UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REAL TRUTH ABOUT OBAMA, INC.,	)	
Plaintiff,	)	No. 3:08-cv-00483-JRS
v.	)	
FEDERAL ELECTION COMMISSION and UNITED STATES DEPARTMENT OF JUSTICE,	)	OPPOSITION TO PRELIMINARY INJUNCTION
Defendants.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINITFF'S MOTION FOR PRELIMINARY INJUNCTION

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* *pro hac vice application pending*

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One week after it incorporated, plaintiff filed this suit asking for extraordinary injunctive relief that would alter the status quo and prevent the Federal Election Commission, near the peak of the election cycle, from enforcing longstanding regulations and enforcement policy. Plaintiff does not allege that it has yet done anything that implicates federal election law or that the Commission has taken any action against it. Rather, without engaging in any fundraising or electoral speech, or any other relevant concrete action, plaintiff has attempted to invoke this Court's jurisdiction because of its unfounded fear of prosecution if it should carry out its alleged intentions. In fact, the particular advertisement and fundraising solicitation plaintiff intends to pursue will not be regulated as plaintiff fears. Plaintiff thus fails to present a justiciable case or controversy. In any event, the provisions plaintiff challenges are all constitutional. The Court should deny plaintiff's request for a preliminary injunction.

I. BACKGROUND

A. Factual Background

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 431-55. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. § 437d(a)(8); to issue advisory opinions construing the Act, 2 U.S.C. §§ 437d(a)(7), 437f; and to civilly enforce against violations of the Act. 2 U.S.C. § 437g.

Plaintiff The Real Truth About Obama, Inc. ("RTAO") is a nonprofit Virginia corporation. (Compl. ¶ 5.) RTAO was incorporated on July 24, 2008. (*See* FEC Exh. 1.) On July 29, two days before RTAO filed this suit, RTAO filed a notice of section 527 status with the Internal Revenue Service. (FEC Exh. 2 (RTAO IRS Form 8871, Notice of Section 527 Status).)

RTAO alleges that it intends to produce an audio advertisement entitled *Change*, post the ad on its website, and air it on the Rush Limbaugh and Sean Hannity radio programs. (Compl. ¶¶ 16-17.) The audio ad purports to provide "the real truth about Democrat Barack Obama's position on abortion," using an "Obama-like voice." (*Id*. ¶ 16.) Near the end, a woman's voice will state: "Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?" (*Id*.) RTAO alleges that it is creating a website at www.therealtruthaboutobama.com that will contain "accurate statements about [Obama's] public policy positions" (*id*. ¶ 15), but the website is not yet active. RTAO intends to broadcast *Change* on the radio "in heartland states" during pre-election periods that meet the timing element of the FECA's "electioneering communication" definition. (*Id*. ¶ 17; *see* 2 U.S.C. § 434(f)(3)(A)(i).) The complaint does not allege that RTAO has produced the ad or taken any concrete steps toward its creation or distribution.

RTAO alleges that it intends to raise more than $1,000 and to spend more than $1,000 to broadcast *Change*, but it does not allege that it has raised or spent any money. (Compl. ¶ 20.) Nor does it allege that it has identified any potential donors or specific donations. RTAO has written one fundraising communication that it alleges it intends to use to raise money (*id*. ¶ 19), but it does not allege that it has ever sent such a letter to any potential contributor.

B. Legal Background

1. Contributions And Expenditures

Under the FECA, "contribution" is defined to include giving anything of value "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Similarly, "expenditure" is defined to include any payment of money made "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). FECA generally prohibits corporations and labor unions from making any contribution or expenditure. 2 U.S.C. § 441b(a).

2. Express Advocacy

In *Buckley v. Valeo*, 424 U.S. 1, 41 (1976), the Supreme Court reviewed FECA's then-prohibition on expenditures by any person of more than $1,000 "relative to" a federal candidate. The Court found the provision unconstitutionally vague and so "construed [it] to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Congress then defined "independent expenditure" to mean an independent communication "expressly advocating the election or defeat of a clearly identified candidate." *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 475, 479 (1976) (codified at 2 U.S.C. § 431(17)).

The Commission later promulgated a regulatory definition of the term "expressly advocating." 11 C.F.R. § 100.22. Part (a) of the regulatory definition encompasses communications that use phrases or campaign slogans "which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. § 100.22(a). Part (b) defines express advocacy as a communication that has an unambiguous "electoral portion" and that cannot reasonably be construed as anything other than an encouragement to elect or defeat a candidate. 11 C.F.R. § 100.22(b). Citing *Buckley*, a number of courts had held that a limited, "magic words" interpretation of "expressly advocating" was the outer constitutional boundary of Congress's power to regulate campaign expenditures. *See infra* Part II.E.2.b. In *McConnell v. FEC*, 540 U.S. 93, 191-92 (2003), however, the Supreme Court held that *Buckley*'s express advocacy construction was imposed because of the vagueness of FECA's original statutory text, not because the government's power was in all cases circumscribed to regulating only a limited number of "magic words" of advocacy. Congress may regulate not only express advocacy, the Court held, but also the "functional equivalent of express advocacy,"

id. at 206; *see also FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 127 S. Ct. 2652, 2667 (2007) (same).

3. Political Committee Status

FECA provides that any "committee, club, association, or other group of persons" that receives over $1,000 in contributions or makes over $1,000 in expenditures in a calendar year is a "political committee." 2 U.S.C. § 431(4)(A). Political committees must register with the Commission and file periodic reports for disclosure to the public of all their receipts and disbursements, with limited exceptions for most transactions below a $200 threshold. *See* 2 U.S.C. §§ 433, 434. No person may contribute more than $5,000 per calendar year to any one political committee. 2 U.S.C. § 441a(a)(1)(C).

In *Buckley*, the Supreme Court held that defining political committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application of FECA's political committee requirements by reaching "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the Act's political committee provisions "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id*. Under the statute as thus limited, a non-candidate-controlled entity must register as a political committee — thereby becoming subject to limits on the sources and amounts of its contributions received — only if the entity crosses the $1,000 threshold of contributions or expenditures and its "major purpose" is the nomination or election of federal candidates.

4. Contributions In Response To Solicitations

FECA does not provide specific guidance as to when a donation is made "for the purpose of influencing any election" and thus constitutes a "contribution" for purposes of the $1,000 political committee threshold. 2 U.S.C. § 431(8)(A)(i). In 2004, the Commission promulgated a

regulation specifying that a "deposit of money . . . made by any person in response to any communication is a contribution . . . if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a); 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004). The regulation was part of the Commission's effort to "significantly curb[] the raising and spending of non-Federal funds in connection with Federal elections." 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007).

5. Corporation-Funded Electioneering Communications

FECA prohibits corporations and unions from making any "direct or indirect payment . . . for any applicable electioneering communication," which is defined in the context of a presidential campaign as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before a general election or thirty days before a primary or convention. 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A)(i).

The Supreme Court has upheld the constitutionality of the financing restriction for non-express advocacy "to the extent that the issue ads … are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 189-94, 203-08; *WRTL*, 127 S. Ct. at 2667. Chief Justice Roberts' controlling opinion in *WRTL* defined "the functional equivalent of express advocacy" as a communication that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. The opinion then listed indicia of genuine issue ads and express advocacy and analyzed the ads at issue. *Id.*; *see infra* p. 29. Shortly after *WRTL* was decided, the Commission promulgated a regulation to codify the Court's controlling opinion, using, essentially verbatim, the same criteria that the Chief Justice used. *See* 11 C.F.R. § 114.15.

II. RTAO HAS NOT MET ITS BURDEN FOR A PRELIMINARY INJUNCTION

A. RTAO Has Not Demonstrated That The Court Has Jurisdiction

Federal courts must presume that they "lack jurisdiction unless the contrary appears

affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations and internal quotation marks omitted). "In … constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (footnote omitted). Here, the answer is no: As we discuss *infra*, based on plaintiff's few factual allegations, RTAO's proposed radio ad does not contain express advocacy under 11 C.F.R. § 100.22(b) and is exempt under § 114.15 from the financing restrictions of 2 U.S.C. § 441b. Moreover, under 11 C.F.R. § 100.57, any donations RTAO raises from its proposed fundraising letter will not be "contributions" under 2 U.S.C. § 431(8). Thus, because RTAO's proposed activities are not restricted by the regulations it challenges, plaintiff has not demonstrated a live grievance or a ripe regulatory challenge, and there is no "case or controversy" within the meaning of Article III.[1]

"Doctrines like standing, mootness, and ripeness are simply subsets of Article III's command that the courts resolve disputes, rather then emit random advice." *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991). Here, where the dispute between the parties concerns injunctive relief, this principle is particularly apt because the "courts should be especially mindful of this limited role [under Article III] when they are asked to award prospective equitable relief instead of damages for a concrete past harm." *Id.*

> [T]he Article III question is ... whether [the plaintiff] has a stake in that relief. Even in order to pursue the declaratory and injunctive claims, in other words, [the plaintiff] must establish that it has a "specific live grievance" against the application of the statutes …, *Golden v. Zwickler*, 394 U.S. 103, 110 (1969), and not just an "'abstract disagreemen[t]'" over the constitutionality of such application, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148 (1967)).

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[1] Had RTAO requested an advisory opinion instead of rushing into federal court, it might have avoided this lawsuit. *See McConnell*, 540 U.S. at 170 n.64 ("[S]hould plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification, see 2 U.S.C. § 437f(a)(1) . . . .").

Lewis v. Cont'l Bank Corp., 494 U.S. 472, 479 (1990).[2]

B. A Preliminary Injunction Is An Extraordinary Remedy That Requires The Plaintiff To Meet A Heavy Burden

A preliminary injunction is an "extraordinary" remed[y] "involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 284 n.2 (4th Cir. 2007). The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). When the movant seeks to alter rather than maintain the status quo, courts generally exercise a higher degree of scrutiny. *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995).

In the Fourth Circuit, courts consider the four *Blackwelder* factors: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." *U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 280 (4th Cir. 2006) (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 193-94 (4th Cir. 1977)). RTAO bears the burden of proving that each factor supports the granting of such relief. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). In applying the factors, "the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied; if such a showing is made, the court must then balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant." *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th

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[2] The decision in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*"), does not establish that this Court has jurisdiction. In *VSHL*, the Commission had conceded the unenforceability of its regulation because of a prior adverse decision that it intended to continue to challenge on further appellate review. Here, the Commission does not contend that its regulations, even if upheld and enforced according to the Commission's own interpretation, would regulate the activity that RTAO describes in its complaint.

Cir. 2002) (citations omitted).

C. Plaintiff Fails To Demonstrate Irreparable Harm

RTAO fails to meet its burden of demonstrating that it will suffer irreparable harm without the requested temporary relief. RTAO's mere allegation of harm under the First Amendment is insufficient to constitute irreparable harm for entry of a preliminary injunction. *See Smith v. Frye*, 488 F.3d 263, 271 (4th Cir. 2007) (allegation does not "necessarily, by itself, state a First Amendment claim under *Elrod* [*v. Burns*, 427 U.S. 347 (1976) (plurality)]").[3]

RTAO devotes one paragraph (Br. 27) to the issue of harm and provides only conclusory allegations of chilled speech. It thus fails to make even a rudimentary showing of irreparable harm, let alone the "clear" or "strong" showing required in this Circuit. *See Scotts*, 315 F.3d at 271; *Dan River, Inc. v. Icahn*, 701 F.2d 278, 284 (4th Cir. 1983). The presumption that irreparable harm occurs when a challenged regulation "directly limits speech," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006), does not apply here, because the Commission's regulations do not directly, or even indirectly, limit plaintiff's speech. Any decrease in its speech is self-imposed.

Rather than demonstrating irreparable harm, RTAO presents speculative scenarios of the "if-then" variety. (*See* Compl. ¶¶ 21-25.) However, even if RTAO's activities were regulated by the provisions it challenges and those provisions required plaintiff to abide by the rules for political committees, it would not suffer irreparable harm. As a political committee, RTAO could pay for unlimited independent campaign advocacy, including express advocacy independent expenditures and electioneering communications. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985); 11 C.F.R. § 114.12 (treating an incorporated political

[3] S*ee also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (mere allegation of any First Amendment burden does not constitute irreparable injury; *Elrod v. Burns* applicable only when "First Amendment rights were totally denied by the disputed Government action").

committee as a political committee rather than a corporation). It has not alleged that its fundraising would be harmed, let alone irreparably harmed, by abiding by the $5,000 limit on contributions to political committees in 2 U.S.C. § 441a(a)(1)(C). Indeed, it has alleged nothing specific about its actual or potential donors, whether it expects to receive more than $5,000 from any one person, or what concrete harm it would suffer by abiding by the $5,000 limit.

RTAO has also failed to allege any irreparable harm from the reporting requirements for political committees. Proof of such harm would require evidence of burdensome reprisals against its members, but RTAO has not alleged any such harm. Serious harm of this kind has been demonstrated only in cases involving organizations, such as the NAACP and the Socialist Workers Party, whose members faced actual, documented danger at the relevant time. *See Buckley*, 424 U.S. at 69 (noting that NAACP members faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility") (citation omitted); *McConnell*, 540 U.S. at 198-99 (noting that *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), found "reasonable probability" of "threats, harassment, and reprisals"); *see also Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 75-76 (D.D.C. 2008) (trade association suffers no irreparable harm in disclosing membership list under lobbying disclosure provisions). Finally, RTAO also claims that it would suffer certain administrative burdens as a political committee, but these do not constitute *irreparable* harm. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Chaplaincy*, 454 F.3d at 297-98.

Since "[t]he basis of injunctive relief in the federal courts has always been irreparable harm," *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation omitted), RTAO's failure on this

point alone suffices to deny RTAO's requested relief.

D. The Balance Of Harms Weighs In Favor Of The Commission

In contrast, enjoining the Commission from enforcing its regulations would substantially injure the Commission and harm the public, whose interests are essentially the same as those of the Commission.[4] "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A "presumption of constitutionality [] attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of . . . [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

The imminent harm to the public if the Commission is not permitted to enforce its regulations far outweighs RTAO's self-imposed censorship and speculative fear. In these key months leading up to the national election, a temporary lifting of the challenged regulations could undermine the public's confidence in the federal campaign financing system. The regulations and policy at issue implement longstanding limits on corporate influence in federal elections and ensure that political committees, whose major purpose is campaign activity, abide by certain contribution limits and disclose their receipts and disbursements to the public. The applicable limits and disclosure requirements serve compelling government interests in preventing corruption, educating the public, and facilitating the Commission's enforcement of the law. Thus, enjoining application of the challenged provisions could confuse political actors,

[4] The Court should reject RTAO's request (Br. 7) that the Court allow it to "make a more modest showing as to concerns about harm to the FEC or others and about promoting the public interest" since, as it claims, its harm is so substantial and its success on the merits so likely. RTAO inverts the applicable standard. Until a court balances the harms to the parties, it cannot know how strong or substantial the plaintiff's showing on the "likelihood of success" on the merits must be. *See Direx*, 952 F.2d at 813-14, 817.

allow improper use of corporate funds in the election process, sanction excessive campaign contributions, and deprive the public of important information.

E. Even If Plaintiff's Challenges Are Justiciable, The Commission Is Likely To Succeed On The Merits

1. Plaintiff's Burden For Its Facial Challenges

RTAO's facial challenges include claims of both overbreadth and vagueness. The Supreme Court has used various formulations in determining facial overbreadth. *Compare, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiff must "establish that no set of circumstances exists under which the Act would be valid") *with, e.g., New York v. Ferber*, 458 U.S. 747, 769-771 (1982) (plaintiff can succeed if it establishes that a "substantial number" of the challenged law's applications are unconstitutional) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Thus, at a minimum, RTAO carries the "heavy burden of proving" that the challenged regulations' "application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)).

RTAO also argues that the regulations are unconstitutionally vague on their face, that is, fail to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and permit "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "A court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

2. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Definition Of Express Advocacy In 11 C.F.R. § 100.22(b)

It is "firmly embedded" in the Supreme Court's First Amendment jurisprudence that corporations and labor unions may constitutionally be prohibited from using their general

treasuries to fund communications "expressly advocating" for or against the election of a candidate. *McConnell*, 540 U.S. at 203. RTAO, however, alleges that the regulatory definition of "expressly advocating" in 11 C.F.R. § 100.22(b) is unconstitutional, both facially and as applied to RTAO's proposed radio advertisement. (*See* Compl. ¶¶ 16, 33; Br. 12-13.) Under 11 C.F.R. § 100.22(b), the definition of "expressly advocating" includes a communication that

> [w]hen taken as a 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.

a. RTAO's Challenge To 11 C.F.R. § 100.22(b) Is Not Justiciable

Because plaintiff's *Change* ad does not constitute express advocacy under section 100.22(b), RTAO fails to demonstrate that there is a ripe controversy or that it will suffer a distinct injury from the provision. Specifically, "[r]easonable minds could . . . differ as to whether [the ad] encourages actions to . . . defeat" Senator Obama's presidential candidacy. 11 C.F.R. § 100.22(b). Because a reasonable person could conclude that the ad encourages listeners to seek information regarding Senator Obama's position on abortion, the ad is not express advocacy under 11 C.F.R. § 100.22(b).[5] Whether the regulation is unconstitutionally

[5] The planned ad (Compl. ¶ 16) does contain several unambiguous "electoral portion[s]" referring to Senator Obama's campaign for President. The electoral portions include a reference to "[a]ppoint[ing] . . . Justices [to] the U.S. Supreme Court" — a uniquely presidential duty — and the manipulation of one of Senator Obama's campaign slogans, "Change we can believe in," (*see* http://www.barackobama.com/splash/), into a rhetorical question, "Is this the change that you can believe in?" Given the ad's devotion to speech regarding the abortion issue and the indirect and oblique references to the presidential campaign, however, the ad "as a whole" could reasonably be interpreted as a call for the listener to learn more about his views on abortion. 11 C.F.R. § 100.22(b). The campaign slogan has been altered and may be uniquely suited to adaptation for non-express advocacy because it contains no explicit electoral component and does not reference the candidate in any way. Furthermore, the ad does not question his leadership qualities or patriotism, or compare him to other candidates. *Cf., e.g., infra* p.17 n.8 (application of express advocacy test in other Commission enforcement matters).

overbroad and vague on its face is thus not justiciable based on RTAO's proposed activities, because plaintiff's sole alleged ad is not regulated. "'Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.'" *Renne*, 501 U.S. at 323 (quoting *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954)). The First Amendment overbreadth doctrine "'only assists plaintiffs who have suffered some injury from application of the contested provision to begin with.' … In other words, a party asserting overbreadth standing must still demonstrate a 'distinct and palpable injury.'" *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 634 (4th Cir. 2007) (internal citations omitted).

b. RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That 11 C.F.R. § 100.22(b) Is Facially Unconstitutional

Even if the Court finds plaintiff's claim against section 100.22(b) justiciable, the regulation is neither overbroad nor vague. As the Commission's assessment of plaintiff's intended radio ad demonstrates, the regulation is narrow and clear. RTAO nevertheless claims (Br. 8-14) that section 100.22(b) violates the First Amendment because it allegedly regulates communications that are not "unambiguously campaign related" and does not comport with a narrow interpretation of "magic words" express advocacy. The former claim fails on the face of the regulation, which requires that "[t]he electoral portion of the communication [be] unmistakable, *unambiguous*, and suggestive of only one meaning," which is "advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(b) (emphasis added). Any communication that unambiguously encourages the defeat of a specific candidate is, by definition, unambiguously campaign related. Thus, even assuming *arguendo* that the Constitution were to prohibit all regulation of financing for communications that are not unambiguously campaign related, section 100.22(b) would not extend beyond that limit.

RTAO's related argument that the regulation of express advocacy is constitutionally limited to a rigid interpretation of whether a communication contains "magic words" was laid to rest in *McConnell*. In that case, the plaintiffs challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-115, 116 Stat. 81, argued that *Buckley* had characterized communications containing magic words as the outer constitutional boundary of Congress's power to regulate in this area. *See McConnell*, 540 U.S. at 190-91 (discussing *Buckley*, 424 U.S. at 44 & n.52). Thus, the plaintiffs argued, BCRA was unconstitutional to the extent that it permitted regulation of communications that simply referred to federal candidates shortly before elections. *See McConnell*, 540 U.S. at 190-91. The Supreme Court rejected this argument, noting that *Buckley* had imposed the magic words requirement because of the vagueness of FECA's original statutory text ("relative to" a candidate), not because the First Amendment required it in all circumstances. *Id.* at 191-92. Accordingly, *McConnell* held that *Buckley*'s "express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id*. Because magic words were not a constitutional requirement, and because the statute otherwise satisfied constitutional scrutiny, the Court upheld BCRA's prohibition of pre-election, corporation-funded communications that refer to federal candidates and are functionally equivalent to express advocacy. *See id*. at 206, 209; *WRTL*, 127 S. Ct. at 2659.

As Justice Thomas noted in dissent, *McConnell*'s holding "overturned" all of the Courts of Appeals decisions — including the Fourth Circuit's decision in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997) — that had interpreted *Buckley* as limiting government regulation to a wooden magic-words interpretation. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., dissenting). Other cases adopting or relying on this interpretation of *Buckley*, such as *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) ("*VSHL*"),

were similarly revealed to be in error. *See id*. at 392 (citing *Buckley* and *Christian Action Network* as support for magic words "limit"). As Justice Thomas further noted, *McConnell*, 540 U.S. at 278 n.11, the only express-advocacy decision that *McConnell* did not cast into doubt was *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) — the case from which the Commission derived the test codified at section 100.22(b). *See Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,292-95 (July 6, 1995) ("[S]ection 100.22(b) . . . incorporate[s] . . . the *Furgatch* interpretation . . . ."). Thus, the claim that the Constitution and *Buckley* prohibit regulation of non-magic words communications must fail, and the narrow test of section 100.22(b) is entirely consistent with *McConnell*'s analysis.

Section 100.22(b) is also consistent with the Supreme Court's holding in *WRTL*. In that case, the Court reiterated *McConnell*'s upholding of BCRA's restriction on corporate electioneering communications that are "the functional equivalent of express advocacy," *i.e.*, communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 127 S. Ct. at 2667. This constitutional standard is similar to the test in section 100.22(b): Both tests narrowly inquire into whether there is any reasonable way to interpret a communication as non-candidate-advocacy and, if so, do not restrict the financing of the communication. Because the constitutional test of *WRTL* is, by definition, not unconstitutionally vague, the test in section 100.22(b) must also satisfy any vagueness concerns.[6] To the extent these standards differ, section 100.22(b) is narrower than the

[6] In addition, both tests avoid vagueness concerns by refusing to consider the subjective intent of the speaker. *Compare* 60 Fed. Reg. at 35,295 ("[T]he subjective intent of the speaker is not a relevant consideration . . . .") *with WRTL*, 127 S. Ct. at 2668 ("To the extent th[e] evidence goes to WRTL's subjective intent, it is again irrelevant."). The regulation's "reasonable person" test is like other constitutional objective tests. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (qualified immunity depends upon a "wholly objective standard" based on whether a "reasonable person" would have known of clearly established rights) (citation omitted); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("[C]onsent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). *WRTL's* adoption of a test based on a communication's

WRTL test, as the regulation requires an "unambiguous" electoral portion, 11 C.F.R. § 100.22(b)(1), while *WRTL* looks to the "mention" of an election and similar indicia of express advocacy. *See WRTL*, 127 S. Ct. at 2667. Thus, the Supreme Court's recent adoption of a constitutional test broader than that of section 100.22(b) further demonstrates the inapplicability here of any rigid magic words test and the permissibility of the Commission's construction.

Plaintiff nonetheless claims (Br. 13) that *McConnell* and *WRTL* "affirmed that 'express advocacy' requires the so-called 'magic words.'" This argument distorts both cases. As discussed above, *McConnell* emphasized that the presence of magic words is not a constitutional requirement. *McConnell*, 540 U.S. at 191-92. And the portion of *WRTL* that RTAO cites affirmatively rejected the proposition, raised in Justice Scalia's partial concurrence, that the only permissible test is a magic words test:

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

WRTL, 127 S. Ct. at 2669 n.7 (citations omitted).[7] Thus, neither case stands for the proposition that the line between permissible and impermissible regulation must be drawn at magic words.

RTAO also relies upon *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), which invalidated a state statute defining non-magic words express advocacy. The

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"reasonable" interpretation thus undermines *VSHL's* holding that section 100.22(b) is flawed because the regulation purportedly "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer." *VSHL*, 263 F.3d at 391.

[7] The four dissenting Justices in *WRTL* also explained at length their disagreement with the magic words standard. *See WRTL*, 127 S. Ct. at 2692-96 (Souter, J., dissenting).

definition at issue in *Leake*, however, was significantly broader and less precise than section 100.22(b), including such "contextual factors" as "the timing of the communication in relation to the events of the day" and "the cost of the communication." *Leake*, 525 F.3d at 298. As the Fourth Circuit noted, the state statute "swe[pt] far more broadly than *WRTL*'s 'functional equivalent of express advocacy' test." *Id*. at 297. This is in contrast to section 100.22(b), which is narrower than the *WRTL* standard. The Fourth Circuit concluded, therefore, that "North Carolina remains free to adopt a definition of express advocacy consistent with the standards approved by *McConnell* and *WRTL*." *Id*. at 301. Accordingly, section 100.22(b) is consistent with both *McConnell* and *WRTL* and does not bear the overbreadth infirmities present in *Leake*.[8]

3. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Solicitation Regulation

The Commission's solicitation regulation reasonably implements the Act's definition of "contribution" and provides in part that money given in response to a communication is a "contribution … if the communication indicates that any portion of the funds received will be used to *support or oppose the election* of a clearly identified Federal candidate." 11 C.F.R. § 100.57(a) (emphasis added). The regulation does not apply to RTAO's proposed solicitation

[8] RTAO also fails to identify any constitutional flaw in the *actual* cases in which the Commission has recently applied its express advocacy regulation. The Commission has applied the regulation to communications characterizing presidential candidates as untrustworthy and unfit for the presidency. *See, e.g.*, *In the Matter of Swiftboat Veterans and POWs for Truth*, MUR 5511, 5525, Conciliation Agreement ¶¶ 15-17, 25-27 (Dec. 4, 2006) (FEC Exh. 3); *In the Matter of The Media Fund*, MUR 5440, Conciliation Agreement ¶¶ 26-29 (Oct. 29, 2007) (FEC Exh. 4). For example, the Commission found that television ads were express advocacy where the ads stated that "John Kerry fought and bled in the Vietnam War. He fought side by side with brothers who could not get out of the draft because they didn't have a rich father like George W. Bush. . . . You better wake up before you get taken out." *Media Fund*, Conciliation Agreement ¶¶ 28-29. Similarly, the Commission found to be express advocacy ads stating that Senator John Kerry "lacks the ability to lead," "cannot be trusted," and "gave [aid] and comfort to the enemy." *Swiftboat Veterans*, Conciliation Agreement ¶ 15. Although none of these ads would satisfy a wooden test of magic-words express advocacy, RTAO fails to demonstrate why it was unconstitutional for the Commission to find that they were campaign ads.

letter (Compl. ¶ 19) and thus RTAO can demonstrate neither irreparable harm nor an Article III case or controversy. In any event, RTAO is not likely to succeed on the merits of its facial challenge: The regulation is well within the Commission's delegated authority, "gives 'fair notice to those to whom [it] is directed,'" *McConnell*, 540 U.S. at 223, and is not overbroad or arbitrary and capricious.

a. RTAO's Challenge To 11 C.F.R. § 100.57 Is Not Justiciable

Section 100.57 "turns on the plain meaning of the words used in the communication and does not encompass implied meanings or understandings" or "depend on reference to external events, such as the timing or targeting of a solicitation." 69 Fed. Reg. 68,057. Because the "plain meaning" of RTAO's proposed fundraising letter (Compl. ¶ 19) is that the organization will be launching a new project to disseminate information about Senator Obama's views on abortion, the letter does not indicate that funds received will be used to support or oppose his candidacy within the meaning of the regulation.[9] Accordingly, donations received will not be "contributions," and the regulation will cause RTAO neither a distinct injury nor irreparable harm. As a result, RTAO's facial challenge presents only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. *See Renne*, 501 U.S. at 323-24; *supra* pp. 5-7, 13.

b. RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That The Solicitation Regulation Is Unconstitutional On Its Face

The Act authorizes the Commission to regulate "contributions," but does not specify the circumstances under which proceeds from a communication soliciting funds are "contributions."

[9] The letter asserts that "there won't be any 'vote for' or 'vote against' type of ads." This disclaimer, however, would not preclude applying section 100.57 if other parts of the letter indicated that some of the funds received would be used to support or oppose Senator Obama's election. *See* 69 Fed. Reg. 68,057; *EMILY's List v. FEC*, No. 05-0049, 2008 WL 2938558, at *32, 36 (D.D.C. July 31, 2008); *cf. FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("disclaimer of endorsement cannot negate" express advocacy in rest of communication).

See 2 U.S.C. § 431(8). Section 100.57 reasonably fills this "gap," thereby ensuring that money donated in response to an appeal to help influence federal elections will not evade the Act's contribution limits and undermine their anti-corruption objective. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The Court in *Buckley* found that the definitions of "contribution" and "expenditure" raise very different constitutional concerns. Because limits on contributions entail "only a marginal restriction upon the contributor's ability to engage in free communication," 424 U.S. at 20-21, they will be upheld under the "less rigorous scrutiny applicable to contribution limits," *McConnell*, 540 U.S. at 141, *i.e.*, if they are "closely drawn to match a sufficiently important interest." *Id.* at 136 (citations and quotation marks omitted). In particular, *Buckley* found it unnecessary to narrowly construe "contribution" as it did "expenditure," and instead stated that the term includes

> not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but *earmarked for political purposes*, but also all expenditures placed in cooperation with or with the consent of a candidate . . . .

424 U.S. at 78 (emphasis added). The Court did not, as plaintiff suggests (Br. 14-15), employ an "unambiguously-campaign-related" analysis or narrowly construe "contribution" beyond the "earmarked for political purposes" criterion. 424 U.S. at 24 n.24, 78. Because RTAO's challenge to 11 C.F.R. § 100.57 rests heavily on this mistaken notion of the Court's construction, plaintiff has little likelihood of success on the merits.[10]

[10] RTAO compounds its errors by suggesting (Br. 15) that donations cannot be deemed "contributions" until the recipient identifies specific regulable activity for which the money will be spent. The definition of "contribution" contains no such tracing requirement, 2 U.S.C. § 431(8), and the Supreme Court has never suggested such a construction. *Cf. Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.19 (1981) (contribution limits apply to all donations to political committees, despite attempt to donate solely for administrative expenses).

When the Commission promulgated section 100.57, it relied in part on *FEC v. Survival Educ. Fund, Inc.* ("*SEF*"), 65 F.3d 285 (2d Cir. 1995), which had addressed whether a mailing sent by a nonprofit issue advocacy group constituted solicitation of "contributions" in the context of a disclaimer requirement. To resolve this issue, the court analyzed the phrase "earmarked for political purposes" as used in *Buckley*. It explained that, "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of" the Act's provision requiring certain disclosures in communications that "solicit" any contributions if the communication "contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF,* 65 F.3d at 295-96.

More recently, courts in the D.C. Circuit have refused to enjoin application of section 100.57. In *EMILY's List,* the court upheld the constitutionality of 11 C.F.R. § 100.57 against a facial challenge. 2008 WL 2938558; *see also EMILY's List v. FEC,* 362 F. Supp. 2d 43 (D.D.C.), *aff'd,* 170 Fed. Appx. 719, 2005 WL 3804998 (D.C. Cir. 2005) (previously denying a preliminary injunction against the regulation). The court specifically rejected the argument that the use of "support or oppose" made the regulation unconstitutionally vague.

> [T]he Supreme Court rejected just such a claim in *McConnell*, stating that "[t]he words 'promote,' '*oppose,*' 'attack,' and '*support*' … 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"

2008 WL 2938558, at *29 (emphasis by the court; citations omitted).

The Washington Supreme Court, sitting *en banc*, recently also upheld the constitutionality of "support" and "oppose." *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n,* 166 P.3d 1174 (Wash. 2007), *cert. denied,* 128 S. Ct. 2898 (2008). The court concluded that "the phrase 'in support of, or opposition to, any candidate' in the definition of 'political committee'" is not unconstitutionally vague. *Id*. at 1183 n.8. Rather, it is "significantly more precise than the phrase 'relative to a clearly identified candidate,' which the

[United States Supreme] Court determined was vague in *Buckley*." *Id*. at 1184. A "person of ordinary intelligence" could understand the meaning of the state's definition. *Id*. Relying on *McConnell's* judgment, 540 U.S. at 170 n.64, that the words "promotes," "supports," "attacks," and "opposes" in 2 U.S.C. § 431(20)(A)(iii) were sufficiently precise to satisfy First Amendment concerns, the Washington court explained that *McConnell's* reasoning goes beyond political party speakers. "[U]nlike the political party-specific statutes that are the primary focus of the *McConnell* decision, … in note 64 the Court rejects a vagueness challenge to the definition of '[f]ederal election activity,' in … § 431(20)(A)(iii), a provision that is *not* limited to party speakers." 166 P.3d at 1184 n.9 (emphasis in original).

Conversely, none of the cases RTAO cites (Br. 16) actually supports its argument. *Leake* invalidated part of North Carolina's "*method for determining* if a communication 'supports or opposes the nomination or election of'" a clearly identified candidate. *Leake*, 525 F.3d at 280 (emphasis added). However, contrary to RTAO's assertion (Br. 15-16), the court did not find the "support or oppose" language itself unconstitutional. Indeed, after holding that the implementing method was unconstitutionally vague and overbroad, the court assured North Carolina that it "remains free to enforce all campaign finance regulations that incorporate the phrase 'to support or oppose the nomination or election of'" a clearly identified candidate. *Leake*, 525 F.3d at 301. Moreover, the court distinguished the provision it invalidated from the "support or oppose" provision upheld in *Voters Educ. Comm. Id.* at 299.

In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), a state statute defined "political committee" as any entity "the primary or incidental purpose of which is to support or oppose any candidate or political party or *to influence or attempt to influence* the result of an election." *Id.* at 712 (emphasis added). Concerned that this definition would include entities engaged only in issue advocacy, the Fourth Circuit ruled that the references to

influencing elections made the definition unconstitutionally vague and overbroad. *Id.* at 712-13. The decision thus provides no support for the proposition that "support or oppose" language is unconstitutional.[11]

Similarly, *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), concerned a state campaign finance statute that included language in addition to "support" and "oppose," and the court found the additional language problematic. Using *Buckley* as a guide, the court construed the definition of "expenditure" to avoid unconstitutional vagueness of the phrase "or otherwise influencing." The case did not concern the definition's phrase "for the purpose of supporting, opposing."[12]

In sum, the solicitation regulation causes plaintiff no harm, plaintiff misunderstands the Supreme Court's explanation of "contribution," and the cases plaintiff cites do not hold that "support or oppose the election of a … candidate" is unconstitutional. In contrast, the authorities on which the Commission relies confirm the constitutionality of that language.

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[11] RTAO also cites (Br. 16; Compl. ¶ 36) *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), and *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), neither of which is apt. *Anderson* discusses limits on "electioneering" near a polling place. The Sixth Circuit did not question the phrase "solicitation of votes for or against any candidate" but instead found that the prohibition of "the displaying of signs [and] the distribution of campaign literature, cards, or handbills" was vague and overbroad. In *ACLU of Nevada*, the Ninth Circuit invalidated an overly broad "content-based limitation on core political speech," but the problematic statutory phrase was "material or information relating to" an election, not "support or oppose." 378 F.3d at 992.

[12] RTAO also cites two loyalty oath cases (Br. 16; Compl. ¶ 36), but they, too, do not involve the "support or oppose" language found in the Commission's solicitation regulation. In *Cramp v. Bd. of Pub. Instr. of Orange County, Fla.*, 368 U.S. 278, 286 (1961), the Court struck down as unconstitutionally vague a law requiring public employees to swear that they have not and will not knowingly "lend [their] aid, support, advice, counsel or influence to the Communist Party." And in *Cole v. Richardson*, 405 U.S. 676, 684 (1972), the Court upheld the "oppose the overthrow of the government" clause in a loyalty oath against a vagueness challenge.

4. RTAO Has Not Met Its Burden For A Preliminary Injunction Against The Commission's Analysis Of Political Committee Status

As explained above, RTAO's intended activity as alleged in its complaint would not constitute making expenditures or receiving contributions; therefore, RTAO would not meet either of the statutory criteria for "political committee" status in 2 U.S.C. § 431(4). RTAO has thus failed to demonstrate a distinct injury or irreparable harm from the Commission's approach to analyzing political committee status. As a result, RTAO's facial challenge presents only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. *See Renne*, 501 U.S. at 323-24; *supra* pp. 5-7, 13. Even if the Court determines that plaintiff has alleged a case or controversy within Article III, the Administrative Procedure Act ("APA") does not provide for judicial review of the Commission's enforcement policy. In any event, this policy is constitutional and properly within the Commission's discretion.

a. The Commission's Enforcement Policy Is Not Reviewable Under The APA

RTAO challenges a policy that does not constitute final agency action, so this claim is not reviewable under the APA. Courts may only hear APA suits based on "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). "Final" agency action consummates the agency's decision-making process and determines the rights and obligations of parties. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (enforcement policy and guidelines "used by inspectors as guidance in making individual enforcement decisions" not final agency action).

After a rulemaking concerning political committee status, the Commission issued an Explanation and Justification ("E&J") for its decision not to promulgate a revised definition of "political committee" or to single out section 527 organizations for increased regulation. 72 Fed. Reg. at 5595. As part of that E&J, the Commission "discusse[d] several recently resolved

administrative matters that provide considerable guidance to all organizations regarding … political committee status." *Id*. Its decision to continue analyzing political committee status on a case-by-case basis rather than promulgating a rule of general application was challenged and upheld in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007) ("*Shays II*"). The E&J's primary purpose was to explain why a broad regulation was *not* created; it neither describes itself as a "policy statement," nor purports to establish a binding norm or decide anyone's legal status. RTAO cites nothing to the contrary. The E&J did not create a new regulation or change past policy but simply explained how the Commission's particular case-by-case enforcement actions provide "guidance" to organizations about political committee status and the major purpose test. 72 Fed. Reg. at 5604. This guidance is not "final" agency action subject to APA review.

b. The Commission's Political Committee Analysis Is Lawful

Even if reviewable, the Commission's approach to political committee status is constitutional. As explained *supra* p. 4, in *Buckley*, the Court established the "major purpose" test and limited the definition of "political committee" to organizations controlled by a candidate or whose major purpose is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id*; *see also MCFL*, 479 U.S. at 252 n.6 (plaintiff not a political committee because "its central organizational purpose is issue advocacy"); *McConnell*, 540 U.S. at 170 n.64.

RTAO's claim appears to focus on the Commission's implementation of the major purpose test, but the Commission's approach is not unconstitutionally vague or overbroad. The assessment of an organization's "major" purpose is inherently comparative and necessarily requires an understanding of an organization's overall activities. In its enforcement decisions, the Commission considers a variety of factors — most of which courts have endorsed or RTAO

does not challenge — to determine whether an organization's major purpose is the election or defeat of a candidate.[13] Those factors include an organization's public statements, representations made in government filings, statements made to potential donors, internal governing documents, and the proportionate amount of spending on election-related activity. *See* 72 Fed. Reg. at 5605. Although RTAO concedes (Br. 19) that an organization's "organic" documents are relevant to determine major purpose, documents like articles of incorporation, though useful, paint only an abstract picture of an organization's actual activities and disbursements.

Courts have endorsed evaluation of public statements and an organization's spending or contributions to determine its major purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (court considered organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."). Courts also consider non-public statements. *Malenick*, 310 F.Supp. 2d at 235 (letter from president to organization's primary contributor); *GOPAC*, 915 F.Supp. at 864, 866 (description of

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[13] The Commission generally considers the major purpose test after first determining that an organization has either spent more than $1,000 in expenditures or raised more than $1,000 in contributions. *See* 72 Fed. Reg. at 5603-04. The only court to address this approach has criticized the Commission for determining whether communicative expenditures contain express advocacy before evaluating the major purpose of an organization; the court believed that the express advocacy analysis is unnecessary for groups whose major purpose is known to be campaign related. *Shays II*, 511 F. Supp. 2d at 26-27. Although the Commission disagrees with that court's criticism, it recognizes that its own interpretation may tend to limit the number of organizations that qualify as political committees. RTAO ignores the conservative aspect of the Commission's approach. *Cf. also Akins v. FEC*, 101 F.3d 731, 741-42 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 524 U.S. 11 (1998) (D.C. Circuit would not have applied major purpose test at all if organization made more than $1,000 in contributions, as opposed to independent expenditures).

organization's meetings attended by national leaders; reference to organization's "Political Strategy Campaign Plan and Budget").

In numerous administrative enforcement proceedings and advisory opinions, the Commission has examined these factors and others to determine whether organizations satisfy the major purpose test. *See* 72 Fed. Reg. at 5605-06. RTAO does not allege that any of these analyses came to the wrong conclusion. Instead, RTAO relies upon unsubstantiated and irrelevant allegations.[14]

Finally, RTAO argues (Br. 18) that the Commission has improperly reformulated the major purpose test to focus on "Federal campaign activity." *Buckley*, however, uses the term "campaign related" to summarize legitimately regulable activity by political committees and to distinguish such organizations from groups "engaged purely in issue discussion." 424 U.S. at 79. The Commission's use of the phrase "federal campaign activity" when examining a group's major purpose is thus reasonable and also takes into account that not all "campaign related" spending involves communications; it may also involve expenditures for activity such as gaining ballot access rather than payments for disseminating advocacy messages. Moreover, the use of the word "federal" simply clarifies that to satisfy the major purpose test an organization's campaign activity must involve federal candidates, not state or local ones. *See* 72 Fed. Reg. at 5601. Like the rest of the Commission's interpretation, this part is reasonable and constitutional.

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[14] For example, RTAO makes the unsubstantiated claim that the existence of an administrative complaint filed with the FEC "can shut down an organization." (Compl. ¶ 45; Br. 19.) Even if it were true, that statement would prove too much. Congress established the Commission's balanced enforcement mechanisms decades ago, providing specific "procedures purposely designed to ensure fairness not only to complainants but also to respondents." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). The Commission does not investigate potential violations of the Act until at least four of its members have voted to find "reason to believe" that the law has been violated. *See* 2 U.S.C. § 437g(a)(2). RTAO's argument would sacrifice proper law enforcement to speculative and generalized fear. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (expense and annoyance of agency proceedings do not constitute irreparable injury, but are part of social burden of living under government).

5. RTAO Has Not Met Its Burden For A Preliminary Injunction Against 11 C.F.R. § 114.15

Section 114.15 straightforwardly implements *WRTL* by providing additional guidance without expanding beyond the constitutional boundary described in that decision. Tracking the language of *WRTL*, section 114.15 states that a corporation or union may fund an electioneering communication "unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a); *Electioneering Communications*, 72 Fed. Reg. 72,899, 72,902 (Dec. 26, 2007); *WRTL*, 127 S. Ct. at 2667. For additional clarity, this general exemption is supplemented by a safe harbor provision for lobbying messages and commercial advertisements. 11 C.F.R. § 114.15(b); 72 Fed. Reg. at 72,903. The regulation also adheres to *WRTL*'s teaching that when there is doubt about a communication's meaning, the "tie goes to the speaker," 127 S. Ct. at 2669; the regulation's rule of interpretation states that in "interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication," 11 C.F.R. § 114.15(c)(3).

a. RTAO's Challenge To 11 C.F.R. § 114.15 Is Not Justiciable

For substantially the same reasons that the ad is not express advocacy under 11 C.F.R. § 100.22(b), it also qualifies for the general exemption set out in section 114.15(a).[15] *See supra* p. 12 & n.5. Moreover, *Change* shares many characteristics with an example included in the Commission's rulemaking of a communication that does not qualify for the safe harbor but that is nevertheless permissible under 11 C.F.R. § 114.15(a). 72 Fed. Reg. at 72,908 (Example 1). That ad criticized a congressman for his environmental record and urged listeners to call him and

[15] The parties agree that *Change* does not fall within the safe harbor of section 114.15(b) "because *Change* identifies Senator Obama as a Democrat and the ad neither has a grassroots lobbying 'focus[]' nor 'proposes a commercial transaction.'" (Br. 22.)

"[t]ell him to protect America's environment." *Id.* While both ads include indicia of express advocacy under 11 C.F.R. § 114.15(a), they both focus on public policy issues. Because "any doubt is to be resolved in favor of finding the communication permissible," both may be financed with corporate or union funds. *Id.* In contrast, *Change* differs from another sample ad that is not permissible under the regulation; that ad identifies two "candidates," then asks "where do the candidates stand?", and characterizes the candidates' records positively and negatively. 72 Fed. Reg. 72,909 (Example 2). In sum, section 114.15 does not prohibit RTAO from running the *Change* advertisement, and the regulation causes RTAO no distinct injury or irreparable harm. As a result, RTAO's facial challenge presents only an abstract inquiry that is not ripe or otherwise fit for judicial resolution. *See Renne*, 501 U.S. at 323-24; *supra* pp. 5-7, 13.

b. RTAO Has Failed To Show That It Is Likely To Succeed In Establishing That 11 C.F.R. § 114.15 Is Unconstitutional On Its Face

Even if the Court finds plaintiff's claim against section 114.15 justiciable, the regulation is effectively a verbatim adoption of the Supreme Court's analysis in *WRTL* and therefore constitutional. It is neither vague nor overbroad.

Contrary to plaintiff's inaccurate description (Br. 22-23) of a rule of interpretation in section 114.15(c), the regulation does not "demote" the Supreme Court's standard. As explained above, section 114.15 contains only one standard, the one articulated by the Court itself: A corporation or union can use its general treasury funds to pay for a communication "unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a). The rules of interpretation articulated in section 114.15(c) come directly from the Court's analysis in *WRTL* when it found the reasonable interpretation of the advertisements at issue in that case. The Court's criteria for determining whether an ad lacks or contains indicia of express advocacy were the following:

> First, [the ads'] content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL, 127 S. Ct. at 2667. These are precisely the factors identified in section 114.15(c)(2), and plaintiff's assertion (Br. 23) that they are "peripheral" to the Supreme Court's analysis is belied by the Court's own express words quoted above.[16]

The Commission's explanation in section 114.15(c) that it will consider both whether a communication includes indicia of express advocacy and whether it has an interpretation other than as an appeal to vote for or against a candidate to determine, "on balance," whether it is permissible, is entirely consistent with the Supreme Court's own analysis. The Court itself set out the criteria quoted above and, in succeeding paragraphs, analyzed both whether the particular ads at issue included indicia of express advocacy and whether they had a message other than an appeal to vote against a particular Senator. *See WRTL*, 127 S. Ct. at 2667. Thus, contrary to RTAO's accusation, the Commission has not given short shrift to the Court's fundamental test by listing indicia of express advocacy and by indicating that such indicia will be noted in determining a communication's reasonable interpretation. That is precisely what the Supreme Court did in *WRTL*; the fact that the Court did not provide step-by-step instructions for its own mode of analysis is irrelevant.

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[16] RTAO argues that the decision in *Leake* somehow supports its position that section 114.15 is void. It does not. *Leake* struck down a state law provision because it relied on open-ended factors such as "'[the] essential nature [of the communication],' 'the timing of the communication in relation to events of the day,' 'the distribution of the communication to a significant number of registered voters for that candidate's election,' and 'the cost of the communication.'" 525 F.3d at 283-84. These sorts of factors are specifically excluded from consideration under section 114.15(d) ("[T]he Commission may consider only the communication itself and basic background information ….). RTAO does not question that section 114.15 adheres to the Supreme Court's limited use of context in *WRTL*.

In sum, because section 114.15 adheres closely to the Supreme Court's analysis in *WRTL,* it is not overbroad or vague, and does not exceed the FEC's statutory authority.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that I will cause the foregoing to be hand-delivered on the 14th day of August, 2008, to:

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And I hereby certify that on the 14th day of August, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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