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

THE REAL TRUTH ABOUT OBAMA, INC.,	)	
Plaintiff,	)	No. 3:08-cv-00483-JRS
v.	)	
FEDERAL ELECTION COMMISSION and UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Administrative Materials

Miscellaneous

Plaintiff The Real Truth About Obama, Inc's ("RTAO") challenge to the Federal Election Commission ("Commission" or "FEC") regulation defining "express advocacy" and the Commission's approach to determining political committee status is even weaker today than it was when this Court denied a preliminary injunction in 2008. Intervening court decisions have not only mooted two of the prior claims in the case, but also narrowed the reach of the challenged regulation defining express advocacy: It no longer functions as part of a ban on speech, but instead helps implement disclosure requirements, which serve important government interests and face a lower level of scrutiny than direct restraints on speech. Even though *Citizens United v. FEC*, 558 U.S. __, 130 S. Ct. 876, 913 (2010), declared unconstitutional spending limits for independent express advocacy, the Supreme Court by an 8-1 vote upheld disclosure requirements that capture a far *greater* range of communications than "express advocacy."

Although RTAO still seeks a preliminary injunction for two advertisements that the group allegedly intended to run in 2008 about then-Senator Barack Obama, plaintiff has moved, with the Commission's consent, for consolidation with the merits; the Court's ability to rule now on the merits necessarily renders any request for preliminary relief moot. In any event, plaintiff cannot show irreparable harm based on its speculative claims about the effects of the Commission's express advocacy regulation and its approach to analyzing whether an organization is a political committee ("PAC status analysis"). Thus, this Court should again deny RTAO's request for a preliminary injunction, and because there are no material facts in dispute and RTAO's remaining challenges lack merit, the Court should also grant summary judgment to the Commission.

I. BACKGROUND

A. Material Facts As to Which There Is No Genuine Dispute[1]

1. The Federal Election Commission is the independent agency of the United States government with exclusive civil jurisdiction to administer, interpret, and enforce the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA" or "Act"). The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce the Act. 2 U.S.C. § 437g.

2. The Department of Justice prosecutes criminal violations of the Act. *See* 2 U.S.C. § 437g(d).

3. The Real Truth About Obama, Inc. ("RTAO") is a nonprofit Virginia corporation. RTAO Material Facts as to Which There Is No Dispute ¶ 1 (Docket No. 126) ("RTAO Facts").

4. RTAO was incorporated on July 24, 2008, six days before it filed its complaint. *RTAO v. FEC*, No. 3:08-cv-483, 2008 WL 4416282, at *1 (E.D. Va. Sept. 24, 2008).

5. RTAO is classified as a "527" organization with the Internal Revenue Service. RTAO Facts ¶ 4; *see* 26 U.S.C. § 527.

6. RTAO's Articles of Incorporation forbid RTAO from "expressly advocat[ing] the election or defeat of any clearly identified candidate for public office" or from making "any contribution to any candidate for public office." RTAO Facts ¶ 7.

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[1] The Fourth Circuit's opinion includes a factual summary of the case. The Commission states the relevant facts here for the purpose of its summary judgment motion, *see* Local Rule 56(B), and notes that these facts are consistent with those found in the Fourth Circuit's opinion. *RTAO v. FEC*, 575 F.3d 342, 345 (4th Cir. 2009); *RTAO v. FEC*, 607 F.3d 355 (4th Cir. 2010).

7. RTAO alleges that it developed two radio advertisements, entitled *Change* and *Survivors*. RTAO Facts ¶¶ 10-11. *Change* purports to provide "the real truth about Democrat Barack Obama's position on abortion," using an "Obama-like voice." *Id.* ¶ 10. That voice states, in a first-person declaration, that Senator Obama wishes to provide federal funds for every abortion performed in the United States, to legalize partial-birth abortion, and to "give Planned Parenthood lots more money." *Id*. Near the end of the ad, a woman's voice asks: "Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?" *Id*.

8. *Survivors* states, *inter alia*, that Senator Obama "has been lying" about his voting history regarding abortion, thereby demonstrating "callousness" and "a lack of character and compassion that should give everyone pause." RTAO Facts ¶ 11.

9. RTAO allegedly intended to broadcast these two ads on the radio "in heartland states" during the thirty days preceding the Democratic National Convention (July 29, 2008 - August 28, 2008) and the sixty days preceding the 2008 general election (September 5, 2008 - November 4, 2008) — broadcast dates that would cause the ads to fall within the windows for "electioneering communications" under the Act. RTAO Facts ¶ 12; 2 U.S.C. § 434(f)(3). RTAO does not allege that it took any concrete steps towards creating or distributing the ads.

10. RTAO alleges that it intended to raise more than $1,000 and to spend more than $1,000 to broadcast the ads. RTAO Facts ¶ 15.

11. RTAO has not spent any money to broadcast these or similar ads. Plaintiff RTAO's Discovery Responses, dated Nov. 13, 2008, at 5 (attached as Exhibit 1) ("RTAO Responses").

12. RTAO has written one fundraising communication that it alleges it intends to use to raise money, RTAO Facts ¶ 14, but RTAO states that it has never sent such a communication to any potential contributor, RTAO Responses at 3-4.

13. RTAO states that "no individual has been identified who has expressed an intent to donate to RTAO in the future." RTAO Responses at 6.

14. RTAO alleges that it is creating a website that will contain "accurate and truthful information about the public policy positions of Senator Obama," RTAO Facts ¶ 9, but the website is not active.

15. RTAO did not produce any evidence that any actual or potential donor to RTAO expressed a fear of intimidation, harassment, or threats if information about their identity or donation were to be disclosed.

16. Plaintiff objected to document requests and interrogatories asking for the basis of any assertions that RTAO would be subjected to threats, harassment, or reprisals, asserting that the requests are "not 'relevant to any party's claim or defense' as required by FRCP 26(b)(1)," Responses at 4, and "irrelevant and/or immaterial to any claim in plaintiff's Amended complaint," RTAO Second Set of Discovery Responses, dated Dec. 5, 2008, at 4 (attached as Exhibit 2). RTAO did not produce any evidence that RTAO would be subjected to intimidation, harassment, or threats if it were to comply with the FECA disclosure requirements at issue in this case. RTAO Responses at 4 (stating that RTAO has "No responsive documents" in response to a request for "[a]ny documents that evidence or reflect any alleged burdens on RTAO or persons associated with RTAO resulting from your compliance with the disclosure requirements at issue in this case, including any threats, harassment, or reprisal").

17. RTAO did not produce any evidence that donors to any organizations with viewpoints similar to its own have suffered threats, harassment, or reprisals after information about their donations or activities was disclosed.

B. Statement of Genuine Issues Regarding RTAO's Statement of Material Facts

The Commission does not contest Nos. 1-2, 4, 7, and 9-15, in RTAO's Statement of Material Facts as to Which There Is No Dispute. As to RTAO's remaining alleged facts, the Commission's responses are below. The Commission notes that the material disputed issues in this case are legal in nature. Therefore, there are no disputes as to any material facts, and no trial or evidentiary hearing is necessary.

Response to RTAO Fact No. 3: The Commission objects to the statement that the Department of Justice "has control over all . . . civil suits in which the United States has an interest" because the Commission has "exclusive jurisdiction with respect to the civil enforcement" of federal campaign finance laws. 2 U.S.C. § 437c(b)(1).

Response to RTAO Fact No. 5: The Commission objects because RTAO has not provided sufficient information to determine whether it is a "political committee" under FECA, and this lawsuit is not a proper vehicle for the Commission or the Court to make that determination. If RTAO spent more than $1,000 to run *Survivors*, it would satisfy the statutory threshold for political committee status because the ad contains express advocacy. *See RTAO*, 2008 WL 4416282, at *7-8.

Response to RTAO Fact No. 6: The Commission objects because RTAO has not provided sufficient information to determine whether RTAO satisfies the constitutional "major purpose" test that is required for political committee status. *See infra* pp. 40.

Response to RTAO Fact No. 8: The Commission objects to the statement that RTAO could have a "reasonable belief" that it will be deemed a political committee based on its alleged "nature" and "planned activities," which appear to be hypothetical and, in any event, RTAO has not provided sufficient information to conclude that it should be considered a political committee.

Response to RTAO Fact No. 16: The Commission objects to the statements that RTAO is "chilled" and that it could "reasonably believe" it will be subjected to an FEC enforcement proceeding because RTAO has not provided sufficient information to conclude that its hypothetical activities would result in RTAO being considered a political committee or that the Commission would begin enforcement proceedings against it.

Response to RTAO Fact No. 17: The Commission objects to this statement as contrary to the record and the law. The fundraising communication RTAO describes (RTAO Facts ¶ 14) would not have been a "solicitation" within the meaning of former 11 C.F.R. § 100.57 (promulgated in 2004) because it does not indicate that funds received will be used to support or oppose Senator Obama's candidacy. Accordingly, donations received would not have been "contributions" under the Act. Moreover, even if RTAO were a political committee, it would not be required to use "federal funds" to send its proposed fundraising communication. *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) (invalidating 11 C.F.R. § 106.6(f) (promulgated in 2004), which required costs for public communications that clearly identified a federal candidate to be financed with federal funds); *Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (Mar. 19, 2010) (deleting section 106.6(f) pursuant to *EMILY's List*). In any event, plaintiff failed to establish that RTAO's proposed solicitation would be

considered a public communication (and therefore subject to former section 106.6(f)'s funding limitation) as RTAO did not provide any information regarding how the communication would be sent to potential donors. *See* 2 U.S.C. § 431(22); 11 C.F.R. §§ 100.26 and 100.27 (both promulgated in 2002) (defining public communication and exempting unpaid communications over the Internet from the definition).

Response to RTAO Fact No. 18: The Commission objects to the statement that RTAO has any "chill" as a result of the June 2008 Department of Justice letter to the president of Democracy 21 as not supported by the record.

Response to RTAO Fact No. 19: The Commission objects to the statement that RTAO could "reasonably believe" it will be subjected to an FEC enforcement proceeding because there is inadequate information to determine whether RTAO's hypothetical activities could result in RTAO being considered a political committee. In addition, the Commission objects to this fact as speculative, hypothetical, and without foundation to the extent it suggests that plaintiff is at risk of a "burdensome and intrusive investigation," an "enforcement action," or civil penalties. If any complaint is filed against RTAO, the Commission is required to give RTAO notice, which RTAO does not claim to have received. *See* 2 U.S.C. § 437g(a)(1). Before the Commission may commence an investigation, at least four of the six Commissioners must find there is reason to believe a violation of the law has occurred. 2 U.S.C. § 437g(a)(2). Moreover, if plaintiff believes that an actual Commission investigation is burdensome or intrusive, there are many administrative and judicial avenues available to challenge the scope of that investigation. *See generally* 2 U.S.C. § 437g(a). The Commission does not have the authority to impose civil penalties. Rather, it may can encourage voluntary conciliation; if at least four Commissioners determine that there is probable cause to believe a violation has

occurred and conciliation fails, and if at least four Commissioners then vote to authorize a *de novo* civil action, a federal court may impose a penalty. *See* 2 U.S.C. §§ 437g(a)(4), 437g(a)(6).

Response to RTAO Fact No. 20: The Commission objects to this fact as vague, speculative, and ambiguous to the extent it refers to "ads materially similar to *Change* and *Survivors*." To the extent this paragraph could be construed as a statement of fact rather than a conclusion of law, the Commission objects that it is not supported by the record in this case.

C. Legal Background

1. Express Advocacy

In FECA, "contribution" is defined to include giving anything of value "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Similarly, "expenditure" is defined to include any payment of money made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). In *Buckley v. Valeo*, 424 U.S. 1, 41 (1976), the Supreme Court reviewed FECA's then-prohibition on expenditures by any person of more than $1,000 "relative to" a federal candidate. The Court found the provision unconstitutionally vague and so "construed [it] 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 (footnote omitted). Congress then defined "independent expenditure" to mean an independent communication "expressly advocating the election or defeat of a clearly identified candidate." *See* FECA Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 2 U.S.C. § 431(17)). Corporations and labor organizations

were prohibited from making independent expenditures using their treasury funds. 2 U.S.C. § 441b.[2]

In 1995, the Commission promulgated a regulatory definition of the term "expressly advocating." 11 C.F.R. § 100.22. Part (a) of the regulatory definition encompasses communications that use phrases or campaign slogans "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. § 100.22(a). Part (b) defines express advocacy as a communication that has an unambiguous "electoral portion" and that cannot reasonably be construed as anything other than an encouragement to elect or defeat a candidate. 11 C.F.R. § 100.22(b). Citing *Buckley*, some courts had held that a limited, "magic words" interpretation of "expressly advocating" was the outer constitutional boundary of Congress's power to regulate campaign expenditures. *See, e.g., FEC v. Christian Action Network, Inc.* 110 F.3d 1049, 1052-55 (4th Cir. 1997) ("*CAN*"). In *McConnell v. FEC*, 540 U.S. 93 (2003), however, the Supreme Court explained that *Buckley*'s "express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id.* at 191-92. This construction was imposed because of the vagueness of FECA's original statutory text, not because the government's power was in all cases circumscribed to regulating only a limited number of "magic words" of advocacy. Congress may regulate not only express advocacy, the Court held, but also the "functional equivalent of express advocacy." *Id.* at 206.[3] *See also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("*WRTL*").

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[2] The prohibition on corporate and union independent expenditures dates back to 1947. *See Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting).

[3] This part of the Court's reasoning occurred in its analysis of "electioneering communications," a newly defined term in the Bipartisan Campaign Reform Act of 2002. *See infra* pp. 12-13. The Court noted that the "new term . . . applies in both the disclosure and the

2. Political Committees

Under FECA, any "committee, club, association, or other group of persons" that receives over $1,000 in contributions or makes over $1,000 in expenditures in a calendar year is a "political committee." 2 U.S.C. § 431(4)(A). Political committees (commonly called "PACs") must register with the Commission and file periodic reports for disclosure to the public of their receipts and disbursements, with limited exceptions for most transactions below $200. *See* 2 U.S.C. §§ 433, 434. No person may contribute more than $5,000 per calendar year to any one political committee, other than a political party committee. 2 U.S.C. § 441a(a)(1)(C).

In *Buckley*, the Supreme Court held that defining political committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application of FECA's political committee requirements by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the Act's political committee provisions "need 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*. Under the statute as thus limited, a non-candidate-controlled entity must register as a political committee only if it crosses one of the $1,000 statutory thresholds and its "major purpose" is the nomination or election of federal candidates.

The Commission received rulemaking petitions urging the agency to promulgate a regulation defining "political committee" to encompass all "527" groups, *i.e.*, "political organizations" holding tax-exempt status under section 527 of the Internal Revenue Code, 26 U.S.C. §§ 527(a) and (e)(1). After extensive public comment and hearings, in 2007 the

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expenditure contexts." 540 U.S. at 190. As discussed *infra* pp. 14, *Citizens United* later overturned the portion of *McConnell* that had upheld the financing restrictions on electioneering communications, but reaffirmed the portion of *McConnell* that had required disclosure for such communications.

Commission published in the Federal Register an Explanation & Justification explaining the Commission's decision not to promulgate a revised definition of "political committee," but to continue its longstanding practice of determining each organization's major purpose on a case-by-case basis. *Political Committee Status*, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007). The notice then discussed a number of prior administrative and civil matters in which the Commission or a court had analyzed a group's major purpose; these descriptions cumulatively "provid[ed] considerable guidance to all organizations" regarding the criteria that are used to apply the "major purpose" test. *See id*. at 5595, 5605-5606. In addition, this notice explained that the Commission uses its regulatory definition of "express advocacy" to help determine whether an organization has made in excess of $1,000 in expenditures in any calendar year and thus satisfies one statutory criterion for political committee status under 2 U.S.C. § 431(4)(A). *See* 72 Fed. Reg. at 5604.

Since long before *Citizens United*, political committees have been able to make unlimited independent expenditures. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 490-501 (1985) ("*NCPAC*"). Similarly, certain ideological non-profit corporations have long been able to make unlimited independent expenditures. *FEC v. Mass. Citizens For Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*").

3. Contributions in Response to Solicitations

FECA does not provide specific criteria for determining whether a particular donation is made "for the purpose of influencing any election," such that the donation would constitute a "contribution." 2 U.S.C. § 431(8)(A)(i). By regulation, the Commission defined a "contribution" to include a "deposit of money . . . made by any person in response to any communication . . . if the communication indicates that any portion of the funds received will be

used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a). On September 18, 2009, the D.C. Circuit declared section 100.57 unlawful. *EMILY's List*, 581 F.3d at 17-18. The Commission accordingly announced that the regulation "will not be enforced" and repealed the regulation effective April 18, 2010.[4]

4. Campaign Financing and Reporting Requirements After BCRA

The Act has long required that all independent expenditures above $250 must be timely reported to the Commission for disclosure to the public. 2 U.S.C. § 434(c)(l). Reports must also identify every person who contributed more than $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(C). In addition, the Act requires that persons making independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before an election file a report with the Commission within 24 hours. 2 U.S.C. § 434(g)(1)(A). In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, § 212(a), 116 Stat. 81 (2002), which added a requirement that persons who make independent expenditures aggregating $10,000 or more up to and including the 20th day before an election file a report within 48 hours. 2 U.S.C. § 434(g)(2)(A).

BCRA also introduced new financing and disclosure requirements for "electioneering communications." The statute prohibited corporations (other than incorporated political committees) and unions from making any "direct or indirect payment . . . for any applicable electioneering communication," which is defined in the context of a presidential election as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before the general election or thirty days before a

[4] *See* Press Release, *FEC Statement on the D.C. Circuit Court of Appeals Decision in* EMILY's List v. FEC, http://www.fec.gov/press/press2010/20100112EmilyList.shtml (Jan. 12, 2010); 75 Fed. Reg. at 13,223.

primary election or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i); 11 C.F.R. § 114.12(a) (promulgated in 1976) (incorporated political committee are treated like political committees, not corporations).

BCRA also required disclosure for "electioneering communications." Every person who makes electioneering communications in an aggregate amount in excess of $10,000 during a calendar year shall file a disclosure statement within 24 hours. 2 U.S.C. § 434(f)(1). This report must include the amount of disbursement, identification of the person making the disbursement, names of any person sharing or exercising direction or control over the activities of such person, and the custodian of the accounts; the amount and recipient of each disbursement over $200; and the names and addresses of all contributors who gave more than $1,000 in a calendar year to the person making the disbursement. 2 U.S.C. § 434(f)(2).[5]

The Supreme Court initially upheld the constitutionality of the financing restriction for electioneering communications "to the extent that the issue ads . . . are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-194, 203-208; *WRTL*, 551 U.S. at 465. The Chief Justice's controlling opinion in *WRTL* defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-470. In 2007, the Commission codified this standard in a regulation. 11 C.F.R. § 114.15.

[5] FECA also requires political committees and other persons to include disclaimers in certain campaign-related communications. *See generally* 2 U.S.C. § 441d (requiring, *inter alia*, that persons who make disbursements to finance a public communication "expressly advocating the election or defeat of a clearly identified candidate, or solicit[ing] any contribution" include in their communication a statement whether the communication has been paid for or authorized by a candidate); *see also McConnell*, 540 U.S. at 230-31 (upholding disclaimer requirements for electioneering communications). RTAO has not directly challenged these requirements or alleged any harm from them.

5. *Citizens United* and the Changed Role of 11 C.F.R. § 100.22

The Supreme Court subsequently held unconstitutional FECA's restriction on corporate financing of independent expenditures, as well as BCRA's electioneering communication financing restrictions. *Citizens United*, 130 S. Ct. at 913. The Commission has accordingly announced that it will no longer enforce the statutory or regulatory restrictions on the financing of electioneering communications.[6] However, in *Citizens United* eight justices upheld BCRA's disclosure requirements for electioneering communications, even if those communications are *not* the functional equivalent of express advocacy. 130 S. Ct. at 914-15. The Court stated: "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'" *Id*. at 914 (quoting *Buckley*, 424 U.S. at 64). The Court thus "subjected these requirements to 'exacting scrutiny,' which requires 'a substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id*. (quoting *Buckley*, 424 U.S. at 64, 66). The Court also explained that disclosure is "less restrictive" than a limit on spending, and the public has an interest in knowing who is responsible for pre-election communications that speak about candidates, "[e]ven if the ads only pertain to a commercial transaction." *Id*. at 915-16.

Prior to *Citizens United*, the Commission's regulatory definition of express advocacy helped implement the ban on corporate and union independent expenditures in 2 U.S.C. § 441b. However, because *Citizens United* found that ban unconstitutional, the definition of express advocacy in section 100.22(b) no longer operates as part of any limit on speech. It now functions only to help determine whether disclosure of independent expenditures is required and as part of the analysis in determining whether an organization is a political committee (*i.e.*,

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[6] Press Release, *FEC Statement on the Supreme Court's Decision in* Citizens United v. FEC, http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml (Feb. 5, 2010).

whether an organization has made more than $1,000 in "expenditures" under 2 U.S.C. § 431(4)(A)).

6. *SpeechNow.org v. FEC*

Relying upon *Citizens United*, the District of Columbia Circuit recently held that a group that receives contributions only from individual persons and whose campaign-related activity consists only of independent expenditures may not be subject to the $5,000 limit on contributions received by political committees. *SpeechNow.org v. FEC*, 599 F.3d 686, 692-97 (D.C. Cir. 2010) (*en banc*). Regarding disclosure and reporting, however, *SpeechNow* upheld the organizational and reporting requirements for political committees. *Id*. at 696-98. The court noted that the reporting required of political committees does not "impose much of an additional burden" compared with the reporting requirements for persons making independent expenditures. *Id*. at 697.

After *Citizens United* and *SpeechNow*, a Commission advisory opinion determined that a political committee that makes only independent expenditures (*i.e.*, no contributions or coordinated expenditures) may now solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations. *See* FEC Advisory Opinion 2010-11, 2010 WL 2960582 (July 22, 2010). In another advisory opinion, the Commission also determined that a corporation may establish, administer, and pay expenses for an independent expenditure political committee. *See* FEC Advisory Opinion 2010-09, 2010 WL 2960580 (July 22, 2010).

D. Procedural History

On July 30, 2008, RTAO filed a complaint and a motion for a preliminary injunction challenging the Commission's regulations at 11 C.F.R. §§ 100.22(b), 100.57, and 114.15, as well

as the Commission's approach to determining political committee status, as unconstitutional on their face and as applied to *Change*. On August 20, RTAO filed a second motion for a preliminary injunction, which sought to enjoin the Commission's enforcement of its regulations against *Survivors*. This Court denied those injunctions on September 11, 2008 (Docket # 65), and issued its Memorandum Opinion on September 24 (Docket # 77). *RTAO*, 2008 WL 4416282, at *1.

The Court held that RTAO failed to meet any of the requirements for preliminary injunctive relief. As to RTAO's likelihood of success on the merits, the Court found that RTAO was unlikely to prevail on any of its claims. This Court held that the Commission's definition of express advocacy, 11 C.F.R. § 100.22(b), is "virtually the same test stated by [the controlling opinion] of *WRTL*," and therefore neither overbroad nor unconstitutionally vague. *RTAO*, 2008 WL 4416282, at *11. This Court also rejected RTAO's claims of overbreadth regarding the agency's analysis of political committee status "[b]ecause the FEC . . . employs the same factors the Supreme Court has approved" for such analysis. *Id*. at *14. In addition, this Court held that RTAO failed to establish any irreparable harm warranting an injunction. Even if RTAO were deemed to be a political committee, the Court reasoned, the challenged regulations left RTAO "free to disseminate their message and make any expenditures they wish." *Id*. at *16. The "only limitation" created by the regulations was FECA's "constitutionally permitted restrictions" on individuals' contributions to RTAO, which the Court held insufficient to constitute irreparable harm. Id. Finally, this Court held that the balance of harms and the public interest weighed in favor of denying injunctive relief, as the Commission would be harmed if it were enjoined from enforcing its presumptively valid regulations, and the public would be harmed if "the next two

months of election law and enforcement . . . bec[ame] a 'wild west' of electioneering communication and contributions without the challenged regulations in place." *Id.*

RTAO filed its notice of appeal as to this Court's denial of injunctive relief on September 12, 2008, and sought an injunction pending appeal, which this Court denied on September 30. RTAO moved the Fourth Circuit for an injunction pending appeal, as well as to expedite consideration of the appeal, which were both denied on October 1, 2008. On appeal, the Fourth Circuit applied the four-part preliminary injunction standard established in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. __, 129 S. Ct. 365 (2008). *RTAO v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) ("*Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit, but in all federal courts."). The Fourth Circuit affirmed this Court's denial of injunctive relief, finding that plaintiff did not satisfy any of the four *Winter* factors. *Id.* at 347-52. RTAO filed a petition for rehearing *en banc*, which was denied. *RTAO v. FEC*, No. 08-1977 (4th Cir. Oct. 6, 2009).

RTAO filed a petition for a writ of certiorari in December 2009. The Commission's responsive brief, filed by the Solicitor General in March 2010, asked the Supreme Court to vacate the Fourth Circuit's judgment with respect to the challenges to 11 C.F.R. §§ 100.57 and 114.15, and to remand with instructions to dismiss those claims as moot, but to deny the petition in all other respects. Brief for the Respondents, *RTAO v. FEC*, 588 U.S. __, 130 S. Ct. 2371 (2010) (No. 09-724), 2010 WL 1130084. In April 2010, the Supreme Court granted the petition, vacated the judgment, and remanded to the Fourth Circuit "for further consideration in light of [*Citizens United*] and the Solicitor General's suggestion of mootness." *RTAO*, 130 S. Ct. 2371. On June 8, 2010, the Fourth Circuit re-issued the first two parts of its original 2008 decision, which had articulated the facts and preliminary injunction standard. *RTAO v. FEC*, 607 F.3d 355

(4th Cir. 2010). The Fourth Circuit remanded the remaining issues to this Court. *Id*. RTAO filed a petition for rehearing *en banc*, which the Fourth Circuit denied on August 6, 2010.

II. ARGUMENT

A. RTAO's Request for a Preliminary Injunction Is Moot, and in Any Event, RTAO Has Again Failed to Meet Any of the Requirements for That Relief

1. RTAO's Request for Preliminary Relief Is Moot As to All Claims

As explained *supra* pp. 11-12, 14, two of RTAO's original claims are now moot, since the Commission has repealed 11 C.F.R. § 100.57 and announced that it will not enforce its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications. RTAO itself states that it is no longer pursuing its claims against 11 C.F.R. §§ 100.57 and 114.15. (RTAO Br. at 3.) However, RTAO still seeks a preliminary injunction on its remaining two claims regarding the express advocacy definition at 11 C.F.R. § 100.22(b) and the Commission's PAC status analysis. But these claims are also moot because no meaningful preliminary relief can now be provided and because consolidation with the merits necessarily renders a *preliminary* injunction superfluous. Moreover, RTAO's alleged plans for future activity are too speculative to warrant injunctive relief.

RTAO sought a preliminary injunction because it allegedly wanted to run two advertisements at particular times between July 29, 2008 and November 4, 2008. (RTAO Facts ¶ 12.) The requested injunctive relief would have prevented the Commission from initiating any investigation into allegations that RTAO failed to adequately disclose its independent expenditures or to register as a political committee. But RTAO does not allege that it actually ran the advertisements, so there is nothing here for the Commission to investigate. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or

abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Because the relief plaintiff seeks would have no practical effect, the Court lacks jurisdiction to consider the preliminary injunction request.

The preliminary injunction request is also moot because RTAO has sought consolidation with the merits.[7] Because the 2008 election has come and gone and there is no reason to delay a decision on the merits, no "preliminary" time remains. Since a preliminary injunction, by definition, lasts only until the merits of the case are resolved, any request for preliminary relief is now moot. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). *See also Timmins v. Narricot Indus.*, 360 Fed. Appx. 419 (4th Cir. 2010) (when "the period for which the injunction was requested ended . . . so did any controversy on which to base Article III jurisdiction."). Thus, granting a preliminary injunction now would have no practical effect — at this stage, plaintiff will receive either permanent relief or no relief. The mootness that will occur when this Court rules on the merits is similar to other situations in which the Court's ability to provide relief ceases during the pendency of the litigation. *See, e.g., Incumaa v. Ozmint*, 507 F.3d 281, 286-89 (4th Cir. 2007) (inmate's First Amendment challenge to a maximum security prison policy was moot upon inmate's release from maximum security facility); *Mellen v. Bunting*, 327 F.3d 355, 364-65 (4th Cir. 2003) (students' claims against school policies generally become moot upon graduation); *Friedman's Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002) (claims were moot

[7] RTAO urges (Br. at 2) this Court to "first . . . grant [the] preliminary injunction . . . followed by a grant of summary judgment for RTAO." The artificial staggering of decisions that RTAO requests runs contrary to the purpose of the consolidation it seeks — judicial efficiency — and in effect requests an advisory opinion regarding the law of preliminary injunctions. *See* RTAO's Motion to Consolidate (Docket No. 127).

where state court provided the relief sought); *Toms v. Allied Bond & Collection Agency, Inc.*, 179 F.3d 103, 106 (4th Cir. 1999) (settlement agreement rendered plaintiff's interest in the case moot).

Moreover, the candidate about whom RTAO sought to advertise — then-Senator Obama — is not currently on the ballot anywhere. Thus, even RTAO's claim for *permanent* relief is moot as to the *Change* and *Survivor* ads it had planned to run in 2008. Under the exception for mootness regarding disputes "capable of repetition, yet evading review," RTAO can likely show that its claims for permanent relief remain justiciable if it plans to run similar advertisements in future elections. *See WRTL*, 551 U.S. at 461-464.[8] But that doctrine has no application to RTAO's continued insistence on *preliminary* relief. *See Independence Party of Richmond Cnty. v. Graham*, 413 F.3d 252, 256 (2d Cir. 2005) ("To apply the 'capable of repetition yet evading review' exception to otherwise moot appeals of preliminary injunctions would, moreover, impermissibly evade the ordinary rule . . . that appellate courts review only 'final decisions' of a lower court.") Once the Court rules on the merits of RTAO's challenges to section 100.22(b) and the Commission's PAC status analysis, that decision will bind the parties as to any

[8] RTAO's allegation (RTAO Facts ¶ 20) that it intends to run materially similar ads "in the future" is too speculative and hypothetical to entitle plaintiff to the extraordinary remedy of a *preliminary* injunction. "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). Moreover, RTAO has not alleged that any possible future ads would expressly advocate — indeed, its Articles of Incorporation state to the contrary, *see* RTAO Facts ¶ 7 — and thus RTAO has not established that its future ads would implicate section 100.22(b). Thus, it is not even clear that RTAO's assertions about its potential future activities are sufficient to demonstrate standing under Article III for permanent relief. The Ninth Circuit recently found that a non-profit corporation lacked standing to challenge state campaign finance laws because its bylaws prohibited it from making contributions or independent expenditures. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 689 (9th Cir. 2010) ("The Chamber suggests that it may wish to make contributions or independent expenditures in the future, but this equivocal assertion is hardly sufficient to create a case or controversy."), *cert. denied*, No. 10-155, __ S. Ct. __, 2010 WL 3834471 (Oct. 4, 2010).

materially similar ads RTAO may seek to broadcast in the future, thus eliminating any future need for "preliminary" relief. Thus, RTAO can offer no sound basis for any argument that its remaining claims will evade review — a necessary requirement to fall within the exception to the mootness doctrine.

Finally, RTAO claims (Br. at 3) that these issues could not be moot or else the Supreme Court would not have granted certiorari and remanded for reconsideration. However, far from suggesting that any claims remain justiciable, the Court's remand order specifically directs that mootness be considered, *see RTAO*, 130 S. Ct. at 2371, and it is well-settled that jurisdiction must exist at all stages of litigation, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

2. A Preliminary Injunction Is an Extraordinary Remedy That Requires a Plaintiff to Meet a Heavy Burden

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 129 S. Ct. at 376; *RTAO*, 575 F.3d at 345. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 129 S. Ct. at 374. Plaintiff must make a "clear showing" that the extraordinary remedy is necessary; "only a possibility of irreparable harm" is not sufficient. *Id*. at 375-76 (internal quotation marks and citation omitted).

The Fourth Circuit's reissuance of its 2009 opinion in this action reaffirms that *Winter* is the appropriate and binding standard here. RTAO argued unsuccessfully in its initial and reply briefs before the Fourth Circuit that the appellate court should adopt RTAO's "speech

protective" preliminary injunction standards.[9] Plaintiff sought rehearing *en banc* of the Fourth Circuit panel decision, which was denied. Upon remand from the Supreme Court, the Fourth Circuit re-issued Part II of its original decision, which set out the preliminary injunction standards from *Winter*. *RTAO*, 575 F.3d at 345. RTAO sought rehearing of that decision, which was also denied. Accordingly, the preliminary injunction standards are settled in this Circuit, and in this action as law of the case. "'The doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988)). "Clearly, courts could not perform their duties satisfactorily and efficiently . . . if a question once considered and decided . . . were to be litigated anew in the same case upon any and every subsequent appeal." *Sejman v. Warner-Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988) (internal quotation marks and citation omitted). The Fourth Circuit has had four opportunities in this case to adopt some preliminary injunction standards other than those of *Winter*, and it has declined to do so every time.

Even if the preliminary injunction standards were not so well-established, there is no merit to RTAO's suggestion (Br. at 14-15, 26, 36) that because it has asserted First Amendment claims as to which the government bears a heightened burden of justifying the challenged regulations, RTAO cannot be required to demonstrate that the criteria for a preliminary injunction have been satisfied. The decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), upon which plaintiff relies, does not alter the settled principle

[9] Appellant's Brief at 16-19, *RTAO*, 607 F.3d 342 (4th Cir. 2009) (No. 08-1977), 2008 WL 4487289 and Reply Brief at 6-17, *RTAO*, 607 F.3d 342 (4th Cir. 2009) (No. 08-1977), 2008 WL 4974076.

that a plaintiff who seeks a preliminary injunction must show that it is likely to suffer irreparable injury, that the balance of equities tips in its favor, and that an injunction is in the public interest. That principle applies regardless of the nature and source of the plaintiff's substantive claims. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (even when the plaintiff's claim on the merits triggers strict scrutiny, the court "considers whether the plaintiff has shown irreparable injury" in considering preliminary injunctive relief); *see generally Winter*, 129 S. Ct. at 374.[10]

3. RTAO Fails To Demonstrate Irreparable Harm, Particularly Since It Does Not Even Allege Harm from the Disclosure Requirements That Are Now the Main Practical Effect of the Challenged Restrictions

Even if RTAO's request for preliminary relief were not moot, RTAO cannot meet its burden of demonstrating that it will suffer irreparable harm, just as it failed two years ago when this Court denied preliminary relief. RTAO's mere allegation of harm under the First Amendment is insufficient. *See Smith v. Frye*, 488 F.3d 263, 271 (4th Cir. 2007) (allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod* [*v. Burns*, 427 U.S. 347 (1976) (plurality)]").[11] Indeed, RTAO's allegations of harm are significantly *weaker* than they were two years ago because *Citizens United* has dramatically changed the scope and import of 11 C.F.R. § 100.22(b): RTAO repeatedly implies that this regulation and the Commission's PAC status analysis ban or limit speech,[12] but after *Citizens United* the definition of "express

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[10] RTAO argues that "regardless of the burden, all ties and benefits of the doubt go to free speech" (Br. at 15, citing *WRTL*), but that decision's statement that the "tie goes to the speaker, not the censor" was in reference to a ban on corporate speech. *WRTL*, 551 U.S. at 474. By contrast, after *Citizens United*, neither section 100.22(b) nor the "major purpose" test bars any entity from speaking or financing speech. *See supra* pp. 1, 14-15.

[11] *See also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (mere allegation of First Amendment burden does not constitute irreparable injury).

[12] *See, e.g.*, Br. at 34 ("would-be speakers . . . are unable to tell what is permitted. Speech is impermissibly chilled."); Br. at 35 (The Commission "has insisted that if an issue is a campaign

advocacy" is no longer part of any restriction on corporate spending. (Even before *Citizens United*, status as a political committee did not involve any spending limits.) Thus, if RTAO wishes to spend money for express advocacy, it will have to report that spending but it can spend without limit. Likewise, even if RTAO were to make express advocacy expenditures over $1,000 and have as its major purpose the nomination or election of candidates, it would have to abide by the reporting and organizational requirements for political committees, but its spending on independent campaign advocacy would remain unlimited.

To demonstrate harm, RTAO provides only conclusory allegations of chilled speech. It thus fails to make even a rudimentary showing of irreparable harm, let alone the "clear" and "strong" showing required. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 284 (4th Cir. 1983). The presumption that irreparable harm occurs when a challenged regulation "directly limits speech," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006), does not apply here, because the challenged restrictions do not limit plaintiff's speech at all. *See Christian Knights*, 919 F.2d at 149-50 (*Elrod* applies only when "First Amendment rights were totally denied by the disputed Government action").

RTAO presents speculative scenarios about its fear of being considered a political committee (*see* RTAO Facts ¶¶ 16-20), but even if RTAO were required to abide by the rules for political committees, it would not suffer irreparable harm. As explained above, as a political committee, RTAO could pay for unlimited independent campaign advocacy, including express advocacy independent expenditures. *NCPAC*, 470 U.S. at 480. Regarding its ability to raise money, RTAO has not alleged that its fundraising would be irreparably harmed by abiding by the

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issue it is essentially foreclosed as a topic for non-campaign speakers, absent FECA compliance."); Br. at 22-23 (claiming that strict scrutiny applies to this case).

$5,000 limit on contributions to political committees in 2 U.S.C. § 441a(a)(1)(C). And if RTAO pays only for *independent* speech as its Articles of Incorporation suggest, it may not be subject to the $5,000 contribution limit generally applicable to political committees. *See SpeechNow*, 599 F.3d at 692-97; *EMILY's List*, 581 F.3d at 9-12; Advisory Opinion 2010-11.[13]

RTAO has failed even to allege any irreparable harm from the reporting requirements for political committees or for persons who make independent expenditures. Proof of harm from disclosure requirements would require evidence of burdensome reprisals against its members. *Citizens United*, 130 S. Ct. at 916 (disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed"). Such harm has been demonstrated only in cases involving organizations, such as the NAACP and the Socialist Workers Party, whose members faced actual, documented danger at the relevant time. *See Buckley*, 424 U.S. at 69 (noting that NAACP members faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility") (citation omitted); *McConnell*, 540 U.S. at 198-99 (noting that *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982), found a "reasonable probability" of "threats, harassment, and reprisals"); *Citizens United*, 130 S. Ct. at 916 ("Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation"); *Doe v. Reed*, 558 U.S. __, 130 S. Ct. 2811, 2821 (2010) (upholding disclosure of signatory information on referendum petitions because "only modest burdens attend the disclosure of a typical petition"). Moreover, the specific

[13] RTAO's Articles of Incorporation state that it "shall not . . . make any contribution to any candidate for public office." RTAO Facts ¶ 7. If RTAO makes no contributions and none of its expenditures are coordinated with candidates or political parties, then those disbursements would not impair the corporation's ability to make unlimited independent expenditures. *See* 2 U.S.C. § 441a(a)(7).

disclosure requirements for political committees have been upheld after *Citizens United* on the basis that they are not significantly more burdensome than independent expenditure disclosure, which RTAO has not challenged here. *See SpeechNow*, 599 F.3d at 697 ("the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal.").

RTAO also claims that it would suffer administrative burdens as a political committee, but these do not constitute *irreparable* harm. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Chaplaincy*, 454 F.3d at 297-98. *SpeechNow* also upheld the Act's political committee organizational requirements, explaining that they do not "impose much of an additional burden on SpeechNow," 599 F.3d at 697.

RTAO's claim that it suffers a "chill" because it subjectively fears an FEC enforcement action also does not constitute irreparable harm. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (expense and annoyance of agency proceedings do not constitute irreparable injury, but are part of social burden of living under government). *See also FEC v. Franklin*, 718 F. Supp. 1272, 1279 (E.D. Va. 1989) ("While all restraints on political activity present first amendment concerns, those concerns do not automatically override either the substantive requirements of the FECA or FEC investigation into allegations of possible FECA violations."),

summarily aff'd, 902 F.2d 3 (4th Cir. 1989). RTAO's amorphous fears are not imminent or otherwise sufficient to justify injunctive relief.[14]

Since "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (internal quotes and citation omitted), RTAO's failure on this point alone suffices to deny RTAO's request for a preliminary injunction.

4. The Balance of Harms and the Public Interest Weigh Strongly in Favor of the Commission

Enjoining the Commission from enforcing its regulations would substantially injure the Commission and the public. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A "presumption of constitutionality [] attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

As this Court recognized in denying a preliminary injunction in 2008, the FEC's critical governmental functions and the associated public interests would have been harmed by enjoining the Commission — during the period immediately prior to the 2008 general election — from

[14] RTAO cites a two-year-old letter in which the Department of Justice states its intention to enforce campaign finance restrictions, as well as past FEC enforcement matters against some section 527 organizations, as proof of RTAO's "chill." RTAO Facts ¶ 18. However, such attenuated evidence of irreparable harm — consisting of DOJ's dated general intentions and a small number of Commission enforcement actions that preceded *Citizens United* and *SpeechNow* — have no connection to RTAO and cannot justify preliminary injunctive relief.

enforcing the regulations RTAO challenges. *RTAO*, 2008 WL 4416282, at *16. The regulations implement longstanding disclosure requirements in federal elections and ensure that political committees disclose their receipts and disbursements to the public. These disclosure requirements serve compelling government interests in preventing actual and apparent corruption, educating the public, and facilitating the Commission's enforcement of the law. Indeed, similar disclosure requirements were upheld in *Citizens United* based on the information interest alone. 130 S. Ct. at 915-16.

As was the case when this Court originally denied RTAO preliminary relief, enjoining application of the challenged provisions would confuse political actors, deprive the public of important information, and severely undermine the public's confidence in the federal campaign finance system. As the Supreme Court has noted, "[c]ourt orders affecting elections . . . can themselves result in voter confusion." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (vacating pre-election preliminary injunction and noting that "the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases").[15] RTAO argues that the government "must *prove* . . . that the public-interest would be served by denying the preliminary injunction," Br. at 18 (emphasis in original), but that is incorrect, because "[a] *plaintiff* seeking a preliminary injunction must establish . . . that an injunction is in the public interest." *Winter*, 129 S. Ct. at 374 (emphasis added). The

[15] In *Winter*, the Supreme Court stressed the importance of considering how a preliminary injunction might affect the public. In that case, the court of appeals had granted a preliminary injunction prohibiting critical and time-sensitive governmental activity "based only on a 'possibility' of irreparable harm" to the plaintiffs. 129 S. Ct. at 375 (citations omitted). The Supreme Court reversed, emphasizing that courts "must consider the effect on each party of the granting or withholding of the requested relief" and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id*. at 376-377 (citations omitted).

preliminary injunction RTAO requests is not in the public interest, and for that and the other reasons explained above, the Court should again deny that relief.[16]

B. Summary Judgment Should Be Entered for the Commission Because Its Regulation Defining Express Advocacy and Its PAC Status Analysis Are Constitutional

RTAO's constitutional challenges have less merit now than they did when this Court and the Fourth Circuit found that RTAO was unlikely to succeed on the merits. Intervening court decisions, including *Citizens United*, mean that the challenged restrictions now operate mainly to implement disclosure requirements that serve important government interests and are subject to a lower level of scrutiny than direct restraints on speech. For these reasons and those discussed below, summary judgment should be entered for the Commission.

1. Summary Judgment Standards

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and where "the moving party is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Where no genuine issue of material fact exists, this Circuit has noted the affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993) (internal quotation marks and citations omitted).

2. Plaintiff's Burden for Its Facial Challenges

RTAO's facial challenges include claims of both overbreadth and vagueness. In a First Amendment facial overbreadth challenge, a law may be invalidated only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate

[16] Because there is no longer any meaningful difference between RTAO's likelihood of success on the merits for purposes of its request for preliminary relief and the actual merits for purposes of the Commission's motion for summary judgment, we address the merits issues only once, in the section that follows.

sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal quotation marks and citation omitted). RTAO carries the "heavy burden of proving" that the application of the challenged regulation and PAC status analysis "to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)). "A court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). RTAO also argues that the restrictions it challenges are unconstitutionally vague on their face, that is, that they fail to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and permit "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972).

3. Exacting Scrutiny Is the Appropriate Standard Here Because the Restrictions RTAO Challenges Impose No Direct Restraint on Speech

RTAO does not challenge any ban or direct restraint on speech. The Commission's regulation at 11 C.F.R. § 100.22 merely provides a definition of express advocacy. Since *Citizens United* declared unconstitutional limits on independent corporate campaign expenditures, the only remaining application of this provision is to the Act's disclosure requirements and, indirectly, to the determination of whether an organization is a political committee. *See supra* pp. 1, 14. In addition, if an organization satisfies the criteria to be deemed a political committee, the consequences of that status include certain disclosure and organizational requirements and, for some political committees, limits on the contributions they can receive. *See supra* pp. 10-11, 15. Thus, neither of RTAO's challenges implicate spending limits.

In evaluating the proper level of scrutiny, the Supreme Court has long distinguished the kind of disclosure, reporting, and administrative requirements involved here from limits on expenditures. *Buckley,* 424 U.S. at 64. "[D]isclosure requirements . . . do not prevent anyone from speaking." *Citizens United,* 130 S. Ct. at 914 (internal quotation marks and citation omitted). Accordingly, the Court in *Buckley* adopted (424 U.S. at 64) a standard of review, "exacting scrutiny," that is lower than the "strict scrutiny" this Court gives expenditure limits. *Compare Citizens United,* 130 S. Ct. at 898 (applying strict scrutiny to prohibitions on corporate independent expenditures), *with id.* at 914 (applying exacting scrutiny to the disclaimer and reporting requirements for electioneering communications). As the Court explained in *Citizens United,* "'exacting scrutiny'. . . requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley,* 424 U.S. at 64, 66). Likewise, the Court has never subjected contribution limits to strict scrutiny. *See, e.g., Citizens United,* 130 S. Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").[17] *See also SpeechNow,* 599 F.3d at 696 (applying "exacting scrutiny" and upholding the disclosure and organizational requirements for political committees); *Human Life of Washington, Inc. v. Brumsickle, et al.,* No. 09-35128, 2010 WL 3987316, at *11-12 (9th Cir. Oct. 12, 2010) (applying "exacting scrutiny" in

[17] In upholding contribution limits to candidates and political committees generally, the Supreme Court in *Buckley* explained why contribution limits are a more marginal restriction on speech than expenditure limitations are: They (1) "leave the contributor free" to participate in "any political association and to assist personally" in the association's electoral efforts; (2) "permit associations and candidates to aggregate large sums of money to promote effective advocacy;" (3) "merely . . . require candidates and political committees to raise funds from a greater number of persons;" and (4) "compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 22.

reliance upon *Citizens United* and other recent Supreme Court opinions). Therefore, RTAO is simply wrong to assert (Br. at 22-23) that strict scrutiny applies here.

Contrary to RTAO's claim (Br. at 23), *Citizens United* does not require strict scrutiny in reviewing the method for determining whether an entity is a political committee. Rather, *Citizens United* equated the requirement that a corporation create and maintain a separate segregated fund to finance independent expenditures (*see* 2 U.S.C. §§ 431(4)(B), 441b(b)) with a ban on speech. 130 S. Ct. at 898. Having done so, the Court then held that such a requirement could not be justified under strict scrutiny. *Id*. But no such ban on speech is present before this Court, and nothing in *Citizens United* addresses anything about the criteria or analysis used to determine whether an organization like RTAO is itself a political committee.[18]

4. The Commission's Express Advocacy Regulation Is Constitutional

Section 100.22(b) is constitutional because it is neither vague nor overbroad. As both this Court and the Fourth Circuit observed in evaluating RTAO's request for a preliminary injunction, the section 100.22(b) standard is similar to the constitutional test for the "functional equivalent of express advocacy" that the Supreme Court applied in *WRTL*, at a time when section 100.22(b) was still used partly to define the ban on corporate independent expenditures. *RTAO*, 2008 WL 4416282, at *11; *RTAO*, 575 F.3d at 349. Now that section 100.22(b) is no longer used to implement a direct restraint on speech, the regulation's constitutionality is even clearer. Indeed, *Citizens United* upheld a reporting requirement applicable to a much *broader* category of communications: all advertisements that meet the statutory definition of "electioneering communication" (2 U.S.C. § 434(f)(3)), even if they are *not* the functional equivalent of express advocacy.

[18] Although the Commission's regulation and PAC status analysis that plaintiff challenges are not subject to strict scrutiny, they would satisfy even that heightened standard.

Under 11 C.F.R. § 100.22(b), the definition of "expressly advocating" includes a communication that

> [w]hen taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because — (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Section 100.22(b) is consistent with the portion of *WRTL* that was not undermined by *Citizens United*. In *WRTL*, the Court narrowed *McConnell*'s upholding of BCRA's restriction on corporate electioneering communications to those that are "the functional equivalent of express advocacy," *i.e.*, communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70. Although *Citizens United* struck down BCRA's financing restrictions for such ads, it simultaneously upheld BCRA's reporting and disclaimer requirements, not only for "functional equivalent" ads but for *all* ads that meet the statutory definition of "electioneering communication." 130 S. Ct. at 913-16. In particular, the Court explained:

> Citizens United claims that, in any event, the disclosure requirements in [BCRA] § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. 551 U.S., at 469-476 (opinion of Roberts, C.J.). Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention.

Id. at 915. Because section 100.22(b) is consistent with Chief Justice Roberts' description of the "functional equivalent of express advocacy," and because Congress can constitutionally require disclosure for a *broader* class of electioneering communications than those that meet the "functional equivalent" test, section 100.22(b) is necessarily constitutional. *See also Human*

Life, 2010 WL 3987316, at *19 (relying on *Citizens United*'s distinction between financing and disclosure requirements to uphold disclosure of issue advocacy).

Both section 100.22(b) and the "functional equivalent" test narrowly inquire into whether there is any reasonable way to interpret a communication as non-candidate-advocacy. Because the controlling opinion in *WRTL* explained that the "functional equivalent" test is not vague (*see WRTL*, 551 U.S. at 474 n.7), the test in section 100.22(b) also satisfies any vagueness concerns. In addition, both tests avoid vagueness concerns by refusing to consider the subjective intent of the speaker. *Compare Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) ("[T]he subjective intent of the speaker is not a relevant consideration . . . .") *with WRTL*, 551 U.S. at 472 ("To the extent th[e] evidence goes to WRTL's subjective intent, it is again irrelevant.").[19] To the extent these standards differ, section 100.22(b) is even narrower than the *WRTL* test, as the regulation requires an "unambiguous" electoral portion, 11 C.F.R. § 100.22(b)(1), while *WRTL* looks to the "mention" of an election and similar indicia of express advocacy. 551 U.S. at 470.

RTAO's argument (Br. at 23-28) that the disclosure of express advocacy is constitutionally limited to a rigid interpretation of whether a communication contains "magic words" was laid to rest in *McConnell* and *Citizens United*. In *McConnell*, the plaintiffs challenging the constitutionality of BCRA argued that *Buckley* had characterized communications containing magic words as the outer constitutional boundary of Congress's power to regulate in this area. *See McConnell*, 540 U.S. at 190-91 (discussing *Buckley*, 424 U.S.

[19] The regulation's "reasonable person" test is like other objective constitutional tests. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity depends upon a "wholly objective standard" based on whether a "reasonable person" would have known of clearly established rights) (citation omitted); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("[C]onsent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

at 44 & n.52). Thus, the plaintiffs argued, BCRA was unconstitutional to the extent that it permitted regulation of communications that simply referred to federal candidates shortly before elections. *See McConnell*, 540 U.S. at 190-91. The Supreme Court rejected this argument, noting that *Buckley* had imposed the express advocacy requirement because of the vagueness of FECA's original statutory text ("relative to" a candidate), not because the First Amendment required it in all circumstances. *Id.* at 191-92. Accordingly, *McConnell* held that *Buckley's* "express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id*.

As Justice Thomas noted in dissent, *McConnell's* holding "overturned" all of the Courts of Appeals decisions — including the Fourth Circuit's decision in *CAN*, 110 F.3d at 1049 — that had interpreted *Buckley* as limiting government regulation to a wooden magic-words interpretation. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting). Other cases adopting or relying on this interpretation of *Buckley*, such as *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*"), were similarly revealed to be in error. *See id*. at 392 (citing *Buckley* and *CAN* as support for magic words "limit"). *WRTL's* adoption of a test based on a communication's "reasonable" interpretation thus undermines *VSHL's* holding that section 100.22(b) is flawed because the regulation purportedly "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer." *VSHL*, 263 F.3d at 391. As Justice Thomas further noted, *McConnell*, 540 U.S. at 278 n.11, the only express advocacy decision that *McConnell* did not cast into doubt was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) — the case from which the Commission derived the test codified at section 100.22(b). *See* 60 Fed. Reg. at 35,292-95 ("[S]ection 100.22(b) . . . incorporate[s] . . . the *Furgatch* interpretation . . . ."). Thus, the claim

that the Constitution and *Buckley* prohibit regulation of non-magic words communications must fail, and the narrow test of section 100.22(b) is entirely consistent with *McConnell*'s analysis.

Plaintiff nonetheless claims (Br. at 26-32), that *McConnell* and *WRTL* "affirmed that 'express advocacy' requires the so-called 'magic words.'" This argument distorts both cases. As discussed above, *McConnell* emphasized that the presence of magic words is not a constitutional requirement. *McConnell*, 540 U.S. at 191-92. And the portion of *WRTL* that RTAO cites affirmatively rejected the proposition, raised in Justice Scalia's partial concurrence, that the only permissible test is a magic words test:

> Justice Scalia concludes that "[i]f a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it." We are not so sure. The question in *Buckley* was how a particular statutory provision could be construed to avoid vagueness concerns, not what the constitutional standard for clarity was in the abstract, divorced from specific statutory language. *Buckley*'s intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test. The *Buckley* Court's "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law."

WRTL, 551 U.S. at 474 n.7 (citations omitted). Thus, neither case stands for the proposition that the line between permissible and impermissible regulation must be drawn at magic words. Again, although *Citizens United* later found unconstitutional all *financing* restrictions on corporate independent expenditures — even those containing express advocacy — the decision upheld disclosure requirements for communications that were less obviously campaign-related than either "express advocacy" or the "functional equivalent of express advocacy."

RTAO also argues (Br. at 23-25) that section 100.22(b) violates the First Amendment because it allegedly regulates communications that are not "unambiguously campaign related." This claim fails on the face of the regulation, which requires that "[t]he electoral portion of the communication [be] unmistakable, *unambiguous*, and suggestive of only one meaning," which is

"advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b) (emphasis added). Any communication that unambiguously encourages the defeat of a specific candidate is, by definition, unambiguously campaign related. Thus, even assuming *arguendo* that the Constitution limited disclosure to those communications that are unambiguously campaign related, section 100.22(b) would not extend beyond that limit.

The plaintiff in *Citizens United* claimed that disclosure was only necessary for communications that were "the functional equivalent of express advocacy." 130 S. Ct. at 915. Eight justices disagreed, finding that the interest of the public in knowing who was financing electioneering communications was alone sufficient to justify disclosure to the full extent of BCRA's statutory definition, which includes communications that are *not* the functional equivalent of express advocacy. *Id*. at 915-16 ("the informational interest alone is sufficient to justify application of [the disclosure requirements] to these ads"). Moreover, in *Citizens United,* the Court found that *Hillary: The Movie* was the functional equivalent of express advocacy because, in part, "the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency." 130 S. Ct. at 890. Thus, the Court applied the same "functional equivalent of express advocacy" test established in *McConnell* and *WRTL*. Of course, this Court and the Fourth Circuit earlier determined that section 100.22(b) is likely constitutional because it is so similar to the *WRTL* test. *RTAO,* 575 F.3d at 349 ("By limiting its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*, § 100.22(b) is likely constitutional."); *RTAO,* 2008 WL 4416282, at *11.[20]

[20] Plaintiff cites *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010), as "recognizing the unambiguously-campaign-related requirement." Br. at 25 n.22. But in that case, the Tenth Circuit found that there are two categories of unambiguously campaign

RTAO also relies upon *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), which invalidated a state statute defining non-magic words express advocacy. The definition at issue in *Leake*, however, was significantly broader and less precise than section 100.22(b), including such "contextual factors" as "the timing of the communication in relation to the events of the day" and "the cost of the communication." *Leake*, 525 F.3d at 298. As the Fourth Circuit noted, the state statute "swe[pt] far more broadly than *WRTL*'s 'functional equivalent of express advocacy' test." *Id*. at 297. By contrast, section 100.22(b) is, if anything, narrower than the *WRTL* standard. In *Leake*, the Fourth Circuit concluded that "North Carolina remains free to adopt a definition of express advocacy consistent with the standards approved by *McConnell* and *WRTL*." *Id*. at 301. As we have explained, section 100.22(b) is just such a standard.

Finally, RTAO does not even allege that the disclosure requirements involved here present any particular burden as applied to the organization or its members. As explained *supra* pp. 25, the Supreme Court has repeatedly made clear that an exception to otherwise valid disclosure provisions requires evidence of burdensome reprisals against an organization's members. *See Citizens United*, 130 S. Ct. at 915 (requiring "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed"). Because RTAO has made no effort to supply such evidence, it has failed to provide any reason why the disclosure requirements associated with the regulation and PAC status analysis it challenges are unconstitutional as applied to its activities.

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related speech: (1) "speech that expressly advocates or is the functional equivalent of express advocacy for the election or defeat of a specific candidate," and (2) "all expenditures by political committees." *Herrera*, 611 F.3d at 676. Thus, the court recognized that communications that met the *WRTL* "functional equivalent" test are campaign-related. Because the *WRTL* test is similar to section 100.22(b), RTAO's reliance on this decision is misplaced.

In sum, even before *Citizens United*, section 100.22(b) was constitutional. Now that the regulation no longer helps define a ban on speech, and now that *Citizens United* has made clear that disclosure can be required for a wide range of communications that refer to federal candidates, it is even more clear that the challenged regulation is constitutional.[21]

5. The Commission's Application of the "Major Purpose" Test in Determining PAC Status Is Constitutional

The Commission's approach to determining whether an entity is a "political committee" is lawful. Based upon the facts presented and RTAO's hypothetical activity, it is not clear that RTAO would be considered a political committee if it follows through on its intentions. RTAO's facial challenge thus presents only an abstract inquiry that is not fit for judicial resolution. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991). Even if the Court determines that plaintiff has alleged a case or controversy within Article III, however, the Commission's PAC status analysis is constitutional, consistent with the approach of the federal courts, and well within the Commission's discretion.

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[21] RTAO fails to identify any constitutional flaw in the actual cases in which the Commission has applied its express advocacy regulation in the past several years. The Commission has applied the regulation to communications characterizing presidential candidates as untrustworthy and unfit for the presidency. *See, e.g.*, Matters Under Review ("MUR") 5511, 5525, *Swiftboat Veterans and POWs for Truth*, Conciliation Agreement ¶¶ 15-17, 25-27 (Dec. 11, 2006); MUR 5440, *The Media Fund*, Conciliation Agreement ¶¶ 26-29 (Nov. 15, 2007) (documents from closed MURs are available at FEC Enforcement Query System, http://eqs.sdrdc.com/eqs/searcheqs). For example, the Commission found that television ads were express advocacy where they stated that "John Kerry fought and bled in the Vietnam War. He fought side by side with brothers who could not get out of the draft because they didn't have a rich father like George W. Bush. . . . You better wake up before you get taken out." *Media Fund*, Conciliation Agreement ¶¶ 28-29. Similarly, the Commission found to be express advocacy ads stating that Senator John Kerry "lacks the capacity to lead," "cannot be trusted," and "gave [aid] and comfort to the enemy." *Swiftboat Veterans*, Conciliation Agreement ¶ 15. Although none of these ads would satisfy a wooden test of magic-words express advocacy, RTAO fails to demonstrate why it was unconstitutional for the Commission to find that they were campaign ads.

a. Based on RTAO's Vague Intentions, Its Challenge Does Not Appear to Be Justiciable

Even if RTAO were to act upon its stated intentions, it is not clear it would be a political committee. If RTAO spent at least $1,000 to run express advocacy advertisements like *Survivors*, then the organization would satisfy the "expenditure" part of the FECA statutory analysis for political committee status, but RTAO still might not satisfy the "major purpose" test established in *Buckley*. 424 U.S. at 79. RTAO does not allege what other activities it intends to do, but its Articles of Incorporation purportedly bar the group from making express advocacy communications and coordinated expenditures or contributions to candidates. (RTAO Facts ¶ 7.) When a plaintiff's speech does not implicate the regulation it challenges, the plaintiff lacks standing under Article III of the Constitution. It is well-established that "[s]tanding is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. __, 128 S. Ct. 2759, 2769 (2008) (internal quotation marks and citations omitted). Indeed, in *Virginia Soc'y For Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998), the Fourth Circuit affirmed the lower court's finding that because the challenged statute included narrowing language ("for the purpose of influencing the outcome of an election") and the plaintiff only intended to conduct issue advocacy, plaintiff lacked standing to challenge the statute. *See also Long Beach Chamber of Commerce*, 603 F.3d at 689 (finding the Chamber lacked standing to challenge campaign finance regulations because the Chamber's bylaws prevented it from making contributions or independent expenditures). Here, because RTAO has not shown it would be a political committee, and even claims (RTAO Facts ¶ 6) that it "does not meet the constitutionally required 'major purpose' test," RTAO has failed to demonstrate standing to challenge the Commission's PAC status analysis.

b. The Commission's PAC Status Analysis Is Not Reviewable Under the APA[22]

Under the APA, courts may hear challenges only to "final agency action." 5 U.S.C. § 704. Final agency action consummates the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). But the primary purpose of the Commission's PAC status analysis that RTAO challenges was to explain why a broad regulation was not created; the Federal Register notice purports neither to establish a binding norm nor to decide any entity's legal status. This explanation does not create a new regulation or change past policy. It simply provides guidance about political committee status and the major purpose test based on specific administrative and civil enforcement actions. *See* 72 Fed. Reg. at 5604. This guidance is not final agency action subject to APA review.

c. The Commission's PAC Status Analysis Is Lawful

Even if reviewable, the Commission's case-by-case approach to determining political committee status is constitutional, and nothing has undermined its validity since this Court and the Fourth Circuit concluded that RTAO was unlikely to succeed on the merits of this claim. *RTAO*, 575 F.3d at 350-51; *RTAO*, 2008 WL 4416282, at *14. As explained *supra* p. 10, in *Buckley* the Supreme Court established the "major purpose" test and limited the definition of "political committee" to organizations controlled by a candidate or whose major purpose is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*; *see also MCFL*, 479

[22] The Commission recognizes that this Court previously rejected the Commission's argument that its PAC status analysis is not final agency action, *RTAO*, 2008 WL 4416282, at *9, but we briefly raise the argument here to preserve it for appeal.

U.S. at 252 n.6 (plaintiff is not a political committee because "its central organizational purpose is issue advocacy"); *McConnell*, 540 U.S. at 170 n.64.

When confronted with rulemaking petitions asking that the Commission classify nearly all section 527 organizations as political committees, the Commission decided, exercising its discretion, to continue its longstanding practice of implementing the "major purpose" test on a case-by-case basis instead of by rulemaking. *See* 72 Fed. Reg. 5595. *See also, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency."); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-95 (1974) (relying upon *Chenery* in leaving up to the Board whether to proceed by rulemaking or adjudication). The Commission's decision to take this approach was upheld in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). RTAO's claim appears to focus (Br. at 39-40) on this explanation of the major purpose test, but the approach the Commission outlined there is not unconstitutionally vague or overbroad.

The assessment of an organization's major purpose is inherently comparative and necessarily requires an understanding of an organization's overall activities. In its enforcement decisions, the Commission considers a variety of factors — most of which courts have endorsed or RTAO does not challenge — to determine whether an organization's major purpose is the election or defeat of a candidate.[23] Those factors include an organization's public statements,

[23] The Commission generally considers the major purpose test after first determining that an organization has either spent more than $1,000 in expenditures or raised more than $1,000 in contributions. *See* 72 Fed. Reg. at 5603-04. The only court to address this approach has criticized the Commission for determining whether communicative expenditures contain express advocacy before evaluating the major purpose of an organization; the court believed that the express advocacy analysis is unnecessary for groups whose major purpose is known to be campaign related. *Shays*, 511 F. Supp. 2d at 26-27. Although the Commission disagrees with

representations made in government filings, statements made to potential donors, internal governing documents, and the proportionate amount of spending on election-related activity. *See* 72 Fed. Reg. at 5605. RTAO contends (Br. at 36-37) that only an organization's "organic" documents and "unambiguously campaign related" expenditures are relevant to determine major purpose, but there is no support for such an unduly cramped application of the *Buckley* test.

To the contrary, courts have endorsed the evaluation of public statements and an organization's spending and contributions to determine its major purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (court considered organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."). Courts also consider non-public statements in evaluating an organization's major purpose. *See Malenick*, 310 F. Supp. 2d at 235 (letter from president to organization's primary contributor); *GOPAC*, 915 F. Supp. at 864, 866 (description of organization's meetings attended by national leaders; reference to organization's "Political Strategy Campaign Plan and Budget").

In numerous administrative enforcement proceedings and advisory opinions, the Commission has examined these factors and others to determine whether organizations satisfy the major purpose test. *See* 72 Fed. Reg. at 5605-06. RTAO does not allege that any of these

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that court's criticism, it recognizes that its own interpretation may tend to limit the number of organizations that qualify as political committees. RTAO ignores the conservative aspect of the Commission's approach. *Cf. Akins v. FEC*, 101 F.3d 731, 741-42 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 524 U.S. 11 (1998) (D.C. Circuit would not have applied major purpose test at all if organization made more than $1,000 in contributions, as opposed to independent expenditures).

specific analyses came to the wrong conclusion. And, contrary to RTAO's assumption (Br. at 40), the Commission can discern a group's "major purpose" without conducting a "broad-ranging, intrusive, and burdensome investigation." Sources such as the group's public statements, fundraising appeals, disclosure reports, charters, or bylaws usually provide the relevant facts. *See* 72 Fed. Reg. at 5601, 5605 (describing sources the Commission considers in its "major purpose" analysis). For example, before even opening an investigation in one matter, the FEC concluded that one organization should not be considered a "political committee" based on the group's public description of its purpose and the group's scanty record of contributions. MUR 4867, *Tribal Alliance for Sovereignty*, Factual and Legal Analysis at 12 (Dec. 11, 1998). Thus, RTAO's claims about Commission enforcement actions are exaggerated and unsubstantiated.[24]

As explained *supra* pp. 30-32, *Citizens United* does not create a new requirement that the Commission's PAC status analysis be subject to strict scrutiny, and nothing in the decision addressed the major purpose test or other criteria for political committee status. If the decision has any relevance to this part of RTAO's challenge, it strengthens the Commission's argument by emphasizing the importance of disclosure even for disbursements that are not the functional equivalent of express advocacy. RTAO suggests briefly (Br. at 40-41) that the Commission's PAC status analysis is flawed because it is supposedly "ad hoc" and evaluates an organization's

[24] For example, RTAO makes the unsubstantiated claim (Br. at 40) that the existence of an administrative complaint filed with the FEC "can shut down an organization." But Congress established the Commission's balanced enforcement mechanisms decades ago, providing specific "procedures purposely designed to ensure fairness not only to complainants but also to respondents." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). The Commission does not investigate potential violations of the Act until at least four of its members have voted to find "reason to believe" that the law has been violated. *See* 2 U.S.C. § 437g(a)(2). RTAO's argument would sacrifice proper law enforcement to speculative and generalized fear. *See Standard Oil*, 449 U.S. at 244 (expense and annoyance of agency proceedings do not constitute irreparable injury, but are part of social burden of living under government).

overall activities. But agencies have wide latitude to develop the law on a case-by-case basis rather than through regulation, and it is the Supreme Court's own "major purpose" test that necessarily asks how an organization's campaign activities compare to its overall mission. The Commission's approach is thus fully consistent with governing precedent, and RTAO's challenge to the Commission's enforcement methodology lacks merit.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied and this Court should enter summary judgment in favor of the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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