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,	)	
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF THE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Audra Hale-Maddox, Attorney, ahale-maddox@fec.gov
VA Bar No. 46929
Phillip Christopher Hughey,
Acting General Counsel, chughey@fec.gov
David Kolker, Associate General Counsel, dkolker@fec.gov
Harry Summers, Assistant General Counsel,
hsummers@fec.gov
Claire Rajan, Attorney, crajan@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases ***Page***

Statutes and Regulations

Administrative Material

As the Commission explained in its opening brief, the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. __, 130 S. Ct. 876, 913 (2010), has further undermined plaintiff Real Truth About Obama, Inc.'s ("RTAO") challenge to the Federal Election Commission ("Commission" or "FEC") regulation defining "expressly advocating" and the Commission's approach to determining political committee status. By striking down limits on corporate campaign expenditures, *Citizens United* narrowed the reach of the express advocacy regulation so that it now primarily implements disclosure requirements, which, contrary to plaintiff's claims, are not subject to strict scrutiny. In fact, *Citizens United* upheld disclosure requirements that capture a far *greater* range of communications than express advocacy, so the Commission's regulation is plainly constitutional as applied to plaintiff's ads about then-Senator Barack Obama. Contrary to plaintiff's claims, *Citizens United* has not undermined the Commission's showing that its analysis of political committee status is consistent with the approach of federal courts.

Moreover, plaintiff's request for preliminary relief is moot. Plaintiff never aired the ads it had planned in 2008, and its claims as to those ads or any materially similar future ads will not meet the "capable of repetition yet evading review" exception to mootness, primarily because plaintiff will now receive a decision on the merits. In any event, plaintiff cannot establish any of the four factors required for preliminary relief under *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365 (2008), which the Fourth Circuit has made clear controls here, despite plaintiff's insistence on its invented "speech-protective standards." Thus, this Court should again deny RTAO's request for a preliminary injunction and grant summary judgment to the Commission.

I. RTAO'S REQUEST FOR PRELIMINARY RELIEF IS MOOT, AND IN ANY EVENT, RTAO FAILS TO MEET THE REQUIREMENTS FOR THAT RELIEF

Plaintiff's request for preliminary relief is moot because the period when RTAO sought to run its specific ads expired in 2008 and consolidation with the merits now renders preliminary relief superfluous. For multiple reasons, RTAO cannot avail itself of the "capable of repetition, yet evading review" exception to mootness (*see Lewis v. Cont'l Bank Corp.*, 494 U.S. 472 (1990)): That exception is not appropriately applied to RTAO's request for preliminary relief, RTAO's alleged plans for future activity are too speculative, and the issues will not evade review in light of this Court's imminent decision on the merits. Even if the preliminary injunction request were not moot, the Fourth Circuit has made clear that it is the four-factor analysis of *Winter* that controls here, not plaintiff's novel, fourteen-factor "speech-protective standards" test. Indeed, RTAO has failed to prove that it should prevail on any of the four *Winter* factors. In particular, plaintiff cannot show irreparable harm from the express advocacy regulation that no longer serves to prohibit any speech. Thus, the Court should find the preliminary injunction request to be moot, or in the alternative, deny preliminary relief.

A. RTAO's Preliminary Injunction Request Is Moot As to All Claims

As the Commission explained in its opening brief (Br. at 18-21), plaintiff's request for preliminary injunctive relief is moot. Plaintiff seeks to preliminarily enjoin the Commission from investigating allegations of particular violations of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA" or "Act"), based on advertisements the group planned to run at specific times in 2008. But those times passed without RTAO airing any of its proposed ads. Thus, there is no factual basis for any Commission enforcement action and a preliminary injunction could not provide RTAO any relief.

As the Commission explained (Br. at 19-20), consolidation of the preliminary injunction with the merits has also mooted RTAO's request for preliminary relief. Once a decision on the merits is issued, granting a preliminary injunction has no practical effect. A federal court may not "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks and citation omitted).

Contrary to RTAO's assertions (Opp. at 13-14), its preliminary injunction request does not satisfy the limited exception to mootness for issues capable of repetition yet evading review. This doctrine "applies only in exceptional situations," *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), and a request for preliminary injunctive relief is not typically such a situation, *see Independence Party of Richmond Cnty. v. Graham*, 413 F.3d 252, 256-57 (2d Cir. 2005). In this case, RTAO has not shown its claims are "capable of repetition" or will "evade review." To be capable of repetition, "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Plaintiff's vague claim that it intends to run "materially similar" ads at some future time is too speculative and hypothetical to entitle plaintiff to the extraordinary remedy of preliminary injunctive relief. (*See* FEC Br. at 20 n.8.) In addition, claims as to any such future activity would not evade review because RTAO now seeks permanent relief on the same matters at issue in the preliminary injunction request, and this Court's decision on the merits (or any subsequent appellate decision) will control any materially similar activity, should it occur. *See Independence Party of Richmond Cnty.*, 413 F.3d at 256-57 (appeal of a preliminary injunction grant fails to meet the evading review prong of the mootness exception where it raises the same

underlying legal questions as the request for permanent relief pending in the district court). Thus, RTAO's claim that a preliminary injunction is required to ensure that "the law can be established for the *next time* clear legal rules are required on short notice" (Opp. at 14) lacks merit.[1]

To the extent RTAO seeks review of the preliminary injunction standard untethered to a concrete case or controversy, the federal courts cannot grant that relief. RTAO argues (Opp. at 17) that it needs the courts to clarify the preliminary injunction standard "to protect RTAO's future issue activity." However,

> [u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. . . . Article III . . . confines [federal courts] to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Lewis, 494 U.S. at 477 (citations, brackets, and quotation marks omitted); *see also Church of Scientology*, 506 U.S. at 12. Establishing a new preliminary injunction standard in the absence of an imminent need for relief concerning a "real and substantial" controversy is beyond the power of the federal courts.

Moreover, because the Fourth Circuit on remand reinstated the preliminary injunction standard portion of its original opinion, that standard is now the law of the case, so plaintiff in fact already knows the applicable standard. *RTAO v. FEC*, 607 F.3d 355 (4th Cir. 2010). RTAO has had multiple opportunities to persuade higher courts to adopt its proposed standard, but those courts have repeatedly declined to do so. (*See* FEC Br. at 21-22 & n.9.) "'The doctrine [of the

[1] In *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007), the plaintiff's request for *permanent* relief was deemed capable of repetition yet evading review, but that mootness determination was not in the preliminary injunction context, and WRTL had alleged very specific plans to run particular ads in future elections; the Court even noted that WRTL had sought a second preliminary injunction for a specific ad it wished to run in a later election cycle. *Id.* at 461-64.

law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988)). A preliminary injunction ruling can establish the law of the case if the record was sufficiently developed and the facts sufficiently clear. *Naser Jewelers, Inc. v. City of Concord, N.H.*, 538 F.3d 17 (1st Cir. 2008). In *Naser*, the First Circuit noted that the plaintiff presented no new evidence at the summary judgment stage; indeed, the record did not "significantly change," except to make the defendant's case stronger. *Id.* at 20. Because the "arguments and evidence . . . are essentially the same ones we previously considered," the court held, "we decline the invitation to this court to change its mind." *Id.* at 20-21 (internal quotation marks and citation omitted). Similarly, the record before this Court on summary judgment is identical to the preliminary injunction record. In fact, the Fourth Circuit also reissued its statement of the facts on remand of the preliminary injunction. *RTAO*, 607 F.3d at 355. Those facts have not changed or been supplemented by RTAO.

In *Christian Civic League of Maine, Inc. v. FEC*, 549 U.S. 801 (2006), the Supreme Court found a request for preliminary relief moot in a situation that was essentially identical to RTAO's situation here. In that constitutional challenge, the plaintiff appealed a three-judge district court's denial of its preliminary injunction request. The plaintiff had sought to run a specific advertisement before a primary election in the 2006 election cycle and alleged that it intended to run "materially similar" ads in the future. The Commission and intervenor-defendants argued that the appeal was moot because the time when the plaintiff intended to run its proposed ad had expired. Additionally, intervenor-defendants noted that the issues would not evade review due to the plaintiff's request for *permanent* injunctive relief and the ability to

appeal a final decision on the merits. The Supreme Court summarily dismissed the appeal as moot. *Id.* RTAO's case is identical in all material respects because (1) the time when a preliminary injunction would have provided plaintiff relief has ended; (2) the only basis for plaintiff's claim that the issue is capable of repetition is a vague intention to run "materially similar ads"; and (3) plaintiff's claim for permanent relief and ability to appeal any adverse decision provide sufficient opportunities for judicial review. Thus, RTAO's request for preliminary relief is similarly moot.

Plaintiff also incorrectly claims that the Supreme Court's actions in granting certiorari, vacating the judgment, and remanding this matter (a "GVR" order) immunize the preliminary injunction request from mootness. (Opp. at 2.) However, the Supreme Court long ago established that a GVR order is not a determination on the merits. In *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), the Court explained that a GVR order "did indicate that we found [an intervening decision] sufficiently analogous and, perhaps, decisive to compel re-examination of the case," but the Court confirmed that the GVR order "did not amount to a final determination on the merits." *Id.* More recently, in describing the various intervening developments that may lead to a GVR order, the Court made clear that such orders are "cautious and deferential" measures that "require only further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see also id.* at 166-69, 174. In any event, in the current case, the only substantive principles that the GVR order supports are that the intervening decision in *Citizens United* may affect the case and that some elements of the case may now be moot. *RTAO v. FEC*, 588 U.S. __, 130 S. Ct. 2371 (2010).

B. *Winter* Provides the Appropriate Standard to Determine Whether the Extraordinary Remedy of a Preliminary Injunction Is Warranted

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 129 S. Ct. at 376; *see RTAO v. FEC*, 575 F.3d 342, 345 (4th Cir. 2009). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 129 S. Ct. at 374. Plaintiff must make a "clear showing" that preliminary relief is necessary; a mere "possibility of irreparable harm" is not sufficient. *Id*. at 375-76.

In spite of *Winter*'s mandate that the "*plaintiff* seeking a preliminary injunction *must establish* that he is likely to succeed on the merits," 129 S. Ct. at 374 (emphasis added), RTAO continues to argue that the government must prove success on the merits here. (Opp. at 11-12.) As the Fourth Circuit made clear in this case, however, "the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts." *RTAO*, 575 F.3d at 347. That holding is the law of the case. Thus, as the Commission explained (Br. at 21-23), it is the *Winter* standard, not plaintiff's fourteen "speech-protective standards" (RTAO Opp. at 11-18), that must be applied here.

There is no basis for RTAO's claim that the Supreme Court's statement in *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) ("*WRTL*") that the "tie goes to the speaker, not the censor," mandates that the preliminary injunction standard should incorporate RTAO's "speech-protective principles." (Opp. at 12.) *WRTL* did not address preliminary injunctions. Rather, that opinion involved an as-applied challenge to the ban on the use of corporate treasury funds to finance electioneering communications; the Court explained that "[d]iscussion of issues cannot be *suppressed* simply because the issues may also be pertinent in an election. Where the First

Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL*, 551 U.S. at 474 (emphasis added). But there is no "suppression" of RTAO's speech in this case and certainly no basis for applying the Court's admonition to disclosure provisions that do not ban speech or spending, let alone for invoking that admonition to require RTAO's fourteen "principles" to be enshrined in a new preliminary injunction standard.

RTAO also tries to collapse the four preliminary injunction factors into one, claiming that "[i]f a provision is likely unconstitutional or beyond statutory authority, irreparable harm, balance of harms, and public interest are already settled." (Opp. at 12.) Essentially, RTAO asks this Court to ignore three of the four standards of the *Winter* analysis, without providing any authority for doing so. However, *Winter* and the Fourth Circuit's opinion in this case make clear that all four factors must be analyzed.

RTAO also wrongly claims (Opp. at 11) that because the Supreme Court vacated the Fourth Circuit's judgment, the Supreme Court deemed the circuit court's application of the *Winter* standard "incorrect." Plainly the Fourth Circuit itself does not share this view, because it subsequently reissued that portion of its opinion, which now binds this Court. Moreover, plaintiff's claim again relies on the view that the Supreme Court's GVR order in this case constitutes a determination on the merits of the matter, which is incorrect. *See supra* p. 6; *Henry*, 376 U.S. at 777; *Lawrence*, 516 U.S. at 168. In any event, the GVR order here simply remanded the case for consideration of *Citizens United* and the possibility of mootness, belying RTAO's claim that the Court intended to make any statement about preliminary injunction standards.

C. Plaintiff Fails to Satisfy Any of the Four Requirements for a Preliminary Injunction

Even if RTAO's claim for injunctive relief were not moot, it cannot meet the standard required for preliminary relief. First, as the Commission showed in its opening brief (Br. at

32-45) and further explains below (*infra* pp. 12-20), plaintiff cannot demonstrate a likelihood of success on the merits.

Second, the Commission also demonstrated (Br. at 23-27) that RTAO has failed to show that it will suffer irreparable harm in the absence of the extraordinary relief it seeks. *See Sampson v. Murray*, 415 U.S. 61, 88 (1974) (basis of injunctive relief in federal court has always been irreparable harm). After *Citizens United*, the regulatory provisions implicated in this case impose no ban on speech but involve only reporting and organizational requirements. RTAO makes speculative and conclusory claims that it may potentially be harmed by the Commission's analysis for determining whether an organization is a political committee, but RTAO alleges no specific or concrete harm to itself and instead points only to a 2008 letter by a Department of Justice official stating a general intention to criminally enforce FECA. (Opp. at 16.) This is woefully inadequate. At its foundation, RTAO's alleged harm is that it simply does not want to be considered a political committee, even though that status is unlikely to subject RTAO even to limits on the contributions it can receive, and the organizational and reporting requirements that apply to such committees are only marginally more burdensome than the requirements for anyone making independent expenditures — requirements that RTAO does not challenge. *See* FEC Br. at 25-26; *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir.), *cert. denied*, No. 10-145, 2010 WL 4272775 (U.S. Nov. 1, 2010). None of those requirements could create the immediate or irreparable harm that is required to justify the extraordinary remedy of a preliminary injunction.

Plaintiff's reliance upon *WRTL* to demonstrate harm (Opp. at 16) is misplaced. RTAO confuses the level of harm necessary to establish that a matter is "capable of repetition" for purposes of a mootness analysis with the immediate and irreparable harm required for a

preliminary injunction. RTAO cites the portion of *WRTL* in which the Court states that "there is no reason to believe" that the FEC will refrain from enforcing the law, as part of the Court's discussion of whether plaintiff had shown a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 551 U.S. at 463 (citations and quotation marks omitted). But the level of injury required to demonstrate justiciability under Article III is significantly lower than the harm necessary to justify a preliminary injunction. Standing, for example, requires an injury in fact, but the "claimed injury need not be great or substantial; an 'identifiable trifle,' if actual and genuine, gives rise to standing." *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687-689 n.14 (1973)). In comparison, a plaintiff seeking a preliminary injunction must make a strong showing of "irreparable" harm that cannot consist of mere monetary loss or administrative burden. (*See* FEC Br. at 23-27.)

Finally, as the Commission has shown (Br. at 27-29), the balance of harms and the public interest weigh strongly in favor of the Commission. Plaintiff barely mentions (Opp. at 16-17) these two factors in its responsive brief, but plaintiff must show that both support its position before a preliminary injunction may issue. "[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). The challenged Commission regulation and enforcement approach implement longstanding disclosure requirements in federal elections and ensure that political committees disclose their receipts and disbursements to the public. These requirements serve compelling government interests in preventing actual and apparent corruption, informing the public, and

facilitating the Commission's enforcement of the law. Indeed, similar requirements were upheld in *Citizens United* based on the informational interest alone. 130 S. Ct. at 915-16.

II. SUMMARY JUDGMENT SHOULD BE ENTERED FOR THE COMMISSION

A. Exacting Scrutiny Is the Appropriate Standard of Review

As the Commission demonstrated (Br. at 30-32), exacting scrutiny applies in this case. Contrary to plaintiff's claims (Opp. at 19-20), strict scrutiny does not apply here because RTAO is not challenging a ban on speech. The regulation at 11 C.F.R. § 100.22(b) merely provides a definition of "expressly advocating." After *Citizens United*, the only remaining application of this provision is to the Act's disclosure requirements and, indirectly, to the determination of whether an organization is a political committee. Likewise, the consequences of political committee status are disclosure and organizational requirements, and for some committees, limits on the contributions they may receive. None of these requirements are subject to strict scrutiny, and plaintiff provides no precedent in which strict scrutiny has been so applied.

Because "disclosure requirements . . . do not prevent anyone from speaking," *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citation omitted), the Supreme Court consistently applies exacting scrutiny that, unlike strict scrutiny, only "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)). The Supreme Court has recently confirmed that exacting scrutiny applies to FECA's disclosure requirements, *Citizens United*, 130 S. Ct. at 914, as well as to disclosure requirements for ballot referenda, *Doe v. Reed*, 558 U.S. __, 130 S. Ct. 2811, 2818 (2010). By contrast, *Citizens United* applied strict scrutiny to a prohibition on corporate *expenditures*. 130 S. Ct. at 898.

Even if RTAO were a political committee and chose to make contributions to candidates or political parties (contrary to its current Articles of Incorporation), the $5,000 contribution limit on contributions it could receive, 2 U.S.C. § 441a(a)(1)(C), would not be subject to strict scrutiny. *Buckley* noted that a "limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." 424 U.S. at 21. The Court thus analyzed contribution limits under a standard that is less demanding than strict scrutiny, explaining that "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id*. at 25 (internal quotation marks and citations omitted); *see also McConnell v. FEC*, 540 U.S. 93, 136 (2003); *Davis v. FEC*, 554 U.S. __ n.7, 128 S. Ct. 2759, 2772 n.7 (2008).[2]

Thus, consistent with the standards clearly articulated by the Supreme Court, exacting scrutiny applies to the regulation and political committee analysis that plaintiff challenges here.

B. The Commission's Express Advocacy Regulation Is Constitutional

The regulation at 11 C.F.R. § 100.22(b), which defines "expressly advocating," is neither vague nor overbroad. (*See* FEC Br. at 32-39.) As this Court and the Fourth Circuit noted in denying a preliminary injunction, *RTAO v. FEC*, No. 3:08-cv-483, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008), at *11; *RTAO*, 575 F.3d at 349, the regulation is consistent with the

[2] RTAO claims that even if this Court applies exacting scrutiny, it should be "high-level scrutiny that operates as the functional equivalent of strict scrutiny." (Opp. at 20 n.9). However, that standard would be strict scrutiny with another name, contrary to Supreme Court precedent.

constitutional "functional equivalent of express advocacy" test established in *WRTL*, a test that was recently applied in *Citizens United*. Moreover, *Citizens United* narrowed the application of section 100.22(b) so that it no longer implements a ban on corporate independent expenditures but now primarily implements disclosure requirements subject to a lower level of scrutiny. Indeed, the Supreme Court has upheld disclosure requirements that apply to far broader categories of speech than section 100.22(b) does, most notably in *Citizens United* itself, which upheld disclosure of all "electioneering communications," even those that are not the functional equivalent of express advocacy. Finally, there is no basis for RTAO's argument that Congress implicitly imported a narrow "magic words" interpretation of express advocacy into the statutory definition of "independent expenditure."

As the Commission has explained (Br. at 33-34), section 100.22(b) is consistent with (and very similar to) the Supreme Court's *WRTL* test, which narrowed *McConnell*'s upholding of the financing restriction on electioneering communications to those that are "the functional equivalent of express advocacy," *i.e.*, those "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70. RTAO argues (Opp. at 25) that when divorced from the statutory criteria defining the term "electioneering communication," *WRTL*'s "functional equivalent of express advocacy" test is vague. However, *WRTL* never suggested that its own test would become impermissibly vague if applied outside these statutory time windows, emphasizing instead that the test was not vague as a general matter. *See* 551 U.S. at 474 n.7. Logically, whether a communication is made within a 30- or 60-day window has little if any bearing on the vagueness of a test asking whether the communication can reasonably be interpreted as anything other than an appeal to vote for or against a candidate. *Citizens United* later applied the *WRTL* test to determine whether *Hillary:*

The Movie was the functional equivalent of express advocacy, 130 S. Ct. at 889-90; because the Court held that it was, the Court proceeded to decide whether the ban on corporate electioneering communications was constitutional as applied to the movie, *id.* at 892 ("Court cannot resolve this case on a narrower ground"). Nothing in the Court's "functional equivalent" analysis suggests that the Court viewed the test it had created in *WRTL* as impermissibly vague.[3]

Although *Citizens United* struck down FECA's financing restrictions on independent electoral advocacy, by a vote of 8-1 the Court applied exacting scrutiny and upheld the requirement at 2 U.S.C. § 434(f) that all electioneering communications be disclosed.

> The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. 551 U.S., at 469-76 (opinion of ROBERTS, C.J.). Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention.
>
> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulation of speech.

130 S. Ct. at 915 (citation omitted). The Court specifically held: "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.*

The three advertisements that *Citizens United* found could permissibly be subject to disclosure were less obviously election-related than the two ads RTAO sought to run in this case. Citizens United proposed to air three ads shortly before an election in which Hillary Clinton was a presidential candidate. The three scripts stated:

---

[3] In particular, the Court explained that the film "would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency." *Citizens United*, 130 S. Ct. at 890.

- "Wait": "If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."

- "Pants": "First, a kind word about Hillary Clinton." [Ann Coulter Speaking & Visual] "She looks good in a pant suit." "Now, a movie about the everything else."

- "Questions": "Who is Hillary Clinton?" [Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ." [Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ." [Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."

Citizens United v. FEC, 530 F. Supp. 2d, 274, 276 nn. 2-4 (D.D.C. 2008). Although the Supreme Court stated that these ads were "pejorative," the Court did not rule that they were the functional equivalent of express advocacy. 130 S. Ct. at 915. Instead, as discussed above, the Court held that it need not limit the scope of FECA's disclosure requirements to ads that were the functional equivalent of express advocacy. The Court also explained that "[b]ecause the informational interest alone is sufficient to justify application of [the electioneering communication disclosure requirements] to these ads, it is not necessary to consider the Government's other asserted interests." *Id.* at 915-916.

In this case, RTAO allegedly intended to run two radio ads shortly before the 2008 election in which Barack Obama was a presidential candidate. The "Change" ad features an "Obama-like voice" explaining the purported ways in which then-Senator Obama would change abortion policy, then stating: "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." A woman's voice then states: "Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?" (RTAO Amended Complaint ¶ 16.) The "Survivors" ad begins with a "Nurse," who says: "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." Then a "male voice" says:

> 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.

(RTAO Amended Complaint ¶ 17.)

Citizens United confirms that requiring disclosure of RTAO's ads is constitutional. If disclosure may be required for an advertisement with a commercial purpose that simply states, as the "Wait" ad did, "If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie," then disclosure of the advertisements at issue in this case may clearly be required. Regardless of whether RTAO's ads contain express advocacy, they both contain references to a presidential candidate in an impending election, which is sufficient to require disclosure. *Citizens United*, 130 S. Ct. at 915 ("the public has an interest in knowing who is speaking about a candidate shortly before an election."). Indeed, when this Court denied RTAO's request for a preliminary injunction, it held that "it is clear reasonable people could not differ that [the "Change"] ad is promoting the defeat of Senator Obama."[4] *RTAO*, 2008 WL 4416282, at *7-8.

[4] Although the Commission does not view RTAO's "Change" ad as express advocacy, it is clearly a closer call than Citizens United's "Wait" ad. In any event, even if not express advocacy under section 100.22(b), "Change" would still be subject to disclosure after *Citizens United*

Citizens United'*s* upholding of disclosure requirements for a category of communications that goes well beyond express advocacy is consistent with the Supreme Court's long history of upholding disclosure requirements applicable to issue advocacy. *See, e.g., United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding lobbying disclosure laws that "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"); *Doe v. Reed*, 130 S. Ct. at 2819-22 (upholding disclosure of names and addresses of signatories on petitions to place referenda on the ballot). *See also Human Life of Wash. v. Brumsickle*, No. 09-35128, 2010 WL 3987316 (9th Cir. Oct. 12, 2010) (relying upon *Citizens United* to uphold disclosure of communications opposing a ballot measure on physician-assisted suicide).

Ignoring *Citizens United*'*s* upholding of disclosure "even if the ads only pertain to a commercial transaction," 130 S. Ct. at 915, RTAO argues (Opp. at 21-22) that *Buckley* limits constitutionally permitted disclosure to the narrow class of communications that contain the "magic words" of express advocacy. However, as the Commission explained (Br. at 34-35), *McConnell* made clear that the First Amendment does not require that *Buckley*'*s* express advocacy construction apply in all circumstances. 540 U.S. at 191-92. And regardless of any dispute about *Buckley's* meaning, *Citizens United* is now the controlling decision on disclosure, and it permits disclosure requirements applicable to the ads in this case. As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916.

---

because it falls within the statutory electioneering communication definition in 2 U.S.C. § 434(f). RTAO does not challenge the disclosure requirements for electioneering communications.

Finally, neither this Court nor the Fourth Circuit accepted RTAO's argument (Opp. at 19-22) that *Buckley* mandates the application of "unambiguously campaign related principles" to this case. *RTAO*, 2008 WL 4416282; *RTAO*, 575 F.3d 342. Nothing in *Citizens United* undermines those decisions. Once again, plaintiff relies heavily on *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), but as the Commission explained (Br. at 38), the state statute at issue in that case was broader and less precise than 11 C.F.R. § 100.22(b), sweeping "far more broadly than *WRTL*'s 'functional equivalent of express advocacy' test." *Leake*, 525 F.3d at 297. Moreover, *Leake* explained that North Carolina was free "to adopt a definition of express advocacy consistent with the standards approved by *McConnell* and *WRTL*." *Id.* at 301. *Leake* does contain language describing an "unambiguously campaign related" standard, *id.* at 281, but the Fourth Circuit repeatedly distinguished *Leake* in denying plaintiff's preliminary injunction in this case. *RTAO*, 575 F.3d at 348-49. In addition, *Leake* pre-dates *Citizens United*, which upheld disclosure for any broadcast communication that mentions a candidate in the pre-election periods, with no reference whatsoever to any "unambiguously campaign-related" standard, although that standard was proposed to the Court by amicus Committee for Truth in Politics.[5] Thus, *Leake*'s conclusion that the far broader campaign finance restrictions at issue there were unconstitutional has no application here.

Finally, RTAO contends (Opp. at 22-25) that Congress adopted a narrow "magic words" definition of express advocacy when it defined an "independent expenditure" as "an expenditure by a person" "expressly advocating the election or defeat of a clearly identified candidate," 2 U.S.C. § 431(17), but there is no support for that claim. Congress simply codified the words

[5] *See* Brief for Committee for Truth in Politics, Inc. as Amicus Curiae Supporting Appellant, *Citizens United*, 130 S. Ct. 876, No. 08-205, available at ttp://www.fec.gov/law/litigation/citizens_united_sc_08_ctp_brief_amici.pdf.

"expressly advocating," without defining or limiting them. RTAO argues that Congress intended to limit independent expenditures to communications containing "magic words" because, RTAO claims, "[w]hen Congress passed its 'independent expenditure' definition, it was everyone's understanding that it applied only to non-coordinated 'expenditures' for magic-words express advocacy." (Opp. at 24). However, RTAO offers nothing but speculation about what "everyone's understanding" was — let alone anything relevant about what *Congress's* understanding might have been. In any event, RTAO also fails to show that *Buckley* itself intended to mandate a magic words limitation on express advocacy in all future contexts.

Contrary to plaintiff's arguments, Congress has in effect endorsed section 100.22(b)'s definition of express advocacy. When Congress enacted the electioneering communication provisions, it specified that nothing in the definition of "electioneering communication" "shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations." 2 U.S.C. § 434(f)(3)(A)(ii). Thus, Congress not only registered no objection to section 100.22(b), but specifically directed that its amendments to FECA should not be construed to affect the regulation. RTAO's arguments about congressional intent thus run directly contrary to this statutory provision that singles out the Commission's express advocacy regulation for protection.

C. The Commission's Application of the Supreme Court's "Major Purpose" Test to Determine Political Committee Status Is Constitutional

As the Commission explained (Br. at 39-45), the Commission's case-by-case approach to determining political committee status, including its application of the "major purpose" test, is constitutional. This Court and the Fourth Circuit correctly found that RTAO was unlikely to succeed on the merits on this claim and no subsequent event has undermined those decisions. *See RTAO*, 575 F.3d at 350-51; *RTAO*, 2008 WL 4416282, at *14.

In *Buckley*, the Supreme Court established the "major purpose" test to limit 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. The assessment of major purpose is inherently comparative, so the Commission considers a number of factors, not merely the "organic" documents and "unambiguously campaign related" expenditures that RTAO claims (Br. at 36-37) are the only criteria that the Constitution allows to be considered. Courts have endorsed the Commission's more flexible, realistic approach, including evaluation of public statements and spending and contributions, *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004), and statements in brochures and communications sent to potential and actual contributors, *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996).

RTAO challenges a 2007 statement of the Commission's approach written to explain why the Commission chose to reject a rulemaking request to expand the types of organizations that would be considered political committees. *Political Committee Status*, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007). However, this approach was upheld in *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007); indeed, that decision criticized the Commission's approach for being too *narrow* and potentially excluding some organizations whose major purpose might be considered the election of candidates. *Id.* at 26-27; *see* FEC Br. at 42-43 n.23.

RTAO's basic claim seems to be that it is unconstitutional for an organization that is not a political committee to be deemed a political committee (Opp. at 15), but that argument merely begs the question of how to identify organizations whose major purpose is nominating or electing candidates. RTAO relies in particular on the statement in *Citizens United* that it would be burdensome for corporations generally (not political committees) to be required to finance independent expenditures with a separate segregated fund. *See* 130 S. Ct. at 897. However, this

argument still fails to answer the real question about how to define "political committee." And *Citizens United* did nothing to undermine the Supreme Court's facial upholding of the political committee requirements more than three decades ago. *See Buckley*, 424 U.S. at 665-666.

RTAO does not challenge any determination the Commission has actually made as to RTAO's own political committee status — there has been none — or, indeed, as to any particular entity. RTAO does say that it "does not believe it should be deemed a PAC [political committee]," Opp. at 15, but the Commission has never asserted that RTAO is a political committee, and based on the group's current inactivity, there is no apparent basis on which to make such a determination.

Moreover, even if RTAO were to engage in activity sufficient for it to become eligible for political committee status, the applicable requirements would not be significantly more burdensome than the independent expenditure reporting requirements, which plaintiff does not challenge here. As the D.C. Circuit recently recognized in reviewing the regulatory requirements for political committees, the burdens of the additional reporting requirements "are minimal," and the organizational requirements do not "impose much of an additional burden," when compared to independent expenditure reporting. *See SpeechNow.org*, 599 F.3d at 697-98. Indeed, given *Citizens United's* upholding of disclosure requirements made by entities that are *not* political committees for a category of communications that covers far more than express advocacy, plaintiff's claim about the potential burdens of political committee status is even weaker than it was before this Court and the Fourth Circuit denied preliminary relief. For these reasons, the Commission's application of the "major purpose" test in determining political committee status is constitutional.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied and this Court should enter summary judgment in favor of the Commission.

Respectfully submitted,

/s/
Audra Hale-Maddox, Attorney, ahale-maddox@fec.gov
VA Bar No. 46929
Phillip Christopher Hughey, Acting General Counsel, chughey@fec.gov
David Kolker, Associate General Counsel, dkolker@fec.gov
Harry Summers, Assistant General Counsel, hsummers@fec.gov
Claire Rajan, Attorney, crajan@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2010, 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:

Michael Boos, michael.boos@gte.net
Attorney & Counselor at Law
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030

James Bopp, Jr., jboppjr@aol.com
Barry Alan Bostrom, bbostrom@bopplaw.com
Kaylan Phillips, kphillips@bopplaw.com
Richard Eugene Coleson, rcoleson@bopplaw.com
Bopp, Coleson and Bostrom
1 South 6th St.
Terre Haute, IN 47807-3510

John Richard Griffiths, john.griffiths@usdoj.gov
United States Department of Justice
Civil Division, Federal Programs Branch
Post Office Box 883
Washington, DC 20044

Debra Jean Prillaman, debra.prillaman@usdoj.gov
Office Of The U.S. Attorney
600 East Main Street, Suite 1800
Richmond, VA 23219

Respectfully submitted,

/s/

Audra Hale-Maddox
VA Bar No. 46929
COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Telephone: (202) 694-1650
Fax: (202) 219-0260
ahale-maddox@fec.gov