No. _____

In The
Supreme Court of the United States

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

v.

Federal Election Commission and
United States Department of Justice

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

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Petition for a Writ of Certiorari

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Questions Presented

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

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

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

Corporate Disclosure

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

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Petition

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

Opinions Below

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

Jurisdiction

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

Constitution, Statutes & Regulations

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

Statement of the Case

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

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

App–22.

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

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

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

of any clearly identified candidate for public office, or

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

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

CA-App–23.

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

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

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

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

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

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

CA-App–24-25.

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

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

CA-App–25, 18-19.

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

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

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

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

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

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

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

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

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

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

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

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

CA-App–26-27.

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

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

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

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

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

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

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

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

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

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

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

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

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

Reasons to Grant the Petition

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

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

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

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

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

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

I.

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

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

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

> operate[s] in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

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

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

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

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

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

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

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

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

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

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

II.

Express Advocacy Requires Magic Words.

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

A. The Holding Conflicts with Other Circuit Decisions.

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

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

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

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

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

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

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

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

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

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

C. The Lower Court's Justification Is Flawed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, Draft A explained that "the legal difficul-

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

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

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

III.

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

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

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

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

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

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

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

A. The Holding Conflicts With Other Circuit Decisions.

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

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

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

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

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

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

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

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

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

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

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

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

confusion.[15]

B. The Holding Conflicts With Decisions of This Court.

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

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

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

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

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

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

C. The Court's Justification Is Erroneous.

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,

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