No. _____

In The
Supreme Court of the United States

The Real Truth About Abortion, Inc., *Petitioner*

v.

Federal Election Commission and
United States Department of Justice

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petition for a Writ of Certiorari

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Questions Presented

When Petitioner sought review of a preliminary-injunction denial herein, this Court granted certiorari, vacated, and "remanded . . . for further consideration in light of *Citizens United v. Federal Election Comm'n,* . . . 130 S. Ct. 876 . . . (2010) . . . ." *Real Truth About Obama v. FEC*, 130 S. Ct. 2371 (2010) ("*RTAO*"). Petitioner has since changed its name to The Real Truth About Abortion, Inc. ("RTAA"). On cross-motions for summary judgment, the lower courts substantively ruled against RTAA, as before the remand, on these two issues, even though the remand indicated that there was "a reasonable probability that the decision below rest[ed] upon a premise that the lower court would reject given the opportunity for further consideration,*"* *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam):

1. Whether the Federal Election Commission's ("FEC") alternate "expressly advocating" definition at 11 C.F.R. 100.22(b) is unconstitutionally overbroad, void for vagueness, and contrary to law, facially and as applied to RTAA's intended activities, because it violates the First and Fifth Amendments of the U.S. Constitution, exceeds statutory authority under the Federal Election Campaign Act ("FECA"), 2 U.S.C. 431 et seq., and should be declared void under the Administrative Procedure Act ("APA"), 5 U.S.C. 702-06.

2. Whether FEC's enforcement policy regulating determination of "political committee" ("PAC") status is unconstitutionally overbroad, void for vagueness, and contrary to law, facially and as applied to RTAA's intended activities, because it violates the First and Fifth Amendments, exceeds statutory authority under FECA, and should be declared void under APA.

Corporate Disclosure

The Real Truth About Abortion, Inc. ("RTAA"), f.k.a. The Real Truth About Obama, Inc. ("RTAO"), has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock.

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Petition

Petitioner RTAA requests certiorari review of *Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012) ("*RTAA*").

Opinions Below

RTAA (App.1a) is reported at 681 F.3d 544 . The district court's opinion on cross-motions for summary judgment (App.31a) is reported at *Real Truth About Obama v. FEC*, 796 F. Supp. 2d 736 (E.D. Va. 2011). The district court's Final Order (App.63a) is unreported.

Jurisdiction

The appellate court's opinion (App.1a) and judgment were filed June 12, 2012. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitution, Statutes & Regulations

Appended are the First and Fifth Amendments (App.65a); 2 U.S.C. 431(17) (App.65a); 11 C.F.R. 100.16(a) (App.66a); 11 C.F.R. 100.22 (App.66a).

Statement of the Case

The jurisdiction of the district court was invoked under 28 U.S.C. 1331, as a case arising under the First and Fifth Amendments, FECA, APA, and the Declaratory Judgment Act, 28 U.S.C. 2201-02. Court-of-Appeals Appendix ("CA-App–") 21.

RTAA (formerly RTAO) was incorporated in July 2008 as a nonprofit under 26 U.S.C. 527, i.e., as a "political *organization*" that may receive donations and make disbursements for certain identified political purposes without paying corporate income taxes. CA-

App–22.

RTAA is not properly a political *committee* (PAC) under FECA because none of its communications are properly "contributions" or "expenditures" aggregating over $1,000 per year, a trigger for PAC status under 2 U.S.C. 431(4)(A). CA-App–22.

RTAA is also not properly a PAC because it does not meet the constitutionally required "major purpose" test under a proper interpretation of the test. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (PAC burdens limited to "organizations . . . under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate" because "[t]hey are, by definition, *campaign related*" (emphasis added)). CA-App–22. In its current Articles of Incorporation, RTAA's purposes are stated as follows:

> The specific and primary purposes for which this corporation is formed and for which it shall be exclusively administered and operated are to receive, administer and expend funds in connection with the following:
>
> 1. To provide accurate and truthful information about the public policy positions of Barack Obama and other pro-abortion candidates for federal office;
>
> 2. To engage in non-partisan voter education, registration and get out the voter activities in conjunction with federal elections;
>
> 3. To engage in any activities related to federal elections that are authorized by and are consistent with Section 527 of the Internal Revenue Code except that the corporation shall not:
>
> (a) expressly advocate the election or defeat

of any clearly identified candidate for public office, or

(b) make any contribution to any candidate for public office; and

4. To engage in any and all lawful activities incidental to the foregoing purposes except as restricted herein.

CA-App–23.

But RTAA reasonable believes it will be deemed a PAC by FEC and DOJ because of (**a**) FEC's use of the challenged "expressly advocating" definition at 11 C.F.R. 100.22(b) (along with the sort of approach taken by 11 C.F.R. 100.57, which is no longer enforced but is the type of consideration employed by the FEC PAC-status policy)[1] and FEC's enforcement policy concerning PAC status, *see* FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC-Status 2*") (emphasizing the need for "flexibility" in determining PAC status based on a wide range of factors in a case-by-case analysis of "major purpose"), to deem several 527 organizations to be PACs and in violation of FECA, *see id.* at 5605 (listing Matters Under Review ("MURs") in which this occurred); and (**b**) the similar nature of RTAA and its planned activities to some of those in the MURs cited in *PAC-Status 2*. CA-App–23.

One way RTAA intended to provide accurate and truthful information about the public policy positions of then-Senator Obama was by creating a website at www. therealtruthaboutobama.com, where accurate

[1] Section 100.57 allowed for donations to an entity to be deemed regulated "contributions" under 2 U.S.C. 431(8) (i.e., "for the purpose of influencing" federal elections) by applying a vague "support or oppose" test to the solicitation.

statements about his public-policy positions would be documented. CA-App–24, 43-48.

RTAA intended to produce and put on its website *Change*, an audio ad stating the following:

> (Woman's voice) Just what is the real truth about Democrat Barack Obama's position on abortion?
>
> (Obama-like voice) Change. Here is how I would like to change America . . . about abortion:
>
> - Make taxpayers pay for all 1.2 million abortions performed in America each year
> - Make sure that minor girls' abortions are kept secret from their parents
> - Make partial-birth abortion legal
> - Give Planned Parenthood lots more money to support abortion
> - Change current federal and state laws so that babies who survive abortions will die soon after they are born
> - Appoint more liberal Justices on the U.S. Supreme Court.
>
> One thing I would *not* change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.
>
> (Woman's voice). Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?
>
> To learn more real truth about Obama, visit www.The RealTruthAboutObama.com. Paid for by The Real Truth About Obama.

CA-App–24-25.

RTAA also intended to produce and place on its website *Survivors*, an audio ad stating the following:

> **NURSE:** The abortion was supposed to kill him, but he was born alive. I couldn't bear to follow hospital policy and leave him on a cold counter to die, so I held and rocked him for 45 minutes until he took his last breath.
>
> **MALE VOICE:** As an Illinois Democratic State Senator, Barack Obama voted three times to deny lifesaving medical treatment to living, breathing babies who survive abortions. For four years, Obama has tried to cover-up his horrendous votes by saying the bills didn't have clarifying language he favored. Obama has been lying. Illinois documents from the very committee Obama chaired show he voted against a bill that did contain the clarifying language he says he favors.
>
> Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause.
>
> Paid for by The Real Truth About Obama, Inc.

CA-App–25, 18-19.

RTAA also intended to broadcast *Change* and *Survivors* (collectively "Ads") as radio advertisements on the Rush Limbaugh and Sean Hannity radio programs in heartland states during electioneering-communication[2]

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[2] "Electioneering communications" are essentially non-express-advocacy, targeted communications mentioning

blackout periods thirty days before the Democratic National Convention (July 29-Aug. 28, 2008) and sixty days before the general election (Sept. 5-Nov. 4, 2008), so the Ads would have met the electioneering-communication definition. CA-App–25, 19.

RTAA also intended to create on its website digital postcards setting out then-Senator Obama's public policy positions on abortion, and viewers would have been able to send these postcards to friends from the website. One planned postcard would have been similar to *Change*, but done in first person and signed "Barack Obamabortion." The postcards would have been designed to be the sort of catchy, edgy, entertaining items popular for circulation on the Internet. CA-App–25, 44-48.

To raise money for funding its website and content, the production of the Ads, the employment of persons knowledgeable about Internet viral marketing, and the broadcasting of the Ads, RTAA needed to raise funds by telling potential donors about itself and its projects. One way RTAA intended to raise funds was with the following communication:

> Dear x,
>
> I need your help. We're launching a new project to let the public know the real truth about the public policy positions of Senator Barack Obama.
>
> Most people are unaware of his radical pro-abortion views. For example, when he was a state senator in Illinois, he voted against a state bill like the federal Born Alive Infant Protection

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candidates in 30- and 60-day periods before primary and general elections. 2 U.S.C. 434(f)(3).

Act. That bill merely required that, if an abortionist was trying to abort a baby and the baby was born alive, then the abortionist would have to treat that baby as any other newborn would be treated. Under this law, the baby would be bundled off to the newborn nursery for care, instead of being left on a cold table in a back room until dead. It seems like everyone would support such a law, but, as an Illinois State Senator, Obama did not. There are lots of other examples of his radical support for abortion, and we need to get the word out. That's where you come in.

A new organization has just been formed to spearhead this important public-information effort. It's called The Real Truth About Obama. We plan to do some advertising. Since we're not a PAC, there won't be any "vote for" or "vote against" type of ads—just the truth, compellingly told.

A central planned project is directed at the world of the Internet. We've already reserved www.TheRealTruthAboutObama.com to set up a website. Here's the exciting part. The website will feature a weekly postcard "signed" by "Barack Obamabortion." Like that? While you are visiting the website, you can send the postcard by email to anyone you designate. What could be easier?! And the postcards will be done in a catchy, memorable manner—the sort of thing that zips around the Internet. Each postcard will feature well-documented facts about Obama's views on abortion.

The postcards will also send people to the website for more real truth about Obama, but

> we also plan to do a radio ad to do that, too. This radio ad will give the real truth about Obama's abortion position—all properly documented, of course. Notice the "Truth" part of our name.
>
> Of course it takes money to develop, host, and maintain a hot-topic website, and to hire the people who specialize in getting things noticed on the Internet (it's called viral marketing). So we need your help. We need for you to send us money. As much as you can donate. Right away. We need to get the word out. We know how. We're ready to roll. Now we need you.
>
> Your friend for truth,
>
> x
>
> P.S.—Please send your check today. Time is of the essence. Please send the largest gift you can invest in this vital project. Together we can get the word out.

CA-App–26-27.

RTAA intended to raise more than $1,000 with this fundraising communication and to disburse more than $1,000 both to broadcast the Ads and to place them before the public on RTAA's website. CA-App–27.

But RTAA was chilled from proceeding with these activities because it reasonably believed that it would be subject to an FEC and DOJ investigation and a possible enforcement action potentially resulting in civil and criminal penalties, based on the fact that FEC has deemed 527s to be PACs, based on (**a**) a rule defining "express advocacy" in a vague and overbroad manner, 11 C.F.R. 100.22(b) (broad, contextual express-advocacy test), that might have made the Ads "independent

expenditures" and (**b**) a vague and overbroad approach to determining whether an organization meets *Buckley*'s major-purpose test for imposing PAC status. *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC-Status 1*"); *PAC-Status 2*, 72 Fed. Reg. 5595.[3] CA-App–27, 19.

RTAA was also chilled from proceeding because, if Defendants *subsequently* deemed RTAA to have been a PAC while doing its intended activities, then RTAA *would have been required* to use "federal funds" (funds raised subject to federal source and amount restrictions) to send out the fundraising communication, *see* FEC Advisory Opinion 2005-13 at 1 (EMILY's List),[4] and RTAA would be in violation for not having used federal funds for the fundraising communication. CA-App–23.

RTAA's chill was heightened by the DOJ's declaration that investigations and criminal prosecutions of "knowing and willful" violations of these FECA provisions by 527 corporations was a priority, *see* CA-App–27-28, 49-53.

In sum, RTAA reasonably feared, if it proceeded with its intended activities: (**a**) that the Ads (both on RTAA's website and as broadcast) would be deemed express advocacy under 11 C.F.R. 100.22(b) and, if RTAA was *not* deemed a PAC, it would be in violation of FECA for failing to place disclaimers on them and

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[3] Some FEC 527 enforcement was based on now-repealed 11 C.F.R. 100.57, some of the principles of which FEC yet follows in determining when donations in response to solicitations are deemed regulable "contributions."

[4] Advisory opinions are available through www.fec.gov or http://saos.nictusa.com/saos/searchao.

failing to file an independent expenditure report; (**b**) that, if RTAA *was* deemed to be a PAC under FEC's enforcement policy on "political committees" and because publication of the Ads would be considered an "expenditure," RTAA would be in violation of FECA for failure to abide by numerous PAC requirements, including placing disclaimers on the Ads and RTAA's website, failure to register and report as a PAC, failure to use federal funds for fundraising, failure to abide by limits on contributions to PACs, and failure to abide by the source limitations imposed on PACs; and (**c**) in any event, that RTAA would suffer an intrusive and burdensome investigation and, possibly, an enforcement action, potentially leading to civil and criminal penalties. So RTAA would not proceed with its intended activities unless it received the judicial relief requested. CA-App–28, 19.

In addition to the activities set out above, RTAA intends to participate in materially similar activities in the future, including broadcasting ads materially similar to *Change* and *Survivors*. CA-App–29, 19. RTAA's chill was and is irreparable harm because it is the loss of First Amendment rights, and there is no adequate remedy at law. CA-App–29.

On July 30, 2008, RTAA filed a pre-enforcement challenge to three FEC regulations and FEC's enforcement policy for determining PAC status, facially and as applied to RTAA's intended activities. CA-App–57. The district court denied a preliminary injunction. CA-App–60. The Fourth Circuit affirmed that denial. CA-App–61; *RTAO v. FEC*, 575 F.3d 342 (4th Cir. 2009). RTAA petitioned for certiorari, which was granted, with the Fourth Circuit's judgment vacated, and "the case remanded . . . for further consideration in light of

Citizens United." *RTAO*, 130 S. Ct. 2371 (citation omitted).

On remand, the Fourth Circuit reissued the parts of its vacated opinion "stating the facts and articulating the standard for issuance of preliminary injunctions," leaving the substantive issues for the district court to consider first. *RTAO v. FEC*, 607 F.3d 355 (4th Cir. 2010) (per curiam). On June 16, 2011, the district court decided cross-motions for summary judgment in favor of FEC and DOJ on the issues presented here. CA-App–81. On June 12, 2012, the Fourth Circuit affirmed. *RTAA*, 681 F.3d 544.

Reasons to Grant the Petition

This case has been here before. This court granted certiorari, vacated the opinion below, and "remanded . . . for further consideration in light of *Citizens United*." *RTAO*, 130 S. Ct. 2371 (citation omitted). By this "GVR" order, the Court indicated that it believed, in light of its analysis in *Citizens United*, that there was "a reasonable probability that the decision below rest[ed] upon a premise that the lower court would reject given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). But the courts below ruled the same way on the merits as they had when this case was first here, ignoring or misapplying the analysis of *Citizens United* and other decision of this Court that required a different outcome.

As described below, this is a case of great national importance because the federal courts and the FEC Commissioners themselves are sharply divided on what constitutes core political speech that is regulable as "express advocacy" and what standards govern

whether onerous political-committee ("PAC") burdens may be imposed on organizations engaged in core political speech—with dire consequences for those who mistake where the vague and shifting lines lie (depending on who fills the chairs at the FEC or a court). FEC complaints are threatened and filed by political operatives against political adversaries in an attempt to get others declared PACs, so as to chill, reduce, or silence their speech—all based on these vague lines.

Circuit splits exist and were sharpened by a recent Eighth Circuit decision on PAC status in *Minnesota Citizens Concerned for Life v. Swanson*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012) (en banc) ("*MCCL*"). *See infra*. And the 3-3 split within the FEC Commission on these issues in this case—express-advocacy and PAC-status standards—has been brought to light by an advisory-opinion Statement by three Commissioners and votes on rival FEC draft advisory opinions that reveal the severe problems caused by lack of current resolution of the issues in this case. *See infra*.

These are problems that profoundly affect the nation and the free-speech rights of citizens as they try to exercise their sovereign rights to free political speech and association. These are problems that this Court has already addressed and answered, but some refuse to follow what this Court has held.

The solution is simple—a reassertion of, and return to, this Court's bright-line tests and applications, as described next. That solution requires a grant of certiorari in this case.

I.

Protecting Core Political Speech and Association by Maintaining Established Bright Lines Is a Matter of Great National Importance.

Central to this case is the vitally important question of how to protect the issue advocacy essential to our republic. This Court requires bright-line protection of core political speech and association, but both FEC's alternate "expressly advocating" definition and its PAC-status enforcement policy replace protective, bright-line tests created by this Court with vague and overbroad lines that chill speech.

In the seminal *Buckley* decision, this Court recognized that "the people are sovereign," that "debate on public issues should be uninhibited, robust, and wide-open," and that FECA

> operate[s] in an area of the most fundamental First Amendment activities. 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."

424 U.S. at 14 (citation omitted).

Consequently, "(p)recision of regulation . . . must be the touchstone in an area so closely touching our most precious freedoms," *id.* at 41, because "vague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by in-

ducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked, *id.* at 41 n.48 (citations and quotation marks omitted). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* (citation omitted).

Buckley applied this required bright-line approach in creating two tests at issue here: (a) the express-advocacy test and (b) the major-purpose test.

(a) In creating the express-advocacy test, this Court applied the bright-line requirement by holding that the phrase "'advocating the election or defeat of' a candidate" is unconstitutionally vague and overbroad unless "construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44, i.e., "express words of advocacy of election or defeat, such as 'vote for,' 'elect' . . . ," *id.* at 44 n.52. *See also id.* at 80 (same express-advocacy construction required in *disclosure* context).

From this magic-words construction of the statutory term "expenditure" in FECA comes the express-advocacy test, which still governs FECA "expenditures" and consequently "independent expenditures," at issue here. But FEC now enforces a vague, alternate express-advocacy test at 11 C.F.R. 100.22(b) that ignores the magic-words definition of express advocacy that this Court established and yet retains. *See* Part II.

(b) And from this Court's insistence on bright-line tests to protect issue advocacy and advocacy groups came the major-purpose test. The Court held (in the *disclosure* context) that requiring "political committees" to report their "expenditures" posed the "potential

for encompassing both issue discussion and advocacy of a political result" through "vagueness" because "'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures.'" 424 U.S. at 79. As a result, this Court adopted the construction of lower courts that "political committee" status may only be imposed on "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" because such "[e]xpenditures . . . are, by definition, campaign related." *Id.* But FEC now enforces this bright-line, major-purpose test with vague, overbroad standards for establishing "major purpose," and lower courts are split over whether there *is* a major-purpose test. *See* Part III.

This case was remanded for reconsideration in light of *Citizens United*. That case reasserted bright-line protection for core political speech and association, including the sort of issue advocacy and issue-advocacy group involved here, and it repudiated vague, overbroad, we-know-it-when-we-see-it tests, 130 S. Ct. at 895-96, such as those in FEC's challenged regulation and policy. The analysis in *Citizens United* compels a similar speech-protective analysis here, with a different outcome than that in the courts below. And in *Citizens United*, this Court applied strict scrutiny to the imposition of PAC-burdens, *id.* at 898, and only applied exacting scrutiny to disclosure of a distinctly different and less burdensome sort of disclosure, *id.* at 914. Yet the court below (as do many courts now) employed exacting scrutiny to both the regulation and policy at issue herein on the mistaken theory that mere "disclosure" is involved. App.11a. But under any standard, the FEC's regulation and policy are vague, overbroad,

and inconsistent with this Court's holdings as to the nature of the express-advocacy and major-purpose tests—both based on the requirement of bright-line protection for core political speech.

II.

Express Advocacy Requires Magic Words.

RTAO challenges 11 C.F.R. 100.22(b), FEC's alternate, non-magic-words, express-advocacy definition as vague, overbroad, and beyond statutory authority.[5] The appellate court upheld the provision because it said that the definition is similar to the appeal-to-vote test, in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) ("*WRTL-II*"). App.14-16a. But that is erroneous as explained below.

A. The Holding Conflicts with Other Circuit Decisions.

The appellate court's decision conflicts with other circuit decisions holding that express advocacy requires

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[5] FEC has not always enforced the alternate express-advocacy test at 11 C.F.R. 100.22(b) because of cases holding it unconstitutional on both constitutional and statutory grounds. On August 23, 2012, three FEC Commissioners voted for "Draft A" of a proposed advisory opinion, which contained an important history of 100.22(b). *See* FEC Advisory Opinion 2012-27 (National Defense Committee), Draft A at 22-35. *See supra* footnote 4 (accessing advisory-opinion documents). As noted in the cited portion of Draft A, three of the six current FEC Commissioners would *not* enforce 100.22(b) due to the questions about its constitutionality and statutory authority. These three commissioners also issued a Statement on Advisory Opinion 2012-11 (Free Speech) to highlight problems with 100.22(b). *See infra* at 22a.

"express words of advocacy." *Buckley*, 424 U.S. at 44 n.52. The Fourth Circuit itself held this very regulation, 100.22(b), unconstitutional for not requiring magic words, *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 329 (4th Cir. 2001),[6] and prior decisions held that express advocacy requires magic words, *see North Carolina Right to Life v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008) (requires "specific election-related words"); *FEC v. Christian Action Network*, 110 F.3d 1049, 1062 (4th Cir. 1997). The panel's decision also conflicts with other circuits that have held that it is a magic-words test. *See Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991); *FEC v. Central Long Island Tax Reform,* 616 F.2d 45, 53 (2d Cir.1980); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 664-65 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651, 664 (6th Cir. 2004); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) (striking definition patterned on 11 C.F.R. 100.22(b)); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003)[7].[8]

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[6] The challenged provision was also held unconstitutional by *Right to Life of Duchess County v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D. N.Y. 1998), for not employing magic words.

[7] This decision recognized that even *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), on which FEC relies for the challenged regulation, "presumed express advocacy must contain some explicit *words* of advocacy." *Getman*, 328 F.3d at 1098. *See also American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("*McConnell* [*v. FEC*, 540 U.S. 93 (2003),] left intact the ability of courts to make distinctions between express advocacy and issue ad-

B. The Holding Conflicts with this Court's Decisions.

The panel's holding also conflicts with this Court's holdings that—where the express-advocacy test applies—it is a magic-words test. *Buckley* clearly said that the express-advocacy test was an "express words of advocacy" test and provided examples. 424 U.S. at 44 n.52. In *FEC v. Massachusetts Citizens for Life*, 479 U.S 238 (1986) ("*MCFL*"), this Court said that "a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc.," *id.* at 249 (citation omitted). *McConnell* repeatedly equated "express advocacy" with "magic words." *See* 540 U.S. at 126, 191-93, 217-19. *McConnell*'s "functionally meaningless" statement about the express-advocacy line, *id.* at 193, did not *eliminate* "express advocacy" as a category of regulated speech requiring "magic words," rather *McConnell* used that analysis to *add* regulation of "electioneering communications" to regulation of magic-words express advocacy. In *WRTL-II*, 551 U.S. 449, all members of the Court equated "express advocacy" with "magic words." *See id.* at 474 n.7 (Alito, C.J., joined by Alito, J.), 495 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in judgment), 513 (Souter, J., joined by Stevens,

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vocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest'" (citation omitted)).

[8] State supreme courts have also held that "express advocacy" requires "magic words." *See Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999); *Osterberg v. Peca*, 12 S.W. 3d 31 (Tex. 2000).

Ginsburg, & Breyer, JJ., dissenting). In *Citizens United*, 130 S. Ct. 876, four members of this Court said that "[i]f ever there was any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley* . . . [N]o one has suggested that *Hillary*[*: The Movie*] counts as express advocacy . . . ." *Id.* at 935 n.8 (citation omitted) (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).

C. The Lower Court's Justification Is Flawed.

The reliance of the appellate court (*see supra*) on the similarity of 100.22(b) to *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70, is misplaced. *WRTL-II*'s test is not a free-floating test that may be employed to communications that are *not* federally defined "electioneering communications." *WRTL-II* specifically acknowledged that the test is impermissibly vague absent that definition. *See* 551 U.S. at 474 n.7 (controlling opinion of Roberts, C.J., joined by Alito, J.).

The disagreement of FEC and the district court over how 100.22(b) applies to the *Change* ad (*see supra* at 4) reveals the test's unconstitutional vagueness. FEC insists that *Change* is *not* express advocacy (Dkt. 31 at 12-13, 27), but the district court, in its pre-remand opinion, declared that it *is*: "reasonable people could not differ that this advertisement is promoting the defeat of Senator Obama." (Dkt. 77 at 13.) After this Court's remand, the district court again decided that "'Change' is plainly the functional equivalent of express advocacy" (App.55a), which would make it express advocacy under that court's equating of 100.22(b) with the appeal-to-vote test. But the court was plainly

wrong because the "functional equivalent of express advocacy" was an *electioneering communication*, in *McConnell*, 540 U.S. at 206, and *WRTL-II*, 551 U.S. at 469-70, not an *independent expenditure*. An "independent expenditure" contains express advocacy. 2 U.S.C. 431(17). By definition, an "electioneering communication" does not contain express advocacy. 2 U.S.C. 434(f)(3).[9] When a federal oversight agency and a federal court—both "reasonable"—cannot agree on the application of a test, the test is unconstitutional and offers no "'no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim,'" *Buckley*, 424 U.S. at 43 (citation omitted).

The appellate court below dismissed the split between FEC and the district court concerning "Change," as not indicating any vagueness "because cases that fall close to the line will inevitably rise when applying § 100.22(b)," and "the disagreement confirms the Commission's judgment that 'Change' does not meet the requirements of § 100.22(b)" because the test requires that reasonable persons not disagree. App.22a. But this response ignores this Court's requirement for bright-line tests so speakers need not hedge and trim, so they can predict in advance whether a communication fits a speech test, and so they are not chilled or

[9] In fact, "'electioneering communication' does not include . . . an independent expenditure." *Id.* Thus, the conflation of express-advocacy independent expenditures with a standard created in *WRTL-II* to limit the (now unconstitutional) corporate ban on electioneering communications creates serious problems of compliance because speakers do not know whether to report certain expenditures as independent expenditures or electioneering communications.

ambushed by unexpected enforcement. As noted below, even members of the FEC split on whether ads fit 100.22(b), which was never a problem under this Court's magic-words express advocacy—designed to prevent just the problem that 100.22(b) creates.

Section 100.22(b) is also beyond statutory authority, though the appellate court ignores this argument. The regulation cites as authority 2 U.S.C. 431(17), the "independent expenditure" definition, which regulates only "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate." That definition implements the magic-words, express-advocacy constructions in *Buckley*, 424 U.S. 44 ("expenditure" limitation), 80 ("expenditure" disclosure), and *MCFL*, 479 U.S. at 249 (construing "expenditure" in 2 U.S.C. 441b). There is no congressional authority anywhere for FEC to interpret "expressly advocating" other than as requiring magic words. Moreover, the only "expenditure" that FEC may regulate is one "for the purpose of influencing any election for Federal office," 2 U.S.C. 431(9), and it was precisely to such "for the purpose of influencing" language that *Buckley* gave "expenditure" an express-advocacy construction to preserve it from vagueness and overbreadth. 424 U.S. at 77, 80.

D. FEC Splits Demonstrate § 100.22(b)'s Unconstitutional Vagueness.

There is a 3-3 split among the FEC Commissioners concerning 100.22(b) (and the FEC's PAC-status enforcement policy), and positions of the Commissioners often differ from positions taken by the FEC Office of General Counsel in briefing. The details of these splits are set out clearly in three documents. While word limits here preclude a thorough treatment of these docu-

ments, some highlights reveal the necessity of thoroughly reviewing these documents in the merits consideration of this case.

The first document is the Statement on Advisory Opinion 2011-12 (Free Speech) by FEC Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Peterson ("Free-Speech Statement"). These Commissioners wrote

> to highlight three points: (1) Section 100.22(b) has been inconsistently applied and given a sweepingly broad interpretation; (2) the conflation of express advocacy and the functional equivalent of express advocacy (by claiming that Section 100.22(b) and the appeal to vote test adopted in *WRTL* are the same test) ignores the Act, creating reporting problems; and (3) a lack of clarity with regard to expenditures in the political committee context, coupled with an inconsistent application of the major purpose test, has created confusion as to whether a group is required to register and report as a political committee.

Free-Speech Statement at 3. Appended to this Statement is Attachment A, self-described as "a list of the factors that the General Counsel's Office has recommended that the Commission consider, and that several Commissioners have considered and relied upon, when determining whether or not a communication constitutes express advocacy under Section 100.22(b)." *Id.* at 26 (listing 45 diverse factors). This quote, Attachment, and the Free-Speech Statement reveal why this Court needs to grant certiorari and clarify and reaffirm this court's express-advocacy and major-purpose tests on which the FEC itself is split.

The second two documents are advisory-opinion drafts A (for which Commissioners Bauerly, Walther, and Weintraub voted) and B (for which Commissioners Hunter, McGahn, and Petersen voted) in FEC Advisory Opinion 2012-27 (National Defense Committee).[10] In Draft B, three Commissioners found *four* ads in the advisory opinion request contained express advocacy but that three ads did not. Draft B at 3. In Draft A, three Commissioners found that *none* of the seven ads contained express advocacy, Draft A at 3, and declared that they would not enforce 100.22(b) due to problems of constitutionality and statutory authority, *id.* at 22-35, a question the other three Commissioners declined to directly address (while noting that its application of the test implied that they would continue to enforce it), Draft B at 3 n.1. When the Commissioners of a federal oversight agency—all presumed to be both "reasonable" *and experts*—cannot agree on the application of a test, the test is unconstitutional for offering "'no security for free discussion,'" *Buckley*, 424 U.S. at 43 (citation omitted). And to further demonstrate the vagueness of the test, comments on AOR 2012-27 by Campaign Legal Center and Democracy 21 (campaign-finance "reform" groups) declared that *five* of the seven ads contained express advocacy under 100.22(b). Comments at 2 (available with other advisory-opinion documents). The final document, Advisory Opinion 2012-27, at 1, said that three ads were not express advocacy and that the FEC could issue no opinion as to the others.

Moreover, Draft A explained that "the legal difficul-

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[10] *Available at* http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1 (all documents available at same link, including certifications re votes on drafts).

ties associated with intercircuit nonacquiescence[11] are compounded by the practical problems inherent in grafting such an approach onto communications that utilize modern media practices." Draft A at 34. Draft A proceeds to explain how media that reaches multiple jurisdictions "would subject nationally broadcast political advertisements to inconsistent regulatory standards" and create serious reporting problems because, e.g., "the same communication that is an independent expenditure in the Fourth Circuit would be an electioneering communication in the First Circuit." *Id.* at 35 & n.12.

In sum, 100.22(b) goes beyond any permissible construction of "express advocacy" or "expenditure," is unconstitutionally vague and overboad, and is "in excess of the statutory . . . authority" and void under 5 U.S.C. 706.

III.

PAC-Status May Only Be Imposed on Groups with the Major Purpose of Regulable, Campaign-Related Activity.

RTAO challenges FEC's PAC-status enforcement policy, found in *PAC-Status 1*, 69 Fed. Reg. 68056, and *PAC-Status 2*, 72 Fed. Reg. 5595. *PAC-Status 2* cited 11 C.F.R. §§ 100.22(b) and 100.57 (now repealed, but the principle of which is yet followed, *see supra* footnote 3) as central elements of FEC's enforcement policy, 72 Fed. Reg. at 5602-05, so the flaws in those regulations, *supra*, are also fatal to this enforcement policy.

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[11] Draft A says, "[i]t appears that the Commission has only applied the doctrine of intercircuit nonacquiescence to this regulation." Draft A at 33.

A third element of the policy is FEC's interpretation of *Buckley*'s major-purpose test. In *PAC-Status 2*, FEC declined to adopt a rule for the major-purpose test, declaring that "the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct." *Id.* at 5601. FEC's vague and overbroad enforcement policy requires "a fact intensive inquiry" weighing vague and overbroad factors (with undisclosed weight) and "investigations into the conduct of specific organizations that may reach well beyond publicly available statements," including all an organization's "spending on Federal campaign activity" (not limited to spending on regulable activity) and other spending, as well as public and non-public statements, including statements to potential donors. *Id.*

PAC-Status 2 also indicated that FEC would consider other factors in its ad hoc, totality-of-the-circumstances, major-purpose test when it discussed its application of the policy to some 527 organizations in previous investigations. 72 Fed. Reg. at 5603-04. These included the fact that an entity spent much of its money "on advertisements directed to Presidential *battleground States* and direct mail *attacking* or expressly advocating," *id.* at 5605 (emphasis added), the fact that groups ceased activity after an election, *id.*, and the fact that they didn't make disbursements in state and local races. *Id.* In addition, FEC thought that it could determine a 527 group's major purpose from internal planning documents and budgets, *id.*, which would normally be protected by the First Amendment privacy right and were only obtained because the organization was subjected to a burdensome, intrusive investigation (which this approach encourages). Major purpose was even based on a private thank-you letter to a donor,

after the donation had already been made. *Id.*

The appellate court held that "the Commission, in its [ad-hoc, case-by-case] policy, adopted a sensible approach to determining whether an organization qualifies for PAC status." App.29-30a. The court's analysis reveals its misunderstanding of the jurisprudence.

A. The Holding Conflicts With Other Circuit Decisions.

The appellate panel's holding conflicts with another Fourth Circuit panel in *Leake*, which held that major purpose "is best understood as an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," 525 F.3d at 287 (emphasis added). That approach would examine how much an advocacy group spends on express-advocacy "independent expenditures" compared to its total disbursements in a particular year to determine if the group was a "political committee" for that year.[12] If over fifty percent of a group's expenditures were for express advocacy (or for FECA "contributions"), then the major purpose of the group would be "nominating or electing candidates," *Buckley*, 424 U.S. at 79, and PAC status could be imposed. There would be no examination of the non-regulable factors that FEC includes in its enforcement policy.

The appellate panel's holding also conflicts with another Fourth Circuit panel in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), which held that the "major purpose" must be "engaging in *express advocacy*," 168 F.3d at 712 (emphasis in original), which clearly

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[12] *See FEC v. GOPAC*, 917 F. Supp. 851, 852 (D.D.C. 1996) (PAC-status determination done by particular year).

requires that the activity considered to determine major purpose must be *regulable* election-related activity.[13]

The appellate panel's holding also conflicts with *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), which took a similar objective approach, relying on *MCFL* for how to determine PAC status, *id.* at 1152:

> In *MCFL,* the Court suggested two methods to determine an organization's "major purpose": (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates. 479 U.S. at 252, 107 S. Ct. 616 n. 6 (noting that MCFL's "central organizational purpose [wa]s issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates"); *see id.* at 262, 107 S. Ct. 616 (noting that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee").

The cited "independent spending" at issue in *MCFL* was magic-words express advocacy. *See MCFL*, 479 U.S. at 249. In the present case, FEC's enforcement

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[13] *See also Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (*affirming Florida Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. Dec. 15,1999) ("organizations whose major purpose is engaging in 'express advocacy,'" *id.* at *4)).

policy conflicts with these bright-line tests for PAC status, and the appellate court's holding conflicts with these decisions.

While other circuit courts have recognized the major-purpose test,[14] only *Leake*, *Bartlett*, and *Coffman*, *supra*, provide guidance on what *activities* may be considered in determining major purpose beyond what *MCFL* provided, *see supra*. And their guidance conflicts with FEC's policy.

This issue is hotly debated among those affected by it, as may be seen in the comments on how major purpose should be determined in response to FEC's notice of proposed rulemaking (ending in FEC's decision in *PAC-Status 2* not to make a rule). *See* 69 Fed. Reg. 68056. And Professor Foley has published an article on the subject. *See* Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. Ky. L. Rev. 341 (2004). But this Court's guidance is required to resolve the

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[14] *See United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392-93 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Florida Right to Life*, 238 F. 3d 1288 (*affirming* 1999 WL 33204523); *Colorado Right to Life,* 498 F.3d at 1153-54; *MCCL*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012). Federal district courts have also addressed the test. *See*, *e.g.*, *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171 (D. Me. 1999); *GOPAC*, 917 F. Supp. 851; *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75 (1978). But other courts contest whether there *is* a major-purpose test. *See infra* at footnotes 16-17 and accompanying text.

confusion.[15]

B. The Holding Conflicts With Decisions of This Court.

The appellate court's holding clearly conflicts with this Court's bright-line approach to determining "major purpose," which provides no encouragement to intrusive investigations and permits ready determination of major purpose. Major purpose may be determined by either an entity's expenditures, *MCFL*, 479 U.S. at U.S. at 262 (major-purpose calculation looks at express-advocacy independent expenditures in relation to total expenditures), or by the organization's central

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[15] Confusion about PAC status and standards in the circuits is particularly evident in *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006) ("*ARLC*"), in which the Ninth Circuit approved the imposition of PAC-style burdens on an *MCFL*-corporation, which *MCFL* forbade, 479 U.S. at 262-64, 253-54. *ARLC* said the burdens (imposed on groups making state-defined "electioneering communications") were "not particularly onerous," 441 F.3d at 791, because they did not "limit the amount that may be contributed to, or spent by, the entity," *id.* But Alaska imposed the same registration and periodic reporting requirements imposed on state PACs, required disclosure of *all* transactions, forbade corporate contributions, and required disbanding to discontinue reporting obligations—all of which are PAC-style burdens, not the one-time reporting of a regulated expenditure approved in *MCFL* for entities lacking the major purpose of nominating or electing candidates, 479 U.S. at 252-55. *ARLC* conflicts with *Getman*, 328 F.3d 1088, which noted that *MCFL* "recognized that reporting and disclosure requirements," at issue in *ARLC*, "are more burdensome for multi-purpose organizations . . . than for political action committees whose sole purpose is political advocacy," *id.* at 1101.

purpose revealed in its organic documents, *id.* at 252 n.6 ("[O]n this record . . . MCFL['s] . . . central organizational purpose is issue advocacy."). The first test determines major purpose based on "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287, i.e., true "contributions" and "expenditures" would be counted. The second test requires an examination of the entity's organic documents to determine if there is an express intention to operate as a political committee, e.g., by being designated as a "separate segregated fund" (an internal "PAC") under 2 U.S.C. 441b(2)(c).

Another reason for granting certiorari is to reaffirm, not only *how* major purpose is determined, *see supra*, but also that there *is* a major-purpose test and that it *controls* on which organizations PAC-status may be imposed. There is a split in the circuits on this issue. On one side are the courts recognizing the major-purpose test (in varying degrees of precision): the Second, Fourth, Seventh, Eighth, Ninth (previous panels), Tenth, Eleventh (previous panel), and D.C. Circuits.[16]

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[16] *See FEC v. Survival Educ. Fund,* 65 F.3d 285, 295 (2d Cir. 1995); *United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972); *Leake*, 525 F.3d 274, 287 (4th Cir.); *Brownsburg Area Patrons Affecting Change,* 137 F.3d at 505 n.5 (7th Cir. 1998); *MCCL*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012); *California Pro-Life Counsel v. Randolph*, 507 F.3d 1172, 1177 (9th Cir. 2007); *California Pro-Life Council v. Getman*, 328 F.3d at 1101 n.16 (9th Cir. 2003); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677-78 (10th Cir. 2010); *Fla. Right to Life*, 238 F.3d at 1289 (11th Cir. 2001) (*affirming Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL

On the other side are the First, Ninth, and Eleventh (recent panel) Circuits, which question whether there is a test, ignore it, or deny it exists.[17]

C. The Court's Justification Is Erroneous.

The appellate court failed to comprehend the need for a bright-line test that could be easily understood and quickly applied without resorting to expensive, intrusive, time-consuming investigations (based on vague, overbroad criteria) and after-the-fact determinations that a group that thought it was not a PAC was a PAC (and so in violation of numerous PAC requirements). FEC's ad-hoc, case-by-case approach chills free speech and association.

33204523 (M.D. Fla. 1999)); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th Cir. 1982); *Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir. 2010); *Machinists Nonpartisan Political League*, 655 F.2d at 392 (D.C. Cir. 1981); *FEC v. EMILY's List,* 581 F.3d 1, 16 n.15 (D.C. Cir. 2009). *See also National Federation of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1330 (S.D. Ala. 2002); *Richey*, 120 F. Supp. 2d at 1327 (S.D. Ala. 2000); *South Carolina Citizens for Life v. Davis*, slip op., No. 3:00-0124-19 (D.S.C. 2000) (opinion and order granting preliminary injunction); *Volle*, 69 F. Supp. 2d at 174-77 (D. Me. 1999); *New York Civil Liberties Union*, 459 F. Supp. at 83-85 (S.D. N.Y. 1978).

[17] *See National Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011); *ARLC*, 441 F.3d at 786-94; *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1011-12 (9th Cir. 2010); *National Org. for Marriage v. Secretary*, No. 11-14193, 2012 WL 1758607 (11th Cir. May 17, 2012).

D. FEC's Application of Its Policy Reveals the Policy's Vagueness and Chilling Effect.

A recent FEC document reveals the vagueness and chilling effect of the FEC PAC-status policy from an inside view. The Free-Speech Statement (on Advisory Opinion 2012-11, by Commissioners Hunter, McGahn, and Petersen, includes a discussion captioned "inconsistent application of section 100.22(b) and the major purpose test makes determining whether a group is a political committee difficult for groups who wish to speak and disclose." Free-Speech Statement at 20 (capitalization altered). The Statement explains the problem with the FEC's current policy, as sketched herein, and pointed to another advisory-opinion document as setting out their view: "Draft C contains our view of what that test entails—review of a group's central organizational purpose and a comparison of that group's spending on behalf of candidates with its overall spending to determine whether a preponderance of the group's spending was for the for the election or defeat of federal candidates. Under current jurisprudence, the Commission can go no further than that." *Id.* at 23 (footnotes omitted).

In sum, because FEC's enforcement policy goes beyond any permissible construction of the major-purpose test and relies on flawed regulations and policies, is unconstitutionally vague and overbroad, and is "in excess of the statutory . . . authority . . ." of FEC, it is void under 5 U.S.C. 706.

Conclusion

For the reasons stated, this Court should grant this petition.

Respectfully submitted,

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Appendix

[***Editor's Note:*** *Page numbers from the published opinion [*] and the reported citation, 681 F.3d 544 [**], are indicated.*]

[Doc. 41, filed June 12, 2012]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE REAL TRUTH ABOUT ABORTION, INC., f/k/a The Real Truth About Obama, Inc.,
Plaintiff–Appellant,
v.
FEDERAL ELECTION COMMISSION; UNITED STATES DEPARTMENT OF JUSTICE,
Defendants–Appellees.

No. 11-1760

DEMOCRACY 21; THE CAMPAIGN LEGAL CENTER,
Amici Supporting Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, Chief District Judge.
(3:08-cv-00483-JRS)

Argued: March 21, 2012

Decided: June 12, 2012

Before NIEMEYER, GREGORY, and FLOYD, Circuit Judges.[*2]

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Gregory and Judge Floyd joined.

COUNSEL

[**545] **ARGUED:** James Bopp, Jr., THE BOPP LAW FIRM, Terre Haute, Indiana, for Appellant. Adav Noti, FEDERAL ELECTION COMMISSION, Washington, D.C., for Appellees. **ON BRIEF:** Michael Boos, LAW OFFICE OF MICHAEL BOOS, Fairfax, Virginia; Richard E. Coleson, Kaylan L. Phillips, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellant. Anthony Herman, General Counsel, David Kolker, Associate General Counsel, Harry J. Summers, Assistant General Counsel, FEDERAL ELECTION COMMISSION, Washington, D.C.; Neil H. MacBride, United States Attorney, Alexandria, Virginia; Tony West, Assistant Attorney General, Michael S. Raab, Daniel Tenny, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.,for Appellees. Fred Wertheimer, DEMOCRACY 21, Washington, D.C.; Donald J. Simon, SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP, Washington, D.C.; J. Gerald Hebert, Tara Malloy, Paul S. Ryan, THE CAMPAIGN LEGAL CENTER, Washington, D.C., for Amici Supporting Appellees.

OPINION

NIEMEYER, Circuit Judge:

The Real Truth About Abortion, Inc. (formerly known as The Real Truth About Obama, Inc.), a Virginia non-profit corporation organized under § 527 of the Internal Revenue Code to provide "accurate and truthful information about the public policy positions of Senator Barack Obama," commenced this action against the Federal Election Commission [*3] and the Department of Justice, contending that it was "chilled" from posting information about then-Senator Obama because of the vagueness of a Commission regulation and a Commission policy relating to whether Real Truth has to make disclosures or is a "political committee" (commonly referred to as a political action committee or PAC). Real Truth asserts that it is not subject to regulation but fears the Commission could take steps to regulate it because of the vagueness of 11 C.F.R. § 100.22(b) and the [**546] policy of the Commission to determine whether an organization is a PAC by applying the "major purpose" test on a case-by-case basis, as published at 72 Fed. Reg. 5595 (Feb. 7, 2007). It alleges that the regulation and policy are unconstitutionally broad and vague, both facially and as applied to it, in violation of the First and Fifth Amendments.

On cross-motions for summary judgment, the district court found both the regulation and the policy constitutional. And, applying the "exacting scrutiny" standard applicable to disclosure provisions, we affirm.

I

Real Truth was organized on July 24, 2008, as an "issue-adversary '527' organization" under § 527 of the Internal Revenue Code. In its IRS filing, Real Truth stated that its purpose was to provide truthful information about the public positions taken by Senator

Barack Obama but that it would not "expressly advocate the election or defeat" of any political candidate or "make any contribution" to a candidate.

Within a few days of its incorporation, Real Truth commenced this action challenging three of the Commission's regulations implementing the Federal Election Campaign Act ("FECA")—11 C.F.R. § 100.22(b) (defining when a communication *expressly advocates* the election or defeat of a clearly identified candidate); 11 C.F.R. § 100.57(a) (defining contributions for certain purposes under FECA); and 11 C.F.R. [*4] § 114.15 (regulating the use of corporate or union funds for "electioneering communications"). In addition, Real Truth challenged the Commission's policy of determining PAC status by using a "major purpose" test on a case-by-case basis. It asserted that these regulations and the policy were unconstitutional, facially and as applied, in that they were overbroad and vague, in violation of the First and Fifth Amendments to the Constitution.

Real Truth's as-applied challenge was mounted in the context of two radio advertisements it intended to air concerning then-candidate Obama's positions on abortion. The first ad, entitled "Change," states:

> (Woman's voice): Just what is the real truth about Democrat Barack Obama's position on abortion?
>
> (Actor's voice mimicking Obama's voice) Change. Here is how I would change America . . . about abortion:
>
> • Make taxpayers pay for all 1.2 million abortions performed in America each year
>
> • Make sure that minor girls' abortions are kept secret from their parents

> • Make partial-birth abortion legal
>
> • Give Planned Parenthood lots more money to support abortion
>
> • Change current federal and state laws so that babies who survive abortions will die soon after they are born
>
> • Appoint more liberal Justices on the U.S. Supreme Court
>
> [*5] One thing I would not change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.
>
> (Woman's voice). Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?

The second ad, entitled "Survivor," reads:

> (Nurse) The abortion was supposed to kill him, but he was born alive. I couldn't bear to follow hospital policy and leave him on a cold counter to die, so I held and rocked him for 45 minutes until he took his last breath.
>
> [**547] (Male voice) As an Illinois Democrat State Senator, Barack Obama voted three times to deny lifesaving medical treatment to living, breathing babies who survive abortions. For four years, Obama has tried to cover-up his horrendous votes by saying the bills didn't have clarifying language he favored. Obama has been lying. Illinois documents from the very committee Obama chaired show he voted against the bill that did contain the clarifying language he says he favors.
>
> Obama's callousness in denying lifesaving

> treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause.

Real Truth alleged that it planned to spend over $1,000 to air these advertisements during the 60-day period immediately before the 2008 general election and that some of this money would be raised through the circulation of a fundraising letter soliciting contributions to "get the word out" regard-[*6]ing then-Senator Obama's views on abortion. In its complaint, it expressed the fear that these expenditures might be construed as "independent expenditures" under 2 U.S.C. § 431(17) and 11 C.F.R. § 100.22(b), subjecting it to disclosure requirements and potentially making it a PAC subject to further regulation.

Real Truth sought a preliminary injunction enjoining enforcement of the challenged regulations and policy against its "intended activities" and against others similarly situated, and the district court denied Real Truth's motion. On appeal, we affirmed the district court's denial of the injunction, applying the preliminary injunction standard announced in *Winter v. Natural Resources Defense Council,* 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed.2d 249 (2008), and holding that Real Truth had not carried its burden of showing a likelihood of success, as well as showing the other requirements for a preliminary injunction. *Real Truth About Obama v. Fed. Election Comm'n,* 575 F.3d 342, 351–52 (4th Cir.2009). Real Truth filed a petition for a writ of certiorari in the Supreme Court.

While Real Truth's petition for a writ of certiorari was pending, the Supreme Court decided *Citizens United v. Federal Election Commission,* ——U.S. ——, 130 S. Ct. 876, 175 L. Ed.2d 753 (2010), striking down,

on First Amendment grounds, a provision of the Bipartisan Campaign Reform Act ("BCRA") banning corporations and labor unions from using their general treasury funds for electioneering communications. Based on its decision, the Court granted Real Truth's petition for certiorari, vacated this court's judgment, and remanded the case for further consideration. *Real Truth About Obama, Inc. v. Fed. Election Comm'n,* —— U.S. ——, 130 S. Ct. 2371, 176 L. Ed.2d 764 (2010).

Also in the interim, the D.C. Circuit decided *EMILY's List v. Federal Election Commission,* 581 F.3d 1 (D.C.Cir. 2009), which struck down certain aspects of 11 C.F.R. § 100.57, also the subject of Real Truth's challenge in this court, leading the [*7] Commission to announce that it would cease enforcement of that regulation.

On remand from the Supreme Court, we reissued the portions of our original decision "stating the facts and articulating the standard for the issuance of preliminary injunctions" and remanded the remaining issues to the district court for reconsideration in light of the Supreme Court's decision in *Citizens United. Real Truth About Obama, Inc. v. Fed. Election Comm'n,* 607 F.3d 355 (4th Cir. 2010) (per curiam).

On remand, the parties agreed that Real Truth's challenges to 11 C.F.R. § 114.15 and 11 C.F.R. § 100.57 had become moot. And on Real Truth's remaining challenges, [**548] the district court granted summary judgment to the Commission and the Department of Justice, holding that 11 C.F.R. § 100.22(b) and the Commission's case-by-case policy for determining whether an organization was a PAC were constitutional, both facially and as applied to Real Truth. More particularly, the court found that § 100.22(b) was

consistent with the "appeal-to-vote" test articulated in *Federal Election Commission v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed.2d 329 (2007), and that the Commission was entitled to use a multifactor approach on a case-by-case basis for determining PAC status because "ascertaining an organization's single major purpose is an inherently comparative task and requires consideration of the full range of an organization's activities." *Real Truth About Obama, Inc. v. Fed. Election Comm'n,* 796 F. Supp. 2d 736, 746, 751 (E.D. Va.2011).

From the district court's judgment, dated June 16, 2011, Real Truth filed this appeal.

II

At the outset, we address Real Truth's contention that, in reviewing the Commission's regulation and policy, we should apply the strict scrutiny standard. Real Truth argues that the [*8] regulation and policy place onerous burdens on speech similar to the burdens to which the Supreme Court applied strict scrutiny in *Citizens United,* 130 S. Ct. at 898 (finding that 2 U.S.C. § 441b, restricting the amount of money a corporation could independently spend on political communication, "silenced entities whose voices the Government deems to be suspect" and therefore should be reviewed under the strict scrutiny standard).

The Commission contends instead that because the challenged regulation and policy only implicate disclosure requirements and do not restrict either campaign activities or speech, we should apply the less stringent "exacting scrutiny" standard. Under this standard, the government must demonstrate only a "substantial relation" between the disclosure requirement and "suffi-

ciently important government interest."[1] *Citizens United,* 130 S. Ct. at 914 (internal quotation marks omitted).

Regulation 100.22(b), which Real Truth challenges as too broad and vague, implements the statutory definition of "independent expenditure," 2 U.S.C. § 431(17), which in turn determines whether a person must make disclosures as required by 2 U.S.C. § 434(c). The definition could also contribute to the determination of whether Real Truth is a PAC because it is an organization with expenditures of more than $1,000, which would impose not only disclosure requirements, but also organizational requirements. *See SpeechNow.org v. Fed. Election Comm'n,* 599 F.3d 686 (D.C. Cir. 2010) (en banc). Similarly, the Commission's policy for applying the "major purposes" test to organizations, which Real Truth also challenges, would also determine whether [*9] Real Truth is a PAC, again implicating disclosure and organizational requirements.

Such disclosure and organizational requirements, however, are not as burdensome on speech as are limits imposed on campaign activities or limits imposed on contributions to and expenditures by campaigns. [**549] Indeed, the Supreme Court has noted that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Buckley v. Valeo,* 424

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[1] Real Truth appears to argue in the alternative that if exacting scrutiny does apply, then it must be a "high" version of that standard, rather than a "complaisant" one. This hybrid standard finds no support in the relevant case law, however, which has consistently applied only one type of exacting scrutiny.

U.S. 1, 68, 96 S. Ct. 612, 46 L. Ed.2d 659 (1976); *see also Fed. Election Comm'n v. Massachusetts Citizens for Life,* 479 U.S. 238, 262, 107 S. Ct. 616, 93 L. Ed.2d 539 (1986). Accordingly, an intermediate level of scrutiny known as "exacting scrutiny" is the appropriate standard to apply in reviewing provisions that impose disclosure requirements, such as the regulation and policy. *See Buckley,* 424 U.S. at 64, 96 S. Ct. 612; *see also Citizens United,* 130 S. Ct. at 914 (applying the exacting scrutiny standard in reviewing certain disclosure provisions of the BCRA).

Real Truth's reliance on the Court's application of strict scrutiny in *Citizens United* is misplaced. In its brief, Real Truth repeatedly notes the *Citizens United* majority's reference to "onerous" burdens on PAC speech, which would ordinarily be subject to strict scrutiny. While it is true that the Court used the word "onerous" in describing certain PAC-style obligations and restrictions, it did so in a context significantly different from the one facing Real Truth. The regulation invalidated in *Citizens United,* 2 U.S.C. § 441b, required corporations to set up a separate PAC with segregated funds before making any direct political speech. These corporate PACs were subject to several limitations on allowable contributions, including a prohibition on the acceptance of funds from the corporation itself. *See* 2 U.S.C. §§ 441a(a)(5), 441b(b)(4). The Court accordingly held that the option to create a separate corporate PAC did not alleviate the burden imposed by § 441b *on the corporation's own speech.* In contrast, the PAC disclosure requirements at issue here neither [*10] prevent Real Truth from speaking nor "impose [a] ceiling on campaign-related activities." *Buckley,* 424 U.S. at 64, 96 S. Ct. 612. Indeed, the

Court distinguished its application of the strict scrutiny standard to expenditure restrictions from the exacting scrutiny standard applicable to disclosure requirement provisions, stating:

> Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Citizens United, 130 S. Ct. at 914 (internal quotation marks and citations omitted).

In sum, we conclude that even after *Citizens United,* it remains the law that provisions imposing disclosure obligations are reviewed under the intermediate scrutiny level of "exacting scrutiny." *See Doe v. Reed,* ——U.S. ——, 130 S. Ct. 2811, 2818, 177 L. Ed.2d 493 (2010) (applying exacting scrutiny to disclosure law relating to ballot referenda); *SpeechNow.org,* 599 F.3d at 696 (applying exacting scrutiny to PAC disclosure obligations under FECA); *Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 55–57 (1st Cir. 2011) (applying exacting scrutiny to PAC disclosure obligations under state law). We will accordingly review the Commission's regulation 100.22(b) and its policy for determining the major purpose of an organization under the exacting scrutiny standard.

III

Turning to the challenge of 11 C.F.R. § 100.22, Real Truth contends that the regulation's second definition of "expressly advocating," as contained in subsection (b), is fatally broader [*11] and more vague than the

[**550] restrictions imposed on the definition of "expressly advocating" by *Buckley,* 424 U.S. at 44 & n. 52, 96 S. Ct. 612, which are codified in subsection (a).

Regulation 100.22 defines "expressly advocating" as the term is used in 2 U.S.C. § 431(17), which in turn defines "independent expenditure" as an expenditure by a person "*expressly advocating* the election or defeat of a clearly identified candidate" and not made by or in coordination with a candidate or political party. (Emphasis added). Subsection (a) defines "expressly advo-cating" in the manner stated by the Supreme Court in *Buckley* and thus includes communications that use phrases "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate, 11 C.F.R. § 100.22(a)—words such as "vote for," "elect," "defeat," or "reject," which are often referred to as the express advocacy "magic words." *See McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 126, 124 S. Ct. 619, 157 L. Ed.2d 491 (2003) (citing *Buckley,* 424 U.S. at 44 & n. 52, 96 S. Ct. 612). Subsection (b), on the other hand, defines "expressly advocating" more contextually, without using the "magic words." This subsection, which is the subject of Real Truth's challenge, provides in relevant part:

> Expressly advocating means any communication that—
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only

one meaning; and

[*12] (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

A

Real Truth first challenges § 100.22(b) as facially overbroad. The Commission's approach of defining "expressly advocating" with the magic words of *Buckley* in subsection (a) and with their functional equivalent in subsection (b) was upheld by the Supreme Court in considering a facial over-breadth challenge to the BCRA, which included a provision defining express advocacy for purposes of electioneering communications. *See McConnell,* 540 U.S. at 189–94, 124 S. Ct. 619 (2003), *overruled in part by Citizens United,* 130 S. Ct. 876.[2] In rejecting the challenge, the *McConnell* Court noted that *Buckley*'s narrow construction of the FECA to require express advocacy was a function of the vagueness of the original statutory definition of "expenditure," not an absolute First Amendment imperative. *Id.* at 191–92, 124 S. Ct. 619. The Court accordingly held that Congress could permissibly regulate not only communications containing the

[2] In 2001, we held that § 100.22(b) was unconstitutional because it "shift[ed] the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation."*Va. Soc'y. for Human Life, Inc. v. Fed. Election Comm'n,* 263 F.3d 379, 392 (4th Cir.2001) (internal quotation marks omitted). But this conclusion can no longer stand, in light of *McConnell* and *Federal Election Commission v. Wisconsin Right to Life,* 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed.2d 329 (2007).

"magic words" of *Buckley,* but also communications that were "the functional [**551] equivalent" of express advocacy. *Id.* at 193, 206, 124 S. Ct. 619.

Later, in *Federal Election Commission v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed.2d 329 (2007), the Chief Justice's control-[*13]ling opinion further elaborated on the meaning of *McConnell*'s "functional equivalent" test. The Chief Justice held that where an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," it could be regulated in the same manner as express advocacy. *Wisconsin Right to Life,* 551 U.S. at 470, 127 S. Ct. 2652. The Chief Justice explicitly rejected the argument, raised by Justice Scalia's concurring opinion, that the only permissible test for express advocacy is a magic words test:

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

Id. at 474 n. 7, 127 S. Ct. 2652 (internal quotation marks and citations omitted).

Contrary to Real Truth's assertions, *Citizens United* also supports the Commission's use of a functional

equivalent test in defining "express advocacy." In the course of striking down FECA's spending prohibitions on certain corporate election expenditures, the *Citizens United* majority first considered whether those regulations applied to the communications at issue in the case. 130 S. Ct. at 888–96. Using *Wisconsin Right to Life* 's "functional equivalent" test, the Court concluded that one advertisement—*Hillary: The Movie*—qualified as the functional equivalent of express advocacy because it was "in essence . . . a feature-length negative advertisement that urges viewers to vote against Senator [Hillary] Clinton for Presid-[*14]ent." *Citizens United,* 130 S. Ct. at 890. But more importantly for our decision, the Court also upheld BCRA's disclosure requirements for all electioneering communications—including those that are *not* the functional equivalent of express advocacy. *Id.* at 914–16 ("We reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy").[3] In this

[3] We take the registration and organizational requirements for political committees to be akin to the disclosure requirements such that, as a constitutional matter, they can be regulated regardless of whether they contain express advocacy or its functional equivalent. *See Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 54–55 & n. 29 (1st Cir. 2011) (reasoning that "Maine's requirement that non-major-purpose PACs register with the Commission" was "first and foremost a disclosure provision" and that "in light of *Citizens United* . . . the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws"); *SpeechNow.org,* 599 F.3d at 694–95 (noting that after *Citizens United,* a group intending to make independent expenditures would be subject only to PAC disclosure

portion of the opinion, joined by eight Justices, the Court explained that because disclosure "is a less restrictive alternative to more comprehensive regulations of speech," mandatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate [**552] advocacy and "only pertain to a commercial transaction." *Id.* at 915. If mandatory disclosure requirements are permissible when applied to ads that merely *mention* a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible.

B

In addition to its overbreadth argument, Real Truth argues that even if express advocacy is not limited to communications using *Buckley's* magic words, § 100.22(b) is nonetheless unconstitutionally vague. Here again, however, Real Truth's arguments run counter to an established Supreme Court prece-[*15] dent. The language of § 100.22(b) is consistent with the test for the "functional equivalent of express advocacy" that was adopted in *Wisconsin Right to Life,* a test that the controlling opinion specifically stated was not "impermissibly vague." *Wisconsin Right to Life,* 551 U.S. at 474 n. 7, 127 S. Ct. 2652. Moreover, just as the "functional equivalent" test is objective, so too is the similar test contained in § 100.22(b). *See id.* at 472, 127 S. Ct. 2652 ("To the extent this evidence goes to WRTL's subjective intent, it is again irrelevant"); Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) ("[T]he subjective

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requirements if the FEC determined that it was a PAC).

intent of the speaker is not a relevant consideration").

Both standards are also restrictive, in that they limit the application of the disclosure requirements solely to those communications that, in the estimation of any reasonable person, would constitute advocacy. Although it is true that the language of § 100.22(b) does not exactly mirror the functional equivalent definition in *Wisconsin Right to Life*—e.g., § 100.22(b) uses the word "suggestive" while *Wisconsin Right to Life* used the word "susceptible"—the differences between the two tests are not meaningful. Indeed, the test in § 100.22(b) is likely narrower than the one articulated in *Wisconsin Right to Life,* since it requires a communication to have an "electoral portion" that is "unmistakable" and "unambiguous." 11 C.F.R. § 100.22 (b)(1).

Real Truth relies heavily on our decision in *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274 (4th Cir.2008), where we held North Carolina's campaign finance statute unconstitutional, to argue that § 100.22(b) is likewise unconstitutional. But our holding in *Leake* is materially distinguishable. First, we held there that the North Carolina statute was unconstitutional because the terms of the statute that defined express advocacy were "clearly susceptible to *multiple interpretations.*" 525 F.3d at 283-84 (emphasis added) (internal quotation marks omitted). In contrast, § 100.22(b) applies solely to communications that "could *only* be interpreted by [*16] a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" and where "[r]easonable 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." (Emphasis added).

Second, the North Carolina provision in *Leake* regulated all electoral speech, including, potentially, issue advocacy. To resolve whether such communications could constitutionally be regulated, we articulated two requirements. First, because the regulation covered electoral speech broadly defined, we applied the requirement in *Wisconsin Right to Life,* 551 U.S. at 474 n. 7, 127 S. Ct. 2652, that it fulfill the statutory definition of "electioneering communication" in [**553] 2 U.S.C. § 434(f)(3)(A)(i), which, we noted, "refers to a 'clearly identified candidate' within sixty days of a general election or thirty days of a primary election." 525 F.3d at 282. Second, to narrow the alternative definition of "express advocacy" in the North Carolina statute, we relied on the functional-equivalent test developed in *Wisconsin Right to Life,* 551 U.S. at 469–70, 127 S. Ct. 2652. *Id.* While the functional equivalent test that we applied to narrow the North Carolina definition of express advocacy was drawn from the functional-equivalent test in *Wisconsin Right to Life* (which itself was evaluating an electioneering communication provision), the Supreme Court has recognized use of the functional-equivalent test to define "express advocacy" wherever the term is used in the election laws. *See, e.g., Citizens United,* 130 S. Ct. at 915. In contrast, in the case before us, "express advocacy" is a component of an "independent expenditure," regulated under § 432(c)(1) and § 431(17) and thus may be defined by applying the functional-equivalent test, precisely as Regulation 100.22(b) has done. Because the "electioneering communications" requirements of § 434(f)(3)(A)(i) are not statutorily relevant to "independent expenditures," we therefore need not apply those requirements applied in *Leake* when

considering "express advocacy" in the context of independent expenditures.

[*17] Finally, our opinion in *Leake* emphasized the importance of BCRA's electioneering communication definition in minimizing the potential vagueness of campaign finance regulations. *Leake,* 525 F.3d at 282. Importantly, however, the North Carolina statute at issue in *Leake* imposed a variety of restrictions on campaign speech, including limits on acceptable contributions and expenditures. Again in contrast, following *Citizens United* § 100.22(b) only implements *disclosure* requirements. The Supreme Court has routinely recognized that because disclosure requirements occasion a lesser burden on speech, it is constitutionally permissible to require disclosure for a wider variety of speech than mere electioneering. *See, e.g., United States v. Harriss,* 347 U.S. 612, 625, 74 S. Ct. 808, 98 L. Ed. 989 (1954) (upholding disclosure and registration requirements on lobbyists despite Congress' inability to ban lobbying itself); *First Natn'l Bank of Boston v. Bellotti,* 435 U.S. 765, 792 n. 32, 98 S. Ct. 1407, 55 L. Ed.2d 707 (1978) (observing that "[i]dentification of the source of [ballot referendum] advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"). *Citizens United* only confirmed the breadth of Congress' power in this regard. *See Citizens United,* 130 S. Ct. at 915 ("Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election"); *see also Doe v. Reed,* —— U.S. ——, 130 S. Ct. 2811, 2819–22, 177 L. Ed.2d 493 (2010) (upholding disclosure requirement for petition signatories); *Natn'l Org. for*

Marriage v. McKee, 649 F.3d 34, 70 (1st Cir. 2011) (holding that state "express advocacy" definition without an "electioneering communication" limitation was not vague).

C

Real Truth advances several other reasons why it believes § 100.22(b) is impermissibly vague, but each merits only brief discussion.

First, Real Truth argues that the regulation applies a balancing test similar to one in 11 C.F.R. § 114.15 (regulating [*18][**554] corporate and labor organization funds expended for certain electioneering communications), which was invalidated in *Citizens United.* The two provisions are, however, substantially distinguishable. The *Citizens United* Court described § 114. 15 as a "two-part, 11–factor balancing test," making it significantly more complicated on its face than § 100.22(b). *Citizens United,* 130 S. Ct. at 895. The Court also emphasized the censorious nature of § 114.15, which, given its complexity, required that regulated entities "either refrain from speaking or ask the [Commission] to issue an advisory opinion approving of the political speech in question." *Id.* In contrast, § 100.22(b) *does not restrain speech;* it only implicates *the requirement for disclosing* specified information. The Supreme Court's criticism of § 114.15 can hardly cast doubt on § 100.22(b).

Second, Real Truth asserts that because § 100.22 considers "proximity to the election" as a factor, it is inconsistent with *Wisconsin Right to Life.* Again, we disagree. *Wisconsin Right to Life* simply held that the timing of speech cannot be used as a proxy for a speaker's intent. 551 U.S. at 472, 127 S. Ct. 2652 ("To the extent th[e] evidence [regarding the timing of

WRTL's ads] goes to WRTL's subjective intent, it is again irrelevant"). As discussed above, however, subjective intent is already an impermissible consideration under both tests. Moreover, as *Wisconsin Right to Life* noted, by virtue of their time-sensitive statutory definition, "*[e]very* ad covered by [the electioneering communication regulations] will . . . air just before a primary or general election." *Id.* So while considering timing with respect to electioneering communications would prove redundant, a limited reference to whether, for example, an ad airs in an election year, would actually help limit the number of communications that are considered independent expenditures.

Third, Real Truth suggests that the entirety of § 100.22 is vague because the regulation contains certain words, such as "suggestive" and "electoral portion," which are facially vague. [*19] Regardless, however, of whether words might be insufficiently clear when standing alone, we cannot conclude that they render the statute vague when considered in their context. The complete phrase in which these words appear—"[t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning"—is essentially a more stringent version of the relevant language from *Wisconsin Right to Life* 's "functional equivalent" test, which requires that a communication be "susceptible of no [other] reasonable interpretation." If, as the Supreme Court has held, the test in *Wisconsin Right to Life* is not vague, then neither is § 100.22(b).

Fourth and finally, Real Truth argues that § 100.22(b) is vague because the district court and the Commission disagreed as to whether Real Truth's "Change" ad was the functional equivalent of express

advocacy. But this fact proves little because cases that fall close to the line will inevitably arise when applying § 100.22(b). This kind of difficulty is simply inherent in any kind of standards-based test. *Cf. United States v. Williams,* 553 U.S. 285, 306, 128 S. Ct. 1830, 170 L. Ed.2d 650 (2008) ("Close cases can be imagined under virtually any statute. The problem that poses is [not] addressed . . . by the doctrine of vagueness"); *United States v. Wurzbach,* 280 U.S. 396, 399, 50 S. Ct. 167, 74 L. Ed. 508 (1930) (holding that the Federal Corrupt Practices Act was not facially vague because "[w]herever the law draws a line there will be cases very near each other on opposite sides"). If anything, the disagreement to which Real Truth alludes [**555] confirms the Commission's judgment that "Change" does not meet the requirements of § 100.22(b), since both the Commission and the district court are rational minds and § 100.22 applies only *when reasonable people could not disagree* about a communication's status.

At bottom, we conclude that § 100.22(b) is constitutional, facially and as applied to Real Truth's intended advertisements. The regulation is consistent with the test developed in *Wisconsin Right to Life* and is not unduly vague.

[*20] IV

Finally, Real Truth contends that the Commission's policy for applying the "major purpose" test in determining whether an organization is a PAC is unconstitutional because it "weigh[s] various vague and overbroad factors with undisclosed weight." It maintains that the only permissible methods of analyzing PAC status are (1) examining an organization's expenditures to see if campaign-related speech amounts to 50%

of all expenditures; or (2) reviewing "the organization's central purpose revealed by its organic documents."[4]

The FECA defines a "political committee" or PAC, as we have called it, as any "committee, club, association, or other group of persons" that makes more than $1,000 in political expenditures or receives more than $1,000 in contributions during a calendar year. 2 U.S.C. § 431(4)(a). The terms "expenditures" and "contributions" are in turn defined to encompass any spending or fundraising "for the purpose of influencing any election for Federal office." *Id.* §§ 431(8)(A)(i), 431(9)(A)(i).

In *Buckley,* the Supreme Court concluded that defining PACs "only in terms of amounts of annual 'contributions' and 'expenditures'" might produce vagueness issues. Accordingly, [*21] the Court limited the applicability of FECA's PAC requirements to organiza-

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[4] The Commission challenges our right to review this issue, arguing that the 2007 Federal Register Notice announcing its decision not to adopt a regulatory definition of "political committee" is not a "final agency action" under the Administrative Procedure Act, and therefore not subject to judicial review. *See Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed.2d 281 (1997). But we do not take Real Truth's challenge as one limited to the 2007 Notice itself. Rather, Real Truth cites the 2007 Notice and the 2004 Notice of Proposed Rulemaking because those documents explain the Commission's PAC-status enforcement policy. What Real Truth objects to is the Commission's decision to adopt a multi-factored standard for determining when an organization qualifies for PAC status. That choice is undoubtedly a "consummation of the agency's decision-making process" that can determine a party's rights and obligations, namely, the obligations of PAC status. *Id.* at 177–78, 117 S. Ct. 1154 (internal quotation marks omitted).

tions controlled by a candidate or whose "major purpose" is the nomination or election of candidates. *Buckley,* 424 U.S. at 79, 96 S. Ct. 612. An organization that is not controlled by a candidate must therefore register as a PAC if its contributions or expenditures exceed $1,000 and its "major purpose" is the nomination or election of a federal candidate.

Following *Buckley,* the Commission adopted a policy of determining PAC status on a case-by-case basis. *See* Political Committee Status, 72 Fed. Reg. 5595, 5596–97 (Feb. 7, 2007) (the "2007 Notice"). Under this approach, the Commission first considers a group's political activities, such as spending on a particular electoral or issue-advocacy campaign, *see id.* at 5601, and then it evaluates an organization's "major purpose," as revealed by that group's public statements, fundraising appeals, government filings, and organizational documents, *see id.*

[**556] In March 2004, the Commission published a Notice of Proposed Rulemaking that, among other things, requested comments on whether the Commission should adopt a regulatory definition of "political committee" or PAC. *See* Political Committee Status, 69 Fed. Reg. 11,736, 11,743–49 (Mar. 11, 2004). After receiving public comments and holding several hearings, the Commission issued a Final Rule stating that it would not alter its existing method of determining PAC status. *See* Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,056–63 (Nov. 23, 2004).

When the Commission's decision not to adopt a statutory definition of a PAC was challenged in court, the court rejected the plaintiffs' request to require the

Commission to commence a new rulemaking. It found, however, that the Commission had "failed to present a reasoned explanation for its decision" to regulate § 527 organizations through case-by-[*22]case adjudication rather than a rulemaking. *See Shays v. Fed. Election Comm'n,* 424 F. Supp. 2d 100, 117 (D.D.C. 2006) ("*Shays I* "). Therefore, it remanded the case to the Commission "to explain its decision or institute a new rulemaking." *Id.* at 116–17.

The Commission responded in February 2007 by publishing in the Federal Register a "Supplemental Explanation and Justification," as part of the 2007 Notice, where it gave notice of its decision not to promulgate a new definition of "political committee" and discussed the reasons it would not do so but instead would continue to apply a case-by-case approach. 72 Fed. Reg. 5596–97. The Commission stated that "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." *Id.* at 5601. The 2007 Notice also "explain[ed] the framework for establishing political committee status under FECA" and "discusse[d] several recently resolved administrative matters that provide considerable guidance to all organizations regarding . . . political committee status." *Id.* at 5595–96.

Although *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose. And thus the Commission was free to administer FECA political committee regulations either through categorical rules or through individualized adjudications. *See, e.g., SEC v. Chenery Corp.,* 332 U.S. 194, 203, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) ("[T]he choice made between pro-

ceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency").

We conclude that the Commission had good and legal reasons for taking the approach it did. The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of [*23] a group's activities against others. As the district court noted in upholding the case-by-case approach in *Shays v. Federal Election Commission,* 511 F. Supp. 2d 19 (D.D.C. 2007) ("*Shays II* "),

> an organization . . . may engage in many non-electoral activities so that determining its major purpose requires a very close examination of various activities and statements. Or an organization may be engaging in substantial amounts of both federal and non-federal electoral [**557] activity, again requiring a detailed analysis of its various activities.

511 F. Supp. 2d at 31.

The necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted. *See, e.g., Fed. Election Comm'n v. Malenick,* 310 F. Supp. 2d 230, 234–37 (D.D.C. 2004), *rev'd in part,* No. Civ. A. 02–1237(JR), 2005 WL 588222 (D.D.C. Mar. 7, 2005); *Fed. Election Comm'n v. GOPAC, Inc.,* 917 F. Supp. 851, 859, 864–66 (D.D.C. 1996); *see also Shays II,* 511 F. Supp. 2d at 29–31 (holding that the Commission's choice to regulate § 527 groups by determining whether they quali-

fied as political action committees on a case-by-case basis was neither arbitrary nor capricious).

Real Truth's argument that the major purpose test requires a bright-line, two-factor test relies heavily on *Massachusetts Citizens for Life,* 479 U.S. at 263, 107 S. Ct. 616, and *Leake,* 525 F.3d at 289. But neither of these cases can bear the weight Real Truth ascribes to it. In *Massachusetts Citizens for Life,* the Court suggested in dicta (inasmuch as Massachusetts Citizens for Life was not a PAC) that an organization's independent spending could "become so extensive that the organization's major purpose may be regarded as campaign activity." *Massachusetts Citizens for Life,* 479 U.S. at 262, 107 S. Ct. 616. This statement [*24] indicates that the amount of independent spending is a relevant factor in determining PAC status, but it does not imply that the Commission may *only* consider spending. Indeed, the Court in *Massachusetts Citizens for Life* implicitly endorsed the Commission's approach when it examined the entire record to conclude that the plaintiff did not satisfy the "major purpose" test.

And Real Truth's reliance on *Leake* is similarly misplaced. In *Leake,* we described the major purpose test as follows:

> Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under "fair warning" that it may fall within the ambit of *Buckley's* test.

525 F.3d at 289. Like the dicta in *Massachusetts Citizens for Life,* this statement suggests that expenditure ratios and organizational documents are important

considerations when determining whether an organization qualifies as a PAC. The case does not, however, make consideration of any other factors improper. In fact, we specifically declined to determine whether the very same bright-line, two-factor test urged by Real Truth was the only permissible manner in which to apply *Buckley's* major purpose requirement. *Id.* at 289 n. 6, 107 S. Ct. 616.

Thus, although cases since *Buckley* have indicated that certain facts may be particularly relevant when assessing an organization's major purpose, those decisions do not foreclose the Commission from using a more comprehensive methodology.

Despite Real Truth's protestations, we see little risk that the Commission's existing major purpose test will chill political expression.[5] In the First Amendment context, a statute may be [*25] found overbroad if a "substantial number of [the statute's] applications are unconstitutional, judged in [**558] relation to the statute's plainly legitimate sweep." *United States v. Stevens,* ——U.S. ——, 130 S. Ct. 1577, 1587, 176 L. Ed.2d 435 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 n. 6, 128 S. Ct. 1184, 170 L. Ed.2d 151 (2008)). Real Truth has failed to explain why the Commission's test would prevent any party from speaking, especially in view of the fact that the application of the test to find that an organization is a PAC would subject the organization

[5] Real Truth does not assert that the major purpose test is unconstitutional as applied to it. Nor could it, since the Commission has never claimed that Real Truth is a PAC. Real Truth also does not specifically identify any instances in which, in its opinion, the Commission incorrectly categorized an organization as a PAC.

only to "minimal" reporting and organizational obligations. *See SpeechNow,* 599 F.3d at 697–98.

We should note that the class of speakers who would be subject to FECA's PAC regulations would be significantly smaller than the totality of groups that speak on political subjects. In most cases the Commission would only begin to consider a group's "major purpose" after confirming that the group had either made $1,000 in expenditures or received more than $1,000 in contributions. *See* 72 Fed. Reg. at 5603–04. The expenditure or contribution threshold means that some groups whose "major purpose" was indisputably the nomination or election of federal candidates would not be designated PACs. *Cf. Shays II,* 511 F. Supp. 2d at 26–27 (criticizing the Commission's method for determining PAC status as too narrow).

And even if an organization were to find itself subject to a major-purpose investigation, that investigation would not necessarily be an intrusive one. Much of the information the Commission would consider would already be available in that organization's government filings or public statements. If additional information were required, the Commission's Federal Register notices, advisory opinions, and other policy doc-[*26]uments would provide the organization with ample guidance as to the criteria the Commission might consider. In this respect, the Commission's test is again distinguishable from the test we struck down in *Leake,* which "provide[d] absolutely no direction as to how North Carolina determines an organization's 'major purpose' " and was implemented using "unannounced criteria." 525 F.3d at 289–90.

At bottom, we conclude that the Commission, in its policy, adopted a sensible approach to determining

whether an organization qualifies for PAC status. And more importantly the Commission's multi-factor major-purpose test is consistent with Supreme Court precedent and does not unlawfully deter protected speech. Accordingly, we find the policy constitutional.

AFFIRMED

[***Editor's Note:*** *Page numbers from the published opinion [*] and the reported citation,* 796 F. Supp. 2d 736 *[**], are indicated.*]

[Doc. 157, filed June 16, 2011]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

The REAL TRUTH ABOUT OBAMA, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION and United States Department of Justice, Defendant.	Action No. 3:08–CV–483

MEMORANDUM OPINION

This matter comes before the Court on The Real Truth About Obama, Inc.'s [**739] ("RTAO") Motions for Preliminary Injunction and Summary Judgment and the Federal Election Commission's (FEC, "the Commission") and the Department of Justice's (DOJ) Motions for Summary Judgment. Having concluded that *Citizens United v. Federal Election Commission,* —— U.S. ——, 130 S. Ct. 876, 175 L. Ed.2d 753 (2010), has not changed the posture of RTAO's challenges, the

Court grants summary judgment in favor of the FEC and DOJ and accordingly denies both of RTAO's Motions.

I. Statement of the Case

This case comes back to the Court on remand from the Supreme Court and, in turn, the Fourth Circuit. RTAO is a non-profit, Virginia corporation classified as a "political organization," and is thereby exempt from income taxation, under 26 U.S.C. § 527. RTAO believes that the FEC will deem it a "political committee" under Federal Election Campaign Act [*2] (FECA). 2 U.S.C. §§ 431–55.

RTAO sued the FEC and DOJ on July 30, 2008, challenging the constitutionality of FEC regulations at 11 C.F.R. §§ 100.22(b), 100.57, and 114.15, as well as the FEC's policy for determining political committee status. Along with raising facial challenges to the regulations and the FEC's policy, RTAO challenged the constitutionality of the regulations' and policy's application to two RTAO advertisements. RTAO planned to run the first, entitled "Change," as an advertisement on political radio shows within sixty days of the 2008 presidential election. The advertisement reads:

> (Woman's voice) Just what is the real truth about Democrat Barack Obama's position on abortion?
>
> (Obama-like voice) Change. Here is how I would change America . . . about abortion:
>
> • Make taxpayers pay for all 1.2 million abortions performed in America each year
>
> • Make sure that minor girls' abortions are kept secret from their parents
>
> • Make partial-birth abortion legal

> • Give Planned Parenthood lots more money to support abortion
>
> • Change current federal and state laws so that babies who survive abortions will die soon after they are born
>
> • Appoint more liberal Justices on the U.S. Supreme Court
>
> One thing I would *not* change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.
>
> (Woman's voice). Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?
>
> To learn more real truth about Obama, visit www.TheRealTruthAboutObama.com. Paid for by The Real Truth About Obama.

The second advertisement, entitled "Survivor," reads:

> (Nurse) The abortion was supposed to kill him, but he was born alive. I couldn't bear to follow hospital policy and leave him on a cold counter to die, so I held and rocked him for 45 minutes until he took his last breath.
>
> (Male voice) As an Illinois Democrat State Senator, Barack Obama voted three times to *deny* lifesaving medical treatment to living, breathing babies who survive abortions. For four years, Obama has tried to cover-up his horrendous votes by saying the bills didn't have clarifying language he favored. Obama has been lying. Illinois documents from the very committee Obama [**740] chaired show he voted *against* the bill that *did* contain the

> [*3] clarifying language he says he favors.
>
> Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause.
>
> Paid for by The Real Truth About Obama, Inc.

Prior to the 2008 presidential election, RTAO planned to disburse over $1,000 to air these advertisements, which may bring RTAO within the FECA definition of "political committee." *See* 2 U.S.C. § 431(4) (2002).

RTAO also planned to solicit donations with digital communications. One such communication reads:

> Dear x,
>
> I need your help. We're launching a new project to let the public know the real truth about the public policy positions of Senator Barack Obama.
>
> Most people are unaware of his radical pro-abortion views. For example, when he was a state senator in Illinois, he voted against a state bill like the federal Born Alive Infant Protection Act. That bill merely required that, if an abortionist was trying to abort a baby and the baby was born alive, then the abortionist would have to treat that baby as any other newborn would be treated. Under this law, the baby would be bundled off to the newborn nursery for care, instead of being left on a cold table in a backroom until dead. It seems like everyone would support such a law, but as an Illinois State Senator, Obama did not. There are lots of other examples of his radical support for abortion, and we need to get the word out. That's

where you come in.

A new organization has just been formed to spearhead this important public information effort. It's called The Real Truth About Obama. We plan to do some advertising. Since we're not a PAC, there won't be any "vote for" or "vote against" type of ads—just the truth, compellingly told.

A central planned project is directed at the world of the Internet. We've already reserved www.TheRealTruthAboutObama.com to set up a website. Here's the exciting part. The website will feature a weekly postcard "signed" by "BarackObamabortion." Like that? While you are visiting the website, you can send the postcard by email to anyone you designate. What could be easier? ! And the postcards will be done in a catchy, memorable manner—the sort of thing that zips around the Internet. Each postcard will feature well-documented facts about Obama's views on abortion.

The postcards will also send people to the website for more real truth about Obama, but we also plan to do a radio ad to do that too. This radio ad will give the real truth about Obama's abortion position—all properly documented, of course. Notice the "Truth" part of our name.

Of course it takes money to develop, host, and maintain a hot-topic website, and to hire the people who specialize in getting things noticed on the Internet (it's called viral marketing). So we need your help. We need for you to send us money. As much as you can donate. Right away. We need to get the word out. We

> know how. We're ready to roll. Now we need you.
>
> Your friend for truth,
>
> x
>
> [*4] P.S.—Please send your check today. Time is of the essence. Please send the largest gift you can invest in this vital project. Together we can get the word out.

[**741] RTAO planned to solicit over $1,000 worth of donations through communications such as this one, which also might make it a political committee.

On July 30 and August 20, 2008, RTAO moved for separate preliminary injunctions against the FEC and DOJ, urging the Court to prohibit the FEC from enforcing the aforementioned regulations and policy with respect to "Change" and "Survivor." RTAO first argued 11 C.F.R. § 100.22(b), which provides a totality-of-the-circumstances, context-specific definition of "express advocacy," is overbroad and vague.[1] § 100.22(b) clarifies the definition of "expenditure" and "indepen-

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[1] 11 C.F.R. § 100.22(b) provides that a communication "expressly advocates" for a candidate's election or defeat when "taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidate(s) because—

> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."

dent expenditure," limiting those to expenses expressly advocating the election or defeat of a Federal election candidate. *See* 2 U.S.C. §§ 431(9) & (17). In turn, whether an expense is an "independent expenditure" determines whether the expense must be disclosed, and whether an organization makes more than $1,000 in "expenditures" helps determine whether the organization is a political committee.[2] *See* 2 U.S.C. §§ 431(4) & 434(c).

RTAO also contended that the FEC's political committee case-by-case enforcement policy was overbroad and vague. In *Buckley v. Valeo,* the Supreme Court limited the definition of political committee in 2 U.S.C. § 431(4) to organizations "under the control of a candidate" or "the major purpose of which is the nomination or election of a candidate." 424 U.S. 1, 79, 96 S. Ct. 612, 46 L. Ed.2d 659 (1976). The FEC takes a flexible, case-by-case approach to determining whether an organization [*5] is a political committee. It considers whether several factors—such as the organization's level of spending on Federal campaigns, public statements, and fundraising appeals—lead to the conclusion that the organization's major purpose is the election or defeat of a Federal candidate. *See* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 1, 2007). Political committees are subject to disclosure requirements and contribution limits—except where the political committee makes only independent expenditures, in which

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[2] § 100.22(b) also helped implement the ban on corporate and union expenditures at 2 U.S.C. § 441b until the Supreme Court overturned the ban in *Citizens United v. Fed. Election Comm'n. See* —— U.S. ——, 130 S. Ct. 876, 913, 175 L. Ed.2d 753 (2010).

case it may receive unlimited contributions. *See SpeechNow.org v. Fed. Election Comm'n,* 599 F.3d 686 (D.C.Cir. 2010). *See* 2 U.S.C. §§ 434, 441a(a)(1)(C), and 441a(a)(3). Political committees can make unlimited independent expenditures. *See Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 105 S. Ct. 1459, 84 L. Ed.2d 455 (1985).

This Court denied both preliminary injunction motions on September 24, 2008.[3] [**742] Applying the Fourth Circuit's preliminary injunction standards from *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.,* the Court concluded RTAO was unlikely to prevail on any of its four claims. 2008 WL 4416282, at *9–13 (E.D.Va. 2008). *See* 550 F.2d 189 (4th Cir.1977). As to its claim that § 100.22(b) is overbroad and constitutionally vague, the Court concluded that § 100.22(b) implemented "virtually the same test" defining the functional equivalent of express advocacy the Supreme Court enunciated in *Federal Election Commission v. Wisconsin Right to Life, Inc.* 2008 WL 4416282, at *11. *See* 551 U.S. 449, 469–70, 127 S. Ct. 2652, 168 L. Ed.2d 329 (2007). The Court further predicted RTAO's challenge to the FEC's political committee enforcement policy was unlikely to succeed, since case law permitted the Commission to use the factors it did to assess an organization's status. 2008 WL 4416282, at *14.

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[3] RTAO originally challenged FEC regulations at 11 C.F.R. §§ 100.57 and 114.15, but it has withdrawn these challenges. After the D.C. Circuit declared § 100.57(a) unlawful in *Emily's List v. FEC,* the FEC ceased enforcing § 100.57(a) on April 18, 2010. *See* 581 F.3d 1 (D.C.Cir. 2009). The FEC ceased enforcing § 114.15 after the Supreme Court invalidated FECA's ban on corporate independent expenditures in *Citizens United.*

The Court also decided that the balance of [*6] harms and the public interest weighed against granting RTAO injunctive relief. 2008 WL 4416282, at *16.

The Fourth Circuit affirmed this Court's denial of the preliminary injunctions. Finding the *Blackwelder* standard "in fatal tension" with the Supreme Court's decision in *Winter v. Natural Resources Defense Council,* the Fourth Circuit panel upheld this Court's decision using the stricter preliminary injunction standards set out in *Winter*. *The Real Truth About Obama, Inc. v. FEC,* 575 F.3d 342, 346 (4th Cir. 2009). *See Winter,* 555 U.S. 7, 129 S. Ct. 365, 374–76, 172 L. Ed.2d 249 (2008). The panel noted RTAO bore a "heavy burden in showing its likelihood of success," given the stringency of the preliminary injunction standards and the "complicated" and "developing" area of law the motions implicated. 575 F.3d at 349. The panel held RTAO did not carry that burden, for reasons similar to those this Court cited in arriving at the same conclusion.

RTAO filed a petition for writ a certiorari in December 2009. Roughly a month later, the Supreme Court struck down the ban on general treasury corporate and union expenditures as unconstitutional in *Citizens United,* 130 S. Ct. at 913. *See* 2 U.S.C. § 441b (2002). The Court overturned *Austin v. Chamber of Commerce,* which permitted a state-law restriction on corporate expenditures, and *McConnell v. FEC,* which previously upheld the ban at § 441b. 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed.2d 652 (1990); 540 U.S. 93, 209, 124 S. Ct. 619, 157 L. Ed.2d 491 (2003). In striking down § 441b, the Court concluded *Austin's* rationale—limiting the influence of "the corrosive and distorting effects of immense aggregations of wealth" in election

campaigns—did not justify a prohibition on a form of political speech. 130 S. Ct. at 903; *Austin,* 494 U.S. at 660, 110 S. Ct. 1391. Additionally, the Court reasoned that the interest in preventing the appearance of corruption did not justify a ban on corporate and union expenditures, just as the *Buckley* Court had concluded with respect to individual and political committee expenditures. 130 S. Ct. at 908. Finally, the Court summarily dispensed with the argument that [*7] the ban protected shareholders who disagreed with a corporation's decision to make an expenditure on behalf of a particular candidate. *Id.* at 911.

In its petition for writ a certiorari, RTAO posed three questions for the Supreme Court, the first two of which engaged RTAO's assertion that the First Amendment requires special preliminary injunction standards. *See* Cert. Pet. at i, *Real Truth About Obama v. FEC,* 130 S. Ct. 2371, 2009 WL 4953054 (Dec. 16, 2010) (No. 09–724). The Solicitor General's response brief asked the Court to vacate the Fourth Circuit's judgment with respect to RTAO's challenges to §§ 100.57 and 114.15, remand with instructions to [**743] dismiss those claims as moot, and deny the petition in all other respects. Brief for Respondents, *Real Truth About Obama, Inc. v. FEC,* 130 S. Ct. 2371, 2010 WL 1130084 (March 24, 2010) (No. 09–724). On April 26, 2010, the Supreme Court vacated the Fourth Circuit's judgment and remanded "for further consideration in light of [*Citizens United*] and the Solicitor General's suggestion of mootness." *Real Truth About Obama v. FEC,* —— U.S. ——, 130 S. Ct. 2371, 176 L. Ed.2d 764 (2010). The Fourth Circuit remanded to this Court and repeated the Supreme Court's instructions. *Real Truth About Obama v. FEC,* 607 F.3d 355 (4th

Cir.2010).

In addition to seeking preliminary relief, RTAO also moves for summary judgment on its challenges to § 100.22(b) and the FEC's political committee status policy. The DOJ and FEC argue RTAO warrants neither form of relief and moves for summary judgment. The Court agrees with the FEC and DOJ.

II. RTAO's Claims for Preliminary Relief Are Moot

The Commission argues RTAO's claims for preliminary relief are moot. The Court agrees. Federal courts may only adjudicate live cases or controversies. *See Marshall v. Meadows,* 105 F.3d 904, 906 (4th Cir. 1997). A case or controversy is no longer live, and [*8] therefore moot, when there is no active dispute for the court to resolve or the parties lack a "legally cognizable interest" in the outcome. *United States v. Hardy,* 545 F.3d 280, 283 (4th Cir. 2008) (citations omitted). In deciding whether a case is moot, the Fourth Circuit requires the plaintiff to be able to prove his standing throughout the litigation. *Townes v. Jarvis,* 577 F.3d 543, 546 (4th Cir. 2009). *See United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed.2d 479 (1980).

RTAO's claims for preliminary relief are moot. Preliminary relief is not appropriate where permanent relief will issue simultaneously and will immediately bind the parties with respect to any future RTAO advertisements. The purpose of a preliminary injunction lies in preserving the court's power to award meaningful relief after a merits decision during the pendency of litigation. *See* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2947 (2d ed.2010). There will be no such pendent period here.

Additionally, since the election period for which the preliminary injunction would lie has passed, there is no need for the Court to preserve its power to provide meaningful relief. Hence, though RTAO may be entitled to relief for a future election cycle, the passing of the 2008 election means that RTAO is not suffering any injury that preliminary relief can remedy.

This case is analogous to *Independence Party of Richmond County v. Graham,* 413 F.3d 252 (2d Cir. 2005). There, a district court handed down a preliminary injunction specifically requiring a local board of elections to permit non-members of the Independence Party to vote in the party's upcoming primary. *Id.* at 255. The Second Circuit, entertaining an appeal of the preliminary injunction after the primary election, concluded the appeal was moot. *Id.* As far as the party's request for preliminary relief was concerned, the controversy was mooted by the passing of the primary election. *Id.* at 255. As the panel explained, the primary election was an [*9] event occurring during the appeal's pendency that made it "impossible for the court to grant any effectual relief whatever to the prevailing party," requiring the court to "dismiss the case, rather than issue an advisory opinion." *Id.* (citations omitted). Similarly, the opportunity for the Court to award preliminary relief to [**744] RTAO has passed, and the Court declines to issue an advisory opinion regarding its claims for preliminary relief.

By its own admission, RTAO seeks not merely two preliminary injunctions but special preliminary injunction standards governing First Amendment claims in the area of political speech. No matter how convincingly RTAO argues in favor of such standards, the Court could not issue them, since the Fourth

Circuit reissued the portion of its first opinion applying *Winter's* preliminary injunction standards to this case. 607 F.3d 355. *See Real Truth About Obama,* 575 F.3d at 345–47. Even if the Court could fashion the special standards RTAO seeks, the Court does not believe the Supreme Court has directed it to do so. To be sure, the Supreme Court's instruction to consider RTAO's claims "in light of" *Citizens United* requires this Court to consider whether *Citizens United* strengthened RTAO's claims for permanent relief. However, the Court does not read the Supreme Court's instruction as directed specifically to RTAO's certiorari questions about the proper preliminary injunction standards applicable to RTAO's claims. The Supreme Court has described its decision to grant certiorari, vacate a lower court judgment, and remand the case as a "cautious and deferential" measure designed to "assist [ ] the court below by flagging a particular issue that it does not appear to have fully considered" and "assist[ ] this Court by procuring the benefit of the lower court's insight." *Lawrence v. Chater,* 516 U.S. 163, 167, 116 S. Ct. 604, 133 L. Ed.2d 545 (1996). Hence, the Court reads the Supreme Court's remand order as merely an instruction to consider whether *Citizens United* altered the law governing RTAO's claims for permanent relief, rather than a command to fashion special preliminary injunction standards for [*10] RTAO's claims.

III. RTAO's Claims for Permanent Relief Are Not Moot

The Commission and the DOJ also argue that RTAO's claims for permanent relief are moot. The Court disagrees. As a rule, a claimant no longer suffers injury-in-fact, mooting the parties' controversy, when the opposing party ceases the conduct that gave rise to the injury. *Incumaa v. Ozmint,* 507 F.3d 281, 286–87

(4th Cir. 2007). Where the claimant has a reasonable expectation that the opposing party will reinstate the offending conduct, however, the Supreme Court permits courts to consider such a dispute as "capable of repetition, yet evading review." *Wis. Right to Life,* 551 U.S. at 449, 127 S. Ct. 2652. The exception applies where (1) the challenged action is too short in duration to be fully litigated prior to cessation, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Id.*

In *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake,* 524 F.3d 427 (4th Cir. 2008), a candidate who participated in the 2006 North Carolina Supreme Court election challenged the state's scheme providing optional public campaign financing. *Id.* at 432. Additionally, two political committees joined the challenge, alleging they chose not to make expenditures on behalf of candidates who did not participate in the funding scheme, for fear that the expenditures might result in the disbursement of funds to a candidate the organizations opposed. *Id.* at 434. The dispute reached the Fourth Circuit after the 2006 election, at which time the candidate had not indicated he planned to run for office in the next election, and the committees had not indicated they planned to participate in future elections. *Id.* at 435.

The Fourth Circuit held the dispute fit "comfortably" within the "capable of repetition, [*11][**745] yet evading review" exception to the mootness doctrine. *Id.* at 435 (citing *Wis. Right to Life,* 551 U.S. at 449, 127 S. Ct. 2652). The panel determined that the candidate and political committees had reasonable expectations that the North Carolina funding scheme would apply to them in future election cycles. *Id.* In so ruling,

the panel expressly rejected the argument that an ex-candidate's claims are "capable of repetition, yet evading review" only if the ex-candidate specifically alleges his intent to run for office in future elections. *Id.*

Leake controls this case. RTAO's challenges fit "comfortably" within the "capable of repetition, yet evading review" exception to the mootness doctrine. *Id.* at 435. RTAO reasonably expects the FEC to apply § 100.22(b) and its political committee status policy in future election cycles. Under *Leake,* that expectation creates a live controversy even in lieu of a statement of RTAO's intent to make the communications in a future election cycle.

IV. The Court Awards Summary Judgment for the FEC and DOJ

The record contains no dispute over an issue of material fact. Therefore, the Court may render a decision as a matter of law. RTAO challenges § 100.22(b) and the FEC's political committee status policy as unconstitutionally vague and overbroad. A restriction is unconstitutionally vague on its face if it fails to give "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." *United States v. Whorley,* 550 F.3d 326, 333 (4th Cir.2008). In a facial challenge to a law on First Amendment grounds, an overbreadth challenge will succeed if "a substantial number of its applications are unconstitutional Judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n. 6, 128 S. Ct. 1184, 170 L. Ed.2d 151 (2008).

[*12] A. *Standard of Review*

The parties and amicus disagree over the applicable standard of review. Since *Buckley v. Valeo,* the Supreme Court has applied different standards of review to expenditure limits, disclosure requirements, and contribution limits. Expenditure limits, which restrict "the number of issues discussed, the depth of their exploration, and the size of the audience reached," are subject to strict scrutiny. *Buckley,* 424 U.S. 1, 19, 96 S. Ct. 612. By contrast, a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20, 96 S. Ct. 612. Hence, contribution limits are subject to intermediate scrutiny; a contribution limit is valid if it is "closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136, 124 S. Ct. 619. *See Citizens United,* 130 S. Ct. at 909. Similarly, disclosure requirements are subject to exacting scrutiny, such that the Government must demonstrate that a "relevant correlation" or a "substantial relation" exists between the governmental interest and the information required disclosed. *Buckley,* 424 U.S. at 64, 96 S. Ct. 612 (citations omitted). *See Doe v. Reed,* —— U.S. ——, 130 S. Ct. 2811, 2818, 177 L. Ed.2d 493 (2010); *Citizens United,* 130 S. Ct. at 914.

RTAO contends strict scrutiny applies to § 100.22(b) and the political committee status policy, but that argument is incorrect. The nature of the substantive regulations that § 100.22(b) and the FEC's political committee status policy implement determines the appropriate standard of review. Neither of challenged provisions implements [**746] a limitation on RTAO expenditures. After *Citizens United,* § 100.22(b) informs the definition of "independent expenditure" in 2

U.S.C. § 431(17), and in turn informs whether disclosure of an independent expenditure is required under 2 U.S.C. § 434(c). § 100.22(b) also informs whether an organization has spent over $1,000 in "expenditures" under 2 U.S.C. § 431(4), a factor the FEC considers when [*13] determining whether an organization is a political committee. Since it effectuates disclosure requirements, § 100.22(b) is subject to exacting scrutiny.

Similarly, for RTAO, the FEC's political committee status policy effectuates a disclosure requirement subject to exacting scrutiny. Political committees that make only independent expenditures may receive unlimited contributions and are subject only to disclosure requirements. *See SpeechNow.org v. FEC,* 599 F.3d 686 (D.C.Cir.2010). Since RTAO plans to make only independent expenditures, it may receive unlimited contributions.[4] Therefore, exacting scrutiny is the proper standard of review. Hence, with respect to both of RTAO's challenges, the questions before the Court are whether a "relevant correlation" or a "substantial relation" exists between the governmental interest underlying the disclosure rules implemented by § 100.22(b) and the FEC policy and the information those rules require disclosed. *Buckley,* 424 U.S. at 64, 96 S. Ct. 612 (citations omitted).

B. *§ 100.22(b), "Expressly Advocating"*

First, RTAO argues § 100.22(b) is unconstitutionally vague. In relevant part, § 100.22(b) states that a communication is express advocacy when

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[4] RTAO's Articles of Incorporation prevent the organization from contributing to any candidate, and the organization intends only to make independent communications. (Am. Compl. ¶ 12; RTAO Mot. for Sum. J. 4–8.)

> taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable 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.

RTAO contends the phrase "electoral portion" and words "encourages," "actions," and "suggestive" are ambiguous. It further argues the § 100.22(b) allows reference to external [*14] factors, because the regulation speaks of "limited reference to external events, such as the proximity to the election [.]" According to RTAO, *Wisconsin Right to Life* prohibits the FEC from considering external factors when deciding whether a communication is express advocacy. *See* 551 U.S. at 473–74, 127 S. Ct. 2652.

§ 100.22(b) is consistent with *Wisconsin Right to Life's* appeal-to-vote test. As the controlling opinion in that case pointed out, the requirement that an advertisement be subject to "no reasonable interpretation" other than an appeal to vote for or against a candidate satisfies any vagueness concerns. 551 U.S. at 470, 474 n. 7, 127 S. Ct. 2652. Both tests are objective: the language of the appeal-to-vote test limiting express advocacy advertisements to those in which "no reasonable person" could disagree about their message mirrors § 100.22(b)'s limitation that "[R]easonable minds [cannot] differ" about an advertisement's message. *Id.*

In fact, [**747] § 100.22(b) provides the further requirement that the "electoral portion" of the advertisement be "unmistakable, unambiguous, and suggestive of only one meaning." § 100.22(b) and the "appeal to vote" test require an advertisement to focus on a "specific" or "clearly identified" candidate. Additionally, both tests disallow consideration of the speaker's subjective intent. *Compare Express Advocacy; Independent Expenditures; Corporate and Labor Expenditures,* 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) ("[T]he subjective intent of the speaker is not a relevant consideration[.]") *with* 551 U.S. at 472, 127 S. Ct. 2652 ("To the extent th[e] evidence goes to WRTL's subjective intent, it is . . . irrelevant."). The Fourth Circuit has concluded that § 100.22(b) is sufficiently similar to the appeal-to-vote test to likely pass constitutional muster. *Real Truth About Obama,* 575 F.3d at 349.

RTAO also overstates the degree to which § 100.22(b) permits consideration of external factors. While Chief Justice Roberts cautioned that "contextual factors . . . should seldom play a [*15] significant role in the inquiry," he further explained that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context." *Wis. Right to Life,* 551 U.S. at 449, 127 S. Ct. 2652. § 100.22(b) faithfully marries these directions by allowing only "*limited* reference to external events." § 100.22(b) (emphasis added). RTAO reads this phrase like an invitation for courts and regulators to consider numerous contextual factors surrounding the advertisement, such as, the time of day or the geographic location in which the advertisement airs. The Court disagrees with this reading. The phrase is best read as a caution rather than an invitation, warning regulators to only consider "basic background information . . . necessary to put

[the] ad in context." *Wis. Right to Life,* 551 U.S. at 449, 127 S. Ct. 2652. Therefore, § 100.22(b)'s reference to "external events" does not broaden the provision beyond Chief Justice Roberts's test.

RTAO argues that *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274 (4th Cir. 2008), requires the conclusion that § 100.22(b) is unconstitutional. In *Leake,* a North Carolina statute defined communications made "to support or oppose the nomination or election of one or more clearly identified candidates." *Id.* at 280. The statute in turn implemented disclosure obligations and contribution limits under North Carolina law. *Id.* The statute classified a communication as supporting or opposing a clearly identified candidate if it used "magic words" or, alternatively, if its "essential nature . . . goes beyond a mere discussion of public issues in that [it] direct[s] voters to take some action to nominate, elect, or defeat a candidate in an election." *Id.* If the "essential nature" of the advertisement was unclear, the statute permitted regulators to 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 significant number of registered voters for that candidate's election, and the cost of the communication[.]" *Id.* at 281.

[*16] The Fourth Circuit held the statute unconstitutional, concluding that the statute regulated a broader range of speech than the functional equivalent of express advocacy. *Id.* at 282–83. The statute regulated communications other than those "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 283. *See Wis. Right to Life,* 551 U.S. at 470, 127 S. Ct. 2652.

According to the panel, the statute's standard, directing regulators to consider how a "reasonable person" would interpret four "contextual factors," permitted an "*ad hoc,* totality of the circumstances-based approach [that] provides [**748] neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech." *Id.* The panel further reasoned that the multiple factors the statute allowed regulators to consider—such as the cost and distribution of the communication—risked regulation of advertisements susceptible to more than one interpretation. *Id.* at 284.

Leake struck down a functional equivalence provision significantly broader and less precise than § 100.22(b). Most obviously, the North Carolina provision allowed regulators to make a wide-ranging inquiry into the context surrounding an advertisement, including the time of day the advertisement aired, the amount of money spent on the advertisement, and the number of voters in the geographic area to which the advertisement was targeted. By contrast, § 100.22(b) expressly cautions regulators and courts against too strongly considering the context of the advertisement. Additionally, *Leake* struck down an express advocacy definition that implemented contribution limits, while § 100.22(b) effectuates only disclosure requirements. *Id.* at 280.

RTAO further contends that § 100.22(b) applies only to electioneering communications.[5] The Court

[5] An "electioneering communication" is a broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office and airs less than 60 days prior to a general election or 30 days prior to a primary election. 2 U.S.C. § 434(f)(3).

disagrees. The Fourth Circuit held § 100.22(b) was likely constitutional even though [*17] the provision does not only apply to electioneering communications. As the panel explained,

> [C]onsistent with *Wisconsin Right to Life* and unlike the statute considered in *Leake* [525 F.3d at 283–84], § 100.22(b) cabins the application of the regulation to communications that "could *only* be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" . . . and where "[r]easonable 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." By limiting its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*, § 100.22(b) is likely constitutional.

Real Truth About Obama, 575 F.3d at 349 (citing *Wis. Right to Life,* 551 U.S. at 469–70, 127 S. Ct. 2652). Furthermore, in *Citizens United,* the Supreme Court applied the appeal-to-vote test to an electioneering communication without ever stating that the advertisement's status as an electioneering communication was a prerequisite to application of the test.

Citizens United does not change the Court's analysis of § 100.22(b). RTAO argues that *Citizens United* signaled a general reassertion of protection for issue advocacy groups and a paring-down of the zone of express advocacy. Specifically, RTAO suggests the Supreme Court's treatment of 11 C.F.R. § 114.15 dictates that § 100.22(b) is unconstitutional. In *Citizens United,* the Supreme Court cited the complexity and

ambiguity of the case-by-case nature of the FEC regulation regime as a reason for engaging in facial review of § 441b. 130 S. Ct. at 895–96. The Supreme Court singled out § 114.15, deriding the regulation as creating an "ambiguous test [ ]" that allowed the FEC "to select what political speech is safe for public consumption." *Id.* The Supreme Court cited the "on-going chill upon [protected] speech" caused by § 114.15 as a basis for facially reviewing § 441b.

RTAO reads the Supreme Court's criticism of § 114.15 to demonstrate the invalidity [**749] of any totality-of-the-circumstances test that implements campaign finance regulations. The Court disagrees with this reading. Initially, it bears pointing out that § 114.15 implemented a test drastically more complex than § 100.22(b). The Supreme Court described § 114.15 as a "two-[*18]part, 11–factor balancing test," and indeed the regulation provides a rather dizzying array of considerations the regulator is to take into account in determining whether a communication is an appeal to vote for a candidate. *Id.* By contrast, § 100.22(b) limits the regulator's reference to "external events." It mandates an objective standard in which a communication must "only" be interpreted by a "reasonable person" to qualify as express advocacy. It directs the regulator to the "electoral portion" of the advertisement and requires that portion be "unmistakable, unambiguous, and suggestive of only one meaning." Finally § 100.22(b) requires that "reasonable minds [cannot] differ" as to whether the advertisement encourages the defeat or election of a candidate that is "clearly identified."

Moreover, the Court cannot agree that the Supreme Court's discursion on § 114.15 indicates that § 100.

22(b) is unconstitutional, given that the Court applied the appeal-to-vote test in *Citizens United*. The Court rejected Citizens United's argument that the communication at issue was not the functional equivalent of express advocacy. *Id.* at 889–90. The Court described *Hillary: The Movie* as "*in essence* . . . a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." *Id.* at 890 (emphasis added). The Court concluded the film was the functional equivalent of express advocacy by applying the appeal-to-vote test, which the Fourth Circuit described as "consistent" with § 100.22(b). *Id.* at 889–90; *Real Truth About Obama,* 575 F.3d at 349.

The Supreme Court laid down the appeal-to-vote test when it considered the constitutionality of § 441b, a direct restraint on speech. *See Wis. Right to Life,* 551 U.S. at 469–70, 127 S. Ct. 2652. The Court further applied the test when it struck down § 441b in *Citizens United,* leaving any test for defining the functional equivalent of express advocacy, such as § 100.22(b), to implement disclosure requirements. The Supreme Court has never backed off its judgment that [*19] disclosure requirements effectuate the legitimate government interest of providing the electorate with information about the sources of campaign-related spending, which in turn allows voters to make informed choices. *See Citizens United,* 130 S. Ct. at 913–14; *McConnell,* 540 U.S. at 197, 124 S. Ct. 619. Therefore, the Supreme Court uses the appeal-to-vote test, which plainly calls for a totality-of-the-circumstances inquiry, to implement disclosure requirements. By mirroring the Supreme Court's appeal-to-vote test, § 100.22(b) ensures a relevant correlation between the Commission's interest in providing voters information and the informa-

tion required disclosed when § 100.22(b) is applied.

No evidence before the Court indicates § 100.22(b) is unconstitutional as applied to "Change" and "Survivor." "Change" is plainly the functional equivalent of express advocacy. It is a genuine candidate advertisement. It focuses entirely on a single candidate and examines his position on abortion, a perennial and intensely-contested issue. The advertisement also bears numerous "indicia of express advocacy." *Wis. Right to Life,* 551 U.S. at 470, 127 S. Ct. 2652. It describes then-Senator Obama's positions on abortion in a manner that a voter who supports greater restrictions on abortion would find repugnant, including that he would make [**750] taxpayer pay for "all 1.2 million" abortions in the United States and that he would ensure the secrecy of minor girls' abortions. Additionally, it co-opts Obama's presidential campaign slogan in a manner designed to make him less attractive as a candidate.

"Survivor" is more obviously the functional equivalent of express advocacy. Because the advertisement focuses entirely on then-Senator Obama's position on abortion, "Survivor" is a genuine candidate advertisement. It bears even stronger indicia of express advocacy than "Change." The advertisement calls Senator Obama's votes on state abortion legislation "horrendous." It claims he "tried to cover-up" those votes and lied about them. The [*20] advertisement calls Senator Obama "callous." Hence, if the FEC deemed "Change" and "Survivor" express advocacy using § 100.22(b), that application would not be unconstitutional.

RTAO has also fallen short of demonstrating that the disclosure requirements § 100.22(b) implements

are unduly burdensome as applied to it. The Supreme Court exempts from application of disclosure requirements organizations that demonstrate "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United,* 130 S. Ct. at 915. RTAO provides no evidence that its donors would risk harassment.

C. *Political Committee Status Policy*

1. RTAO has standing to challenge the policy.

RTAO briefly challenges the policy by which the FEC determines whether an organization is a political committee. *See* 2 U.S.C. § 431(4). The Commission argues that RTAO lacks standing to raise this challenge, since RTAO has not demonstrated that it is a political committee and contends that it does not meet the major purpose test. The Court disagrees. In order to establish its standing to sue, RTAO must show (1) an injury in fact, (2) a causal connection between its injury and the defendant's conduct, and (3) the likelihood that the Court will redress the injury with a favorable decision. *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n,* 263 F.3d 379, 386 (4th Cir. 2001). When a party brings a preenforcement challenge to an agency regulation, it must allege "an intention in a course of conduct arguably affected with a constitutional interest," along with "a credible threat of prosecution" under the regulation. *Id.* (citing *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed.2d 895 (1979)).

RTAO has demonstrated its standing to challenge the Commission's political committee [*21] status policy. RTAO stated its intention to purchase time to air "Change" and "Survivor." At the very least, these

two advertisements merit examination by the Commission as possible express advocacy. An organization's level of spending on Federal campaign activity is among the factors the FEC uses in determining whether an organization is a political committee. *See* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5601 (Feb. 1, 2007). Should the FEC deem "Change" and "Survivor" express advocacy, the advertisements would figure significantly into the FEC's determination of RTAO's political committee status. Therefore, RTAO has alleged an intention to engage in constitutionally protected political speech and RTAO is subject to a credible threat to prosecution under the FEC's policy.[6]

[**751] 2. The Court denies RTAO's challenge to the policy.

The FEC has declined to adopt a regulation for determining whether an organization is a political committee. *Cf. Shays v. Fed. Election Comm'n,* 511 F. Supp. 2d 19 (D.D.C.2007). Instead, the Commission undertakes a fact-intensive, case-by-case adjudication to determine whether a group's major purpose is a Federal candidate's election or defeat and therefore subject to the regulatory requirements that status entails. 72 Fed. Reg. at 5601. The FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications. *Id.* at 5604. The Commission looks to the organization's

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[6] The FEC also renews its argument, denied by the Court in its previous opinion, that the political committee status policy is not a final agency action subject to judicial review. The Court notes that the Commission raises the argument here simply to preserve it for appeal.

public statements and the content of its fundraising appeals, including email messages, fundraising appeals, and personal meetings. *Id.* at 5601, 5604-05. The group's contribution sources, internal documents, and internal statements have also figured into the Commission's adjudications. *Id.* at 5601, 5605.

[*22] RTAO argues the Commission's multi-factored approach to deciding political committee status fails to provide RTAO fair notice of its status and encourages selective enforcement. It further contends FEC adjudication pursuant to a multi-factored inquiry burdens speech, regardless of the outcome of any adjudication. The Court disagrees. The FEC is correct that ascertaining an organization's single major purpose is an inherently comparative task and requires consideration of the full range of an organization's activities. The Commission is not charged with deciding whether the election or defeat of a candidate is *one of* an organization's major purposes. Isolating one or two factors would, by the very nature of the inquiry, make it impossible to determine whether the organization, as a whole, operated with *the* major purpose of electing or defeating a candidate. As the district court explained in *Shays v. Federal Election Commission,*

> an organization . . . may engage in many non-electoral activities so that determining its major purpose requires a very close examination of various activities. Or an organization may be engaging in substantial amounts of both federal and non-federal electoral activity, again requiring a detailed analysis of its various activities.

511 F. Supp. 2d 19, 31 (D.D.C. 2007). Therefore, the FEC is entitled to consider the full range of an organization's activities in deciding whether it is a political

committee.

RTAO has not persuaded the Court that the FEC's approach substantially harms an organization's ability to speak. RTAO thinks *Federal Election Commission v. Massachusetts Citizens for Life,* 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed.2d 539 (1986), only permits the Commission to use two factors in determining whether an organization is a political committee: the organization's expenditures and the central purpose revealed in its organic documents. That argument is incorrect. In that case, the Supreme Court implied that a group's central organizational purpose and the amount it spent in independent expenditures were relevant factors in determining whether an organization was a political committee. *Id.* at 252 n. 6, 262, 107 S. Ct. 616. *Massachusetts Citizens for Life* did not hold, or [*23] even suggest, that those factors are the exclusive indicia of an organization's status as a political committee.

Since *Massachusetts Citizens for Life,* courts have endorsed the consideration of an organization's public statements, spending [**752] and contributions, and non-public statements in determining whether an organization is a political committee. *See Fed Election Comm'n v. Malenick,* 310 F. Supp. 2d 230, 234–37 (D.D.C. 2004); *Fed. Election Comm'n v. GOPAC, Inc.,* 917 F. Supp. 851, 859, 864–66 (D.D.C. 1996). Additionally, the Fourth Circuit previously agreed with this Court's judgment that the Commission's political committee status policy is likely constitutional. *Real Truth About Obama,* 575 F.3d at 351. As the panel explained, the policy "appears simply to be adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose of a particular organization's contributions."

Id. The use of multiple factors to implement disclosure requirements does not greatly burden an organization's speech, because "disclosure requirements impose no ceiling on campaign-related activities." *Buckley,* 424 U.S. at 64, 96 S. Ct. 612. By relying heavily on relevant Supreme Court and lower court cases, the FEC's policy determines whether an organization as a whole aims to elect or defeat a particular candidate. Therefore, the FEC's political committee status policy ensures a correlation between the Commission's interest in providing voters information and the information required disclosed by political committee status.

Citizens United did not alter the Court's analysis. *Citizens United's* primary holding, in which the Supreme Court held § 441b unconstitutional, does not shed light on the constitutionality of the political committee status policy. The Court did consider the constitutionality of certain disclosure requirements, but only those applicable when an organization makes an electioneering communication. 130 S. Ct. at 914-15. *See* 2 U.S.C. [*24] § 434(f)(3)(A). The Court applied exacting scrutiny to those disclosure requirements and upheld them. 130 S. Ct. at 915–16. After *Citizens United,* the D.C. Circuit has further explained that the additional burdens imposed by political committee status are "minimal" when compared to the burdens on other persons who make independent expenditures. *SpeechNow.org,* 599 F.3d at 697. To the extent *Citizens United* speaks to RTAO's claim, it confirms the Court's judgment that the FEC policy is subject to a more relaxed level of review than RTAO believes it is.

The Supreme Court did not consider any issue related to an organization's eligibility as a political committee or the burdens an organization suffers as a

result of being so categorized. Nor does the Supreme Court's criticism of 11 C.F.R. § 114.15 lead to the conclusion that any multi-factor test implementing a campaign finance regulation is unconstitutional. RTAO thinks that it does, but the Court disagrees with that argument for reasons similar to those it cited in rejecting the argument with respect to § 100.22(b).

RTAO has not convinced the Court that the FEC's political committee status policy is unconstitutional as applied to it. There is evidence before the Court suggesting that, prior to the 2008 election, RTAO's major purpose was the defeat of Senator Obama as a presidential candidate. *See Buckley,* 424 U.S. at 79, 96 S. Ct. 612. RTAO's articles of incorporation list among its primary aims the dissemination of information about Senator Obama's policy positions. As the Court has explained, the two advertisements before the Court are express advocacy communications aimed at dissuading citizens from voting for Senator Obama. RTAO's fundraising communication says RTAO plans to persuade the public about the "real truth" about Obama's position on abortion. It further states that "everyone would support" a certain abortion restriction proposed in Illinois and describes Obama's opposition to the measure "radical." [**753] RTAO argues that it merely plans to engage in issue advocacy, but the materials before the Court disclose a singular focus on Senator [*25] Obama suggesting a major purpose to defeat his presidential candidacy. Given these indications that RTAO's major purpose is Senator Obama's defeat, the Court does not conclude the FEC's political committee status policy is unconstitutional as applied to RTAO.

V. Conclusion

For the reasons stated above, the Court grants

summary judgment in favor of the FEC and the DOJ, and rejects RTAO's challenges to 11 C.F.R. § 100.22(b) and the Commission's policy on determining political committee status.

Let the Court send a copy of this Memorandum Opinion to all counsel of record.

An appropriate Order will issue.

/s/

James R. Spencer
Chief United States District Judge

ENTERED this 16th day of June 2011

[Doc. 158, filed June 16, 2011]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REAL TRUTH ABOUT OBAMA, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION AND UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Action No. 3:08-CV-483

FINAL ORDER

This matter is before the Court on The Real Truth About Obama, Inc.'s ("RTAO") Motions for Preliminary Injunction (Docket No. 125) and Summary Judgment (Docket No. 129) and the Federal Election Commission's (FEC) and the Department of Justice's (DOJ) Motions for Summary Judgment (Docket Nos. 135 and 138). For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS the FEC's and DOJ's Motions and therefore GRANTS the FEC and the DOJ judgment as a matter of law. Accordingly, the Court DENIES RTAO's Motions.

Let the Clerk send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/
James R. Spencer
Chief United States District Judge

ENTERED this 16th day of June 2011

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

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2 U.S.C. § 431(17)

Independent expenditure. - The term "independent expenditure" means an expenditure by a person

> (A) expressly advocating the election or defeat of a clearly identified candidate; and
>
> (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

11 C.F.R. § 100.16(a)

The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents" if it is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

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11 C.F.R. § 100.22

Expressly advocating means any communication that–
(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or

"Mondale!"; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.