Nevertheless, RTAO maintains that the *Citizen United* Court implicitly rejected the subpart (b) definition of express advocacy by finding that "express advocacy" was limited to "magic words." This is flatly incorrect. The only support RTAO offers for its theory is a footnote by the dissent, which by definition, is not a holding of the majority. *See* Pl. Brief at 26, *citing Citizens United*, 130 S. Ct. at 935 n.8 (Stevens, J.) ("If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley v. Valeo*…."). Even if the dissent's statement was the opinion of the majority, however, the dissenters did not limit express advocacy to "magic words," but merely observed that express advocacy has long been understood to include "magic words" speech. And even if the dissenters had explicitly limited express advocacy to "magic words," it would not follow that the FEC may regulate only "magic words" under FECA: *McConnell* and *WRTL II* have indisputably held otherwise by approving the regulation of "electioneering communications" and the "functional equivalent of express advocacy." Hence, even if RTAO's characterization of the dissent was correct, it still would not support its argument that the subpart (b) definition is overbroad with respect to disclosure.

Also unavailing is RTAO's claim that the skepticism expressed by the *Citizen United* Court regarding 11 C.F.R. 114.15 should be interpreted as an indirect critique of 11 C.F.R. 100.22(b). RTAO's only proffered reason for such an interpretation is its allegation that both rules follow the same "subjective, balancing, speech-chilling, FEC-empowering, ad hoc, we-know-it-when-we-see-it approach." Pl. Br. at 32. First, it goes without saying that a judicial critique of one agency rule does not in any way suggest a critique of all agency rules. Subpart (b) does not remotely resemble 11 C.F.R. 114.15. Instead, as this court has found, it is almost

identical to the *WRTL II* Court's formulation of the test for the "functional equivalent of express advocacy." If the *WRTL II* test, as stated by the Supreme Court, is not "subjective," "speech-chilling" or "ad hoc," then neither is the subpart (b) definition. Further, even insofar as subpart (b) definition allows "contextual considerations," *see* Pl. Br. at 33, the *WRTL II* 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[.]" 127 S. Ct. at 2669 (citations 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").

In short, since *Virginia Society* was decided, new Supreme Court case law – including *McConnell, WRTL II* and *Citizens United*, "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. *WRTL II* made clear that express advocacy is not limited to magic words – but may also include communications that can only be interpreted to appeal to vote for or against a candidate. Finally, *Citizens United* declared that for the purposes of disclosure, regulation can extend even beyond communications that meet the *WRTL II* 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.

This Court was thus correct in denying plaintiff preliminary relief on this claim. If the *WRTL II* test is constitutional – and *Citizen United* suggests nothing to the contrary – then so too is the virtually identical subpart (b) test. RTAO's claim that subpart (b) is

unconstitutional because it does not adhere to a "magic words" test has no basis, and should be rejected.

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

RTAO also 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 and beyond the FEC's statutory authority because it is based on "ad hoc, case-by-case, analysis of vague and impermissible factors." Pl. Br. at 40. This Court was correct in rejecting RTAO's objections, and should do so again. *RTAO,* 2008 WL 4416282 at *14.

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).

In *FEC v. MCFL,* 479 U.S. 238 (1986), the Court expressed the "major purpose" test in slightly different terms, describing political committees as "those groups whose primary objective is to influence political campaigns." *Id*. at 262 (emphasis added). The Court in *McConnell* restated the "major purpose" test for political committee status as articulated by *Buckley*. 540 U.S. at 170 n.64.

RTAO argues 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), represents an overbroad and unbounded inquiry into "vague and impermissible" factors. Pl. Br. at 40.

RTAO asserts that the FEC, in implementing the "major purpose" test, instead may make only two 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. Pl. 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 37. According to RTAO, the FEC may make no other inquiry.

But these are limitations that RTAO simply makes up. It cites *MCFL* as support, but this case contained no such restrictions on the major purpose inquiry. 479 U.S. at 262. The test set forth in Supreme Court precedent 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." *Buckley*, 424 U.S. at 78-81; *MCFL,* 479 U.S. at 262. The

Court has not limited 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.").

RTAO's invocation of the *Citizens United* decision does not save its argument. *Citizens United* did not address the determination of political committee status, much less the FEC's methodology for assessing a group's "major purpose." It has no application here. Indeed, RTAO does not really attempt to argue otherwise. It simply alleges that the Supreme Court criticized the FEC's rule implementing *WRTL II*, *see* 11 C.F.R. 114.15, and implies this

court should be similarly critical of the FEC's "major purpose" policy. Pl. Br. at 40-41. But, as explained in Section II *supra*, this is not a legal argument; it is a non sequitur, and should be dismissed as such.

Nor does *North Carolina Right to Life (NCRL) v. Leake*, 525 F.3d 274 (4th Cir. 2008) provide support for RTAO's position. In *NCRL,* the Fourth Circuit described the "major purpose" 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 election-related speech." 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 on supporting or opposing candidates." *Id.* at 289 (emphasis added). None of these formulations states or implies the kind of highly restricted inquiry which RTAO advocates.

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 its earlier decision to reject RTAO's challenge to the FEC's "major purpose" policy.

## CONCLUSION

For the foregoing reasons, the challenged rule, *see* 11 C.F.R. 100.22(b), and the FEC's implementation of the "major purpose" test for political committee status, do not violate the First Amendment. Accordingly, this Court should deny RTAO's motion for summary judgment and preliminary injunction, and grant summary judgment in favor of the FEC.

**Respectfully submitted**,

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