No. 11-1760

United States Court of Appeals for the Fourth Circuit

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

v.

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

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

Appellant's Brief

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

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

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-1760 Caption: The Real Truth About Obama, Inc. v. FEC & DOJ

Pursuant to FRAP 26.1 and Local Rule 26.1,

Real Truth About Obama (name of party/amicus) who is Appellant (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on 9/19/2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Richard E. Coleson
(signature)

9/19/2011
(date)

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes & Regulations

Other Authorities

Jurisdictional Statement

The district court had jurisdiction over all issues on appeal under 28 U.S.C. 1331 as a case arising under the First and Fifth Amendments, the Federal Election Campaign Act ("FECA"), 2 U.S.C. 431 et seq., the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. 702-06, and the Declaratory Judgment Act, 28 U.S.C. 2201-02.[1]

This Court has jurisdiction over this appeal of the district court's June 16, 2011 order (Joint Appendix ("JA–") 81) denying summary judgment to Real Truth About Obama, Inc. ("RTAO") and granting summary judgment to the Federal Election Commission ("FEC') and Department of Justice ("DOJ"). 28 U.S.C. 1291. Notice of appeal was filed July 15. JA–82.

Statement of Issues

1. Whether FEC's alternate "expressly advocating" definition, 11 C.F.R. 100.22(b), is unconstitutionally overbroad, void for vagueness, and contrary to law, facially and as applied to RTAO's intended activities, because it violates the First and Fifth Amendments of the U.S. Constitution, exceeds statutory authority under FECA, and should be declared void under the APA.

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[1] Though the district court devotes Part II of its opinion to holding that "RTAO's Claims for Preliminary Relief Are Moot," JA–62-65, it lacked jurisdiction to decide the issue since RTAO formally withdrew the motion for preliminary injunction at oral argument. JA–55 (Tr. 2:21-25).

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 RTAO's intended activities, because it violates the First and Fifth Amendments, exceeds statutory authority under FECA, and should be declared void under the APA.

Statement of Case

On July 30, 2008, RTAO filed a pre-enforcement lawsuit against FEC and DOJ, challenging three FEC regulations and FEC's enforcement policy for determining political committee ("PAC") status, facially and as applied to RTAO's intended activities. JA–57. The district court denied two motions for preliminary injunction. JA–60; *RTAO v. FEC*, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008). On August 5, 2009, this Court affirmed the preliminary-injunction denials. JA–61; *RTAO v. FEC*, 575 F.3d 342 (4th Cir. 2009). RTAO petitioned the Supreme Court for a writ of certiorari, which was granted, this Court's judgment vacated, and "the case remanded . . . for further consideration in light of *Citizens United v. Federal Election Comm'n,* 558 U.S. ----, 130 S.Ct. 876 . . . (2010) [("*Citizens*")] and the Solicitor General's suggestion of mootness." *RTAO v. FEC*, 130 S.Ct. 2371 (2010).[2]

[2] The district court erroneously says that RTAO "has withdrawn" its challenges to 11 C.F.R. 100.57 and 114.15. JA–60 (n.3). Actually, those became moot. *See infra* at 13. In its opening summary judgment brief, RTAO recited its affirma-

On June 8, 2010, this Court reissued only 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 denied summary judgment to RTAO and granted it to FEC and DOJ on both counts. JA–81. On July 15, RTAO noticed appeal of the summary-judgment order. JA–82.

Statement of Facts

Plaintiff RTAO is a nonstock, nonprofit, Virginia corporation whose principal place of business was Richmond, Virginia (JA–21), but now is Fredericksburg, Virginia. *See* https://cisiweb.scc.virginia.gov/z_container.aspx (searchable).

Defendant FEC is the federal government agency with enforcement authority over FECA. Its headquarters are located in Washington, DC. FEC promulgated the regulation and adopted the enforcement policy at issue in this case. JA–21-22.

Defendant DOJ is an executive department of the United States government, with the Attorney General as its head. It's headquarters are in Washington, DC. It has control over all criminal prosecutions and civil suits in which the United States has an interest, including criminal enforcement authority over the applicable federal laws at issue in this case. JA–22.

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tion to the U.S. Supreme Court that these claims were moot. Doc. 126 at 3.

RTAO was incorporated in July 2008. JA-22. It is nonprofit under 26 U.S.C. 527, meaning it is a "political organization" under the Internal Revenue Code that may receive donations and make disbursements for certain identified political purposes without having to pay corporate income taxes. JA–22.

RTAO is not properly a "political committee" ("PAC") under FECA because none of its communications should qualify as either a "contribution" or "expenditure," aggregating more than $1,000 during a calendar year, which is a trigger requirement for PAC status under 2 U.S.C. 431(4). *See also* 11 C.F.R. 100.5 (PAC definition). JA–22.

RTAO is also not properly a PAC because, even if it were to reach the $1,000 contribution or expenditure threshold to trigger statutory PAC status under FECA, RTAO does not meet the constitutionally required "major purpose" test. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (limiting imposed PAC burdens to "organizations that are 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)). JA–22.

As set out in its Articles of Incorporation, RTAO's purposes are 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 Senator Barack Obama;
>
> 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.

JA–23.

However, RTAO has a reasonable belief that it will be deemed a PAC by FEC and DOJ because of (**a**) FEC's use of the challenged provision 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) 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 RTAO and its planned activities to some of those in the MURs cited in *PAC-Status 2*. JA–23.

One of the ways that RTAO intended to provide accurate and truthful informa-

tion about the public policy positions of Senator Obama was by creating a website at www.therealtruthaboutobama.com, where accurate statements about his public policy positions would be stated and documented. JA–24, 43-48.

RTAO intended to produce an audio ad titled "*Change*" and place it on its website, which stated 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.TheRealTruthAboutObama.com. Paid for by The Real Truth About Obama.

JA–24-25.

RTAO intended to produce another audio ad, titled "*Survivors*," and place it on its website, which stated 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.

JA–25, 18-19.

RTAO 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"[3] 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. JA–25, 19.

RTAO also intended to create on its website digital postcards setting out Senator Obama's public policy positions on abortion, and viewers would have been

[3] Electioneering communications are essentially non-express-advocacy, targeted communications mentioning candidates in 30- and 60-day periods before primary and general elections. *See* 2 U.S.C. 434(f)(3).

able to send these postcards to friends from within the website. One of the planned postcards would have been similar to the *Change* ad, except it would have been done in first person and "signed" by "Barack Obamabortion." The postcards would have been designed to be the sort of catchy, edgy, entertaining items that are popular for circulation on the Internet. JA–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, RTAO needed to raise funds by telling potential donors about itself and its projects. One of the ways that RTAO intended to raise funds was by use of 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 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.

JA–26-27.

RTAO 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 RTAO's website. JA–27.

However, RTAO 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.[4] JA–27, 19.

RTAO was also chilled from proceeding because, if Defendants subsequently deemed RTAO to have been a PAC while doing its intended activities, then RTAO 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),[5] and RTAO would be in violation for not having used federal funds for the fundraising communication. JA–23.

RTAO'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* JA–27-28, 49-53.

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[4] Some FEC 527 enforcement was based on now-unenforced 11 C.F.R. 100.57.

[5] Advisory opinions are available at http://saos.nictusa.com/saos/searchao.

Consequently, RTAO reasonably feared, if it proceeded with its intended activities: (**a**) that the Ads (both on RTAO's website and as broadcast) would be deemed express advocacy under 11 C.F.R. 100.22(b) and, if RTAO was not deemed a PAC, it would be in violation of FECA for failing to place disclaimers on them and failing to file an independent expenditure report; (**b**) that, if RTAO 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" (under 100.22(b)), RTAO would be in violation of FECA for failure to abide by numerous PAC requirements, including placing disclaimers on the Ads and RTAO'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 RTAO would suffer an intrusive and burdensome investigation and, possibly, an enforcement action, potentially leading to civil and criminal penalties. So RTAO would not proceed with its intended activities unless it received the judicial relief requested. JA–28, 19.

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

at law. JA–29.

Summary of Argument

The Supreme Court remanded this case for reconsideration in light of its decision in *Citizens*. What did the Court decide in *Citizens* that made it find a reasonable probability of a different result in this case on remand? *Citizens* expressly rejected vague, overbroad tests for regulating core political speech because such tests chill core political speech. And *Citizens* pronounced PAC-burdens "onerous," holding that they did not provide a constitutionally adequate vehicle for corporation's core political speech. These holdings control the present case, involving challenges to a vague and overbroad express-advocacy test and PAC-status policy that are of a kind with the tests rejected in *Citizens*.

FEC's alternate "expressly advocating" definition, at 11 C.F.R. 100.22(b), is unconstitutionally vague and overbroad under controlling precedent of the Supreme Court and this Circuit. And it is beyond statutory authority because it is governed by an "expenditure" definition that uses language that the Supreme Court has held vague and overbroad in the context of expenditure disclosure and construed to require "magic words" "express advocacy," which requirement Congress imported into the "expressly advocating" definition.

FEC's PAC-status policy is also unconstitutionally vague and overbroad under controlling precedents of the Supreme Court and this Circuit. It is also beyond

statutory authority because it is contrary to how binding precedents have construed the underlying statutes.

Argument

RTAO has even stronger legal arguments than it had in its appeal of a preliminary injunction denial, *RTAO v. FEC*, 575 F.3d 342. First, RTAO has been proven right on two of its four original claims, which are of a kind with the remaining two. The D.C. Circuit held 11 C.F.R. 100.57 unconstitutional and FEC abandoned enforcement. *See EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). The Supreme Court declared 11 C.F.R. 114.15 "precisely what *WRTL* sought to avoid," *Citizens*, 130 S.Ct. at 896 (referencing *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*")),[6] and FEC abandoned enforcement. Yet under the erroneous approach of the court below, those provisions would remain in effect. Second, by its grant-vacate-remand ("GVR") order, the Supreme Court found that there was a reasonable probability of a different result on remand.[7] Third, *Citizens* reasserted

[6] The controlling opinion ("*WRTL-II*" herein) was by Roberts, C.J., joined by Alito, J.). *WRTL-II* states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[7]

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal *a reasonable probability that the decision below rests upon a premise that the lower court would reject given the opportunity for further consideration*, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we

bright-line protection for issue advocacy and issue groups, repudiating vague, overbroad, we-know-it-when-we-see-it tests, such as the tests in the claims remaining before this Court.

I. FEC's Alternate "Expressly Advocating" Definition Is Vague, Overbroad, Beyond Statutory Authority, and Void.

RTAO challenges the alternate "expressly advocating definition, 11 C.F.R. 100.22(b),[8] as unconstitutionally vague and overbroad under the First and Fifth Amendments to the U.S. Constitution, beyond statutory authority under FECA, and void under the APA.

FEC's "expressly advocating" definition defines part of the "independent expenditure" definition, i.e., a non-coordinated "expenditure . . . expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. 431(17). Independent expenditures require reporting and disclaimers, 2 U.S.C. 434(c) and

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believe, potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam) (emphasis added).

[8] Subpart (a) of Section 100.22 defines "expressly advocating" with the Supreme Court's magic-words approach. *See* Addendum. Subpart (b) uses this test:

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

441d, and can trigger PAC status, 2 U.S.C. 431(4) (PAC definition), which is a particular concern of RTAO.

A. Standards of Review.

Before its "*Standard of Review*" discussion, the district court noted that RTAO challenged 100.22(b) as vague and overbroad and then provided standards of review for facial vagueness and First Amendment facial-overbreadth challenges. JA–66-67. These tests are part of the review standards. Vagueness challenges must be resolved before overbreadth is considered because if a provision's scope cannot be established it is inherently overbroad. *See Buckley*, 424 U.S. at 76, 80 ("Vagueness Problems" make law "impermissibly broad"). And whether a provision is properly tailored to adequate governmental interests can only be considered after the provision is proven otherwise constitutional and the provision's scope is established. *See id.* (resolving vagueness and overbreadth before holding that disclosure "expenditure" definition "as construed, bears a sufficient relationship to a substantial governmental interest").

Regarding vagueness, "[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) (citation omitted). "[W]hen a statute 'interferes with the right of free

speech or of association, a more stringent vagueness test should apply.'" *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2719 (2010) (citation omitted). And *Citizens* requires "objective," bright-line First Amendment tests, expressly rejecting "ambiguous" and "[multi]-part, [multi]-factor, balancing test[s]." 130 S.Ct. at 895-96.

Regarding First Amendment facial overbreadth, a provision is unconstitutional 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 (2008) (citation omitted).

Regarding what may be called "*Buckley* overbreadth," government may only regulate "spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 281-83 (4th Cir. 2008) ("*Leake*"). The district court ignored the argument based on this standard.

Regarding statutory authority, if FEC lacks statutory authority, its regulation is unlawful. The district court ignored the argument based on this standard.

Only *after* determining that 100.22(b) is *not* unconstitutionally vague and overbroad, *is* unambiguously campaign related, and is *not* beyond statutory authority would any other standard of review come into play. So as to both provisions at issue here, there is no reason to reach exacting or strict scrutiny, though strict scru-

tiny applies (or its functional equivalent).

The district court decided that speech restrictions not banning speech are subject to complaisant exacting scrutiny easily linked to an informational interest. JA–67-68. But *Citizens* only applied "exacting scrutiny" in upholding an as-applied challenge to ordinary, non-PAC-style "disclosure," i.e., "BCRA's disclaimer and disclosure provisions" for "electioneering communications." *Citizens*, 130 S.Ct. at 913. *Citizens* described that scrutiny as "requir[ing] a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914. (citation omitted). But that does not mean that any restriction touching on disclosure gets complaisant scrutiny.

The Supreme Court has expressly decided how exacting scrutiny functions in the *disclosure* context:

> The remaining issue that we must consider is the constitutionality of § 319(b)'s *disclosure* requirements. "[W]e have repeatedly found that *compelled disclosure, in itself, can seriously infringe* on privacy of association and belief guaranteed by the First Amendment." *Buckley,* 424 U.S., at 64. As a result, we have *closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals' political speech. Id.,* at 75. To survive this scrutiny, significant encroachments "cannot be justified by a mere showing of some legitimate governmental interest." *Id.,* at 64. Instead, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," and the governmental interest "must survive exacting scrutiny." *Ibid*. (footnotes omitted). That is, *the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights. Id.,* at 68, 71.

Davis v. FEC, 554 U.S. 724, 744 (2008) (emphasis added). So where a disclosure burden is high, scrutiny is high, i.e., either strict or the functional equivalent of strict scrutiny. *Buckley* called exacting scrutiny a "strict standard" in the context of disclosing independent expenditures. 424 U.S. at 75.

Since 100.22(b) can trigger statutory PAC-status, an "onerous" burden, *Citizens*, 130 S.Ct. at 898, and since *Citizens* treated onerous PAC requirements under strict scrutiny, *id.*,[9] the burden is high and scrutiny is high, even if exacting scrutiny applies. The alternative would be that states can impose any onerous requirements they desire—the equivalent of the PAC burden for corporations that *Citizens* rejected, *id.* at 913—and claim that the informational interest justifies such burdens under complaisant review. *Citizens* prohibits that.

Finally, *Leake* decided two issues virtually identical to those at issue here and the decision did not turn on whether there was a ban. *Leake* said that the definitions of "expenditure" and "contributions" (which contained the unconstitutional "context prong" in its definitions) affected "[m]any of North Carolina's campaign finance regulations—including, for example, *reporting requirements* and contribution limits . . . ." 525 F.3d at 280. So the district court should have simply recited Part II.B of *Leake*, *id.* at 281-83, the controlling analysis, and then followed that

[9] The imposition of PAC-status or PAC-style burdens alone requires strict scrutiny. *See infra* at 46-49.

analysis in striking down two provisions very similar to those at issue in *Leake*.

B. Section 100.22(b) Fails the Requirement that Government Only Regulate Speech that Is Election-Influencing by Being Unambiguously Campaign Related.

The First Amendment forbids Congress from regulating core political speech in just any way it wants. In enacting FECA under its constitutional power to regulate *elections*, Congress understood that it could only regulate clearly *election-influencing* speech. This is clear in numerous definitions, including the definitions of two central things that FECA regulates, "contributions" and "expenditures." Both regulate transactions "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i) and (9)(A)(i).

In *Buckley*, the Supreme Court recognized the authority of Congress to regulate federal elections, 424 U.S. at 13, then considered the constitutionality of a statute requiring the *disclosure* of *expenditures*. The Court described what was required:

> Section 434(e) requires "(e)very person (other than a political committee or candidate) who makes contributions or expenditures" aggregating over $100 in a calendar year "other than by contribution to a political committee or candidate" to file a statement with the Commission. Unlike the other disclosure provisions, this section does not seek the contribution list of any association. Instead, it requires direct disclosure of what an individual or group contributes or spends.

424 U.S. at 74-75 (footnote omitted). The Court held that while the disclosure provision might be justified by governmental interests if *otherwise* constitutional, *id.*

at 75-76, the expenditure and contribution definitions had vagueness and overbreadth problems: "'Contributions' and 'expenditures' are defined in parallel provisions in terms of the use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems." *Id.* at 77 (footnote omitted). This had to be resolved first. *Id.* at 76-77.

Buckley imposed an unambiguously-campaign-related construction on the purpose-of-influencing-elections language to save it from unconstitutionality. The problem it addressed was whether "the *relation* of the information sought to the purpose of the Act [regulating elections] *may be too remote*," and, therefore, "*impermissibly broad*." *Id.* at 80 (emphasis added). The Court required that government restrict its election-related laws to reach only First Amendment activities that are "*unambiguously related* to the campaign of a particular federal candidate," *id.* (emphasis added), in short, "*unambiguously campaign related*," *id.* at 81 (emphasis added). Thus, any provision requiring disclosure of expenditures that uses the purpose-of-influencing-elections language is subject to this construction and is vague and overbroad unless given it. Moreover, since this is a construction of statutory language still used in the expenditure definition, any regulation that goes beyond this construction is beyond statutory authority.

From this requirement, the Supreme Court derived two tests that govern this

case: (1) the major-purpose test, which determines which groups may be treated as "political committees," *id.* at 79 ("organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate"), and (2) the express-advocacy test, which determines which communications may be treated as purpose-of-influencing "independent expenditures," *id.* at 80.

In *Leake*, this Court recognized this unambiguously-campaign-related requirement as the controlling analysis and as requiring a magic-word, express-advocacy test for independent expenditures and a narrow appeal-to vote test, applying *only* to statutory electioneering communications:

> Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that *uses specific election-related words*. Second, "the functional equivalent of express advocacy," *defined as an "electioneering communication"* that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This latter category, in particular, has the potential to trammel vital political speech, and thus regulation of speech as "the functional equivalent of express advocacy" warrants careful judicial scrutiny.

525 F.3d at 282-83 (emphasis added).

Given *Leake*'s holding, 100.22(b) fails as a matter of law because it does not fit the approved categories and because it relies on a test somewhat like the

appeal-to-vote test that *Leake* said applied only to electioneering communications (and may "trammel . . . speech"). *Leake* held that the unambiguously-campaign-related requirement mandates a narrow major-purpose test for determining PAC status. *Id.* at 287-90. Applying these holdings readily reveals that the challenged regulations and enforcement policy at issue here are unconstitutionally vague and overbroad, beyond statutory authority, and void under the APA. The Government must bear the threshold burden of demonstrating that its regulation and enforcement policy meet the unambiguously-campaign-related requirement. *Leake*, 525 F.3d at 281-83.

The district court ignored *Leake*'s controlling analysis, simply distinguishing the provisions at issue. JA–70-71. Superficial distinctions are typically possible between even substantially similar provisions, as these are, but the prior constitutional *analysis* is controlling and should be followed because it has not been overturned or superseded. In contrast to its refusal to follow *Leake*, the district court repeatedly cites as authority portions of this Court's opinion at *RTAO*, 575 F.3d 342, *see* JA–69, 71-73, 78, that were vacated and not re-issued. *See RTAO*, 607 F.3d 355.

While the court below ignored *Leake*'s unambiguously-campaign-related requirement, another court in this Circuit recently recognized it as controlling, but decided that it did not have to employ it in striking down an "expressly advocat-

ing" definition that imported *WRTL-II*'s appeal-to-vote test. *See Center for Individual Freedom v. Tennant*, No. 08-190, 2011 WL 2912735 (S.D.W.Va. July 18, 2011) ("*CFIF*").

C. "Express Advocacy" Requires "Magic Words."

The Supreme Court "remanded . . . for . . . consideration in light of *Citizens*." 130 S.Ct. 2371. The Court surely had in mind in finding a reasonable probability of a different result on remand, *see supra* at 13 & n.7, the clear statement of the *Citizens* concurrence and dissent: "If there was ever 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* . . . ." 130 S.Ct. at 935 n.8 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (emphasis added). *See also id.* at 956 (equating express advocacy with "magic words"). This statement directly rejects the approach of 100.22(b), and it is a reiteration of what all of the Justices have been reaffirming repeatedly in saying that "express advocacy" requires "magic words."

The Court created "express advocacy" as a term of art in *Buckley* and clearly defined it as requiring "express words of advocacy of election or defeat, such as 'vote for' . . . ." 424 U.S. at 44 n.52. *Buckley* explicitly applied this construction to a purpose-of-influencing "*expenditure*" definition in the context of independent-

expenditure reporting. *Id.* at 80. So it has direct applicability here where a purpose-of-influencing expenditure definition applies in the same disclosure context.

Buckley was decided on January 30, 1976. On May 11, 1976, Congress incorporated *Buckley*'s magic-words "expressly advocating" term of art in the newly-minted "independent expenditure" definition. Public Law 94-283, 90 Stat. 479. That statute, codified at 2 U.S.C. 431(17), remains unchanged and is the authority that FEC cites for 100.22(b), which goes beyond the magic-words statutory authority, and reintroduces the vagueness and overbreadth that *Buckley* removed in construing the "expenditure" definition that is foundational to the "independent *expenditure*" definition. An "independent expenditure" is an "expenditure," which means it must be "for the purpose of influencing" federal elections, 2 U.S.C. 431(9)(A)(i), which has already been construed as requiring (and still requires) magic-words express advocacy.

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), the Court considered another "expenditure" definition in the statute banning corporate (and other) "expenditures," defined to reach expenditures "in connection with any election," 2 U.S.C. 441b. The Court noted MCFL's argument

> that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates . . . . The argument relies on the portion of

> *Buckley* . . . , that upheld the *disclosure requirement for expenditures by individuals other than candidates and by groups other than political committees*. . . . There, in order to avoid problems of *overbreadth*, the Court held that the term "expenditure" encompassed "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S., *at 80* (footnote omitted).

MCFL, 479 U.S. at 248-49 (emphasis added). The emphasized portions of the block-quote show the clear relevance of the Court's analysis to the present case. Though 441b was a *ban*, the analysis argued that the portion of *Buckley* that dealt with expenditure *disclosure* controlled this similar "expenditure" definition because "in connection with" suffered under the same vagueness and *overbreadth* problem as the "for the purpose of influencing" language of the definition at issue in *Buckley*. The Court "agree[d] . . . that this rationale require[d] a similar construction of the more intrusive provision that directly regulates independent spending" and "h[e]ld that an expenditure must constitute 'express advocacy' . . . to be subject to the prohibition . . . ." *Id.* at 249. The Court reaffirmed "that . . . 'express advocacy' depend[s] upon the use of language such as 'vote for' . . . ." *Id.* Thus, there is no difference between disclosure and ban contexts in the standards for vagueness, overbreadth, and the unambiguously-campaign-related requirement. Any "expenditure" definition employing the operative language construed in *Buckley* and *MCFL* has already been, and must be, given the magic-words express-advocacy construction.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court repeatedly equated "express advocacy" with "magic words." *See* 540 U.S. at 126, 191-93, 217-19. So *McConnell*'s hyperbolic "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* merely used that analysis to *add* regulation of "electioneering communications" to *ongoing* regulation of magic-words express advocacy.

Post-*McConnell*, equation of express advocacy with magic words continues. In *WRTL-II*, all members of the Court equated "express advocacy" with "magic words." *See* 551 U.S. 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, Ginsburg, & Breyer, JJ., dissenting). As noted above, the *Citizens* concurrence and dissent added Justice Sotomayor to the unanimous pronouncement.

This Court held 100.22(b) unconstitutional for not requiring magic words, *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001), and other decisions held that express advocacy requires magic words, *see Leake*, 525 F.3d at 283 (requires "specific election-related words"); *FEC v. Christian Action Network*, 110 F.3d 1049, 1062 (4th Cir. 1997) ("*CAN-II*") (same). These holdings directly control this case.

Other circuits have held that express advocacy requires 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); *Chamber of Commerce v. Moore*, 288 F.2d 187, 195-96 (5th Cir. 2002); *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 (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) ("*CPLC*").[10] *See also ACLU of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("'*McConnell* left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes'" (citation omitted)); *Anderson*, 356 F.3d at 664-65 (same); *Carmouche*, 449 F.3d at 665.[11]

The First Circuit "affirm[ed] for substantially the reasons set forth in the district court opinion" the holding that "'100.22(b) is contrary to [FECA] as the Su-

[10] This decision recognized that even *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), on which FEC relied for the challenged regulation, "presumed express advocacy must contain some explicit *words* of advocacy." *CPLC*, 328 F.3d at 1098.

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

preme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of FEC.'" *Maine Right to Life Committee v. FEC,* 98 F.3d 1 (1st Cir. 1996) (per curiam) (quoting *Maine Right to Life Committee v. FEC*, 914 F.Supp. 8, 13 (D. Me. 1996)).[12] And *Leake*, 525 F.3d at 280-86, held a statute similar to 100.22(b) unconstitutional. Other courts have rejected *Furgatch*-style definitions. *See Moore*, 288 F.3d 187; *Gov. Gray Davis Comm. v. American Taxpayers Alliance*, 102 Cal.App.4th 449 (Cal. Ct. App. 2002); *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266 (Colo. App. 2001); *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000).

And post-*McConnell*, other courts have joined *Leake* in holding that the only two types of (non-PAC) speech that are regulable are magic-words express advocacy and federally-defined electioneering communications meeting *WRTL-II*'s appeal-to-vote test. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010); *Broward Coal. of Condos., Homeowners Ass'ns and Cmty. Orgs., Inc. v. Browning*, No. 4:08cv445, 2009 WL 1457972, at *5 (N.D. Fla. May 22, 2009) (order granting summary judgment); *National Right to Work Legal De-*

[12] *See* also *Right to Life of Duchess County, lnc. v. FEC,* 6 F.Supp.2d 248, 253-54 (S.D.N.Y. 1998) ("100.22(b)'s definition of 'express advocacy' is not authorized by FECA, 2 U.S.C. § 441b, as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley*").

fense and Education Foundation v. Herbert, 581 F. Supp. 2d 1132, 1144 (D. Utah 2008).

Citizens changed this great body of authority in only one respect. It decided that, as to disclosure, communications merely meeting the electioneering communication definition (without also passing the appeal-to-vote test) could be subject to disclaimers and one-time, event-driven reporting requirements (not PAC-style requirements). 130 S.Ct. at 915. But that holding merely means that, for disclosure purposes, statutorily defined electioneering communications meet the unambiguously-campaign-related requirement. Note that the electioneering-communication definition was a whole new approach to regulation that was not based on vague and overbroad purpose-of-influencing or in-connection-with elections language but based on tightly defined activity in closely confined periods near elections, which the Court held was not vague or overbroad. *Id.* at 192 ("In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."). But this does not mean that the Court has changed its mind about requiring "magic words" for "expenditures" defined on the basis of purpose-of-influencing-elections language. In fact, the *Citizens* concurrence on the disclosure issue simultaneously reaffirmed that "express advocacy" requires "magic words." 130 S.Ct. at 935 n.8

(Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ.).

In the face of all this authority declaring that "express advocacy" is a magic-words standard, FEC justifies 100.22(b) based on the express-advocacy test in *Furgatch*, 807 F.2d 857. *See* FEC, "Express Advocacy . . . ," 60 Fed. Reg. 35291, 35294 (July 6, 1995) (explanation & justification). But 100.22(b) does not even follow *Furgatch*'s mandate that "speech may only be termed 'advocacy' if it presents a clear *plea for action*, and . . . it must be clear what action is advocated[, i.e.,] . . . a vote for or against a candidate . . . "[13] 807 F.2d at 864. Section 100.22(b) contains no clear-plea-for-action requirement that must be to "vote."[14] Absent this central element of *Furgatch*, FEC cannot assert that its test is identical to *Furgatch*'s test. Anyway, *Furgatch* does not control here. In *CAN-II*, 110 F.3d 1049, this Court noted *Buckley*'s and *MCFL*'s requirement of magic words for express advocacy, interpreted the *Furgatch* test,[15] then expressly rejected FEC's

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[13] *Furgatch* applied this to an anti-Nixon ad that proclaimed "DON'T LET HIM DO IT!" where the only way to "[not] let him do it" was to vote against him. The Ninth Circuit decided that there was a "clear plea for action" and the action solicited was "a vote for or against a candidate" so the communication at issue fit the test.

[14] The Ninth Circuit has since recognized that even *Furgatch* "presumed express advocacy must contain some explicit *words* of advocacy." *CPLC*, 328 F.3d at 1098.

[15] This Court's extended interpretation of what *Furgatch* required included this:

> Indeed, the simple holding of *Furgatch* was that, *in those instances*

assertion that it followed *Furgatch* in promulgating 100.22(b):

> Contrary to its assertions, the Commission's regulatory definition of "express advocacy" does not parallel this test. According to the FEC:
>
> > [l]ike the first prong in *Furgatch,* the Commission's regulation requires the "electoral portion of the communication [to be] unmistakable, unambiguous, and suggestive of only one meaning" (11 C.F.R. § 100.22(b)(1)). Like the second and third prongs, the Commission's regulation requires that "[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" (11 C.F.R. § 100.22(b)(2)). Appellant's Reply Br. at 9 (footnote omitted). It is plain that the FEC has simply selected certain words and phrases from *Furgatch* that give the FEC the broadest possible authority to regulate political speech (*i.e.,* "unmistakable," "unambiguous," "suggestive of only one meaning," "encourage[ment]", 807 F.2d at 864), and ignored those portions of *Furgatch,* quoted above, which focus on the

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

Id. at 1054 (emphasis in original). And this Court expressly noted that the following FEC representation in opposing certiorari for *Furgatch* was inconsistent with 100.22(b):

> "The court of appeals' assessment of Mr. Furgatch's advertisement under [the "express advocacy'] standard turns upon the particular facts of this case, and thus does not necessarily indicate how courts will assess other communications in other circumstances. Such a fact-dependent determination does not warrant plenary review by this Court, particularly since the Court discussed the proper application of the express advocacy standard only last Term in *FEC v. Massachusetts Citizens for Life, Inc.* [479 U.S. at 248-50], and applied it in a manner consistent with that of the court of appeals in this case."

CAN-II, 110 F.3d at 1054 (citation omitted).

words and text of the message.

CAN-II, 110 F.3d at 1054 n.5. In this Circuit, FEC cannot succeed in arguing that 100.22(b) follows *Furgatch*. That has already been authoritatively rejected. In fact, *CAN-II* awarded attorney's fees against FEC for asserting its baseless position. *Id.* at 1064. Nothing has altered the controlling Fourth Circuit holdings that express advocacy requires "magic words."

D. Section 100.22(b) Is Beyond Statutory Authority.

Section 100.22(b) is beyond statutory authority for going beyond "magic words" in defining the express-advocacy construction applied to "expenditure" definitions employing both purpose-of-influencing-elections language. *See supra* at 27-28. 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. at 44, 80. There is no congressional authority anywhere for FEC to interpret "expressly advocating" other than as requiring magic words. Congress has only regulated two types of non-PAC campaign-related speech: (1) "independent expenditures," 2 U.S.C. 431(17), for which it employed *Buckley*'s magic-words "expressly advocating" as a term of art with fixed meaning following the Supreme Court's construction of "expenditure" to require magic-words express

advocacy, and (2) "electioneering communications," 2 U.S.C. 434(f)(3), which it defined as targeted, broadcast ads identifying candidates 30 and 60 days before primaries and general elections respectively. Neither definition contains an appeal-to-vote test, so Congress has not asserted its authority to regulate under that test, but *WRTL-II* did limit the electioneering-communication prohibition to communications with *WRTL-II*'s appeal to vote. Congress has nowhere sought to regulate any hybrid of these, only magic-words independent expenditures and bright-line electioneering communications. Moreover, the only "expenditure" that FEC may regulate by statute—as an "independent *expenditure*"—is one "for the purpose of influencing any election for Federal office," 2 U.S.C. 431(9), and it was precisely to such language in an "expenditure" definition that *Buckley* gave an express-advocacy construction to preserve it from vagueness and overbreadth in the *disclosure* context. 424 U.S. at 77, 80.

As already noted, *supra* at 27-28, courts have expressly held that 100.22(b) is beyond statutory authority because its purportedly authorizing "expenditure" definition has already been construed to require magic-word express advocacy. *See Maine Right to Life Committee,* 98 F.3d 1; *Maine Right to Life Committee*, 914 F.Supp. 8, 13; *Right to Life of Duchess County,* 6 F.Supp.2d at 253-54.

Furthermore, it is simply illogical to assert that any sort of "functional *equivalent* of express advocacy," *WRTL-II*, 551 U.S. at 469 (emphasis added), can be a

type of express advocacy. If they were the same, Congress would have included electioneering communications within the independent-expenditure definition, which it did not, and *McConnell* and *WRTL-II* would have simply said that an electioneering communication was a type of independent expenditure, rather than identifying some of it as functionally equivalent. Congress expressly provided that any communication fitting the electioneering-communication definition that also "constitutes an expenditure or an independent expenditure under this Act" is not an electioneering communication. 2 U.S.C. 434(f)(3)(B)(ii). This means that Congress said that the definitions do not overlap, so that a communication either contains magic-words express advocacy and is an independent expenditure, or it merely mentions a candidate in the requisite manner and time-frames before elections and is an electioneering communication. Thus, a narrowing construction imposed on the electioneering-communication prohibition to save it from unconstitutionality cannot be imported into the independent-expenditure definition by means of an alternate "expressly advocating" definition. Congress enacted statutes regulating the two as separate types of communications without overlap.

E. Section 100.22(b) Is Unconstitutionally Vague and Overbroad.

The district court upheld 100.22(b) as "consistent with [*WRTL-II*'s] appeal-to-vote test." JA–69. But that test is not free-floating and is unconstitutionally vague outside its electioneering-communication context. *WRTL-II* made this clear, in re-

sponse to Justice Scalia's vagueness accusation, that the appeal-to-vote test was not vague *because it was anchored by the statutory electioneering-communication definition*:

> Justice SCALIA thinks our test impermissibly vague. . . . [W]e agree with Justice SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. . . . And keep in mind this test is only triggered if the speech meets the brightline requirements of [the electioneering-communication definition] in the first place.

551 U.S. at 474 n.7 (underscoring added). Conversely, absent the brightline context of the electioneering-communication definition, *WRTL-II* agrees that the appeal-to-vote test *is* unconstitutionally vague (and consequently overbroad). Neither the notion of "functional equivalence," which was replaced by *WRTL-II*'s appeal-to-vote test, *id.* at 469-70, nor that test itself is a free-floating test that Congress or FEC may apply elsewhere.

This was the recent holding of a court in this Circuit in a carefully reasoned opinion reflecting the approach the court below should have taken. *See CFIF*, No. 08-190, 2011 WL 2912735, at *17-21. The court first noted this Court's unambiguously-campaign-related requirement, including *Leake*'s holding that a communication would be the "functional equivalent of express advocacy" only if it meets *both* the electioneering-communication definition *and* the appeal-to-vote test. *Id.* at *17. But it said it need not reach an analysis based on the unambiguously-campaign-related

requirement because the case could be decided on vagueness grounds. *Id.* at *19. It noted that though "Chief Justice Roberts expressly cabined the 'appeal to vote' test within the . . . 'electioneering communication' definition to assuage the concurrence's vagueness concerns," yet

> the three concurring justices outright rejected the 'appeal to vote' test of vagueness grounds, arguing that it
>
> > ultimately depend[s] . . . upon a judicial judgment . . . concerning 'reasonable' or 'plausible' import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decision maker's subjective evaluation of the importance or unimportance of the challenged speech.
>
> [*WRTL-II*, 551 U.S.] at 493 (Scalia, J., concurring). The fractured holding of the *WRTL II* Court leaves the "appeal to vote" test on shaky ground, at least as to the vagueness issue identified and addressed by all five justices joining in the judgment.

Id. at 20. Thus, the *CFIF* court decided that the confinement of the appeal-to-vote test to the electioneering-communication context "was a significant, if not dispositive, reason the test survived vagueness scrutiny." *Id.* So the court held that "a stand-alone 'appeal to vote' test cannot survive a vagueness challenge." *Id.* at 21. The

> test, on its own, "ultimately depend[s] . . . upon a judicial judgment . . . concerning 'reasonable' or 'plausible' import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decision maker's subjective evaluation." *WRTL II,* 551 U.S. at 493 (Scalia, J., concurring). West Virginia's use of the "appeal to vote" test contains none of the objec-

> tive, clearly-discernable elements that *WRTL II* emphasized in footnote 7. Instead, it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers," *Buckley,* 424 U.S. at 43, and will therefore muddle the scope of attendant regulation. Due to this impermissible vagueness, [the "expressly advocating" definition] is unconstitutional.

Id.

The same analysis applies to 100.22(b). The extent that the district court and Appellees rely on *WRTL-II*'s appeal-to-vote test to justify 100.22(b), and to the extent the two tests are comparable, 100.22(b) is facially unconstitutional for vagueness for not restricting the test to the limiting context in which *WRTL-II* narrowly upheld it against unconstitutional vagueness. Moreover, 100.22(b) contains inherently vague terms—"electoral portion," "encourages," "actions," "suggestive," and "limited reference to external events, such as proximity to the election"—that are far from the precision that the Supreme Court required from *Buckley* to *Citizens*. Section 100.22(b)'s reliance on "proximity to the election" to determine the functional equivalent of express advocacy is not only vague but this central feature of 100.22(b) has already been held unconstitutional for this purpose in *WRTL-II*.[16] Moreover, FEC has recently included the appeal-to-vote test as a

[16] *WRTL-II* expressly rejected proximity to an election as a criterion for the functional equivalent of express advocacy. *See WRTL-II*, 551 U.S. at 472. The limited "basic background information" that *WRTL-II* said *may* be considered included whether legislation on a mentioned issue is pending, but not any of the criteria that *WRTL-II* expressly rejected, *id.*, at 474, which includes the proximity to an election that 100.22(b) would examine.

content standard for coordination in a coordinated-communication regulation, calling it "the functional equivalent of express advocacy" standard, and stating that this test "is broader than express advocacy." FEC, "Coordinated Communications," 75 Fed. Reg. 55947, 55952 (Sept. 15, 2010). So it may not now insist that express advocacy and the appeal-to-vote test are the same. In fact, the new coordination rule lists express advocacy as a separate content standard, conceding that the two are not equivalent. *See* 11 C.F.R. 109.21(c)(3) (express advocacy) and (5) (appeal-to-vote test).

In remanding for reconsideration in light of *Citizens*, the Supreme Court clearly had in mind its forceful repudiation of FEC's approach to regulation in 11 C.F.R. 114.15, which was based on the same sort of subjective, balancing, speech-chilling, FEC-empowering, ad-hoc, we-know-it-when-we-see-it approach taken by FEC in both 11 C.F.R. 100.22(b) and its PAC-status enforcement policy. Before the Supreme Court in this case, FEC expressly relied on its interpretation (articulated in now-abandoned 11 C.F.R. 114.15) of *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70, insisting that *WRTL-II*'s context-sensitive *application* of the appeal-to-vote test was a part of the test itself. Br. Resp'ts at 15-16, *RTAO*, 130 S.Ct. 2371 ("To the extent the standards differ, 100.22(b) is narrower than the *WRTL* test, as the regulation requires an 'unambiguous' electoral portion, 11 C.F.R. 100.22(b)(1), while the lead opinion in *WRTL* looks to the 'mention' of an

election and similar 'indicia of express advocacy.'") (brief available at http://www.justice.gov/osg/briefs/2009/0responses/2009-0724.resp.pdf). What *Citizens* said about FEC's approach to its appeal-to-vote test in 11 C.F.R. 114.15 clearly indicates that FEC may not take the same approach with regard to 100.22(b) and its PAC-status enforcement policy.

The *Citizens* repudiation of 11 C.F.R. 114.15 is too lengthy to reproduce here, but bears review. *See* 130 S.Ct. at 895-96. *Citizens* noted that FEC reduced the Court's objective, protective test into a subjective, unprotective rule. It reduced the appeal-to-vote test to a mere *part* of FEC's "two-part, 11-factor balancing test." *Id.* at 895. FEC made details of the application of the appeal-to-vote test to particular grassroots lobbying ads a part of 114.15. Ignoring *WRTL-II*'s reassertion of strong constitutional protection for issue advocacy, FEC imposed maximum control over it. FEC made a rule so vague and overbroad that *Citizens* declared it like a prior restraint for compelling speakers to seek advisory opinions before daring to speak. *Id.* at 895-96. And *Citizens* noted that many persons could not afford the protracted litigation necessary to dispute FEC's de facto licensing scheme. *Id.* FEC did "precisely what *WRTL* sought to avoid," *Citizens* concluded. *Id.* at 896. It chilled political speech.

Section 100.22(b) takes the same vague and overbroad approach. It allows "limited reference to external events, such as the proximity of an election," which

WRTL-II expressly eschewed. 551 U.S. at 472-74. There cannot be express-advocacy criteria that were forbidden in applying *WRTL-II*'s appeal-to-vote test. *WRTL-II* said that ads meeting its test were the functional equivalent of express advocacy. *Id.* at 469-70. But context and proximity to an election could not be used in determining whether an ad fell within the test, rather the test must look to the substance of the communication itself. *Id.* at 469, 472-74. *WRTL-II* repudiated the context-and-proximity approach FEC and Intervenors took in their effort to prove that WRTL's ads were the functional equivalent of express advocacy, along with the burdensome discovery imposed on WRTL in an effort to establish contextual factors. Yet 100.22(b) embraces context and proximity to an election as criteria for express advocacy (the supposed equivalent), to be determined by burdensome investigations in enforcement actions and by burdensome discovery in litigation. "Such litigation constitutes a severe burden on political speech." *WRTL-II*, 551 U.S. at 468 n.5. If such severe burdens are unconstitutional in applying the appeal-to-vote test, then *WRTL-II*'s declaration of equivalence mandates that these burdens are necessarily unconstitutional in applying the express advocacy test. If *WRTL-II* eschewed context-and-proximity criteria and mandated focus on the substance of the communication in applying its test, then the declared equivalence mandates that the same criteria be employed for determining express advocacy.

Section 100.22(b) relies on a "reasonable person" standard, while *WRTL-II*

required an objective standard based on the meaning of the actual words and not what some hypothetical person might think the ad in general and in context might mean. *Id.* at 469-70. It relies on the operative phrase "advocacy of the election or defeat of . . . candidates, though *Buckley* expressly held that the phrase "'advocating the election or defeat of' a candidate " is unconstitutionally vague and overbroad absent the express-advocacy construction. 424 U.S. at 42, 44.

Other vague and overbroad terms in 100.22(b), such as "encourages," "actions,"[17] and "suggestive,"[18] further diminish the constitutionality of, and statutory authority for, this regulation. It requires examination of an undefined and vague "electoral portion." As a result, would-be speakers, enforcers, and courts are unable to tell what is permitted.

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[17] *Buckley* specifically defined expressly advocating election or defeat as encouraging a *vote* for against someone, not as encouraging *actions* to elect or defeat. *Buckley*, 424 U.S. at 44 n.52. Substituting "actions" introduces vagueness and broadens the activity encompassed, all without precedential authority.

[18] *WRTL-II*'s appeal-to-vote test employed the term "susceptible," 551 U.S. at 469-70 ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"), which clearly indicates that the communication at issue must only be capable of one meaning in order to be restricted. This formulation favors liberty of expression. By contrast, "suggestive" takes the issue away from the clear meaning of the text to what a communication might suggest. It is too vague for use in restricting First Amendment activity, where bright lines are required to protect speakers and chill would-be censors and those who would file complaints to invoke the powers of censorship. It favors suppression of expression. "In drawing that line [between campaign advocacy and issue advocacy], the First Amendment requires us to err on the side of protecting speech rather than suppressing it." *WRTL-II*, 551 U.S. at 457.

Section 100.22(b) applies year-round, includes non-broadcast communications, and does not require targeting, so its vagueness is not mitigated by being confined to communications otherwise meeting the brightline electioneering communication definition. And the other saving graces of *WRTL-II*'s appeal-to-vote test and the mandated procedures for as-applied challenges are wholly absent from the way in which FEC has been applying its alternative express advocacy test. Just as it did to WRTL in *WRTL II*, FEC has sought to establish express advocacy by engaging in wide-ranging discovery into intent and effect.[19] It has broadly employed often marginal contextual factors. It has insisted that if an issue is a campaign issue it is essentially foreclosed as a communication topic for non-campaign speakers absent FECA compliance. Both *WRTL-II* and *Citizens* foreclose such speech-chilling regulation.

F. Applying Section 100.22(b) to RTAO's Ads Highlights the Vagueness.

Applying 100.22(b) to RTAO's proposed Ads readily demonstrates its flaws. FEC "den[ied] that the '*Change*' ad is express advocacy under . . . 100.22(b)" but "admit[ted] that the '*Survivors*' ad is express advocacy under . . . 100.22(b)." Doc. 87 (Am. Answer ¶ 26). Of course neither ad is express advocacy under the requi-

[19] Examples of FEC's application of section 100.22(b) with relevant analysis can be found in James Bopp, Jr. & Richard E. Coleson, Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communications) at 15-24 (Sept. 28, 2007) (available at http://sers.nictusa.com/fosers/showpdf.htm?docid=4963).

site magic-words test.

Despite FEC's position that *Change* was not express advocacy, the district court decided (in denying preliminary injunction) that "it is clear that reasonable people could not differ that [*Change*] is promoting the defeat of Senator Obama," so it would be express advocacy under 100.22(b). Doc. 77 at 13; *see also id.* at 15 n.3 ("clearly both are expressly advocating the defeat of Senator Obama"). In its summary judgment opinion, the district court again decided that section 100.22(b) is constitutional as applied to the Ads, that "'*Change*' is plainly the functional equivalent of express advocacy" and "'*Survivor*' is more obviously" so. JA–74.

Since the FEC and the district court *disagree* as to whether *Change* is express advocacy under 100.22(b), the flaw in the regulation is apparent. Since RTAO believes that both the district court and FEC are comprised of the "reasonable persons" envisioned by 100.22(b), the fact that they view an ad differently readily reveals a clear problem with this reasonable-person test. If the enforcement agency and a federal court cannot agree on the applicability of 100.22(b) how can RTAO know what it may do and how it may be free from arbitrary enforcement? The test is unconstitutionally vague and overbroad, beyond statutory authority, and void.

II. FEC's PAC-Status Policy Is Vague, Overbroad, Beyond Authority, and Void.

In remanding this case for reconsideration in light of *Citizens*, the Supreme

Court surely had in mind its declaration that PACs impose "onerous" burdens, its repudiation in of PACs as constitutionally adequate vehicles for corporate core political speech, and its rejection of multi-factor tests in that case. *See infra*. What the Court rejected is precisely what is at issue in FEC's PAC-status enforcement policy.

RTAO challenges FEC's no-rule policy because RTAO reasonably fears that it will be deemed a PAC—by FEC or a court compelling FEC to bring an enforcement action on a complaint. The policy is set out in two statements: *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 (now-abandoned) 100.57 as central elements of its policy, 72 Fed. Reg. at 5602-05, so the flaws in those regulations negatively affect the policy. The major-purpose test is the third element of the enforcement policy. RTAO complains that

> [b]ecause the FEC's enforcement policy for determination of PAC status goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity received a "contribution" or made an "expenditure," is unconstitutionally vague and overbroad, and is in excess of the statutory . . . authority . . ." of the FEC, it is void under 5 U.S.C. § 706.

JA–36.

A. Standards of review.

The standards for vagueness, First-Amendment substantial overbreadth,

Buckley-overbreadth, and statutory authority are the same here as for Part I.A. *See supra* at 15-16. Only if the policy survives review under those standards, which it cannot properly do, would it be proper to consider whether exacting or strict scrutiny applies, but strict scrutiny would apply in such case.

Citizens applied two different types of scrutiny to two distinctly different types of speech burdens. It dealt with *both* a ban *and* PAC-status and PAC-burdens on one hand, to which it applied strict scrutiny, 130 S.Ct. at 896-98, and separately it dealt with mere disclaimers and one-time, event-driven reports on the other hand, to which it applied intermediate exacting scrutiny, *id.* at 913-14. PAC-status and PAC-style disclosure cannot properly be conflated with, and treated as, mere "disclosure" (disclaimers and one-time, event-driven reports) as the district court erroneously did. JA–67-68.

That strict scrutiny applies to PAC-status and PAC-burdens, as well as speech bans, is clear in *Citizens*. The Court first noted that "Section 441b is a *ban* on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." 130 S.Ct at 897 (emphasis added). But the Court then considered PAC-burdens *alone*, i.e., as would be true if there *were no ban*: "*Even if a PAC could somehow allow a corporation to speak*—and it does not—the option to form *PACs does not alleviate the First Amendment problems* with § 441b. *PACs are burdensome . . . .*" *Id.* at 897 (emphasis added). After explaining the "onerous"

nature of PAC-status and PAC-burdens, the Court held that "[l]aws that *burden* political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 898 (quoting *WRTL-II*, 551 U.S. at 464) (emphasis added). In both *Citizens* and *WRTL-II*, it is not "laws that *ban* political speech" but rather "laws that *burden* political speech" that are subject to strict scrutiny—unless that burden is truly *only* "BCRA's disclaimer and disclosure provisions," *Citizens*, 130 S.Ct. at 913, by which is meant one-time, event-driven reports of the sort that *Citizens* considered under exacting scrutiny.

This distinction between PAC-style burdens and "BCRA's . . . disclosure requirements" is well-known to FEC. While PAC-style burdens are well-described in *Citizens*, 130 S.Ct. at 897-98, they are also set out in entire FEC manuals titled *FEC Campaign Guide for Corporations and Unions* (2007) (134 pages) (http://fec.gov/pdf/colagui.pdf) and *FEC Campaign Guide for Nonconnected Committees* (2008) (134 pages) (http://fec.gov/pdf/nongui.pdf), both with extensive supplements and supporting brochures providing further information, e.g., on *Best Practices for Committee Management* (no date) (http://fec.gov/pages/brochures/best_practices.pdf) and *Committee Treasurers* (updated 2011) (http://fec.gov/pages/brochures/committee_treasurers_brochure.pdf). In addition, citizens must consult numerous FEC rules, explanations and justification for the

rules ("E&Js"), advisory opinions ("AOs"), matters under review ("MURs"), and court decisions to track what PACs may and may not do, and how. The situation with PAC-status and PAC-burdens is precisely what the Supreme Court described in *Citizens* in describing the burden of prolix, vague laws that require hiring a lawyer in order to speak: "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" 130 S.Ct. at 889.

By contrast, regarding ordinary, one-time, event-driven disclosure of independent expenditures and electioneering communications, FEC has a small brochure on *Coordinated and Independent Expenditures* (updated 2011) (http://fec.gov/pages/brochures/ie_brochure.pdf) (11 pages) and *Electioneering Communications* (updated 2009) (http://fec.gov/pages/brochures/ec_brochure.pdf) (6 pages). This ordinary disclosure requires no complicated work for an appointed treasurer, and the page-number disparity between FEC publications alone reveals the error of equating PAC-style burdens with the ordinary disclosure to which *Citizens* applied exacting scrutiny.

Thus, strict scrutiny applies to any provision imposing PAC status. This is confirmed by *Austin*, which made clear that strict scrutiny applies to PAC burdens

regardless of whether they are deemed a ban:

> The [Michigan] Act imposes requirements similar to those in the federal statute involved in MCFL: a segregated fund must have a treasurer . . . ; and its administrators must keep detailed accounts of contributions, . . . and file with state officials a statement of organization, ibid. In addition, a nonprofit corporation like the Chamber may solicit contributions to its political fund only from members, stockholders of members, officers or directors of members, and the spouses of any of these persons. . . . *Although these requirements do not stifle corporate speech entirely, they do burden expressive activity.* See MCFL, 479 U.S., at 252 (plurality opinion); id., at 266 (O'CONNOR, J.). *Thus, they must be justified by a compelling state interest*

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658 (1990), *overturned on other grounds*, *Citizens*, 130 S.Ct. at 913 (emphasis added). The Supreme Court held the same in *MCFL*: "When a statutory provision *burdens* First Amendment rights, it must be justified by a *compelling* state interest." 479 U.S. at 263 (emphasis added). The fact that strict scrutiny was being applied to the PAC burdens at issue in *MCFL* is clear from the Court's statement that "[t]he state interest in *disclosure* therefore can be met in a manner *less restrictive* than imposing the full panoply of regulations that accompany status as a *political committee* under the Act. *Id.* at 262 (emphasis added). The less-restrictive-means requirement is a strict-scrutiny standard (as is the compelling-interest requirement), and the Court here clearly distinguishes between simple, one-time, event-driven, independent-expenditure disclosure and the "full panoply" of PAC-status and PAC-burdens, applying strict scrutiny to the latter. Nor was a *prohibition* at issue here because

the Court had *already* decided that *MCFL*-type nonprofit corporations were *not subject* to the prohibition. *See id.* at 260 ("[T]he desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of independent spending."). So the Court was applying strict scrutiny to the FEC's desire to impose PAC-status and PAC-burdens on entities not subject to the corporate prohibition on independent expenditures at 2 U.S.C. 441b.

B. *Citizens* Declared PAC Burdens "Onerous" and Rejected PACs as Adequate Vehicles for Corporate Political Speech and Vague, Multi-Factor Tests.

What in *Citizens* illumines this reconsideration on remand? *Citizens* held that PACs impose "onerous" burdens, 130 S.Ct. at 895, 898, 912, so any notion that RTAO would benefit from being a PAC is erroneous, and scrutiny of the FEC policy PAC-status policy requires strict scrutiny. The Supreme Court envisioned no complaisant, deferential review of "onerous" burdens on core political speech on this remand. *See supra*.

And *Citizens* forcefully repudiated both the notion that PACs are constitutionally adequate vehicles for corporate core political speech, *id.* at 897, and speech-chilling, vague, multi-factor tests, *id.* at 895-96. So the Supreme Court surely envisioned that the courts below would similarly reject FEC's vague, multi-factor PAC-status policy that makes it unclear when an organization slips into PAC status. *Citizens* forcefully repudiated FEC's appeal-to-vote-test rule at 11 C.F.R.

114.15, which was based on the same sort of vague and overbroad, ad-hoc approach taken by FEC in its PAC-status enforcement policy. If 114.15 was "precisely what *WRTL* sought to avoid," *Citizens*, 130 S.Ct. at 896, then FEC's PAC-status enforcement policy was precisely what *Buckley* and *MCFL* sought to avoid.

As this Court put it—in striking down similar vague and overbroad standards regulating (1) communications, under a contextual, reasonable-person standard, *Leake*, 525 F.3d at 280-82, and (2) PACs, under a provision that "provid[es] insufficient direction to speakers and leav[es] regulators free to operate without even the guidance of discernable, neutral criteria," *id.* at 290—the government "is essentially handing out speeding tickets without 'telling anyone . . . the speed limit,'" *id.* at 290 (citation omitted). Such an approach is "dangerous" to "political speech," *id.*, as stated next, *id.*:

> is nowhere so dangerous as when protected political speech is involved. [The challenged provision]'s "we'll know it when we see it approach" simply does not provide sufficient direction to either regulators or potentially regulated entities. Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject.

C. FEC Must Prove Its Policy Only Regulates Activity that Is Election-Influencing by Being Unambiguously Campaign Related.

Buckley held that PAC-status could only be imposed on groups "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*." 424 U.S. at

79 (emphasis added). *Leake* held that the unambiguously-campaign-related requirement applies to PAC-status rules and that it mandates a *narrow* major-purpose test for determining PAC status. 525 F.3d at 287-90. Consequently, the Government bears the threshold burden of demonstrating that its PAC-status policy only considers unambiguously-campaign-related activity in determining PAC status and only captures groups with *Buckley*'s major purpose under a permissible interpretation of the major-purpose test.

D. Major Purpose Is Based on "an Empirical Judgment [that] an Organization Primarily Engages in Regulable, Election-Related Speech."

Under *Buckley*'s major-purpose test, PAC 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 candidates." 424 U.S. at 79. Such groups meet the unambiguously-campaign-related requirement because they "are, by definition, campaign related." *Id.*

Determining a group's major purpose is "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech *Leake*, 525 F.3d at 287. Major purpose may be determined by either an entity's expenditures: "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." *MCFL*, 479 U.S. at U.S. at 262 (major-

purpose calculation looks at express-advocacy independent expenditures in relation to total expenditures). Or major purpose may be determined by the organization's central purpose revealed in its organic documents. *Id.* at 252 n.6 ("MCFL['s] . . . central organizational purpose is issue advocacy.").

Thus, the first test for major purpose requires a comparison of the entity's total disbursements for a year with its unambiguously-campaign-related, regulable expenditures, so that only the amount of true political "contributions" and "expenditures" would be counted. The second test requires an examination of the entity's organic documents to determine if there was 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).

Because *Buckley's* and *MCFL's* major-purpose test is an authoritative construction of the definition of "political committee," and a constitutional limit on the application of the political committee requirements of FECA, FEC's enforcement policy that does not comply with this construction is beyond FEC's statutory authority.

The Tenth Circuit agrees with the foregoing analysis:

> 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 contribu-

> tions to candidates. 479 U.S. at 252 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 (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"). Thus, under FECA, any group that (1) spends more than $1,000 in a year, and (2) has as its "major purpose" the influencing of a federal election, should be considered a political committee. As a political committee, the group must adhere to certain registration, organizational, recordkeeping, reporting, and disclosure requirements. *See MCFL,* 479 U.S. at 254 ("[M]ore extensive requirements and more stringent restrictions . . . may create a disincentive for such organizations to engage in political speech.").

Colorado Right to Life Committee v. Coffman, 498 F.3d 1137, 1152 (10th Cir. 2007). *See also Herrera*, 611 F.3d at 678 (same two methods). *Leake*'s requirement that major purpose be determined based on "regulable, election-related speech," 525 F.3d at 287, agrees with the Tenth Circuit that only "expenditures for express advocacy or contributions to candidates" are cognizable in calculating major purpose.

Notably, Congress did not include "electioneering communications" as a trigger for PAC status—only "contributions" and independent "expenditures," 2 U.S.C. 431(4), so Congress did not assert an interest in counting electioneering communications toward statutory PAC status. This is reasonable because, as *WRTL-II* makes clear, the electioneering-communication definition sweeps in genuine issue advocacy along with campaign speech, which could be filtered out

(only in the electioneering-communication context) by the appeal-to-vote test, 551 U.S. at 469-70, which in any event no longer plays any role in federal election law. *A fortiori*, if even electioneering communications may not count toward major purpose, then *non*-regulable speech and activities may clearly not be counted.

The reason for such a bright line is threefold. First, groups must be easily able to determine whether their activities put them at risk for the onerous burdens of PAC status, or else they will be chilled by vague and overbroad standards from constitutionally protected core political speech. Second, enforcement agencies and those who might complain to them need bright lines to prevent selective enforcement risks and the burden of having to defend against frivolous complaints (often by political rivals for perceived advantage by partially or fully disabling an opponent). Third, if a PAC-status enforcement policy is dependent on fact-intensive investigations based on overbroad, ambiguous criteria, the investigation itself becomes an unconstitutional burden on expressive association.

Under the approved method described by *MCFL* and the Tenth Circuit, *supra*, if an opponent complains that a group really has the major purpose of nominating or electing candidates, the group can quickly clear itself by submitting a few, readily available documents showing its annual expenditures and its regulable federal contributions and expenditures from which simple arithmetic will show if the regulable, campaign-related speech comprises more than fifty percent of the

group's annual expenditures. Nor can FEC argue, as it did in *MCFL*, that there will be inadequate disclosure, because *MCFL* already decided that regular disclosure of contributions and independent expenditures supplies all of the information the government needs from groups lacking *Buckley*'s major purpose. 479 U.S. at 262. It is the *nature* of the group, determined by the major-purpose test, that determines whether a group may be treated like a PAC, not the amount of its contributions and independent expenditures. And that nature is determined with a *proper* major-purpose test. But that is not FEC's approach, as set out in its chilling and unauthorized PAC-status enforcement policy.

E. FEC Employs an Impermissible Major-Purpose Policy.

In *PAC-Status 2*, after having initiated a rulemaking proceeding, FEC declared its refusal to adopt the sort of rule set out above (or any rule) for the major-purpose test, insisting that "the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct." 72 Fed. Reg. at 5601. Instead, it set out its vague and overbroad enforcement policy regulating major purpose, requiring FEC to engage in "a fact intensive inquiry," in order to weigh various vague and overbroad factors with undisclosed weight, requiring "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" (but not limited to spending on regulable activity) and other spend-

ing, and 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 First Amendment privacy and were only obtained because the organization was subjected to a burdensome, intrusive investigation. Major purpose was even based on a private thank-you letter to a donor, *after* the donation had already been made. *Id.*

PAC-Status 2, therefore, sets out an enforcement policy based on an ad-hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-ranging, intrusive, and burdensome investigations (often begun when a complaint is filed by a political or ideological rival) that, in themselves, can shut down an organization, without adequate bright lines to pro-

tect issue advocacy and issue-advocacy groups in this core First Amendment area. Because FEC's policy goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity made an "expenditure," 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 foregoing reasons the district court's order granting summary judgment to FEC and DOJ should be reversed and the case remanded with an order to enter summary judgment for RTAO.

Oral Argument

RTAO requests oral argument, due to the complex nature of the issues.

Respectfully submitted,

/s/ James Bopp, Jr.

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

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

Addendum

11 C.F.R. § 100.22:

Sec. 100.22 Expressly advocating (2 U.S.C. 431(17)).

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.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1760 **Caption:** The Real Truth About Obama, Inc. v. FEC & DOJ

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(s) Richard E. Coleson

Attorney for The Real Truth About Obama

Dated: 9/19/2011

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I certify that on September 19, 2011, the foregoing document was served by electronic service through the Court's CM/ECF system on the following counsel of record for Defendants at the listed e-mail addresses:

Anthony Herman
General Counsel
David Kolker
Associate General Counsel
dkolker@fec.gov
Harry J. Summers
Assistant General Counsel
hsummers@fec.gov
Adav Noti
Attorney
anoti@fec.gov
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463-0000
Counsel for Appellee FEC

Tony West
Assistant Attorney General
Neil H. MacBride
United States Attorney
Michael S. Raab
michael.raab@usdoj.gov
(202) 514-4053
Daniel Tenny
daniel.tenny@usdoj.gov
(202) 514-1838
Attorneys, Appellate Staff
Civil Division, Room 7215
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Counsel for Appellee DOJ

Debra J. Prillaman
debra.prillaman@usdoj.gov
Office of the United States attorney
Suite 1800
Main Street Center
600 E. Main Street
Richmond, VA 23219-0000
Counsel for Appellee DOJ

/s/
Richard E. Coleson