United States District Court
Eastern District of Virginia
Richmond Division

The Real Truth About Obama, Inc. ***Plaintiff*,** ***v.*** **Federal Election Commission** and **United States Department of Justice**, ***Defendants*.**	**Case No. 3:08-cv-00483-JRS**

Reply in Support of Second Preliminary Injunction Motion

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ARGUMENT

I. Introduction

RTAO has developed another issue-advocacy ad, *Survivors*, that it intends to broadcast if it obtains the judicial relief sought in this case, so that it can raise the necessary money and publicize its ad without the chill of legal risk. Doc. 53. As with the *Change* ad and the other communications that RTAO has stated its intent to do, *Survivors* focuses on a prolife issue, in this case infanticide, i.e., whether infants targeted for abortion who are born alive are entitled to the full legal protections that born-alive infants normally enjoy. Congress enacted the Born Alive Infant Protection Act to assure protection where federal law governs. Senator Obama had the opportunity to vote for a similarly-protective bill when he was an Illinois State Senator, but he voted against it thrice.

Survivors focuses on a controversy that has swirled in the national news media between Senator Obama and the National Right to Life Committee over that issue, and it attempts to set the record straight in public debate. NRLC says that Senator Obama has lied about his voting record, and Senator Obama has said that NRLC is lying. *See* Douglas Johnson and Susan T. Muskett, National Right to Life White Paper: Barack Obama's Actions and Shifting Claims on the Protection of Born-Alive Aborted Infants—and What They Tell Us About His Thinking on Abortion (Aug. 28, 2008) (available at http://www.nrlc.org/ObamaBAIPA/WhitePaperAugust282008.html) ("On August 25, 2008, the independent group FactCheck.org (www.factcheck.org) issued a review of this question that concluded, 'Obama's claim is wrong. In fact, by the time the HHS Committee voted on the bill, it did contain language identical to the federal act. . . . The documents from the NRLC support the group's claims that Obama is misrepresenting the contents of SB 1082.'").

Survivors is plainly the sort of "discussion of issues and candidates" for which the Supreme Court said that the First Amendment mandates protection when it identified the dissolving-distinction problem that requires the bright, speech-protective, express-advocacy line:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42.

Survivors demonstrates exactly how issue advocacy works. Issue-advocacy groups respond with public advocacy to current developments on their issues. They don't have time to await an uncertain license to speak from the FEC, even if the FEC occasionally does a hurry-up advisory opinion. They don't want to announce to the world in advance what they plan to say, by putting their intended speech up for public comment in the advisory opinion process, giving their issue-advocacy opponents an opportunity to plan a response. And they don't have to seek prior consent or publicly expose their ads in advance because this issue advocacy is precisely the speech that the Supreme Court declared most strongly protected by the First Amendment in *Buckley*, 424 U.S. 1, and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 ("*WRTL II*"),[1] and off limits to government regulation.

But the FEC refuses to limit itself to its permitted authority. Although *Survivors* contains none of the "magic words" that are required for express advocacy by the U.S. Supreme Court and the Fourth Circuit, *see* Doc. 4 at 11-14 (RTAO's *Preliminary Injunction Brief*), the FEC declares

[1]This principal opinion ("*WRTL II*") is by Chief Justice Roberts (Justice Alito joining). This opinion states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977) (Absent majority opinion, holding is position taken by those concurring on narrowest grounds.)

that *Survivors* may be prohibited as express advocacy. Doc. 56 at 4-6.[2] Although *Survivors* does not contain a clear call to action that can only be interpreted as an appeal to vote for or against a candidate as is required for electioneering communications to be regulated, *WRTL II*, 127 S. Ct. at 2667, *see also* Doc. 4 at 24 n.8, the FEC declares that it may be prohibited as an electioneering communication. Doc. 56 at 7-8.

The FEC's interesting analysis of *Survivors* (discussed *infra*) demonstrates that its regulations at 11 C.F.R. §§ 100.22(b) ("expressly advocating") and 114.15 (*WRTL II*'s appeal-to-vote test) are unconstitutionally vague and overbroad, in addition to being beyond permissible authority. Here, as in all four of the challenged provisions, the FEC is engaging in a forbidden "'we'll know it when we see it approach.'" *North Carolina Right to Life v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) (citation omitted). Such an approach, "simply does not provide sufficient direction to either regulators or potentially regulated entities. Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject." *Id.* The FEC must not be allowed to continue "handing out speeding tickets without 'telling anyone . . . the speed limit.'" *Id.* (citation omitted).

II. RTAO Meets Its Preliminary-Injunction Burden.

A. RTAO Has Irreparable Harm.

The FEC declares its belief that *Survivors* may be prohibited for RTAO as both express advocacy and a regulable electioneering communication, Doc. 56 at 2, 3-8, but the FEC still wants to contest RTAO's irreparable harm. *Id.* at 2-3. RTAO has briefed this issue, *see* Doc. 4 at 27 and Doc. 50 at 19-20, so only three brief comments are made here.

[2]The Department of Justice joins the FEC's arguments, Doc. 57, so when this brief refers to "FEC" arguments, the DOJ's arguments are included.

First, the FEC relies on the notion that RTAO won't be a political committee unless it meets the major-purpose test. Doc. 56 at 1. This ignores the fact that corporate express advocacy and electioneering communications are illegal for RTAO in and of themselves, so RTAO certainly is harmed if it may not do those as a result of constitutionally-flawed tests. And the FEC's interpretation and enforcement of the major-purpose test is itself at issue here, so the FEC's attempt to hide behind it is ineffective. RTAO is harmed because it is chilled from its activity for fear of being deemed a political committee based on vague, overbroad, and ultra vires regulations and enforcement policies.

Second, the FEC argues that, "even if RTAO were a political committee," it would be free to do express advocacy and restricted electioneering communications. Doc. 56 at 2. But imposed PAC status is precisely a harm that RTAO seeks to avoid, and it is a constitutionally-cognizable harm as a matter of law. *See* Doc. 50 at 19-20. It is irreperable because there is no opportunity for RTAO later to receive compensation from the FEC and the DOJ for lost speech opportunities, even if lost speech could be compensated, which it cannot. So RTAO does not need to prove that all of the pieces of harm that constitute PAC status are individual harms because PAC status is itself a well-recognized harm.

Third, RTAO alleges a reasonable fear of chill as to fundraising, due to the vague, overbroad, and ultra vires regulation at 11 C.F.R. § 100.57, that is keeping RTAO from raising funds to do its activities, including publicizing *Survivors*. This is a clear, present, irreparable harm that the FEC fails to address.

B. The Balance of Harms and Public Interest Favor RTAO.

The FEC attempted no new arguments as to the balance of harms, so no response is needed. *See* Doc. 56 at 3.

C. RTAO Has Likely Success on the Merits.

1. The Unambiguously-Campaign-Related Requirement Analysis Controls.

The FEC completely ignores the analysis that controls this case. The Fourth Circuit has recognized that (a) *Buckley*'s unambiguously-campaign-related requirement controls, *Leake*, 525 F.3d at 283; (b) express-advocacy requires the so-called "magic words," *id.*; (c) government may only regulate magic-words express advocacy or electioneering communications under *WRTL II*'s appeal-to-vote test and nothing in between, *id.*; and determining "*the* major purpose," *id.* at 287, requires an "empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech." *Id.* (emphasis added). *See also* Doc. 4 at 8-12. Under this governing analysis and these holdings, RTAO must prevail on the merits here.

2. 11 C.F.R. § 100.22(b) ("Expressly Advocating" Definition) Is Void.

As just noted, the Fourth Circuit follows the Supreme Court in requiring that express advocacy be limited to magic words, so the FEC's effort to defend its alternative "expressly advocating" definition at 11 C.F.R. § 100.22(b) is an exercise in futility before this Court. *Survivors* contains no true express advocacy, i.e., magic words. Furthermore, the FEC's forbidden analysis demonstrates the unconstitutional vagueness and overbreadth of its approach, as shown next.

First, the FEC says that *Survivors* attacks Senator Obama's character, citing *WRTL II* for the proposition that to do so is an "indicia of express advocacy." Doc. 56 at 4-5 (citation omitted). This argument is flawed. First, any language from the appeal-to-vote test or its application in *WRTL II* applies only in the context of communications that meet the statutory electioneering-communication definition. The Fourth Circuit has made it clear that *WRTL II*'s appeal-to-vote test is not a free-floating test that can be used anywhere else. *Leake*, 525 F.3d at 282. No court has ever held that actual express advocacy can be determined by whether a communication criti-

cizes a public official or his character. There is nothing inherent in criticism of a candidate that establishes that a communication clearly calls for a vote for or against a public official. One could criticize the actions of an incumbent who happens to be a candidate, including actions that go to his or her character, and still support the election of that candidate, as witnessed by numerous statements made by former primary election foes who now support either Senator Obama or Senator McCain for President.

In the related electioneering communication context, two post-*WRTL II* decisions show that criticizing a candidate cannot create an "appeal to vote" under *WRTL II*'s test for regulable electioneering communications, so *a fortiori* it cannot establish actual express advocacy. In both of these cases, the FEC and the intervenors (BCRA prime sponsors Sen. McCain et al.) agreed to a stipulated judgment conceding that the ads at issue were protected political speech under *WRTL II*'s test. *WRTL III* held the electioneering communication Prohibition unconstitutional as applied to WRTL's 2006 Child Custody Protection Act ("CCPA") advertisement. *Wisconsin Right to Life v. FEC*, No. 04-1260, slip op. at 1 (D.D.C. July 23, 2007) ("*WRTL III*").[3] The CCPA ad stated the positions of Senators Feingold and Kohl (the candidate), based on their prior votes, and characterized their positions. The other case involved an ad that the Christian Civic League of

[3]The ad stated:

> Listen up, parents. Wisconsin requires parental consent before your minor daughter can have an abortion. But, she can be taken to Illinois for an abortion that is kept secret from you. Imagine, your daughter can be taken across state lines for a major surgical procedure without your knowledge or consent. The U.S. Senate recently passed a bill to protect parents from secret abortions. Fortunately, Senator Kohl voted for the rights of parents. But, sadly, Senator Feingold did not. Your help is urgently needed because some Senators are holding up further action on the bill. Please call Senators Kohl and Feingold at 202-224-3121 and urge them to stop efforts by the Senate Democratic leadership to hold up a bill which will prevent secret abortions. That's 202-224-3121.

Maine sought to run.[4] This ad also stated the candidates' position on the issue and characterized that position. The district court held the electioneering communications prohibition unconstitutional as applied to the ad. *Christian Civic League of Maine v. FEC*, No. 06-614, slip op. at 1-2 (D.D.C. Aug. 21, 2007) ("*CCLM*"). Consequently, there is now no question that ads stating a candidate's position and criticizing or praising that position may be fully protected political speech.

In fact, *WRTL II* rejected the FEC's argument that criticism establishes the functional equivalent of express advocacy. *WRTL II* was decided in response to the FEC's and Intervenors' argument that criticism was the real indicator of the wrong intent that made an electioneering communication subject to prohibition and to WRTL's extended argumentation that criticism of public officials is at the core, not the periphery, of First Amendment protection, *see Brief for Appellee* at 1-5, *WRTL II*, 127 S. Ct. 2652, which included the following quote about criticism:

> This struggle of the government to silence the people continues here as BCRA sponsors, Intervenors herein, defend the "electioneering communication" prohibition by declaring that quashing criticism is the true intent behind the provision and thus argue that broadcast ads are sham, not genuine, if the ads (a) "took a *critical* stance regarding a candidate's position on an issue" and (b) "referred to the candidate by name." Intervenors' Br. at 22 (emphasis added). Intervenors' Brief is replete with complaints about Senators being criticized for their positions on a current legislative matter. *See id.* at 3, 10, 11, 15, 16, 22, 23 n.11, 24, 25 n.14, 27, 28, 36. So is the FEC's Brief. *See* FEC Br. at 10, 11, 19, 20, 33, 44, 48.

Brief for Appellee at 5, *WRTL II*, 127 S. Ct. 2652. *WRTL II* clearly rejected the FEC's notion then, as this Court must do now, that if citizens criticize public officials then the government may

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[4]The ad stated:

> Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

restrict their speech. Such pre-Revolutionary British and European thought was rejected in this Republic with the First Amendment.

Second, the FEC represents that "*Survivors* says that Senator Obama has 'been lying' for years," which it says is a character attack. Doc. 56 at 5. The ad more specifically said that Senator Obama has been lying for four years about three votes. Doc. 53 at 2. The notion that the People can't say that an incumbent politician is not telling the truth would astound the Framers. The regulation at issue says nothing about whether a communication may say that a politician is being untruthful. *Buckley*'s express-advocacy test turned on no such question, nor does *Leake*'s. The FEC continues to make up the tests as it goes along, but it still gives no guidance. Will it find there is no express advocacy if instead the speaker says the politician was "mistaken," "in error," "wrong," or "untruthful," or that he "told a lie"? Or is there something unique about saying a politician is "lying"? Can the People never say that a politician has misrepresented his record, or are candidates free to tell lies without challenge, except by PACs?

Fourth, the FEC says that "*Survivors* does not implore listeners to take action relative to any public policy on abortion, nor does it refer them to a source of additional information on such policies." Doc. 56 at 5. The FEC misstates the nature of issue advocacy. "Issue advocacy conveys information and educates." *WRTL II*, 127 S. Ct. at 2667. It need not do more to qualify as issue advocacy. Indeed, issue advocacy is fairly understood as the *absence* of express advocacy, rather than the *presence* of some issue (let alone the need to implore listeners to take some action) because *WRTL II* said that "[i]ssue advocacy conveys information and educates," *id.*, and equated it with "political speech." *Id.* at 2659. As to the second part of this argument, is the FEC saying that *Survivors* would not be express advocacy if RTAO had referred hearers to its website, as it did in *Change*? The FEC leaned on that referral heavily in declaring that *Change* was not express advo-

cacy, even interpreting it as a call to action. Doc. 31 at 12 & n.5. But again, there is no precision. No predictability. No guidance. Only vagueness.

Finally, and most interestingly, the FEC tries to convert a familiar expression, *giving one pause*, into a clear call to action that can only be interpreted as a call to vote for or against a candidate. Before proceeding, it should be noted that the FEC seems to be conceding that there must be some such clear plea for action, a position that RTAO has argued with respect to electioneering communications and *WRTL II*'s appeal-to-vote test. *See* Doc. 4 at 24 & n.8. This is reasonable because the FEC expressly says that it "derived" 11 C.F.R. § 100.22(b) from *Furgatch*, Doc. 31 at 15, and *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), expressly required that there be a *clear plea for action* that can only be interpreted as a call *to vote* for or against a candidate. *Id.* at 864.[5] The *Furgatch* test also required "some explicit *words* of advocacy," *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (emphasis in original),[6] which are ab-

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[5] *Furgatch* stated its now-moribund test as follows:

> We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is ummistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a *clear plea for action*, and thus *speech that is merely informative is not covered by the Act*. Finally, it *must be clear what action is advocated*. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages *a vote* for or against a candidate or encourages the reader to take some other kind of action.

Id. (emphasis added).

[6] In the cited passage, *CPLC I* restricted *Furgatch* as follows:

> But a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy. *See id.* at 864 (noting that "context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words"). "Context," we emphasized, "remains a consideration, but an ancillary one, peripheral to the words themselves." *Id.* at 863.

sent from *Survivors*, so the FEC is not being faithful to the one authority it claims to justify § 100.22(b) in that respect. *Survivors* lacks both a clear call to action that can only be interpreted as a call to vote for or against a candidate and any explicit words of advocacy. It cannot be express advocacy even under the now-moribund *Furgatch* test. There is nothing even close to *Furgatch*'s imperative "Don't let him do it!" 807 F.2d at 864.

What *Survivors* actually says is that "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." Doc. 53 at 2. There is no clear call to action of any sort because there are no words in the imperative ("Pause!") or cohortative mood ("Let's pause."), which are required in English grammar for there to be a call to action. In fact "pause" is used in *Survivors* as something to be given by words and ideas that proceed it, not something the hearer is actively called to do. But even if *Survivors* did say "Pause!" or "Let's pause," that would still not be a clear call to action that can only be interpreted as a call for a vote for or against a candidate. It might be a little closer, although still not express advocacy, if the ad said "Stop!" or "Let's all stop!" But "pause" is not even "stop." Note that "pause" is used here is intransitive, with no indication of *what* one is to pause as there would be if it were transitive. So "pause" means: "1. To cease or suspend an action temporarily. 2. To linger; tarry: paused for a while under the huge oak tree. 3. To hesitate: He paused before replying. to cease what one is doing for a period." *The American Heritage Dictionary of the English Language* (4th ed. 2000). So even if a speaker asserts that something "should give everyone pause," that is not a call to *stop* doing something. Even if *Survivors* spoke of voting in an election, which it does not, the invitation *at most* would be to pause that activity, not to stop it. And this purported "call to action" gives no indication of which direction the hearer should go after the pause, as "Don't let him do it!" attempted to do.

But *to give pause* has a long and common literary usage that indicates that it has nothing to do with elections and cannot be a clear plea for action that can only be understood as a call to vote for or against a candidate. Perhaps the most famous use of the phrase is by William Shakespear in *Hamlet*:

> To be, or not to be: that is the question:
> Whether 't is nobler in the mind to suffer
> The slings and arrows of outrageous fortune,
> Or to take arms against a sea of troubles,
> And by opposing end them? To die: to sleep:
> No more; and by a sleep to say we end
> The heartache and the thousand natural shocks
> That flesh is heir to,—'t is a consummation
> Devoutly to be wish'd. To die, to sleep;
> To sleep: perchance to dream: ay, there 's the rub:
> For in that sleep of death what dreams may come,
> When we have shuffled off this mortal coil,
> *Must give us pause*: . . . .

Hamlet, Act iii, Scene 1 (emphasis added). Shakespeare was not commanding anyone to pause, nor encouraging them to do so, but rather he was saying that certain things make us pause and reflect on them by their very nature.

So *Survivors* readily may be interpreted as stating that the actions of Senator Obama with respect to infanticide are of such a profound nature as to cause everyone to pause and reflect. What they think about in the predicted pause is up to them. Some will doubtless applaud, while others will not. How they proceed after the predicted pause, is also up to them. They have, as *WRTL II* said of issue advocacy, been given information and educated, and whether they take cognizance of the information, including in their voting, is up to them, for they have not been invited to vote one way or the other. 127 S. Ct. at 2667.

Part of "everyone" who should be given pause by the actions described in *Survivors* is Senator Obama himself. It may be sincerely hoped by RTAO that by calling attention to Senator

Obama's actions he will do better next time, in whatever capacity that might be. Such a use of the phrase is employed in the following quote from a book on child discipline, which speaks of the fact that disapproval gives one pause and motivation to do better next time:

> When we approach discipline as learning, this ability to internalize moral behavior will occur in the natural course of growth. Children will make mistakes, but, given half a chance, they will learn from them. Our disappointment and displeasure *give them pause*—and a strong desire to do better the next time around. However, when parents are too quick to punish (or when they assume that children will not really learn from their mistakes without paying a penalty), these lessons may be lost.

Cathy Rindner Tempelsman, *Child-Wise* at ch. 7 (1994) (emphasis added). Any time an incumbent politician's record is criticized, the speaker is likely hoping for a change in the candidate's attitude toward the issue itself, which is another alternate understanding of the *give pause* in *Survivors*. The statement that "everyone" will be given pause by the actions merely broadens the scope of the disappointment and disapproval, which in turn should heighten the pressure on the incumbent politician to alter his attitudes to move more into the mainstream.

So the FEC is incorrect that "give . . . pause" is any sort of clear call to action, let alone one that can only be interpreted as a call to vote for or against a candidate. And the FEC is simply wrong in asserting that "[t]o ask listeners to defer action or hesitate before supporting a candidate is to expressly advocate against that candidate," Doc. 56 at 5, for that is not what *give pause* does or means in *Survivors*. No one is actually asked to do anything; there are no words about supporting or opposing any candidate; there is nothing about candidacy or election; the words have another reasonable meaning; there is no express advocacy under *Furgatch*'s clear-plea-for-action test; and there is no express advocacy even under the FEC's flawed regulation because reasonable minds could differ as to the meaning of *Survivors*. The FEC's effort to show that *Survivors*

contains express advocacy simply shows that its alternative test is doomed for vagueness and overbreadth. And it is plainly beyond the FEC's authority.

3. The FEC's Enforcement Policy on PAC Status, Including Its Major-Purpose Test Policy, Is Void.

The FEC acknowledges that funds spent on *Survivors* would trigger statutory PAC status, calling into direct question the "major purpose" of RTAO for determining whether PAC burdens may be imposed under *Buckley*, 424 U.S at 79. That issue has been thoroughly briefed, and the briefing need not be repeated beyond the brief discussion of this issue in the Introduction (*supra*).

4. 11 C.F.R. § 114.15 (*WRTL II*'s Appeal-to-Vote Test) Is Void.

The FEC says the *Survivors* is "the functional equivalent of express advocacy under 11 C.F.R. § 114.15" "for substantially the same reasons that [it] is express advocacy." Doc. 56 at 7. As shown above, however, *Survivors* is not express advocacy. The FEC continues to use characteristics discussed in *WRTL II*'s *application* of the appeal-to-vote test that are not in the test itself, were unique to the grassroots lobbying context at issue, and addressed arguments made by the parties without incorporating those into the test itself. The FEC continues the flawed argument that issue advocacy must do something other than what *WRTL II* said that it does, i.e, "convey[] information and educate[]." 127 S. Ct. at 2667. The FEC continues to ignore the lack of any clear plea for action. The FEC is apparently engaging in contextual evaluation, forbidden by *WRTL II*, *id.* at 2666, because there is no mention of any election or candidacy in *Survivors* that would lead a hearer to connect it with an election. It has another interpretation than as any invitation to vote for or against Senator Obama because it is an effort to set the record straight on a public-policy issue currently in public debate. It is simply another communication on the prolife

issue, just as *Change* was. And the FEC clearly has not given the benefit of the doubt to *Survivors* as it was required to do. *Id.* at 2666.

Finally, the FEC attempts to recruit *WRTL II*'s discussion of "the hypothetical Jane Doe ad" to its analysis. Doc. 56 at 7. In dictum, *WRTL II* distinguished that ad from the ads at issue in *WRTL II* on a ready point of contrast, i.e., "that ad condemned Jane Doe's record on a particular issue,'" while WRTL's ads did no such thing. *WRTL II*, 127 S. Ct. at 2667 n.6 (citation omitted). But *WRTL II* did not establish criticism of a voting record as part of the appeal-to-vote test, *id.* at 2667, that governs whether statutory electioneering communications may be regulated. And it would not have made criticism of a public official the test because it rejected precisely such arguments made to it *WRTL II*. *See supra* at 7.

In sum, under the only test that controls, *WRTL II*'s appeal-to-vote test, *Survivors* may not be regulated. There is no clear plea for action that can only be interpreted as an appeal to vote. But the FEC's arguments do show why RTAO requires the requested judicial relief. The FEC is simply making up its tests as it goes along, rather than employing the bright lines that the First Amendment mandates.

CONCLUSION

For the foregoing reasons a preliminary injunction should issue as to the challenged provisions as applied to the *Survivors* ad. The FEC must not be allowed to continue "handing out speeding tickets without 'telling anyone . . . the speed limit.'" *Leake*, 525 F.3d at 290 (citation omitted).

Respectfully submitted,

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