No. 08-1977

United States Court of Appeals for the Fourth Circuit

The Real Truth About Obama, Inc., *Plaintiff-Appellant*

v.

Federal Election Commission and
United States Department of Justice, *Defendants-Appellees*

Appeal from the United States District Court for the
Eastern District of Virginia, Richmond Division

Reply Brief

James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434
Lead Counsel for Plaintiff-Appellant

Michael Boos
LAW OFFICE OF MICHAEL BOOS
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030
703/691-7717
Counsel for Plaintiff-Appellant

Table of Contents

Table of Authorities

Cases

Constitution, Statutes & Rules

I. The District Court Ignored This Court's Controlling Analysis.

North Carolina Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008), controls this case. Yet the district court's opinion completely ignored *Leake*'s clear articulation of the unambiguously-campaign-related principle that governs all campaign-finance regulation and of the tests implementing the principle. Appellees (collectively "FEC") also ignore *Leake*'s analysis and attempt to distinguish the case because it involved a different provision. FEC-Br. 24-26, 35, 45-46. Any case can be distinguished on superficial bases. But since *Leake* is binding precedent, its *analysis* is binding. That analysis required a preliminary injunction on all counts under the unambiguously-campaign-related principle and the tests implementing it that *Leake* recognized. 525 F.3d at 281-82, 286-89.[1]

In addition to stating that controlling principle, *Leake* was *explicit* as to three controlling tests applying this principle. First, where express advocacy is required, it must include the "magic words." *Id.* at 282. So 11 C.F.R. § 100.22(b) is unconstitutional and void. Second, the major-purpose test for PAC status is "an empiri-

[1]While a peak period of public interest in the issue discussed in RTAO's proposed ads has just passed, this case and the preliminary injunction motion is not moot because this case and this motion fit the exception to mootness for cases capable of repetition yet evading review, *see FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2662-63 (2007) ("*WRTL II*"), and because RTAO has verified its intent to run materially similar ads in the future and it is highly likely that President-Elect Obama will run again. Because of the ongoing problem with obtaining preliminary injunctions to protect free speech, this appeal, focusing on preliminary injunction standards, is particularly important.

cal judgment as to whether an organization primarily engages in *regulable*, election-related speech." 525 F.3d at 287 (emphasis added). So the FEC's PAC-status policy is unconstitutional and void. Third, an "electioneering communication" is regulable only if it (a) meets the statutory definition and (b) is "'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" *Id.* at 282 (*quoting FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*")). This appeal-to-vote test applies *only* in the context of electioneering communications (so cannot support 11 C.F.R. § 100.22(b)), and it is as stated, without the addition of elements from the *application* of the test in *WRTL II*. So 11 C.F.R. § 114.15—which demotes the true test to being only part of the FEC's test and treats elements of the application of the test in a particular context as part of the test itself—is unconstitutional and void.[2] These particular tests implementing the unambiguously-campaign-related requirement might be debatable elsewhere, but not in the Fourth Circuit, unless district courts may now disregard their superior appellate courts.

[2]While *Leake* had no occasion to explicitly deal with a test to determine what may be considered a contribution, it explicitly stated that "after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate,'" *Leake*, 525 F.3d at 281 (*quoting Buckley v. Valeo*, 424 U.S. 1, 80 (1976), which includes the determination of what constitutes a contribution and renders 11 C.F.R. § 100.57(a) unconstitutional. *See infra* at III.C.

In addition, the FEC cites *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), as the authority for 11 C.F.R. § 100.22(b), but the regulation does not follow *Furgatch* under this Circuit's interpretation of that case in *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) ("*CAN II*").[3] In *CAN II*, this court considered at length the *Furgatch* decision, *id.* at 1053-55, and declared that

> the simple holding of *Furgatch* was, *in those instances where political communications do include an explicit directive to voters to take some course of action*, but that course of action is unclear, 'context'—including the timing of the communication in relation to the events of the day—may be considered in determining whether the action urged is the election or defeat of a particular candidate for public office.

Id. at 1054 (emphasis in original). Since 11 C.F.R. § 100.22(b) requires no such "explicit directive," it is not authorized by *Furgatch*.[4] Moreover, *CAN II* declared

---

[3]*McConnell v. FEC*, 540 U.S. 93 (2003), did not eliminate the continued applicability of *CAN II*, *see* FEC-Br. 21-22, or the unambiguously-campaign-related requirement from which the express-advocacy test was derived to govern "independent expenditures" (which still require "magic words" express advocacy). *McConnell* merely approved "electioneering communications" as to another category that Congress could regulate (which was then given the appeal-to-vote test in *WRTL II*, implementing the unambiguously-campaign-related requirement). *CAN II*'s holding that 11 C.F.R. § 100.22(b) is unconstitutional on the independent basis that it is inconsistent with *Furgatch*, its purported authority, was untouched by *McConnell*, as was this Court's determination that the regulation is a we-know-it-when-we-see-it test. *See infra* (in text).

[4]The Ninth Circuit has placed its own limiting gloss on *Furgatch*: "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (emphasis in original). So 11 C.F.R. § 100.22(b) is not authorized under the Ninth Circuit's own interpretation of the *Furgatch* test because it does not require "some explicit *words* of advocacy" in a "clear plea for

that 11 C.F.R. § 100.22(b) is a forbidden we-know-it-when-we-see-it test, which is unconstitutional in any event (as *Leake* also held, 525 F.3d at 283):

> To quote the following passage, in which the FEC articulates some of the multitude of factors that would be considered under its interpretation in determining whether a given communication was prohibited, is to appreciate the breadth of power that the FEC would appropriate to itself under its definition of "express advocacy":
> [E]xpress electoral advocacy [can] consist[ ] not of words alone, but of the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film editing, photographic techniques, and music, involving highly charged rhetoric and provocative images which, taken as a whole, sen[d] an unmistakable message to oppose [a specific candidate].
> Appellant's Opposition to Fees at 8. This is little more than an argument that the FEC will know "express advocacy" when it sees it.

CAN II, 110 F.3d at 1057. *CAN II*'s conclusion that the FEC was not "substantially justified" in asserting that "'*no* words of advocacy are necessary to expressly advocate the election of a candidate,'" *id.* at 1064 (emphasis in original), remains as true today as when *CAN II* was decided.

Although the court below declined to follow *Leake*'s analysis, other courts have done so. A Utah federal court expressly relied on *Leake* for its analytic framework in granting summary judgment, including, inter alia, (a) that only unambiguously-campaign-related activity "may be constitutionally regulated," (b) that "[a]ccordingly, [*Buckley*] defined the term 'contribution' to include donations made directly to a candidate and also any expenditures made in cooperation with a

---

action." *Furgatch*, 807 F.2d at 864.

candidate," (c) that "expenditure" was limited to express advocacy, by which was meant "magic words," and (d) that the unambiguously-campaign-related requirement governs the major-purpose test for PAC status. *Nat'l Right to Work Legal Def. & Educ. Found. v. Herbert*, No. 07-809, 2008 WL 4181336, at *5, *17-18 (D. Utah Sep. 8, 2008). A Florida federal court followed *Leake* and *Herbert* in recognizing the unambiguously-campaign-related principle as a threshold requirement for regulation under any level of scrutiny. *Broward Coal. of Condos., Homeowners Ass'ns. and Cmty. Orgs. v. Browning*, No. 08-445, slip. op. at 13 (N.D. Fla. Oct. 29, 2008) (order granting prelim. inj.) (available on PACER). And a West Virginia court issued a preliminary injunction against a *Furgatch*-style express advocacy definition "strikingly similar" to the one in *Leake* (and also 11 C.F.R. § 100.22(b)), and it expressly relied on the unambiguously-campaign-related requirement, *Ctr. for Individual Freedom v. Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *5, *9, *14, *17 (S.D. W. Va. Oct. 17, 2008) (mem. op. granting prelim. inj.), including citing *Leake* as to its necessity, *id.* at *17. The court below should have similarly followed *Leake*'s analysis and issued a preliminary injunction, as happened in *Ireland* and *Browning*.[5]

[5]Another federal court in this Circuit followed the court below in denying a preliminary injunction, but it also ignored the *Leake* analysis. *See Koerber v. FEC*, No. 08-39 (E.D.N.C. Oct. 29, 2008) (order denying prelim. inj.), *notice of appeal filed* (4th Cir. Oct. 31, 2008) (provided as supplemental authority herein by FEC).

The fact that RTAO received no preliminary injunction despite explicit, binding Fourth Circuit precedent reveals a mistake of law that this Court should correct. Equally apparent is the need to clarify and strengthen preliminary injunction standards to protect timely free speech because a later victory on the merits does not protect speech when it is required. Where the need for timely speech is involved, the denial of a preliminary injunction is a denial of the right to speak.

II. Speech-Protective Standards and Interests Must Govern.

This Court should clarify that where free speech is involved preliminary injunction standards must be speech-protective. The same is true of the interests that courts consider in applying these standards. *See infra*.

The district court set out the preliminary injunction standards it would apply, JA–102-04, and the FEC recites its own, FEC-Br. 13-14. While one standard indicates that in free speech cases the merits-success factor should be decided first to determine if there is harm, JA–104, no standards were cited that otherwise recognize that this case involves free speech and the highest constitutional protections.

RTAO argued that the preliminary injunction standards should take into account *WRTL II*'s special protection for issue advocacy and the fact that WRTL forever lost the opportunity to run its ads when they were timely, even though the ads were fully protected by the First Amendment. RTAO-Br. 17-18. *WRTL II*

addressed the need for timely judicial protection of issue advocacy, particularly the sort that by definition arises shortly before elections, and instituted streamlined procedures and highly speech-protective rules. 127 S. Ct. at 2666-67.[6] These must be reflected, in several ways, in how preliminary injunction motions about issue advocacy are decided.

First, preliminary injunction standards involving issue advocacy must reflect our constitutional principles that "[i]n a republic . . . the people are sovereign," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), and there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted). *WRTL II* requires that we recall that we deal with the First Amendment, which mandated that "'Congress shall make no law . . . abridging the freedom of speech,'" 127 S. Ct. at 2674, and that "[t]he Framers' actual words put these cases in proper perspective," *id.* So "no law," i.e., "freedom of speech," is the constitutional default and must be the overriding presumption where free expression is at issue.

[6]Even the *WRTL II* dissent agreed that preliminary injunctions should be available for those who could qualify, 127 S. Ct. at 2704, which means that the standards must be *capable* of qualification, i.e., both the standards applied and the interests balanced must be speech-protective.

Second, this "no law" default, *supra*, means that when determining the status quo in a "prohibitory" injunction,[7] as sought here, the status quo to be preserved is "freedom of speech," i.e., the state of the law *before* a challenged provision or policy regulating speech or association was set in place. When a regulation is challenged as unconstitutional, that *regulation* has altered the status quo. "[T]he status quo is "the last peaceable uncontested status between the parties which preceded the controversy until the outcome of the final hearing.'" *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.,* 269 F.3d 1149, 1155 (10th Cir. 2001) (citation omitted). "The purpose of a preliminary injunction is to preserve the status quo as it exists or *previously existed* before the acts complained of, thereby preventing irreparable injury or gross injustice." *Slott v. Plastic Fabricators, Inc*., 167 A.2d 306 (Pa. 1961) (emphasis added). Agencies must not be permitted to bootstrap a purported "status quo" and an enforcement interest by altering the status quo with a regulation of debatable constitutionality and then asserting that preliminary injunctions must be denied because the new regulation is the status quo and agencies have an interest in enforcement.

---

[7]In contrast to a "prohibitory" injunction, a "mandatory" injunction "affirmatively require[s] the nonmovant to act in a particular way, and as a result . . . place[s] the issuing court in a position where it may have to provide ongoing supervision to assure that the nonmovant is abiding by the injunction." *SCFC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096,1099 (10th Cir.1991). Mandatory injunctions usually alter the status quo and a movant must show a heightened likelihood of success. *Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir.1999) (per curiam).

Third, the "freedom of speech" presumption, *supra*, means that First Amendment protections must be incorporated into the preliminary injunction standards, not limited to merits consideration. So, for example, if strict scrutiny applies, as here, the preliminary injunction burden shifts to the FEC to prove the elements of strict scrutiny, just as the FEC has the burden on the merits:

> The Government argues that, although it would bear the burden of demonstrating a compelling interest as part of its affirmative defense at trial on the merits, the [plaintiff] should have borne the burden of disproving the asserted compelling interests at the hearing on the preliminary injunction. This argument is foreclosed by our recent decision in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004). In *Ashcroft*, we affirmed the grant of a preliminary injunction in a case where the Government had failed to show a likelihood of success under the compelling interest test. We reasoned that '[a]s the Government bears the burden of proof on the ultimate question of [the challenged Act's] constitutionality, respondents [the movants] must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than [enforcing the Act].' Id., at 666. That logic extends to this case; here the Government failed on the first prong of the compelling interest test, and did not reach the least restrictive means prong, but that can make no difference. The point remains that the burdens at the preliminary injunction stage track the burdens at trial.

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006). *See also Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1060, 1072-73 (10th Cir. 2001) (placing the burden on the government to justify its speech restrictions in a preliminary injunction hearing); *Pac. Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1231 (10th Cir. 2005) (in First Amendment challenge, government bears burden of establishing that content-based restriction will "more

likely than not" survive strict scrutiny); *Browning*, No. 08-445, slip. op. at 11 (N.D. Fla. Oct. 29, 2008) (preliminary injunction burden tracks trial burden).

Fourth, where the unambiguously-campaign-related requirement is at issue, the government always has the burden of meeting that threshold burden, regardless of the level of scrutiny, before it proceeds to meet the burden imposed by the required level of scrutiny. *Leake*, 525 F.3d at 281 (government authority to regulate elections "cabin[ed]" by unambiguously-campaign-related requirement); *Herbert*, No. 07-809, 2008 WL 4181336, at *10 ("before applying exacting scrutiny . . . the court must first determine whether the activities being regulated are unambiguously campaign related"). The unambiguously-campaign-related principle has been implemented through the magic-words express-advocacy test (for "independent expenditures"), *Buckley*, 424 U.S. at 80, the major-purpose test (for PAC status), *id.* at 79, *Buckley*'s recognition of a limiting interpretation of "contribution," *id.* at 23 n.24 ("The use of ['for the purpose of influencing'] 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. " (emphasis added)), and *WRTL II*'s appeal-to-vote test (for "electioneering communications"), 127 S. Ct. at 2667. *See also Leake*, 525 F.3d at 281-83, 287. So applying this threshold requirement entails a straightforward measuring of a challenged provision against these benchmarks.

Fifth, because strict scrutiny is the antithesis of deference or a presumption of constitutionality, no deference or favorable presumption must be afforded the regulation of speech in preliminary injunction balancing. This is required by the "freedom of speech" presumption and because "the *Government* must prove that applying [the challenged provision to the communication at issue] furthers a compelling interest and is narrowly tailored to achieve that interest. *WRTL II*, 127 S. Ct at 2664 (emphasis in original). In fact, the enforcement efforts of agencies charged with regulating free speech require "extra-careful scrutiny from the court," *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981), because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," *id.*[8] While there is a place for deference to an agency, it applies only where there is a "'reasonable choice within a gap left open by Congress.'" *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) (*quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)). But there is no deference where "the Supreme Court has spoken on the issue. . . . It is

[8]*See also FEC v. Florida for Kennedy Comm.*, ("[T]he activities that the FEC seeks to investigate differ profoundly in terms of constitutional significance from the activities that are generally the subject of investigation by other federal administrative agencies. The sole purpose of the FEC is to regulate activities involving political expression, the same activities that are the primary object of the first amendment's protection. The risks involved in government regulation of political expression are certainly evident here.").

not the role of the FEC to second-guess the wisdom of the Supreme Court." *Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir.1991). *See also Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248, 254 (S.D. N.Y. 1998) (same).

Sixth, the necessary incorporation of First Amendment protections into preliminary injunction standards requires that in determining the balance of harms and the public interest, courts must apply *WRTL II*'s requirement that "'[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.'" *Ireland*, No. 08-190, slip. op. at *51 (S.D. W. Va. Oct. 17, 2008) (mem. op. granting prelim. inj.) (*quoting WRTL II*, 127 S. Ct. at 2669) (applying principle to consideration of public harm).

Seventh, the "freedom of speech" presumption, *supra*, means that agencies have no per se interest in restricting or regulating speech. Since they deal with free speech, their first loyalty should be to the First Amendment. Beyond that, their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond the agency's interest in the preliminary injunction balancing of harms: "It is difficult to fathom any harm to Defendants [enforcement officials] as it is simply their responsibility to enforce the law, whatever it says." *Id.* Even where an agency's regulation is at issue, the agency's only interests are in faithfully implementing the substantive law established by the legislature and abiding by the Constitution. Consequently, while

the FEC has the duty to defend campaign laws and regulations, it does so as a statutory mandate, not as a party having any ownership interest in the substantive content or the per se ability to enforce them. The risks inherent in an agency charged with overseeing our most precious liberties, *see supra*, apply here, too. As a consequence, courts should expect from the FEC its best, good-faith arguments on the merits, not scorched-earth litigation tactics in disregard of the fundamental liberties at issue, *cf. CAN II*, 110 F.3d 1049, and any "right to enforce" must be viewed as an instrumental, statutory interest, not as some weighty property right (let alone a powerful liberty). Certainly it should never be equated with the fundamental "freedom of speech." So where there is a balancing of the two, "freedom of speech" must always win unless there is some *other* interest that is weighty enough to warrant denial of a preliminary injunction. Even to the extent the "freedom of speech" and the ability to enforce a regulation are considered equal, "'[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.'" *Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *27 (*quoting WRTL II*, 127 S. Ct. at 2669).

Eighth, the fact that an issue-advocacy case may be filed near an election favors the plaintiff, not the defendant in the preliminary injunction balancing, because issue advocacy is most important when public interest in an issue is highest, which may fall near an election: "a group can certainly choose to run an

issue ad to coincide with public interest," without proximity to an election meaning that it is "electioneering." *WRTL II*, 127 S. Ct. at 268. *WRTL II* expressly rejected the use of timing to determine whether an ad is regulable: "That the ads were run close to an election is unremarkable in a challenge like this. Every ad covered by BCRA § 203 will by definition air just before a primary or general election." *Id.* at 2667. *WRTL II* also specifically envisioned eve-of-election litigation in its rules for as-applied challenges involving electioneering communications. *Id.* at 2666. To penalize people who suddenly see a need to exercise their First Amendment right to associate to amplify their speech, *Buckley*, 424 U.S. at 22, is to ignore the "freedom of speech" presumption. *See supra*. Under the First Amendment, there is no reason that citizens can't just suddenly associate and speak—whenever they want. There is no prescience requirement, mandating people to know months in advance that they will want to speak. Nor are First Amendment protections limited to long-established groups. Nor do First Amendment rights diminish near the peak of the election cycle. 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)). Any delay in filing a challenge may not be held against the would-be speaker because it "could . . . have delayed because it did not arrive at a plan to

exercise its rights to speak until relatively recently. *Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *26.

Ninth, where a law is unconstitutional or likely so, there is no authority for it to exist or operate just because an election is near. In fact, proximity to a time of high public interest argues against allowing a law restricting issue advocacy to remain in effect. *See supra*. So the trial court was wrong in insisting that issuing the preliminary injunction "would likely" result in "a 'wild west'" with "confuse[d] political actors" and so on. JA–30. "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *26.

Tenth, where an agency wants to argue that there will be a "wild west" scenario if a law of questionable constitutionality is preliminarily enjoined and "freedom of speech" prevails, the agency must provide proof. *Id.* at *27. Where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (internal citation omitted); *see also Members of*

City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n. 22 (1984) ("[This Court] may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity."). *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (same); *see also id.* at 192 (FEC may not *speculate* that NRA received more because it did not record corporate contributions of under $500, citing *Turner*, 512 U.S. at 664). Where an agency asserts voter confusion, it bears a heavy burden of proof. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 n.13 (1997) (re anti-fusion statute); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (paternalistic limiting of information highly suspect); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221 (1986) (closed primary law banning opening primary to independents not justified by preventing voter confusion). Against this need for proof that the sky will fall if a law of questionable constitutionality is preliminarily enjoined is the paramount fact that "the protection of First Amendment rights is very much in the public's interest." *Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *27.

In sum, where issue advocacy is involved, our most cherished constitutional rights are involved, as is the fundamental right of the sovereign people to participate in self-governance. The high constitutional protections for issue advocacy reflect that fact. The preliminary injunction standards and permissible

interests to consider must reflect that high protection. It is not constitutionally permissible to employ the same preliminary-injunction standards that might be applied to maintaining the status quo in a fuss between neighbors over fence construction. If proper standards had been followed below, RTAO should have received a preliminary injunction. Those standards should be articulated by this Court so that when RTAO does materially similar issue advocacy in the future at times when public interest is high, which likely will again be near an election, it will get the protection to which the First Amendment entitles it.

III. RTAO Has Likely Success on the Merits.

A. The Unambiguously-Campaign-Related Requirement Analysis Controls.

As noted in Part I, this Court has recognized the unambiguously-campaign-related requirement as a threshold requirement that all campaign-finance laws must meet. Under that principle, and the clearly-articulated tests that implement it, RTAO had a high likelihood of success on the merits. But there was a failure below to follow precedent, as the district court ignored the controlling analysis, as the FEC essentially ignores it now.

B. 11 C.F.R. § 100.22(b) Is Void.

The district court decided that 11 C.F.R. § 100.22(b) was likely constitutional on two bases, i.e., because (1) its contextual, reasonable-person test was essentially the same as the "appeal-to-vote" test for regulable electioneering communi-

cations in *WRTL II* (127 S. Ct. at 2667), JA–21, and (2) *WRTL II* approved using context to interpret the meaning of communications. JA–21. The court was wrong on both bases.

As to the first basis, *WRTL II*'s appeal-to-vote test is not a free-floating test for express advocacy. *WRTL II* expressly stated that "the proper standard for an as-applied challenge to *BCRA § 203*," 127 S. Ct. at 2666 (emphasis added), includes the appeal-to-vote test, which by its terms is for the "*functional equivalent* of express advocacy," *id.* at 2667 (emphasis added). Since the test is for as-applied challenges to "*BCRA § 203*," which is the electioneering communication prohibition, it applies solely to electioneering communications. It was not created to interpret the "expressly advocating" language in FECA's "independent expenditure" definition at 2 U.S.C. § 434(17), as 11 C.F.R. § 100.22(b) does. *McConnell* established the "functional equivalent" terminology to refer to electioneering communications, as distinct from express-advocacy independent expenditures. 540 U.S. at 206. *WRTL II* followed that terminology. Moreover, it is logically impossible for "the *functional equivalent* of express advocacy" to be a *kind* of express advocacy. If it were a *kind* of express advocacy, it would *be* express advocacy, not the *functional equivalent* of express advocacy. So the appeal-to-vote test applies only in the electioneering communication context, as *WRTL II* made clear in its defense against the dissent's claim that the appeal-to-vote test is vague. *WRTL II*, 127 S.

Ct. at 2669 n.7 (appeal-to-vote test not vague because, inter alia, it is restricted to communications fitting the statutory electioneering communications definition).

The FEC attempts to avoid *WRTL II*'s clear limitation of the appeal-to-vote test to the electioneering communication context with a strained argument based on the following statement from *Leake*, although the FEC omits the underlined words: "even if the dissent is correct and *WRTL* did not intend to mandate the specific dictates of BCRA § 203 as a necessary prerequisite for functional equivalency, it is inconceivable that the Supreme Court would ever allow a state to substitute a test as vague and broad as this "context prong" as an alternative standard. For even a cursory reading of § 163-278.14A(a)(2) uncovers its serious constitutional infirmities . . . ." 525 F.3d at 299. The FEC argues that this means that this Court did not find the "electioneering communication" definition necessary to the functional equivalent of express advocacy. FEC-Br. 26. In fact, the FEC goes further, insisting that RTAO's argument makes the definition a "*constitutional* test, requiring that every regulation of non-magic-words express advocacy meet both the *WRTL* standard and the BCRA definition to be constitutional." *Id.*

This argument is flawed. First, there is no such thing as "non-magic-words express advocacy" because express advocacy requires magic words, as *Leake* reiterated in the same context as the statement the FEC cites above: "Specifically, *WRTL* only allows political speech to be regulated if it both 'meets the brightline

requirements of BCRA § 203' and 'is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" 525 F.3d at 297. Second, as noted from the underlined words omitted by the FEC, this Court in *Leake* was making an *arguendo* statement responding to the dissent, i.e., the statute is flawed because of *WRTL II*, but even absent *WRTL II* it would still be unconstitutional. *Leake* held that *WRTL II is* controlling authority, however, so that ultimately ends the analysis. Third, the definition of electioneering communication definition is not *itself* a constitutional requirement (e.g., because Congress might be able to justify changing the 60-day periods before general elections to 61-day periods), but it (as limited by the appeal-to-vote test) is the *only* "functional equivalent of express advocacy" that Congress has passed and the Supreme Court has recognized to date. If there were another attempt to create another "functional equivalent," Congress would have to do that, not the FEC. If Congress were to attempt it, the statute would have to meet the same strict scrutiny burden of proof that was required for BCRA in *McConnell*. Until that happens, *Leake* makes clear (following Supreme Court precedents) that there are only two options: (1) magic-words express advocacy or (2) "electioneering communications" limited by the appeal-to-vote test. The FEC has not authority for creating hybrid creatures in between.

The FEC makes an "*arguendo*" nod to the controlling unambiguously-campaign-related principle by pointing to the word "unambiguous" in § 100.22(b). FEC-Br. 20. Including that word does not comply with the principle because the Supreme Court has always implemented the principle through specific tests, and the one applicable to independent expenditures is the express-advocacy test. In *WRTL II*, all of the Justices agreed that where the express-advocacy test applies it requires "magic words." *See* RTAO-Br. at 27 n.6. In any event, this Court has already held that express advocacy requires "magic words," *Leake*, 525 F.3d at 281-82, which excludes applying the appeal-to-vote test. The FEC might have argued for ignoring stare decisis (for which there is no justification), but its effort to ignore *Leake* must fail.

As to the district court's approval of a "context" test—because *WRTL II* approved noticing "basic background information"—the Court ignored the first part of the same sentence in *WRTL II*, which contains the clear instruction that "contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry" when "determining whether an ad is the 'functional equivalent' of express advocacy." 127 S. Ct. at 2669. In addition, *WRTL II* expressly rejected, individually, the contextual factors (such as timing) that the FEC would rely on in applying § 100.22(b). *Id.* at 2668-69. Moreover, this Court said that the limited reference to context approved in *Furgatch* could only come "*in those instances*

where political communications do include an explicit directive to voters to take some course of action, but that course of action is unclear," *CAN II*, 110 F.3d at 1054 (emphasis in original), which limitation is not reflected in § 100.22(b). This flawed "express advocacy" definition is "based . . . 'on a misreading of the Ninth Circuit's decision in *Furgatch*.'" *Id.* at 1061 (*quoting FEC v. Christian Action Network*, 894 F. Supp. 946, 958-59 (W.D. Va. 1995), *affirmed*, 92 F.3d 1178 (4th Cir. 1996) (per curiam)). As a result of the fundamental flaws in § 100.22(b), this Court declared that "[e]ven absent binding Supreme Court precedent, [it] would bridle at the power over political speech that would reside in the FEC under such an interpretation." *Id.* at 1061. *McConnell* did not alter either the FEC's fundamental misreading of *Furgatch* nor the fundamental flaws in § 100.22(b).

Furthermore, § 100.22(b) is doomed for vagueness because the FEC continues to declare that *Change* is *not* express advocacy under that regulation, FEC-Br. 28 n.8, while the district court insists that it *is*, JA–110-11. So the regulation "trap[s] the innocent by not providing fair warning," "foster[s] arbitrary and discriminatory application," and "inhibit[s] protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were

clearly marked." *Buckley*, 424 U.S. at 41 n.48 (quotation marks and citations omitted). This is far from the "narrow specificity" required to protect free speech. *Id.*[9]

Also, *Change* could *not* be express advocacy under the regulation's own criterion because "reasonable minds . . . differ[ed]"—since the district court made no finding that the FEC is unreasonable. And the failure to protect *Change* in the face of such a "tie" means that the First Amendment required protection for *Change* because "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 127 S. Ct. at 2669. "[W]e give the benefit of the doubt to speech, not censorship." *Id.* at 2674.

Finally, as noted in Part I, the federal district court in the *Ireland* case preliminarily enjoined a *Furgatch*-style express advocacy test relying on *Leake*'s analysis. *Supra* Part 1. The same would have happened here, if precedent had been similarly followed.

---

[9]The FEC suggests that vagueness can be mitigated by advisory opinion ("AO") requests. But the National Right to Life Committee's ("NRLC") requested an AO on September 26, 2008, to protect similar pro-life ads. Athough enough commissioners said at an October 23, 2008, meeting that they approved one of the ads, the FEC did not issue an AO to protect it, postponing further consideration until after the timely opportunity was lost. *See* http:??saos.nictusa.com/saos/searchao?SUBMIT=pending (last visited Nov. 11, 2008).

C. 11 C.F.R. § 100.57 Is Void.

The FEC attempts to evade a challenge to 11 C.F.R. § 100.57 on standing grounds, insisting that the regulation does not govern the solicitation letter. FEC-Br. 31. The district court rightly rejected this argument. JA–112. The central problem of knowing when § 100.57 applies is the vagueness of "support or oppose." When RTAO sends materially similar future solicitations, how will it know where the support/oppose line falls? Here it appears that the FEC has pushed the line toward the First Amendment's "freedom of speech" to avoid litigation, but absent litigation the vagueness of the line permits the FEC to interpret it to offer less liberty, which should be expected. After all, *FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995) was a solicitation for express advocacy, but the FEC spun that into a broader, vaguer support/oppose standard. *Buckley*'s endorsement of a narrowed scope of the "contribution" definition to avoid vagueness and overbreadth, 424 U.S. at 23 n.24, 78 (which is consistent with its uniform application of the unambiguously-campaign-related requirement in all other areas of campaign-finance law), including donations "earmarked for political purposes," is not broader than § 100.57, as the FEC argues. FEC-Br. 33. "Political purposes" in *Buckley* plainly referred to the activities of which *Buckley* spoke elsewhere, i.e., making "contributions" or independent "expenditures" to which terms *Buckley* had already applied interpretations to meet the unambiguously-campaign-related requirement.

Leake's recognition that all campaign finance regulations must be "cabined" by the unambiguously-campaign-related requirement, 525 F.3d at 284, requires the same interpretation of "political purpose." The FEC attempts to dodge this plain meaning of "political purposes" by relying on *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), but of course that case was donations to a PAC, which are clearly "contributions" and fit the unambiguously-campaign-related requirement. Measured against the benchmark phrase that *Buckley* found unconstitutionally vague and overbroad—"advocating the election or defeat of a candidate," 424 U.S. at 42— "support or oppose the election of a . . . candidate" is unconstitutionally vague and overbroad.

D. The FEC's PAC-Status Policy Is Void.

As set out in Part I, *Leake* said that the major-purpose test for PAC status is "an empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech." 525 F.3d at 287 (emphasis added). The FEC fails to respond to this central argument and decisive argument. Since *Leake* controls in this circuit, the district court had no discretion to ignore it.

E. 11 C.F.R. § 114.15 Is Void.

As set out in Part I, *Leake* stated *WRTL II*'s appeal-to-vote test as it truly is, 525 F.3d at 282, without the addition of elements from the *application* of the test in *WRTL II*. By contrast, 11 C.F.R. § 114.15 demotes the true test to being only

part of the FEC's test and imports application factors. Since *Leake* controls in this circuit, the district court had no discretion to depart from it. The FEC tries to divert attention from this controlling analysis by distinguishing *Leake* based on the sort provision at issue, but that does not alter the analysis, which controls. The FEC then attempts to ignore the import of the carefully-chosen words of *WRTL II*'s appeal-to-vote test. FEC-Br. 46. If an ad can only be interpreted "as an appeal to vote," 127 S. Ct. at 2667, there must be some sort of "*appeal*," i.e., some clear plea for action, that can only be interpreted as a call "*to vote*" for or against a candidate (not simply as supporting or opposing a candidate). Apparently having no response to this argument, the FEC creates the straw-man argument that RTAO "seeks to reintroduce a test akin to the magic words requirement that the Supreme Court rejected in *McConnell* and *WRTL*." FEC-Br. 46. Preliminarily, of course, *McConnell* and *WRTL II* actually recognized that *where an express-advocacy test applies* the magic words *are* required. But as to the appeal-to-vote test, RTAO has never argued for particular "magic words," only that there be a clear plea for action, and that the action appealed for could only be interpreted as an appeal to vote for or against a candidate. Otherwise, in limiting the scope of regulable electioneering communications (consistent with the unambiguously-campaign-related requirement), *WRTL II* was creating a test that allowed regulation of free speech far beyond *Furgatch*'s interpretation of express advocacy (which required such a

"clear plea for action"). But such an interpretation of the appeal-to-vote test must be rejected if phrase "*functional equivalent* of express advocacy," as set out in *McConnell* and *WRTL II*, is to have any meaning. An "appeal to vote" test could not identify the "functional equivalent" of express advocacy absent some sort of appeal to vote.

IV. The Other Preliminary Injunction Standards Were Met.

As outlined in the opening brief and above, RTAO had a strong likelihood of success on the merits. Because of this, RTAO had a loss of First Amendment rights at a time when the issue in its ads was perhaps at its peak in the public interest, clearly irreparable harm. RTAO-Br. 51-52. The FEC argues that RTAO has no irreparable harm because RTAO can do what it wants to do *as a political committee*. FEC Br. 15. Imposed PAC status is itself a well-recognized harm, which is why the Supreme Court said that the government must justify imposing PAC status with strict scrutiny. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990). *WRTL II* declared that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." 127 S. Ct. at 2671 n.9. And if a would-be speaker does not speak because it does not want to assume the onerous and unconstitutionally-applied burdens of PAC status or face severe penalties, that serious First Amendment harm has no remedy. Certainly, the FEC will not be reimbursing RTAO for any harm caused by its regulations and policy.

And if the proper standards for preliminary injunctions where issue advocacy is involved as applied, as set out in Part I, *supra*, the balance of harms and public interest factors clearly weigh in RTAO's favor. So the district court was wrong to deny a preliminary injunction.

Conclusion

For the foregoing reasons the district court's denial of a preliminary injunction should be reversed.

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434

Michael Boos
LAW OFFICE OF MICHAEL BOOS
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030
703/691-7717

Certificate of Service

I hereby certify that on November 12, 2008, I electronically filed the foregoing with the Clerk of Court using the CM\ECF System, which will send notice of such filing to the following registered CM\ECF users:

Eric Fleisig-Greene
U.S. DEPARTMENT OF JUSTICE

Debra Jean Prillaman
OFFICE OF U.S. ATTORNEY

Adav Noti
David Kolker
Harry Summers
FEDERAL ELECTION COMMISSION

Tara Malloy
CAMPAIGN LEGAL CENTER AND DEMOCRACY 21

/s/ James Bopp, Jr.
James Bopp, Jr