

United States District Court
Eastern District of Virginia
Richmond Division

The Real Truth About Obama, Inc. v. Federal Election Commission and United States Department of Justice, <i>Plaintiff,</i> <i>Defendants.</i>	Case No. 3:08-cv-00483-JRS
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**Reply in Support of
Preliminary Injunction Motion**

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Table of Contents

ARGUMENT.....	1
I. Timely Association and Speech Are Not Suspect..	1
II. This Case Is Justiciable.....	3
A. RTAO’s Challenge Is to the Vague Provisions that Prevent Timely Advance Knowledge of Permissibility and Permit the Present Arbitrary Enforcement.....	3
B. The FEC’s Effort to Distinguish RTAO’s Intended Activity from Prior Interpretations Is Unconvincing..	7
C. The FEC’s Interpretation Does Not Protect RTAO Because Others May Disagree and May Sue to Require Enforcement.....	12
III. The Preliminary Injunction Requirements Are Met.....	15
A. RTAO Has Likely Success on the Merits..	15
B. The Other Elements Are Met..	19
CONCLUSION.	20

Table of Authorities

Cases

<i>Austin v. Mich. State Chamber of Commerce</i> , 494 U.S. 652 (1990).....	19
<i>Babbitt v. United Farm Workers Nat’l Union</i> , 442 U.S. 289 (1979).....	3
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).	2, 4, 7, 9, 15-18
<i>Chamber of Commerce of the United States v. FEC</i> , 69 F.3d 600 (D.C. Cir. 1995).....	7
<i>City News & Novelty, Inc. v. City of Waukesha</i> , 531 U.S. 278 (2001).	12
<i>City of Mesquite v. Aladdin’s Castle, Inc.</i> , 455 U.S. 283 (1983).....	12
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973).....	4
<i>FEC v. Massachusetts Citizens for Life</i> , 479 U.S. 238 (1986).	19
<i>FEC v. Survival Education Fund</i> , 65 F.3d 285 (2d Cir. 1995).	17
<i>FEC v. Wisconsin Right to Life</i> , 127 S. Ct. 2652 (2007)	2, 9, 14-16, 18, 19
<i>Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.</i> , 528 U.S. 167 (2000).	11
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983).....	4
<i>McConnell v. FEC</i> , 540 U.S. 93 (2003).....	15
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966).....	2
<i>New Hampshire Right to Life PAC v. Gardner</i> , 99 F.3d 8 (1st Cir.1996).....	5
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).	2, 9
<i>North Carolina Right to Life v. Bartlett</i> , 168 F.3d 705 (4th Cir. 1999).....	4-6
<i>North Carolina Right to Life v. Leake</i> , 525 F.3d 274 (4th Cir. 2008).....	11, 15-19
<i>Northeastern Fla. Chapter of the Associated Gen’l Contractors of Am. v. City of Jackson- ville</i> , 508 U.S. 656 (1993)	12
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	2

<i>United States v. W. T. Grant Co.</i> , 345 U.S. 629 (1953).....	12
<i>Virginia Society for Human Life v. FEC</i> , 263 F.3d 379 (4th Cir. 2001).	3, 5, 6
<i>Wilson v. Stocker</i> , 819 F.2d 943 (10th Cir.1987).....	5
<i>Wisconsin Right to Life v. FEC</i> , 466 F. Supp. 2d 195 (D.D.C. 2006)	9
<i>Constitution, Statutes & Regulations</i>	
2 U.S.C. § 4347g(a)(8).....	7, 12
11 C.F.R. § 100.22(b).	6, 8, 9, 15
11 C.F.R. § 100.57.....	12
U.S. Const. amend. I.	<i>passim</i>
<i>Other Authorities</i>	
72 Fed. Reg. 5595.	18
Bob Bauer, <i>Campaign Finance Law and What We All Know</i> (Nov. 23, 2007).....	14
Bob Bauer, <i>The “Real Truth” about Jim Bopp’s New Case</i> (July 31, 2008)	13
Conciliation Agreement on Matters Under Review 5511 and 5525 (Swift Boat Veterans and POWs for Truth)	7-9
FEC, Advisory Opinion 2007-33 (Club for Growth).....	4
Rick Hasen, <i>Bob Bauer Says Pro-Clinton 527 Will Face a Reckoning</i> , Election Law Blog (Feb. 21, 2008)	14
Michael Luo, <i>Group Plans Campaign Against G.O.P. Donors</i> (Aug. 8, 2008)	14
Ben Smith, <i>Obama lawyer warns of ‘reckoning’ for Clinton 527 donors and staff</i> (Feb. 21, 2008)	13

ARGUMENT

I. Timely Association and Speech Are Not Suspect.

In this case, several Americans recently decided that they wanted to exercise their right to free expression by telling the public the truth about a prominent politician's public-policy positions. They decided to amplify their voices by exercising their First Amendment association right. They promptly organized effectively by incorporating as The Real Truth About Obama, Inc. ("RTAO") and obtaining nonprofit status. Aware that similar groups have suffered serious consequences for similar activity, they promptly sought the pre-activity, pre-enforcement judicial relief available in First Amendment cases. And they sought a preliminary injunction because untimely speech is of little value, and this is the time when Senator Barack Obama's positions on the issues of RTAO's concern are of greatest public interest and importance.

The Federal Election Commission ("FEC") recites this story as if it were somehow suspect.¹ The FEC's first insinuation, Doc. 31 at 1, is that individuals can't just associate and speak with First Amendment protection because, apparently (according to the FEC), the First Amendment has a prescience requirement. So under this view, in order for First Amendment rights to engage, RTAO should have known months ago that it would want to speak. Then it could have organized long ago. The First Amendment includes no such requirement. Its protections are not limited to long-established groups.

The timing of this association and intended speech are not suspect. It is precisely what the Framers envisioned when "We the People" mandated that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. With "no law," citizens could speak whenever they wanted, without thought to whether they had jumped through some series of

¹The Department of Justice ("DOJ") simply incorporates the FEC's arguments. Doc. 32.

hoops or obtained the government’s prior permission. Nor is the topic of RTAO’s speech suspect: “[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. . . . of course includ(ing) discussions of candidates” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Rather than being restricted, such public “issue advocacy,” or “political speech,” must be protected: “The test to distinguish constitutionally protected political speech from speech that [government] may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also ‘reflec[t] our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”’” *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2665 (2007) (“*WRTL II*”) (quoting *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))). The people have these rights because they, not their elected officials or federal agencies, are sovereign: “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.” *Id.* at 14-15. “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The second insinuation is that RTAO’s First Amendment rights diminish “near the peak of the election cycle.” Doc. 33 at 1. But speech in temporal and topical proximity to an election enjoys the highest protection. *Buckley*, 424 U.S. at 14 (“constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office”) (citation

omitted)).

The third insinuation is that RTAO doesn't have constitutional rights until it has done something that "implicates federal election law," such as "fundraising or electoral speech," or that "the Commission has taken . . . action against it." *Id.* This is contrary to the right to bring pre-activity, pre-enforcement First Amendment challenges to avoid risking activity that may lead to enforcement and penalties. RTAO has "alleged[d] 'an intention to engage in a course of conduct arguably affected with a constitutional interest,' and there . . . exist[s] 'a credible threat of prosecution'" See *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 386 (4th Cir. 2001) ("*VSHL*") (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

II. This Case Is Justiciable.

The FEC asserts that RTAO has an "unfounded fear of prosecution" because "the particular advertisement and fundraising solicitation plaintiff intends to pursue will not be regulated as plaintiff fears." Doc. 31 at 1. So the FEC challenges justiciability. *Id.* at 6. But the convenient interpretation of the FEC's lawyers and/or Commissioners² that these communications are not regulated does not make this case non-justiciable.

A. RTAO's Challenge Is to the Vague Provisions that Prevent Timely Advance Knowledge of Permissibility and Permit the Present Arbitrary Enforcement.

RTAO challenged the very vagueness that the FEC now employs to interpret the challenged provisions in a way that the FEC believes will allow it to escape this case. Vague laws are uncon-

²RTAO asked lawyers from the FEC Office of General Counsel whether the position taken in their opposition to preliminary injunction (that RTAO's activity implicated no challenged regulation) was officially voted upon by the Commissioners. In a response letter, the FEC counsel recited that "[t]he statements in the . . . Memorandum . . . were the product of consultation with the Commission." This constitutes a refusal to reveal whether the position was an OGC position or a formal Commission position. Therefore, it seems a convenient litigation position. But even if there were a Commission vote to adopt the position, as occurred in *VSHL*, 263 F.3d 379, that would not prevent review. See *infra*.

stitutional because they prevent speakers from knowing in advance³ what is permissible and permit arbitrary enforcement. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In the First Amendment area, bright lines are required. *Buckley*, 424 U.S. at 41 & n.48. So the issue is not what the FEC’s current litigation position is as to the interpretation of its regulations, but whether the regulations themselves appear on their face to apply to RTAO and its planned present and future activities.

In a similar situation, the Fourth Circuit dealt with what it called a “litigation position” in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). The State Board of Elections argued that there was no case or controversy because “irrespective of the statute’s plain language, the Board interpret[ed] the definition of political committee” in such a way as to permit the challenger’s intended activity. *Id.* at 710. The Fourth Circuit disagreed for reasons that control this case:

When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute. *See Doe v. Bolton*, 410 U.S. 179, 188 (1973). A non-moribund statute that “facially restrict[s] expressive activity by the class to which

³The FEC suggests that RTAO should simply get advisory opinions. Doc. 31 at 6 n.1. An advisory opinion would not have been timely because the FEC has sixty days to provide one. 11 C.F.R. § 112.4. So if RTAO had requested one in late July, when it sought injunctive relief, a response would not have been due until late September, meaning that RTAO would have lost precious time for its issue advocacy, at key time of public interest, with no certain expectation of the interpretation that the FEC now offers. In fact, the advisory opinion process permits public comments, 11 C.F.R. § 112.3, and it is clear that others would not have agreed that the regulations permit RTAO to do its advocacy, *see infra*, so the FEC likely would have felt less free to adopt its current litigation position in light of such comments. The FEC might have also been less likely to be so generous in its interpretation in the absence of a challenge to its rules. There is evidence for this in the fact that it recently rejected a request to use an abbreviated disclaimer for brief ads, AO 2007-33 (Club for Growth), which request implicated one of the very burdens alleged here by RTAO. And RTAO wants to do materially-similar activity, which may or may not be approved by the FEC based on the criteria that the FEC employed in reaching its present interpretation, *see infra*, and having to wait sixty days each time a new ad or fundraising communication is prepared is an unbearable First Amendment burden, harking back to the days of licensing schemes, government censors, and prior restraints.

the plaintiff belongs” presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary. *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir.1996). This presumption is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights. *See Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir.1987).

Bartlett, 168 F.3d at 710. The Fourth Circuit noted that NCRL wanted to do similar activity in the future and that only the good graces of the Board meant that the activity would be protected in the future because no rule guaranteed that the activity would be protected, and the Board might change its mind. *Id.* at 710-11. In the present case, RTAO wants to do materially-similar future activity—which would certainly be materially-similar in RTAO’s eyes, but perhaps not in the FEC’s eyes (and there is no way to know, given the vague rules and application criteria employed)—and only the FEC’s interpretation *might* protect that activity because the challenged rules do not.⁴ Moreover, the Fourth Circuit noted that, despite the Board’s interpretation, there were others who could disagree with the Board’s interpretation and could pursue punishment of NCRL. *Id.* at 711. The same is true here. *See infra*. The question of what the regulations at issue mean, and to what facts they appear to apply on their face, is ultimately a question of law. Questions of law are for this Court to decide, not the FEC, even though the FEC created the challenged provisions. Agencies are not free to create vague and overbroad laws and then interpret and apply them in arbitrary and capricious ways as they see fit.

The Fourth Circuit dealt with a similar non-justiciability claim in *VSHL*, 263 F.3d 379. The

⁴For example, there is a current controversy over whether Senator Obama has actually lied about his voting record as an Illinois State Senator on a state equivalent to the federal Born-Alive Infants Protection Act (“BAIPA”) (which requires that any child born alive, even after an attempted abortion, be protected as any born child), and in turn Senator Obama has now said that National Right to Life Committee (“NRLC”) has lied about his voting record on this issue. *See* <http://www.nrlc.org/ObamaBAIPA/Obamacoveruponbornalive.htm>. RTAO is considering an ad based on this issue, but it would necessarily say that Senator Obama is lying. Would the FEC consider this a character attack and, therefore, express advocacy? There is no guidance.

FEC in that case argued that VSHL lacked standing because the Fourth Circuit had struck down the FEC's alternative express-advocacy test, 11 C.F.R. § 100.22(b), in a prior case and the FEC had adopted a policy of not enforcing the regulation in the Fourth Circuit. *Id.* at 386. The Fourth Circuit first noted that its prior decision had contained dicta criticizing § 100.22(b), but had not held it unconstitutional (the Fourth Circuit did hold it unconstitutional in *VSHL*, 263 F.3d at 392). It then noted the similar policy position in *Bartlett*, *see supra*, and that the court had rejected the argument against standing: “when a statute on its face restricts a party from engaging in expressive activity, there is a presumption of a credible threat of prosecution.” *Id.* at 388. *VSHL* noted that under the FEC's position, “NCRL's First Amendment rights would exist only at the sufferance of the State Board of Elections.” *Id.* The Fourth Circuit noted that “[t]he FEC's policy of non-enforcement, adopted . . . in a closed meeting, is somewhat more formal than the promise it made during litigation by the State in *NCRL*,” *id.*, but that it had not been formalized in a rule, with “the rigors of notice and comment rulemaking.” *Id.* “A simple vote of the Commission . . . could scuttle the policy.” *Id.* The Fourth Circuit found standing. *Id.* at 389.

The FEC's present claim of nonjusticiability has many similarities to *VSHL*. While the FEC did enact *rules* in the present case, its current *litigation position* as to the reach of those rules was not subject to rulemaking rigors, only to some “closed meeting” discussion that could readily be reversed. The position was not obvious from the rules at issue. *See infra*. And it provides no guidance for RTAO's planned materially-similar activity. The vague lines of the rules remain as vague as ever. RTAO has standing to challenge these provisions. *VSHL* also resolves the FEC's undeveloped ripeness argument, Doc. 31 at 6, because “it is enough to ‘allege[] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a [regulation].’” *Id.* at 389 (citation omitted).

The FEC made a similar standing and ripeness claim in *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995). That court rejected the FEC’s claim that plaintiff had not suffered cognizable harm, pointing in part to the fact that federal law “permits a private party to challenge the FEC’s decision *not* to enforce.” *Id.* at 602 (*citing* 2 U.S.C. § 4347g(a)(8)). The cited statute applies to this case, too, and is discussed further *infra*. The court concluded that the FEC’s “standing argument [wa]s rather weak and easily reject[ed] it.” *Id.* at 604. And it held that *Chevron* deference is not afforded the FEC’s interpretation of the underlying statute. *Id.* at 605.

The FEC’s present position is precisely the sort of arbitrary and capricious enforcement that vague laws allow, and for which they are unconstitutional. As discussed below, the FEC’s present interpretation of its regulations is highly suspect in light of prior enforcement activity and the views of others. The FEC must not be permitted to adopt a convenient litigation position to avoid challenge to the vague and overbroad provisions at issue.

B. The FEC’s Effort to Distinguish RTAO’s Intended Activity from Prior Interpretations Is Unconvincing.

The FEC’s attempt to show how the FEC’s alternative express-advocacy definition, at 11 C.F.R. § 100.22(b), does not encompass the *Change* ad is unconvincing. While RTAO believes that the ad is constitutionally-protected from regulation under the true express-advocacy test, *see Buckley*, 424 U.S. at 44, n.52, it is not at all clear that it is protected under the regulation.

It is helpful to begin with an example of an ad that the FEC found to be express advocacy under § 100.22(b). In the Conciliation Agreement on Matters Under Review (“MURs”) 5511 and 5525 (Swift Boat Veterans and POWs for Truth) (“SV-CA”), the FEC found that five television ads “expressly advocated the defeat of Senator John Kerry” because

[t]he television advertisements were broadcast shortly before the 2004 Presidential Election, explicitly challenge Senator Kerry’s “capacity to lead,” assert that he cannot be “trusted,” and ask why citizens should be willing to “follow” him as a leader. The Commission concludes that, speaking to voters in this context, the advertisements unambiguously refer to Senator Kerry as a Presidential candidate by discussing his character, fitness for office, and capacity to lead, and have no other reasonable meaning than to encourage actions to defeat him. *See* 11 C.F.R. § 100.22(b); *Explanation and Justification*, 60 Fed. Reg. at 35,295.

SV-CA ¶ 25. An example of these “express advocacy” ads that, according to the Commission, “attacked the character, qualifications, and fitness for office of Senator John Kerry,” SV-CA

¶ 15, is *Any Questions?*:

John Kerry has not been honest
And he lacks the capacity to lead.
When the chips are down, you could not count on John Kerry.
...
I served with John Kerry . . . John Kerry cannot be trusted.

SV-CA ¶ 15. Clearly there are no express words of advocacy in *Any Questions?*. And while there is clearly opposition to Sen. Kerry, there is nothing that looks like a call to action to vote against him. To be sure, it says that he is dishonest and can’t be trusted, but since when can citizens be barred from freely asserting that a politician is dishonest? It says he can’t lead, but politicians are constantly being accused of poor leadership—and poor judgment, intelligence, and character. It is a fact of life for public officials in a nation where there are no anti-sedition laws. And if Senator Kerry put his ability to lead and his military record at issue in any way in an effort to advance himself, aren’t those who served under or with him permitted to publicly say what they have apparently long—and vehemently—felt about him? The “Swift Vets contend[ed] that its 2004 activities were intended to set the record straight with regard to the public discussion of John Kerry’s conduct in, and statements about, the Vietnam War, particularly Mr. Kerry’s statements about the conduct of those who fought in Vietnam, and the declaration that he was ‘reporting for duty’ in connection with his 2004 Presidential campaign.” SV-CA ¶ 13. SwiftVets also

contend[ed] the reason that it ran its ads when it did “was because it had made its point on the issue of concern at the time it was the focus of public debate.” SV-CA ¶ 13. “Setting the record straight” as to assertions by a public official and candidate concerning his record of both private and public actions, at a time when the issue is a focus of national debate, is well within the core of the First Amendment’s highest protection.⁵

The candidate’s remedy where such an apparently long-simmering dispute among soldiers bubbles into public view is to join public debate on the allegations against him. His legal remedy would be constrained by the “actual malice” standard of *New York Times*, 376 U.S. 254 (1964), because of “our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’” *Buckley*, 424 U.S. at 14 (*quoting New York Times*, 376 U.S. at 270).

Yet the Commission found that *Any Questions?* was express advocacy under 11 C.F.R. § 100.22(b) because of proximity to an election, character references, and, according to the Commission, discussion of Sen. Kerry’s “fitness for office.” SV-CA ¶ 25. Of course, none of these criteria appear in § 100.22(b). And they are inherently vague. When does proximity count (it doesn’t for electioneering communications under *WRTL II*’s appeal-to-vote test, 127 S. Ct. at 2667), and how proximate must it be? When does discussion of an incumbent politician’s actions slip into discussing “fitness for office”? How, under our First Amendment jurisprudence, can discuss-

⁵In *WRTL II*, the Commission and Intervenors made nearly identical arguments concerning the timing of *WRTL*’s ads. *See, e.g.*, Brief for Appellant Federal Election Commission at 45-47, and some of their arguments were picked up by the *WRTL II* dissent, 127 S. Ct. at 2698 (Souter, J., dissenting, joined by Stevens, Ginsburg & Breyer, JJ.), and the district court dissent. *See WRTL v. FEC*, 466 F. Supp. 2d 195, 217-18 (D.D.C. 2006) (Roberts, J., dissenting). But *WRTL II* either ignored the arguments or expressly rejected them. *See* 127 S. Ct. at 2668 (rejecting argument that ads were run near an election, not run after the election, and during a Senate recess, and declaring that “a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote”).

ing the “character” of a U.S. Senator, even if he is a presidential candidate, be restricted without reverting to the days of anti-sedition laws? The Commission’s finding that there was express advocacy required it to find that there was absolutely no doubt, no ambiguity, about whether the ad called for a *vote* against Sen. Kerry—that no reasonable person could think otherwise.

With the sort of criteria applied to *Any Questions?* in mind, it is easy to see why RTAO is chilled from running *Change* and materially-similar ads, and it is easy to see why the FEC’s current interpretation seems a convenient litigation position. The FEC’s discussion in this case of why *Change* is not regulated and the new criteria it provides, do nothing to thaw the chill. The FEC says that *Change* “contains several unambiguous ‘electoral portion[s]’ referring to Senator Obama’s campaign for President,” including “appointing Justices . . . —a uniquely presidential duty—and the manipulation of one of Senator Obama’s campaign slogans, ‘Change we can believe in’” Doc. 31 at 12 n.5. That slogan, claims the FEC, “may be uniquely suited to adaptation for non-express advocacy because it contains no explicit electoral component and does not reference the candidate in any way.” *Id.* But if it were an “*explicit* electoral component,” there would be no debate because that would be express advocacy under *Buckley*’s magic-words definition. 424 U.S. at 44 n.52. And since the whole *Change* ad “reference[s] the candidate,” it is difficult to see how the FEC can split hairs over what part of an ad does or does not reference a candidate. Moreover, the FEC ignores the fact that *Change* does connect the “change” slogan with the candidate at the beginning: “Change. Here is how I would like to change America . . . about abortion” The “change” theme shows up twice in that quoted material (and the closing use of the fuller version of the theme, makes it clear that it is the campaign theme that is being referenced), and the “I” is plainly Senator Obama. So how is RTAO supposed to know what the FEC says is permissible use of a campaign slogan and what is not? The FEC’s distinc-

tions are unconvincing. Where is the First Amendment bright line? The FEC introduces new criteria: “the ad does not question his leadership qualities or patriotism, or compare him with other candidates.” Doc. 31 at 12 n.5. But those new criteria appear nowhere in § 100.22(b), and they do not define express advocacy. For example, an ad could mention another candidate and still be issue advocacy, as in the common example of voter guides that merely compare candidate’s positions. And clearly an ad could say that someone is a lousy leader or unpatriotic without advocating his election or defeat. Finally, the FEC says that “[g]iven the ad’s devotion to speech regarding the abortion issue and the indirect and oblique references to the presidential campaign, . . . the ad ‘as a whole’ could reasonably be interpreted as a call for the listener to learn more about his views on abortion.” Doc. 31 at 12 n.5. But there is no “call” to do anything in *Change*. RTAO is *telling* the truth about Senator Obama’s abortion views, not *calling* listeners to find out about them. It is true that the closing says: “To learn more real truth about Obama, visit www.TheRealTruthAboutObama.com,” but that is simply making more information available. But to the present point, is the FEC saying that if RTAO includes this line in its materially-similar ads then the FEC will deem the ads as not express advocacy under § 100.22(b)? What if it doesn’t? The FEC doesn’t say. The FEC is applying the forbidden “we’ll know it when we see it approach.” *North Carolina Right to Life v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008). It is “handing out speeding tickets without ‘telling anyone . . . the speed limit.’” *Id.*

In light of its prior interpretation of § 100.22(b) in *Any Questions?*, the FEC’s current litigation position is more in the nature of a voluntary cessation of unconstitutional activity as applied to the particular universe of activity subject to the present litigation. However, the voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. “If it did, courts would have to leave defendants to return to their old

ways.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1983)); see also *Northeastern Fla. Chapter of the Associated Gen’l Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) (quoting *Aladdin’s Castle*, 445 U.S. at 289); *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (collecting cases). Indeed, “the general rule that voluntary cessation of a challenged practice rarely moots a federal case . . . traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.” *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (citations omitted).

C. The FEC’s Interpretation Does Not Protect RTAO Because Others May Disagree and May Sue to Require Enforcement.

A central problem with the FEC’s litigation position is that it doesn’t remove the potential for harm to RTAO because, if a complaint is filed against RTAO and the FEC declines to bring an enforcement action, the complainant can sue to compel enforcement after 120 days in the U.S. District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A).

[T]he court may declare that the dismissal of the complaint or failure to act is contrary to law, and direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

2 U.S.C. § 437g(a)(8)(C). As the FEC recites, Doc. 31 at 20, “courts in the D.C. Circuit have refused to enjoin application of section 100.57” (“contribution” presumption). *Id.* (citations omitted). As to whether there might be parties to complain of the FEC’s non-enforcement against RTAO, based on the FEC’s interpretation of the challenged provisions as not applying to RTAO and its intended activities, that is readily shown.

Two candidates for making a such a complaint would be the Campaign Legal Center and

Democracy 21, who filed an amici curiae brief in this case. Doc. 39-1. The authors of this brief showed every indication that they believe that RTAO is *not* free to do its intended activities. In fact, as recited in RTAO's opening memorandum, Doc. 4 at 4, Democracy 21 is the group that wrote the letter to the Department of Justice urging that criminal prosecution of 527s for activities involving the challenged provisions be made a high priority. Two other potential complainants might be Professors Briffault and Ortiz, who obviously feel strongly about the case and have also filed an amici curiae brief, in which they opine that RTAO may be a political committee, Doc. 38-2 at 4, a position that is clearly incompatible with RTAO being free to do its intended activity.

Another highly likely candidate for making a complaint is Senator Obama, or his campaign-finance lawyer, Bob Bauer. *See* Bob Bauer, *The "Real Truth" about Jim Bopp's New Case* (July 31, 2008) (disclosing that he is "counsel to Obama for America") (part of Bauer's blog titled "More Soft Money Hard Law Web Updates: The 2nd Edition to the Guide to the New Campaign Finance Law"; available at www.moresoftmoneyhardlaw.com/news/html?AID=1313). Bauer insists that *Change* "is all about Obama, unambiguously and only in relation to his Presidential candidacy" and that "[s]hort of a fusillade of classic 'magic words,' this advertising program could not be less ambiguous in its meaning." Clearly, Bauer doesn't agree with the FEC's litigation position that RTAO is free, under the challenged provisions, to do its intended activity. With such a view, a complaint against the FEC for non-enforcement against RTAO if RTAO proceeds with its intended activity is a near-certainty. Bauer has also threatened, in no uncertain terms, dire consequences for anyone who donated to a 527 created to support Senator Clinton, citing the very provisions at issue here and the FEC's recent history of vigorous enforcement against 527s for activity similar to what RTAO proposes. *See* Ben Smith, *Obama lawyer warns of 'reckoning'*

for Clinton 527 donors and staff (Feb. 21, 2008) (published at www.politico.com; article on file with counsel for RTAO); Rick Hasen, *Bob Bauer Says Pro-Clinton 527 Will Face a Reckoning*, Election Law Blog (Feb. 21, 2008) (providing link to Bauer's actual letter and noting that Bauer rejected arguments from 527's lawyers that the FEC's new *WRTL II* rule protected the planned issue advocacy) (available at http://www.politico.com/blogs/bensmith/0208/Obama_lawyer_warns_of_reckoning_for_Clinton_527_donors_and_staff.html]). On his blog, Bauer noted the current vagueness of the law with respect to the very provisions at issue and declared the dangers:

The arguments about issue advocacy will not peter out, of course, after *WRTL* or the experience with 527s in 2004. Groups, individuals, corporations and unions have the need or desire to speak to the campaign issues, or they will find in the campaigns just the opportunity they want to highlight an issue or introduce it to a national audience. And if they speak, they will do so in a regulatory environment thick with risk created by indeterminate "rules" All these speakers can be told is this: that they should avoid activity that we all know is regulated campaign activity, or accept the consequences.

See Bob Bauer, *Campaign Finance Law and What We All Know* (Nov. 23, 2007) (available at http://moresoftmoneyhardlaw.com/updates/outside_groups.html?AID=1140).

Another possible complainant is Accountable America, a group attempting to intimidate Republican donors to nonprofit groups, including issue-advocacy 527s. See Michael Luo, *Group Plans Campaign Against G.O.P. Donors* (Aug. 8, 2008) (available at www.nytimes.com). The group has been sending out a threatening letter to "Republican Supporters" and has offered a \$100,000 reward for information leading to criminal convictions for violations of campaign-finance laws. See <http://www.accountableamerica.com>.

In sum, the FEC's litigation position provides no protection for RTAO against harm. In fact, in the current climate, the FEC's suggestion that RTAO should just go ahead and do its activities is disingenuous. It clearly bespeaks a litigation position that is convenient only for the FEC.

RTAO's allegation of chill is reasonable. RTAO has standing. Its claims are ripe.

III. The Preliminary Injunction Requirements Are Met.

A. RTAO Has Likely Success on the Merits.

RTAO has likely success on the merits. As to the FEC's alternate express-advocacy rule, 11 C.F.R. § 100.22(b), the Fourth Circuit precludes it as a permissible choice:

Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that uses specific election-related words. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Leake, 525 F.3d at 282-83. That post-*McConnell v. FEC*, 540 U.S. 93 (2003), decision is binding in this Circuit, so those are the FEC's only two choices for regulating expenditures for communications. There is no authority for an ambiguous hybrid test between the two. Attempting to blur the bright lines of these two tests chills issue advocacy, which chilling is forbidden by the First Amendment. And the FEC's effort to justify its vague express-advocacy definition by likening it to *WRTL II*'s appeal-to-vote test, Doc. 31 at 15, conveniently ignores the fact that the appeal-to-vote test is vague and overbroad apart from its unique application to communications that already meet the "electioneering communications" definition. *See WRTL II*, 127 S. Ct. at 2669 n.7 (defending test against vagueness charge). The FEC's vague rule applies beyond this limited context.

Moreover, the FEC's claim that the unambiguously-campaign-related requirement is met because § 100.22(b) contains the word "unambiguous," Doc. 31 at 13, simply demonstrates that the FEC does not comprehend this core constitutional requirement for the campaign laws that the FEC is supposed to administer. While there has been a universal requirement since *Buckley* that

all campaign finance laws and regulations be “unambiguously related to the campaign of a particular candidate,” 424 U.S. at 80, the Court has consistently applied this requirement through derivative tests, e.g., the express-advocacy test for “independent expenditures,” *id.*, the major-purpose test for “political committees,” *id.* at 79, and the appeal-to-vote test for “electioneering communications.” *WRTL II*, 127 S. Ct. at 2667. The FEC cannot sidestep the very express-advocacy test that *Buckley* employed to meet the unambiguously-campaign-related requirement and claim that it meets the requirement.

The FEC’s effort to argue that *McConnell* vitiated the express-advocacy test, Doc. 31 at 14, ignores the fact that the binding *Leake* decision has decided that express advocacy requires magic words, such as “vote for.” *McConnell*’s simply decided that in addition to express advocacy with magic words, Congress could regulate “electioneering communications,” which do not contain the magic words. But both *McConnell* and *WRTL II* recognized that as to express advocacy itself, the magic words are required. *See* Doc. 4 at 13 and n.6 (noting that all of the Justices in *WRTL II* agreed that express advocacy requires magic words). The FEC attempts to blunt this fact by, for example, arguing that the *WRTL II* dissenters disagreed “with the magic words standard.” Doc. 31 at 16 n.7. But their disagreement with the standard does not change their recognition that “express advocacy” and “independent expenditures” require magic words, regardless of whatever else they believe that Congress should be able to do.

As to the solicitation presumption, 11 C.F.R. § 100.57, the FEC relies primarily on its litigation position that RTAO’s proposed solicitation isn’t for activity that will “support or oppose” Senator Obama. This litigation position has been dealt with at length *supra*, and simply does not remove the underlying chill of the vague position itself and the risk of harm to RTAO. The FEC attempts to import a lower standard of review by reciting that *Buckley* employed intermediate

scrutiny for contribution limits, Doc. 31 at 19, but that effort must fail because the issue is what is properly included as a contribution in a vague and overbroad regulation that creates a presumption, not whether a limit on properly-defined contributions is permissible. The FEC also wants to dispute the fact that *Buckley* recognized a narrow scope for contributions. *Id.* But simply reading *Buckley* reveals that it first noted that “for the purpose of influencing” was undefined, 424 U.S. at 23 n.24, that “[o]ther courts have given that phrase a narrow meaning to alleviate various problems in other contexts, *id.*, that “[t]he use of the phrase presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution,” *id.*, and that as the Court used “contribution” it reached only “[f]unds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. . . . [and] dollars given to another person or organization that are earmarked for political purposes” *Id.* This narrowing of the scope of “purpose of influencing” is consistent with the unambiguously-campaign-related requirement, which the Fourth Circuit says is a requirement for all regulation in this area. *Leake*, 525 F.3d at 282. By “earmarked” funds for “political purposes,” *Buckley* of course would have meant for “political purposes” recognized as regulable, just as *FEC v. Survival Education Fund*, 65 F.3d 285, 289, 295 (2d Cir. 1995), recognized that contributions in response to a solicitation that said that donations would be used for express-advocacy independent expenditures would be contributions. *SEF* provides no authority to create a vague and overbroad “support or oppose” test. As to the vagueness of “support or oppose,” the benchmark for vagueness in this area must be *Buckley*’s initial construction of “relative to a clearly identified candidate,” which the Supreme Court construed to mean “advocating the election or defeat of a clearly identified candidate.” 424 U.S. at 42. The Court said that while that construction “refocuses the

vagueness question, the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether.” *Id. Buckley* then explained the dissolving-distinction problem between advocacy of issues and advocacy of the election or defeat of candidates, *id.* at 43-44, which RTAO set out in its opening brief, Doc. 4 at 10, and said that the phrase still required “express” or “explicit” words of advocacy. 424 U.S. at 44 n.52. Measuring “support or oppose” against this true benchmark readily shows its utter failure to resolve the vagueness and dissolving-distinction problems that *Buckley* identified as essential to avoid in the context of campaign-finance law.

As to the FEC’s enforcement policy on political committee (“PAC”) status, the FEC’s main argument is that RTAO has not standing because it would have neither expenditures nor contributions to meet the statutory triggers for PAC status. That litigation position has been dealt with above. The FEC next argues that its published refusal to make a rule on PAC status is not “final” agency action. But the FEC’s refusal to make a rule was after notice and comment in a rulemaking procedure, 72 Fed. Reg. 5595, making it a “final” decision not to make a rule but to rely instead on the non-rule policy set out in the Explanation & Justification. This is different in kind from the sort of guidelines “used by inspectors” that the FEC recites as support for its position that its decision is not “final.” Doc. 31 at 23-24. On the merits, the FEC fails to demonstrate the bright lines that are essential to First Amendment regulation, and it totally ignores the binding statement of the Fourth Circuit that PAC status must be based on the major-purpose test, which requires “an empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech.” *Leake*, 525 F.3d at 287.

As to 11 C.F.R. § 114.15, the FEC’s effort to state *WRTL II*’s appeal-to-vote test, 127 S. Ct. at 2667, the FEC again argues that RTAO may proceed with its ad. Doc. 31 at 27. The problems

with this convenient litigation position have already been addressed *supra*. The FEC then attempts to liken *Change* to an FEC sample ad criticizing a congressman for his environmental record, and to distinguish it from an ad that names two candidates and characterizes their records differently. Doc. 31 at 27-28. The sample ads are rather simplistic and don't deal with the nuances typical of real life. For example, the FEC totally ignores its "indicia of express advocacy" and the fact that *Change* mentions that Senator Obama is a "Democrat." And RTAO still has no guidance on when an ad might "take[] a position on . . . character, qualifications, or fitness for office." As noted above, *supra* at 5 n.4, RTAO is considering running an ad that would say that Senator Obama has lied about his voting record. This materially-similar ad would still be about the abortion issue, but would the FEC consider that such statements are indicia of express advocacy, and, if so, what weight would they be given in determining whether the provision is permissible? Whatever else may be said of the FEC's rule, it is not permissible in this Circuit, which has recognized the unambiguously-campaign-related requirement and set out *WRTL II*'s appeal-to-vote test without including *WRTL II*'s application of the test to a unique context as part of the test itself. *Leake*, 525 F.3d at 282-83.

B. The Other Elements Are Met.

As set out above, RTAO has likely success on the merits. It also has irreparable harm for the reasons set out in its opening memorandum. The FEC attempts to dodge the *inherent* burden of PAC status by arguing that RTAO has not proven that it would be harmed by PAC restrictions, such as contribution limits. PAC status is an *inherent* burden, recognized as a matter of law, that requires the FEC to justify it under strict scrutiny. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986) ("*MCFL*"); *Leake*, 525 F.3d at 286-90. So RTAO has no need to prove that the pieces of

PAC status are burdensome. For example, for an organization that wants to raise unlimited funds, it is a burden for it to be subject to contribution limits. Although RTAO has been chilled from soliciting funds, it has actually received \$10,000 from an individual who heard of this case in the news. Plainly it would be a harm to have to refund the portion beyond contribution limits.

Since RTAO has actual harm, the arguments that it made as to why it meets the other preliminary injunction elements remain in force. *See* Doc. 4 at 27-28.

CONCLUSION

For the foregoing reasons a preliminary injunction should issue and no security should be required, or it should be nominal, since Defendants have no monetary stake.

Respectfully submitted,

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