Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

THE REAL TRUTH ABOUT OBAMA, INC. **Plaintiff,** **v.** **FEDERAL ELECTION COMMISSION AND UNITED STATES DEPARTMENT OF JUSTICE** **Defendants.**	**C.A. No. 3:08-cv-483**

AMICUS CURIAE BRIEF OF PROFESSORS RICHARD BRIFFAULT AND DANIEL R. ORTIZ

INTEREST OF THE *AMICI CURIAE*

The individual *amici* are law professors who have devoted much of their careers to the study of election law, especially campaign finance law. Richard Briffault, the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, has written 18 articles on campaign finance law, some of which have been cited by the courts in campaign finance cases. *See, e.g., FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2001); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting); *Landell v. Sorrell*, 382 F.3d 91, 109 (2d Cir. 2004), *rev'd* 548 U.S. 230 (2006); *Speechnow.org v. FEC*, ___ F. Supp. 2d ___, 2008 WL 2698652 (D.D.C., July 1, 2008); *Kermani v. New York State Bd. of Elections*, 487 F. Supp. 2d 101, 112 (N.D.N.Y. 2006); *McConnell v. FEC*, 251 F. Supp. 2d 176, 666, 697 (D.D.C. 2003) (opinion of

Judge Kollar-Kotelly); *id.* at 787 n. 85, 788 n.90 (opinion of Judge Leon), *aff'd in part and rev'd in part*, 540 U.S. 90 (2003). Daniel R. Ortiz, the John Allan Love Professor of Law at the University of Virginia School of Law, has written numerous articles and book chapters on election law and on campaign finance regulation, in particular. He has also co-edited *The New Campaign Finance Sourcebook*. He served as director of the Task Force on Legal and Constitutional Issues for the National Commission on Election Reform chaired by Presidents Ford and Carter. *Amici*'s affiliations are listed for identification purposes only.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff's motion for preliminary injunction is a frontal assault on the nation's campaign finance laws. Its success would seriously undermine the regulatory structure for protecting the integrity of federal elections – a structure that Congress created in 1974 and strengthened in 2002 and that the Supreme Court has repeatedly upheld. If the plaintiff Real Truth About Obama (RTAO) were to someone prevail, Congress's carefully designed framework for insuring fair elections – the disclosure of the sources of campaign funds, limitations on large contributions, and bans on the use of corporate and union treasury funds – that is fundamental to our campaign finance system would be gutted in the midst of a presidential campaign.

Plaintiff's suit would open the current election to massive evasion of the law by so-called "527" organizations. Named after the section of the Internal Revenue Code under which they are formed, 527s are "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for . . . influencing or attempting to influence the selection, nomination or appointment of any individual" to office. 26 U.S.C. § 527(e)(1),(2). These

527s by definition operate in contemporary election campaigns, and often at their core. Indeed, an authoritative study found that in the 2004 election, 527 organizations spent more than $400 million to influence the presidential contest alone. *See* Stephan R. Weissman and Ruth Hassan, "BCRA and the 527 Groups," in Michael Malbin, ed., *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* (2006). Funded principally by very wealthy donors, 527s like the Swift Boat Veterans and MoveOn.org were key means of evading federal campaign laws. Although not all 527 organizations engage in federal campaign activity, many do, and those must be subject to the campaign finance regulations that apply to all other campaign participants in the campaign laws are to achieve their goals.

Nor does it matter that RTAO styles itself an "issue advocacy" 527 organization. As the Supreme Court has explained, issue advocacy may be "functionally identical in important respects" to express advocacy. *McConnell*, 540 U.S. at 126. Not all issue advocacy may be regulated by campaign finance law, but issue advocacy that is "functionally identical" to express advocacy may be subject to campaign finance rules consistent with the First Amendment. *See id*; *accord*, *FEC v. Wisconsin Right to Life, Inc.* (*"WRTL"*), 127 S. Ct. 2652 (2007). The crucial distinction in campaign finance law is not, as the plaintiff contends, *between* "issue-advocacy '527' organizations" and "political committees" but *within* the broad category of issue-advocacy 527s. An effective, constitutionally sound campaign finance system requires that a 527 organization whose major purpose is affecting a federal election be regulated like all other political committees. The FEC rules and policies that plaintiff attacks provide reasonable, constitutional standards for determining which 527 organizations are – as a result of their political activities – federal election campaign

committees. These regulations and practices, which reflect three decades of experience with elections, are entirely consistent with governing Supreme Court and lower federal court precedent. So, too, the FEC's regulation for determining which corporate communications constitute regulable "electioneering communications" are entirely consistent with the governing *WRTL* decision.

If plaintiff were to prevail, 527s could play an important role in the current election without having to comply with the disclosure requirements, contribution limitations, and corporate and union prohibitions that both Congress and the Supreme Court have found vindicate the "clear and compelling interest in preserving the integrity of the electoral process." *McConnell*, 540 U.S. at 119. There is no constitutional basis for the plaintiff's challenge. Even in the unlikely event that plaintiff can demonstrate that it is not a political committee or that it is constitutionally entitled to an "as-applied" exemption, its arguments are wholly insufficient to satisfy the "heavy burden of persuasion" that the plaintiff must bear to succeed in its sweeping facial attack on the campaign finance system. *Crawford v. Marion Co. Elec. Bd.*, 128 S. Ct. 1610, 1621-22 (2008).

ARGUMENT

I. The FEC May Closely Examine a 527 Organization's Election-Related Activities to Determine Whether it is a Political Committee Under FECA.

At the heart of this case is the question of how the Federal Election Commission should determine whether a 527 organization – which, by definition, accepts and spends money for the purpose of "influencing or attempting to influence" elections – ought to be treated as a "political committee" under the Federal Election Campaign Act ("FECA"). A political committee is subject to disclosure requirements; it may not take corporate or union money; and contributions to a political

committee are subject to dollar limitations. The Supreme Court has repeatedly sustained these requirements and restrictions because they vindicate compelling governmental interests in protecting the integrity of the electoral process. The value of an informed electorate justifies the disclosure of information concerning political committee contributions and expenditures. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). The prevention of the corruption or the appearance of corruption of elected officials justifies contribution limitations, including contributions to political committees. *E.g., id.* at 29; *FEC v. California Medical Ass'n*, 453 U.S. 182 (1981). The prohibition on corporate money is necessary to protect against the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990); *McConnell,* 540 U.S. at 205. The corporate and union bans also protect the interests of dissenting shareholders and union members. *McConnell,* 540 U.S. at 204.

FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1000 during a calendar year or which makes expenditures aggregating in excess of $1000 during a calendar year." 2 U.S.C. § 431(4)(A). There has been little difficulty applying this definition to committees that make contributions directly to or that coordinate their expenditures with federal candidates. However, organizations that make election-related expenditures independent of candidates may also qualify as political committees. Many well-established organizations that are primarily engaged in public education, grassroots lobbying, or promoting or opposing certain public policies or issue positions may make statements concerning officeholders and candidates that could be construed as election-related. To avoid

imposing the burdens of "political committee" status on organizations that are primarily non-electoral and whose electoral activities are undertaken independently of a candidate, the Supreme Court has limited "political committee" status to organizations "the major purpose" of which "is the nomination or election of a candidate." *Buckley,* 424 U.S. at 79; *accord, FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 n. 6 (1986) (*"MCFL"*) (plurality opinion). To be sure, even entities that are not primarily electoral are subject to disclosure requirements if they make campaign expenditures above a threshold level, 2 U.S.C. § 434(e), and the ban on corporate and union money applies to corporations and unions directly and not just to their contributions to political committees, 2 U.S.C. § 441b. But an independent political organization must be treated as a FECA political committee only if affecting the nomination or election of a candidate is its major purpose. On the other hand, it is absolutely clear that an entity that has the "major purpose" of supporting or opposing a candidate for federal office can be treated as a FECA political committee and regulated accordingly.

How is "major purpose" to be determined? The Supreme Court has never addressed the question. *Buckley* simply articulated the standard. In *MCFL* – the only other Supreme Court case in which the major purpose standard received even minor attention – it was "undisputed" that the "central organizational purpose" of the right-to-life organization whose activities were under review was not electoral. 479 U.S. at 252 n.6. Massachusetts Citizens for Life had been incorporated five years before it produced the electioneering literature at issue in the case, and it had long engaged "in diverse educational and legislative activities," including organizing an ecumenical prayer service, sponsoring conferences, drafting and submitting legislation, sponsoring testimony on legislation, and

engaging in grassroots lobbying concerning its legislative proposals. *See id.* at 241-42.

On the other hand, there are organizations which are organized in the heat of an election; that focus all their communications, public statements, and activities on election candidates; and that discuss issues solely as they relate to those candidates. There are even organizations, like plaintiff Real Truth About Obama, Inc. ("RTAO"), which define themselves entirely around a single, specific candidate. Although their communications discuss issues, the content of those communications exclusively concerns a single candidate, and the very name of the organization refers to that candidate. It is not implausible to think that an organization so focused on a candidate has as its "major purpose" the goal of influencing the election in which that candidate is running.

This is particularly so when an entity has chosen to organize itself under section 527. As Judge Sullivan explained in *Shays v. FEC*, "an organization's usage of 527 status is inherently indicative of its choice to principally engage in electoral activity, which goes a long way to satisfying the major purpose test." 511 F. Supp. 2d 19, 30 (D.D.C. 2007). Section 527 is not the only provision of the Internal Revenue Code that enables an entity to obtain tax-exempt status in order to engage in public education, public policy debates, or issue advocacy. A "corporation . . . community chest, fund or foundation" engaged in public educational activities can obtain tax-exempt status by organizing under section 501(c)(3) of the tax code. A "civic league[] or organization . . . operated exclusively for the promotion of social welfare" can engage in public education and legislative lobbying and still obtain tax-exempt status by organizing under section 501(c)(4) of the tax code. An entity that chooses 527 status signals that it has an electoral purpose.

This is confirmed by the explosive growth of 527s in the 2004 presidential elections. Prior to

2004, these organizations were at most modest participants in federal election campaigns. But when the Bipartisan Campaign Reform Act of 2002 ("BCRA") effectively clamped down on donations of "soft money" – that is, money that does not comply with the dollar limitations and source prohibitions of federal campaign law – to the political parties, hundreds of millions of dollars began to flow into the 527s to be used for electoral purposes. *See* Weissman & Hassan, *supra*. Effective enforcement of election law, particularly restrictions on such soft money, not only permits but requires investigation into the activities of 527s to determine if they have crossed the line and have made electioneering their "major purpose," as many did in 2004. Indeed, a central lesson of the 2004 election is the need for effective standards that assure that the disclosure, contribution, corporate and union rules that apply to all other campaign participants also apply to 527s whose major purpose is electioneering.

Plaintiff RTAO seems to believe that a 527 organization can control the determination of its status simply through statements denying an electioneering purpose in its Articles of Incorporation. But as the District of Columbia Circuit has observed, "it is the purpose of the organization's disbursements, not of the organization itself, that is relevant." *Akins v. FEC*, 101 F.3d 731, 743 (D.C. Cir. 1997). Although an organization's official statements declaring an electoral purpose may facilitate finding a "major purpose," *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004), making a statement denying electoral purpose dispositive of political committee status would be an open invitation to evasion.

Rather, the resolution of a particular organization's major purpose necessarily requires an examination of that organization's actual activities – its expenditures, its statements soliciting

contributions, its other public statements; a calculation of the amounts spent on federal campaigns and of the amounts spent on non-federal-campaign matters; and then a determination of the federal-election share of the total. This will inevitably "require[] a very close examination of various activities and statements." *Shays,* 511 F. Supp. 2d at 31. Indeed, *Shays* sustained this approach, including review of the 527's "fundraising solicitations, contribution sources, public statements and internal documents, and the full range of campaign activities," *id.* at 30 – the very review plaintiff RTAO now disparages.

The question then becomes which fundraising solicitations and what public statements can be treated as evidence of federal electoral activity for the "major purpose" test. That is the focus of the next two sections of this brief.

II. Fundraising Letters Indicating that the Funds Solicited Will Be Used to Support or Oppose a Federal Candidate May Be Considered Evidence of Electioneering Purpose.

In determining whether a 527 organization's major purpose is influencing elections, the FEC has stated that it will consider fundraising appeals that indicate "that the funds received would be used to support or defeat a Federal candidate" to be evidence of an electoral purpose. 72 Fed. Reg. 5595, 5604 (Feb. 7, 2007). RTAO's facial challenge attacks both this and the underlying regulation defining money provided in response to a fundraising solicitation as a "contribution" when the solicitation indicates "that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a). RTAO does not actually challenge the use of solicitations to determine whether funds given in response are "contributions." Instead, plaintiff contends that the "support or oppose" standard is vague and overbroad. It asserts

that a solicitation can trigger "contribution" status only if the solicitation is either for "funds provided to a candidate or political party or campaign committee" or expressly advocate the election or defeat of a clearly identified candidate." RTAO Mot. at 15 (quoting *Buckley*, 424 U.S. at 23 n. 24).

RTAO is entirely mistaken. The use of "support or oppose" for determining whether an activity may be subject to campaign finance law has been repeatedly sustained by the courts, including in the context of determining whether funds are contributions within the meaning of FECA. Nor does anything in FECA or case law support either of plaintiff's asserted requirements for determining when a response to a solicitation constitute a contribution.

"Support or oppose" is not unconstitutionally vague or overbroad. The Supreme Court specifically rejected that claim when it upheld the BCRA provision defining the "federal campaign activity" of a state and local political party to include public communications that "promote," "oppose," "attack," and "support" a candidate. *McConnell*, 540 U.S. at 170 n. 64. As the Court explained, "these words 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)).

Similarly, the Fourth Circuit treated whether a committee is "supporting or opposing a candidate" as a constitutional standard for whether it can be regulated as a political committee. *See North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008). *Leake* struck down the North Carolina law defining a political committee as one that has "a major purpose to support or oppose the nomination or election" of a candidate solely because North Carolina required only "a" major purpose, not "the" major purpose of supporting or opposing a candidate. But *Leake* saw no

constitutional difficulty in defining electoral activity in terms of "supporting or opposing" a candidate. Indeed, the court invoked "supporting or opposing" or "support or opposition" – and not express advocacy of election or defeat – a half-dozen times over two pages of its opinion in laying out its constitutional standard. *See id.* at 287-88.

And just last month the district court for the District of Columbia specifically upheld the "support or oppose" provision of §100.57, noting that the contentions that the phrase is unconstitutionally vague and "not related to the express advocacy requirement" were "entirely unavailing" in light of the Supreme Court's ruling in *McConnell*. *See Emily's List v. FEC*, ___ F.Supp.2d ___, 2008 WL 2938558, *29 (D.D.C., July 31, 2008).

Nor does case law support RTAO's proposed test. The first prong of RTAO's proposed test would limit the use of a solicitation to determine whether funds are a contribution to "funds provided to a candidate or political party or campaign committee," quoting from a footnote in *Buckley v. Valeo*. Leaving aside that funds provided to a candidate, political party, or campaign committee would be a contribution regardless of what the solicitation says, RTAO conveniently ignores the next sentence in that footnote, which states: "In addition, dollars given to *another* person or organization that are earmarked for political purposes are contributions under the Act." 424 U.S. at 23 n.24. (emphasis supplied). Surely, funds given to a 527 organization in response to a solicitation indicating that they will be used to support or oppose a clearly identified federal candidate are "earmarked for political purposes" within *Buckley*. *See id.* at 78 ("Contribution" is defined to include "not only contributions made directly or indirectly to a candidate, political party, or campaign committee" but also "contributions made to other organizations or individuals but

earmarked for political purposes.").

RTAO's proposed alternative requirement – that the solicitation itself include language of express advocacy – is equally inconsistent with precedent. n *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d. Cir. 1995), the Second Circuit rejected that proposal in a related context. *Survival* dealt with the FECA requirement that anyone who "solicits any contribution" must include a specified notice indicating who paid for the solicitation and whether or not it was authorized by a candidate. 2 U.S.C. § 441d(a)(3). The district court in that case held, much as RTAO contends here, that the disclaimer could apply only to communications "that expressly advocate the election or defeat of a clearly identified candidate for federal office." 65 F.3d at 293. The Second Circuit rejected that interpretation, finding that "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of § 441(d) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id.* at 295. The "support or oppose" standard is consistent with *Survival*'s requirement of language indicating that contributions will be targeted to elect or defeat a candidate.

III. The FEC's Definition of Express Advocacy is Constitutional.

RTAO asserts that the portion of the federal regulation defining "expressly advocating," 11 C.F.R. § 100.22(b), is void on its face. This contention would have consequences that go well beyond determining "political committee" status. Section 100.22(b) also affects the definition of when an individual's political expenditures or those of an entity that is not a political committee are subject to campaign finance regulation, including the application of disclosure requirements and the ban on the use of corporate or union treasury funds. Were RTAO to succeed, both the disclosure

requirement and the controls on corporate and union money would be more open to evasion. But the rule is squarely consistent with the "functional equivalent of express advocacy standard" of constitutionality articulated by Chief Justice Roberts in his lead opinion in the recent *WRTL* decision, 128 S. Ct. at 2664.

RTAO's contention that the § 100.22 is unconstitutional because it regulates ads that do not include the so-called "magic words" of advocacy is entirely without support. *Buckley* did not mandate a magic words test. *MCFL* found express advocacy without the magic words. *McConnell* emphasized that the magic words test is not constitutionally required. *WRTL* confirmed that communications that go beyond the magic words can be regulated so long as they are "the functional equivalent of express advocacy."

"Expressly advocating" grows out of *Buckley*'s analysis of when independent expenditures – that is expenditures by individuals and organizations other than candidates and political parties – are sufficiently election-related that it is constitutional to regulate them. In FECA, Congress sought to impose disclosure requirements on expenditures "for the purpose of . . . influencing" an election, but the Supreme Court, finding that the broad statutory language has the "potential for encompassing both issue discussion and advocacy of a political result," construed "expenditure" "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 79, 80. *Buckley* gave as examples of "expressly advocate" "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44, n. 52. These became known as the "magic words" of advocacy, but the Court never held that the magic words are

literally required in order for a communication to be regulated.

In *MCFL*, the Court found that a communication constituted express advocacy even though it did not contain the magic words. *MCFL* dealt with an anti-abortion organization's newsletter that urged voters to "vote pro-life"; identified candidates in terms of whether they supported or opposed the organization's positions; and provided photographs of the candidates with the most favorable records. At no time, however, did the newsletter use the magic words of advocacy together with the names of candidates. Nonetheless, the Court concluded that the newsletter "cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides *in effect* an explicit directive: vote for these (named) candidates." 479 U.S. at 249 (emphasis supplied). The Court's use of "in effect" indicates that the magic words are not essential if other words, combinations of words or photographs, or other features of the communication have the "effect" of expressly advocating election or defeat.

In *McConnell,* the Court considered the record developed by Congress in analyzing campaign practices in the more than two decades after *Buckley* and found that virtually all campaign advertisements eschew the magic words. "Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words." 540 U.S. at 127. As a result, so-called issue advocacy and express advocacy "proved functionally identical in important respects." *Id.* at 126. *McConnell* recognized that "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad" and concluded that *Buckley*'s express advocacy analysis was merely a response to FECA's broad language, that is, it "was the product of statutory

interpretation rather than a constitutional command." *Id.* at 192-93.

McConnell specifically rejected constitutional challenges to three BCRA provisions that imposed restrictions or disclosure requirements on campaign advocacy that went beyond the magic words. The Court held that the application of BCRA's ban on the use of soft money – that is, money that does not comply with FECA's dollar limits on contributions and prohibitions on corporate and union treasury funds – by state and local political parties for public communications that "promote," "support," "attack," or "oppose" a clearly identified federal candidate is constitutionally sound. *Id.* at 170. The Court held Congress could impose disclosure requirements on "electioneering communications," defined as broadcast, cable, or satellite communications, aired within sixty days before a general election or thirty days before a primary election that simply "refer[] to a clearly identified candidate for federal office," if the communications are broadcast or aired to the candidate's constituency. *Id.* at 194-202. And the Court rejected a facial challenge to the extension of the ban on the use of corporate and union treasury funds to pay for campaign expenditures to the same "electioneering communications." *Id.* at 203-09.

WRTL created an as-applied exception from the restrictions on corporate electioneering communications upheld in *McConnell*, but *WRTL* neither overturned *McConnell*'s finding that the "electioneering communication" provision is facially constitutional nor mandated the "magic words" test. In his lead opinion Chief Justice Roberts, determined that an ad can be treated as an electioneering communication if it is "the functional equivalent of express advocacy." *Id.* at 2664.

Section 100.22(b) provides a definition of "expressly advocating" that is consistent with *WRTL*'s "functional equivalent" standard. Under 100.22(b), a communication will be treated as

"expressly advocating" the election or defeat of a candidate if it

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

This is extremely close to Chief Justice Roberts's standard that an ad "is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. It is consistent with *Buckley*'s requirement that an expenditure be "unambiguously related to the campaign of a particular candidate." 424 U.S. at 80. It describes exactly the analysis undertaken by the Court in *MCFL*.

Section 100.22(b) indicates that the communication should "taken as a whole and with limited reference to external events, such as the proximity to the election." This language is borrowed from *FEC v. Furgatch*, which defined "express advocacy" to include speech which "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a candidate." 807 F.2d 857, 864 (9th Cir. 1987). The principal external event in *Furgatch* was timing. The ad in question, which was sharply critical of the actions and character of President Carter and urged readers "Don't Let Him Do It," was published one week before the 1980 presidential election. The court reasoned that "the ad is bold in calling for action, but fails to state expressly the precise action called for . . . . Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed." *Id.* at 865.

Although other courts have disagreed with *Furgatch*'s approach, *see, e.g.*, *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 425 (4th Cir. 2003), *Virginia Soc. for Human Life v. FEC*, 83 F. Supp.2d 668, 676 (E.D. Va. 2000), those decisions predated *McConnell* and relied on the assumption repudiated by *McConnell* that the First Amendment mandates the magic words test. Indeed, *Leake* was vacated and remanded in light of *McConnell*. 541 U.S. 1007 (2004). The Supreme Court has never questioned *Furgatch*; and *McConnell*, in rejecting the facial challenge to BCRA's definition of "electioneering communication" – which relies heavily on the timing of the ad – vindicated *Furgatch*'s and 100.22(b)'s "limited reference to external events" standard.

To be sure, *WRTL* placed limits on the use of context. Chief Justice Roberts's lead opinion emphasized the primacy of the content of an ad in determining whether it is the functional equivalent of express advocacy. But even Chief Justice Roberts did not completely reject a "limited reference to external events." His opinion said that such contextual factors "should seldom play a significant role in the inquiry." *Id.* at 2669. But that is a far cry from saying that context can never play any role. Indeed, Chief Justice Roberts agreed that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context." *Id.* Section 100.22(b)'s "limited reference to external events" is consistent with *WRTL*'s willingness to consider "basic background information that may be necessary to put an ad in context."

Nor is 100.22(b) inconsistent with the Fourth Circuit's recent decision in *Leake* invalidating North Carolina's definition of regulable "communications." The North Carolina law was far more open-ended than the FEC regulation. The North Carolina law inquired into the "essential nature" of the communication, and provided that regulators could consider "contextual factors such as the

language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication." *Leake, supra*, 523 F.3d at 280-81 (quoting N.C.G.S. §163-278.14A(a)(2)). As Judge Wilkinson noted, the North Carolina law opened up a host of imponderables: "For instance, how is a speaker – or a regulator for that matter – to know how the "timing" of his comments "relate' to the events of the day? Likewise, how many voters would be considered 'significant'? And at what 'cost' does political speech become regulable?" *Id.* at 284. Section 100.22(b), by contrast, is far tighter and more limited. It makes no reference to "cost" or the "significan[ce] of the number of voters reached;" indeed, it does not refer to the number of voters reached at all. And instead of referring to timing loosely "in relation to the events of the day," § 100.22(b) refers only to "proximity to the election," which, as *Furgatch* indicates, makes sense since the "express advocacy" question is about whether the communication is expressly advocating how to vote in the election. Moreover, § 100.22, like *WRTL* but unlike the North Carolina law, cautions that only "limited reference" may be made to context.

In short, nothing in *Leake* or in any Supreme Court case, would support a determination that § 100.22 is facially unconstitutionally. Section 100.22 goes beyond "magic words" but under *McConnell* and *WRTL* that is entirely consistent with the First Amendment.

IV. Section 114.15's Regulation of the Permissible Use of Corporate and Union Funds for Electioneering Communications is Constitutional.

Section 114.15 grows out of the interplay of Congress's regulation of corporate and union electioneering communications, *McConnell*'s rejection of a facial challenge to that law, and *WRTL*'s

creation of an as-applied exception to the electioneering communications provision. *WRTL* held that only a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" can be subject to the electioneering communication restriction. 127 S. Ct. at 2667. In then applying this new standard to the ads that Wisconsin Right to Life sought to air, Chief Justice Roberts's lead opinion noted that the "ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id.* The Chief Justice also explained that the ads "lack[] indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; they do not take a position on a candidate's character, qualifications, or fitness for office." *Id.*

11 C.F.R. § 114.15 tracks the *WRTL* lead opinion closely. It exempts electioneering communication from the corporate and union treasury fund prohibition "unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate," which is exactly the Chief Justice's language. Following the Chief Justice's application of his standard to the specific ads in the case, the regulation provides "rules of interpretation" for applying the "no reasonable interpretation" test to specific communications. Like the Chief Justice, the regulation looks to whether there are "indicia of express advocacy," specifically whether the communication "[m]entions any election, candidacy, political party, opposition candidate, or voting by the general public," § 114.15(c)(1)(i), or "[t]akes a position on any candidate or officeholder's character, qualifications, or fitness for office," § 114.15(c)(1)(ii). Other than the added phrase "or voting by the general public" in (c)(1)(i) and the phrase "or officeholder's" in

(c)(1)(ii) this is identical to the Chief Justice's application of his own test in *WRTL*. It is hard to see how these added phrases are in any way inconsistent with *WRTL*.

The regulation also confirms that a communication would be interpreted as something other than an appeal to vote for or against a candidate if it includes content that "focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue." § 114.15(c)(2)(i). Again this is virtually identical to the Chief Justice's approach except that the added language "urges a candidate to take a position" actually creates a broader exemption from regulable electioneering communication. The regulation would also treat as a permissible use of corporate or union treasury funds any communication that "includes a call to action or other appeal that . . . urges a action other than voting for or against or contributing to a clearly identified Federal candidate or political party." § 114.15(c)(2)(iii). This goes beyond the literal words of *WRTL* only in indicating that a call to make a campaign contribution to a candidate or party could be treated as an electioneering communication, but surely treating a call to make a campaign contribution as the functional equivalent express advocacy is consistent with the spirit of the decision. Finally, § 114.15 tracks *WRTL* precisely in providing that "any doubt" whether a corporate or union communication is permitted or prohibited "be resolved in favor of permitting the communication," § 114.15(c)(3), and in requiring that the determination be made by considering "only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any discovery." § 114.15(d).

In short, all of § 114.15's key phrases and concepts come from the Chief Justice's opinion

and the regulation closely adheres to the Chief Justice's analysis. With the *WRTL* lead opinion providing the governing standard in this area, § 114.15 is plainly constitutional.

CONCLUSION

Twice this past term the Supreme Court rejected facial challenges to the constitutionality of election laws, emphasizing that such a challenge imposes a "heavy burden of persuasion" to demonstrate that a law is unconstitutional "in all its applications." *Crawford v. Marion Co. Elec. Bd.*, 128 S.Ct. 1610, 1621-22 (2008); *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190-91, 1195 (2008). That heavy burden on the plaintiff is particularly appropriate in this case. The need for effective campaign finance regulation – for full disclosure of the sources of campaign money, and for enforcement of the limits on large contributions and on the uses of corporate and union treasury funds – is greater than ever. In the 2004 presidential election, 527 organizations proved to be a key mechanism for smuggling some of the "soft money" barred by BCRA back into federal elections. Surely, there are new 527s, organized to support or oppose this year's candidates, that are eager to participate in this year's election. Unless there are rules and policies grounded in campaign realities that require those 527s actually engaged in electioneering to abide by the rules that apply to other campaign actors, the campaign finance laws are at risk of being flouted again. If RTAO's facial challenge were to succeed, the 2008 election would be wide open to campaigning by groups exempt from disclosure and funded by very large individual donations and corporate or union money.

As the *Grange* and *Crawford* courts indicated – and as *McConnell* and *WRTL* demonstrated in the campaign finance context – specific constitutional problems with particular applications of a

law can be addressed with an as-applied exception. Indeed, since no enforcement action has even been opened against RTAO, it could very well be the case that RTAO's expenditures, solicitations, and other activities would be found to be primarily issue-oriented and not electioneering. On the other hand, the very existence of an entity which is organized under section 527 "primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for . . . influencing or attempting to influence" an election, and which has focused its fundraising and spending activities exclusively on – and even named itself after – the presumptive presidential nominee of a major party suggests that the rules and policies under attack are unlikely to be unconstitutional "in all their applications."

For the foregoing reasons, we urge the court to reject plaintiff's request for a preliminary injunction against all applications of the rules and policies at issue in this case.

Respectfully Submitted,

Date: August 14, 2008 By: 

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CERTIFICATE OF SERVICE

I, RICHARD BRIFFAULT, hereby certify that a copy of the foregoing MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF has been served this 14th day of August, 2008, by first-class mail, postage prepaid, upon:

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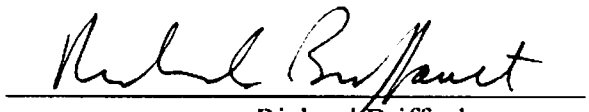

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