No. 10-145

# In The Supreme Court of the United States

SPEECHNOW.ORG, *et al.*,

*Petitioners,*

v.

FEDERAL ELECTION COMMISSION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF *AMICI CURIAE* OF COMMITTEE FOR TRUTH IN POLITICS AND THE COMMONWEALTH FOUNDATION FOR PUBLIC POLICY ALTERNATIVES IN SUPPORT OF PETITIONERS

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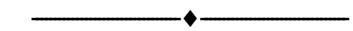
## INTEREST OF *AMICI CURIAE*[1]

The Committee for Truth in Politics is a non-profit organization that is deeply concerned about associational privacy and the effect of unconstitutional campaign finance laws on the political process. Its interest is in safeguarding associations' First Amendment rights from the ever-increasing expansion of unconstitutional burdens imposed by the government.

The Commonwealth Foundation for Public Policy Alternatives is an independent, non-profit research and educational institute that develops and advances public policies on the nation's founding principles of limited constitutional government, economic freedom, and personal responsibility for one's actions. It is concerned about governments' impositions of burdensome regulatory schemes on First Amendment rights.



## SUMMARY OF ARGUMENT

At issue in this case is whether the government can impose the burdens of political action committee ("PAC") status on associations of citizens whose

[1] The parties have consented to the filing of this brief *amici curiae*, as indicated by letters of consent filed with the Office of the Clerk of this Court. Counsel of record for all parties have been given at least 10 days notice of *amici curiae*'s intention to file. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amici*, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

speech is non-corrupting. The lower court held that the PAC organizational and reporting requirements found burdensome in Supreme Court precedents imposed little additional burden on SpeechNow, because it had already agreed to comply with significantly less burdensome expenditure-specific disclosure requirements. Such a finding in effect equates PACs with other citizen groups who do not possess the same attributes that warrant extensive regulation of PACs. Also, it mistakenly views the burdens of this invasive regime as of the same kind as the less burdensome requirements for simple expenditure-specific disclosure.

PAC status places an association into a comprehensive regulatory scheme, which has been found burdensome in and of itself, and as applied to certain associations. This Court has repeatedly recognized the burdens of PAC status, and these burdens have been borne out by the experience of associations. In light of this, the Court should review the lower court's ruling that imposes PAC status on independent expenditure groups whose speech is non-corrupting, and for which there is no compelling government interest in burdening.

The Court's guidance on this issue of national importance is urgently needed now. The burdens under which PACs operate have only increased in the years since *Buckley v. Valeo*, 424 U.S. 1 (1976). Government-imposed monetary and other costs of participation in the political process – the expert

accountants, lawyers, paid advisors and staff – effectively restrains speech.

The current PAC regulatory scheme imposes too great a burden because it permits few to speak freely, other than the elite who have the time and resources to ensure they will not be investigated, fined or found inadvertently out of compliance with the law.

Allowing the lower court's decision to stand effectively takes away the free speech rights safeguarded by *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The result will be that citizens who can't afford the monetary and time commitments required under the PAC regulatory scheme will not be able to exercise their First Amendment rights.

## ARGUMENT

This case is of utmost importance to associations of citizens across the country because there are very real and burdensome consequences if PAC status is imposed on them. Campaign finance regulation has become so complex and confusing that ordinary citizens cannot understand it, and even experts struggle with it. Professionals must be hired before one speaks to handle the heavy workload, help maneuver through the complex web of restrictions, and help avoid the imposition of penalties. The PAC regulatory regime imposes a greater burden on the speech of small associations. *See National Organization For Marriage v. McKee*, 666 F. Supp. 2d 193, 206

(D. Me. 2009) ("Regulation tends to grow and to develop requirements appropriate for large organizations . . . and to ignore the burdensome effects on the speech of individuals and small organizations."). Small citizen groups, *including those whose speech is non-corrupting*, are chilled from speaking because they want to avoid the complexity altogether or because they cannot afford a team of specialists. The Court's review is needed to prevent immediate and nationwide suppression of speech on important public policy matters. Indeed, the lower court's holding that PAC burdens are minimal has already been cited approvingly. *See National Organization For Marriage v. McKee*, 2010 U.S. Dist. LEXIS 85725 at *45-46 (D. Me. Aug. 19, 2010) (citing *SpeechNow*'s finding that organizational PAC requirements are "only a minimal added burden").

## I. The Lower Court's Holding That The Government, Consistent With The First Amendment, May Require Associations Of Citizens To Register And Report As PACs In Order To Make Unlimited Independent Expenditures Conflicts With Supreme Court Precedent.

"PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United*, 130 S. Ct. at 897. While the lower court understood disclosure can be burdensome, App. 20, it entirely missed that PAC burdens are not judged as mere disclosure laws.

### A. PAC registration and reporting requirements are burdensome as a matter of law.

The burdens associated with PAC status were first noted in *Buckley*. The Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also with the potential burden of disclosure requirements on an association's own speech. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 265-66 (1986) (O'Connor, J., concurring) (*MCFL*) (*citing Buckley*, 424 U.S. at 66-68, 74-82). Since *Buckley*, the Court has repeatedly recognized, both generally and specifically, the burdens imposed by PAC status, especially on small associations. "Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear." *MCFL*, 479 U.S. at 253; *see also FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2671 n.9 (2007) (*citing MCFL*, 479 U.S. at 253-255 (plurality opinion)) ("PACs impose well-documented and onerous burdens, particularly on small nonprofits."); *FEC v. Akins*, 524 U.S. 11, 14-15 (1998) ("[T]he Act imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act's definition of 'political committee.' Those groups must . . . file complex FEC reports. . . ."). Most recently, the Court held that "PACs are burdensome alternatives; they are expensive to

administer and subject to extensive regulations." *Citizens United*, 130 S. Ct. at 897.

In *MCFL*, the Court provided a detailed description of the burdens of PAC status imposed by operation of the statute:

> Under § 432, [a PAC] must appoint a treasurer, § 432(a); ensure that contributions are forwarded to the treasurer within 10 or 30 days of receipt, depending on the amount of contribution, § 432(b)(2); see that its treasurer keeps an account of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, and the name and address of any person to whom a disbursement is made regardless of amount, § 432(c); and preserve receipts for all disbursements over $200 and all records for three years, §§ 432(c), (d). Under § 433, [a political committee] must file a statement of organization containing its name, address, the name of its custodian of records, and its banks, safety deposit boxes, or other depositories, §§ 433(a), (b); must report any change in the above information within 10 days, § 433(c); and may dissolve only upon filing a written statement that it will no longer receive any contributions nor make disbursements, and that it has no outstanding debts or obligations, § 433(d)(1).
>
> Under § 434, [a political committee] must file either monthly reports with the FEC or

> reports on the following schedule: quarterly reports during election years, a pre-election report within 30 days after an election, and reports every 6 months during nonelection years, §§ 434(a)(4)(A), (B). These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation, § 434(b).

*MCFL*, 479 U.S. at 253-54. The court of appeals ignored these facts and neglected these precedents. It imposed the PAC regulatory regime on SpeechNow based on the government interest justifying *non-PAC* disclosure requirements upheld in *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003) and *Citizens United*, 130 S. Ct. at 914. App. 21-23.

This holding turns *MCFL* on its head. The lower court found that because expenditure-specific disclosure requirements of electioneering communications were upheld by this Court in *McConnell* and *Citizens United*, it was thus constitutional to impose the "full panoply of regulations that accompany status as a political committee" on associations making only independent expenditures because such additional regulations are a minimal additional burden. *MCFL*, 479 U.S. at 262. Such a conclusion is erroneous both as a matter of law and as a matter of fact.

PAC organizational and reporting requirements are not mere expenditure-specific disclosure requirements; operating as a PAC imposes an entirely different and much more burdensome regulatory scheme upon an association. Moreover, the fact that SpeechNow can comply with significantly less burdensome expenditure-specific disclosure requirements does not ipso facto turn the PAC regulatory scheme into a "minimal burden" for SpeechNow. If such were the case, it would have been a minimal burden for MCFL to have operated as a PAC, rather than using expenditure-specific disclosure for its independent expenditures. But this Court did not find that to be the case. *MCFL*, 479 U.S. at 255.

### B. The court of appeals' holding conflicts with Supreme Court precedent because it grossly underappreciates the organizational, reporting, and administrative burdens of PAC status.

As the previous section demonstrates, this Court has held as a matter of law that PACs are burdensome. And, in fact, the evidence over the last three decades demonstrates that this holding is incontrovertibly true. The court of appeals thus ignored both relevant holdings of this Court and clear evidence supporting those holdings.

The court of appeals made two determinations regarding PAC burdens. First, the court concluded that organizational requirements do not impose much of a burden in addition to those already imposed by expenditure-specific disclosure requirements. Second, the court concluded that additional PAC reporting requirements are minimal. Both of these determinations are erroneous. In addition, the court of appeals failed even to discuss, let alone recognize the administrative burdens that PAC status imposes.

#### 1. The court of appeals erroneously concluded that "organizational requirements" do not impose much of an additional burden.

From creation to termination, operating a PAC is complex, time consuming, and fraught with opportunity for misstep. In concluding that organizational

requirements do not impose much of an additional burden on citizen groups, the court of appeals erred in two respects.

First, it erroneously concluded that designating a treasurer and retaining records does not impose much of an additional burden. App. 23. Second, the court of appeals failed to recognize that the burdensome organizational requirements imposed by the government on a PAC are the same whether an association chooses to operate relatively simply or with a more complex organizational structure. App. 23. Each of these will be addressed in turn.

The complexity and burdens of organizing as a PAC preclude many organizations from even attempting to participate in the political process. *See MCFL*, 479 U.S. at 255 n.8 (some "may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent political speech"). One of the first things a PAC must do is name a treasurer. *See* 2 U.S.C. 432(a) ("No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant."). The act of naming a treasurer is easy – it consists of listing the individual's name and address on a form. However, it is often no easy task to find a qualified individual willing to devote the time to serve in the position or to assume the legal liability of doing so.

The days of the volunteer treasurer are over for several reasons. The complexity of the job has all but

required committees to look for individuals with expertise in accounting. A nine-page guidance document published by the Federal Election Commission ("FEC") on implementing internal controls by political committees is but one example of the specialized knowledge a treasurer needs. *See* FEC Internal Controls and Political Committees at 1, 2 <http://www.fec.gov/law/policy/guidance/internal_controls_polcmtes_07.pdf> (emphasis added) ("The responsibility of establishing the necessary control procedures falls to a political committee's treasurer. . . . This guide should not be the only resource that is consulted. *In addition to* accounting professionals, there are numerous resources that can be found on the Internet."). Treasurers are expected to be up to date on the reporting and recordkeeping rules, reconcile the bank account, file FEC reports, IRS returns, and state reports. *See* Comment of Birkenstock and Cline in Response to SEC File #S7-18-09, Political Contributions by Certain Investment Advisers at 3 (Oct. 9, 2009) <http://www.sec.gov/comments/s7-18-09/s71809-227.pdf> ("It is also common for candidates to have treasurers who work in finance or accounting and serve a particularly important role. . . .").

Even for those with experience, recordkeeping imposes significant burdens:

> As a treasurer of a county party, and an accountant for the past 40 years, I thought I was capable of handling the reporting and record keeping requirements for a Congressional candidate. I was wrong and my efforts

> to learn were severely hampered by . . . the unwieldy reporting program.

Comment of Gloria Bram, Agency Procedures and Processes (Feb. 11, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/bram.pdf>. One mistake is enough to create discrepancies that are difficult to remedy and can lead to fines. The FEC has confirmed that treasurers may be pursued in their *personal capacities* and thus, be personally liable. Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005) <http://www.fec.gov/law/policy/2004/notice2004-20.pdf>. An FEC brochure specifically states that "[c]ommittee treasurers may be liable for civil monetary penalties if reports are not filed or are not filed on time." Committee Treasurers Brochure, <http://www.fec.gov/pages/brochures/committee_treasurers_brochure.pdf>.

Given all this, it is not hard to see why some organizations have difficulty finding an individual willing and qualified to serve as treasurer. As experts have noted, "The unintended consequence of [complicated laws] is that the price of admission into politics becomes too high. People do not want to become . . . treasurers because of the potential liability." Bipartisan Commission on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* at 62 (last visited August 18, 2010) <http://www.fppc.ca.gov/pdf/McPherson.pdf> ("Bipartisan Commission").

But working as a treasurer is not the only labor required to operate a PAC. Far from it. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 708 (1990) (Kennedy, J., dissenting), for example, it was noted that the organization's PAC consumed an estimated twenty-five to fifty percent of its receipts in establishment and administrative expenses. Given this reality, it is becoming a rarity to find a PAC that is able to successfully operate on a small administrative budget using a volunteer staff. The sheer amount of time required, the knowledge of rules, the potential for significant fines for minor missteps, and continuous recordkeeping and reporting requirements necessitate hiring a cadre of professionals.

To comply with the law's requirements, PACs need to hire attorneys, CPAs, and IT professionals, all of which cost money that a new or small PAC does not have. *See* Interview by Jim Lehrer of Randy Tate, *Campaigns Under Scrutiny – Opposing Reform*, NewsHour at ¶14 (Sept. 30, 1997) <www.pbs.org/newshour/campaign/september97/hearing_9-30.html> (Randy Tate stating that "If you've ever set up a political action committee, you need several attorneys, a couple of CPA's, piles of paper work, and it would have a chilling effect on everyday citizens trying to organize their neighborhood to have an impact on their local member of Congress."); Bipartisan Commission at 62 ("Thus the regulations have injured grassroots democracy and have essentially professionalized politics so that you have to have lawyers and accountants on your campaign staff.").

In January 2009, the FEC sought public comment on its policies and procedures. Agency Policies and Procedures, 73 Fed. Reg. 74494, 74495 (Dec. 8, 2008). In response, the FEC received comments from several individuals highlighting the organizational burdens placed on volunteer-driven PACs:

> This whole system needs to be revised, the rules are mountainous. . . . As a local grassroots Democratic club, for us, the rules, regulations, paperwork, filings are so complex, and if something is missed, fines are issued . . . this makes it impossible for a group of volunteers to operate in a relatively small way in the process, without expensive, professional assistance from one of few professionals who understand it. . . .

Comment of Diane Valentino, Agency Procedures and Processes (Dec. 12, 2008) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm29.pdf>. Another individual also noted the burdens which demand professional help:

> I have just started a political action committee. The record-keeping burden is simply unbearable! I believe this red tape has the effect of deterring grassroots participation in the political process. If I did not have hours to volunteer to the PAC, we just could not participate. This favors the large PACs that can hire professionals to run the PAC.

Comment of Jason Eugene Call, Agency Procedures and Processes (Dec. 17, 2008) http://www.fec.gov/law/

policy/enforcement/2009/comments/comm30.pdf>; *see also Citizens United*, 130 S. Ct. at 897 (noting that PAC regulations might explain why fewer than 2,000 of the millions of corporations have PACs).

"Relative simplicity of operation" does not eliminate these organizational requirements, contrary to the court of appeals' belief. The burdensome organizational requirements imposed on a PAC are the same irrespective of how an organization chooses to operate. The legal obligations of PACs are the same, which is why the lower court's decision to allow the government to require a group to function as a PAC is such a consequential ruling for the country.

### 2. The court of appeals erroneously concluded that additional reporting requirements by PACs are "minimal."

The organizational requirements are "just the beginning." *Citizens United*, 130 S. Ct. at 897. PACs must also comply with an entirely different, and much more complex and confusing reporting scheme than that used by expenditure-specific filers. The Federal Election Campaign Act (FECA) is 244 pages, www.fec.gov/law/feca/feca.pdf, and there are 567 pages of regulations, www.fec.gov/law/cfr/11_cfr.pdf. There have been over 1,803 advisory opinions issued since 1975, http://saos.nictusa.com/saos/searchao, over 1,200 pages of explanations and justifications for regulations in the *Federal Register*, www.fec.gov/law/cfr/ej_

main.shtml, and more than 379 court cases, www.fec.gov/law/litigationalpha.shtml.

There are reporting forms with instructions, www.fec.gov/general/library.shtml, campaign guides and brochures, www.fec.gov/general/library.shtml. Other sources of information regarding enforcement of laws and regulations are found in audit reports, www.fec.gov/audits/audit_reports_auth.shtml, and in over 6000 Matters under Review, http://eqs.nictusa.com/eqs/searcheqs.

It is true that the FEC is required by law to provide resources and to assist PACs with compliance with these complex requirements. However, this legal duty is a tacit acknowledgment of the pitfalls inherent in operating as a PAC. Moreover, the FEC's attempt to fulfill its statutory duty does not sufficiently ameliorate the burdens placed upon PACs by the complexity of PAC reporting.

For example, PACs that expect to receive or make contributions or expenditures in excess of $50,000 in a calendar year are required to file reports electronically with the FEC. 11 C.F.R. § 104.18(a)(i) and (ii). Although the FEC provides free filing software, this does not lessen the burden placed on many PACs. As one commenter noted, "[t]he current software provided – FECFile – is clunky and confusing. . . . The free FEC software need not be as fully-featured as commercial packages available to campaigns, but it should be easy to use so that low-budget candidates and committees are able to file reports without

recourse to prohibitively expensive applications. . . ." Comment of Peter d'Errico, Agency Procedures and Processes (Dec. 19, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm14.pdf>.

Another commenter stated:

> The sample formats for transmitting data were poorly explained, the program was extremely convoluted and not user friendly. It shouldn't require a Master's degree in both Accounting and Systems Analysis to use it. And the experience required to use the program severely hampers the ability of new candidates with limited funds to run for public office.

Comment of Gloria Bram at ¶3.

The barrier to exercising the right to association due to being regulated as a PAC is demonstrated in an experiment conducted by Dr. Milyo. In 2007, 255 subjects attempted to comply with PAC reporting laws from 3 states. Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, at 27, Institute for Justice (Oct. 2007; last visited August 19, 2010) <www.ij.org/publications/other/campaign-finance-red-tape.html> ("Milyo"). The difficulties of complying with PAC reporting laws was evident: not one subject completed all of the tasks correctly. *Id*. at 8. This is problematic because for "even a very small group with just a few contributors and expenditures, missing one filing deadline might generate hundreds of thousands of dollars in fines, or

more." *Id*. at 3. Almost 89% of the participants agreed that when the specter of fines and punishment for incorrect compliance was raised, many people would be deterred from engaging in independent political activity altogether. *Id*. at 14-16. Or, their participation in the political process was delayed for years:

> Even with [my] limited experience I found this exercise to be complicated and mentally challenging. I took nearly the alloted [sic] amount of time to complete the forms and still made two major errors. The burdensome paper work and fines imposed for errors in reporting proved to be a hurdle that prevented the formation of our PAC . . . for a number of years.

*Id* at 18; *see also Citizens United*, 130 S. Ct. at 898 (noting onerous restrictions may prevent PAC formation and that "PACs, furthermore, must exist before they can speak").

In another reporting experiment, California's Bipartisan Commission found that even participants with backgrounds in campaigns could not generate a form without making multiple mistakes, even with using a fairly simple set of mock campaign data. Bipartisan Commission at 69. Those without a campaign background spent up to 3 hours completing the forms; some gave up in frustration. *Id*. Both those with campaign experience and those without it felt uncomfortable and uncertain about some of the responses on their prepared reports. *Id*.

### 3. The PAC regulatory scheme also imposes significant administrative burdens.

The burdens on a PAC do not end with the filing of its reports. After a report is filed with the FEC, it is reviewed by an analyst in the Reports Analysis Division (RAD). If the analyst believes there is an error, however slight, the PAC will receive a "request for additional information" ("RFAI"). The PAC is required to respond to the RFAI, and in some cases, must amend reports. RFAI's themselves can create substantial burdens for small and large PACs alike. *See* Comment of Jan Baran, FEC Agency Procedures at 10 (Jan. 5, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm33.pdf> ("These RFAIs are redundant and impose significant burdens on the recipients.").

The FEC may also audit the PAC. One practitioner described the impact of the audit process on a PAC as potentially "catastrophic." Testimony of Marc Elias, FEC Public Hearing on Agency Practices and Procedures at 26 (Jan. 14, 2009) <http://www.fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf>. Mr. Elias went on to explain:

> The FEC – an FEC audit, for those of you who are not here and have never been through it, is equivalent to those life audits that the IRS did and drew so much criticism for. It is not "let us come in and spend a few weeks talking to you and looking at some records." It is "give us every piece of paper

> that the committee has ever generated over a cycle." We will look at every check. We will look at every disbursement. We will look at every invitation. We will question everything and anything you have done during the course of this election cycle. It is extremely burdensome.

*Id*.

Post-*Citizens United*, citizens now face the unhappy choice of remaining quiet or becoming burdened by the PAC regulatory scheme. Imposing this scheme on non-corrupting associations cannot be squared with this Court's precedents. *See Citizens United*, 130 S. Ct. at 908, 910. The Court should take this opportunity to reiterate that the PAC regulatory scheme is not only burdensome, but that it may not be imposed in the absence of non-corrupting speech.

## II. The Consequences Of Allowing The Decision Below To Stand: Reduced Participation By Citizen Groups In The Political Process.

Refusal to review the decision will seriously erode the federal constitutional policy in favor of free speech and may well chill the exercise of free speech rights. *Nike, Inc. v. Kasky*, 539 U.S. 654, 681-82 (2003) (Breyer, J., dissenting).

### A. The lower court's decision allows the government to impose onerous burdens on associations of citizens wishing to exercise their rights of political speech.

Expenditure-specific disclosure is done only if and when an independent expenditure is made. Once the independent expenditure is disclosed, no additional reports are required assuming no additional expenditures are made. By contrast, PAC reporting is ongoing and is required whether or not expenditures are made; it does not end until termination of the PAC. PAC reporting requirements thus severely burden speech by restricting spontaneous expression, especially for associations that do not intend to continue to speak after an election. *See MCFL*, 479 U.S. at 254 n.7 (PAC burdens serve as a disincentive for such organizations to engage in political speech.). Newcomers are often unable to organize quickly enough to speak, s*ee Citizens United*, 130 S. Ct. at 898 ("Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign."), and they are intimidated by the ongoing burdens that operating as a PAC entail. The numerous requirements and steep learning curve not only dampen enthusiasm of new associations, they often cause such citizens to choose not to speak altogether.

Both the Milyo and California studies show that PAC reporting requirements are so complex, that even those with accounting and campaign backgrounds

have difficulty complying. *See MCFL*, 479 U.S. at 256 (noting "practical effect" of PAC burdens is "to make engaging in protected speech a severely demanding task"). Complex reporting is a burden in and of itself, but it also creates other burdens – administrative fines and investigations from simple errors, and deterrence of participation in the political process.

The subjects in Dr. Milyo's experiment had little doubt that the burdens of PAC compliance, especially when combined with the threat of severe penalties, would chill participation:

> Subjects were sincerely frustrated in their attempts to complete the disclosure forms – and believed these difficulties would deter political activity. . . . About two-thirds of respondents agreed that the disclosure requirements would deter many people from engaging in independent political activity. That figure rose to 85% to 89% when the specter of fines and punishment for incorrect compliance was raised.

Milyo at 14-16. After the experiment, subjects were given the opportunity to comment. By a ratio of more than 20 to one, the comments were negative, and included:

> "A lawyer would have a hard time wading through this disclosure mess and we read legal jargon all the time."
>
> "Good Lord! I would never volunteer to do this for any committee."

> "Worse than the IRS!"
>
> "Seriously, a person needs a lawyer to do this correctly."

*Id*. at 17.

Recent FEC enforcement actions have demonstrated the complexities of reporting and the threat of fines from technical violations, and provide real-life examples of how the FEC's complex procedures and processes burden citizens, particularly the inexperienced, and how "being subjected to such treatment leads many to swear off future involvement in the federal election process." *Statement of Reasons of Commissioners Petersen, Hunter and McGahn II*, FEC MURS 5957, 6031 at 1 <http://eqs.nictusa.com/eqsdocs/29044243959.pdf>.

The FEC's commissioners have noted the widespread problem of burdensome requirements that deter participation. "We have been struck by the number of committees, including separate segregated funds of corporations, that seek to terminate after encountering the regulatory burdens associated with 'political committee' status the court noted in *GOPAC*." *Statement of Reasons of Commissioners Petersen, Hunter and McGahn II*, FEC MUR 6005 at 4 n.10 <http://eqs.nictusa.com/eqsdocs/29044234461.pdf> ("MUR 6005) (citing five committees). This was reaffirmed in the California study:

> Nothing discourages the citizenry from participating in the political process more quickly or completely than a political system that

> is permitted to become unduly complex and incomprehensible. If the rules of the game are too difficult or complicated for the average citizen to readily understand them, the citizens are naturally repelled by that complexity. The average citizen may then rationally choose to opt out of the process rather than attempt to maneuver through the difficulties and expense of obtaining the necessary legal or technical assistance. Such complexity then runs counter to the purpose of government to encourage public participation.

*See* Bipartisan Commission at 34.

It is therefore clear that the lower court's ruling, if allowed to stand, will create a chilling effect across the country and significantly burden the exercise of core First Amendment freedoms.

### B. The lower court's decision has generated uncertainty among associations of citizens wishing to speak, thereby chilling their First Amendment rights.

The lower court's decision creating a new type of PAC – an independent expenditure PAC – brings the total number of "distinct entities" regulated by the FEC to 72. *Citizens United*, 130 S. Ct. at 895. Associations unclear about how the ruling below applies to them must choose not to speak, guess about the ruling's application and hope they're correct, or request an advisory opinion from the FEC. *See Citizens*

*United*, 130 S. Ct. at 896. The latter option operates as a prior restraint particularly on ad hoc associations that form quickly in the heat of an election. *See id*. at 895.

Prior advisory opinions may not be relied upon by other would-be speakers unless their situation is "indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. § 437f(c)(1)(B). Rarely are situations "indistinguishable in all its material aspects." For example, the use of excess campaign funds has been the subject of over 350 advisory opinions. http://saos.nictusa.com/saos/searchao?SUBMIT=clear_basic (search term "excess campaign funds"). Therefore, recent advisory opinions regarding independent expenditure groups provide little comfort for others. Unless this Court reviews the case, there will remain great uncertainty for citizens. *See* 2 U.S.C. § 437f(b) (FEC cannot properly establish binding rule of law in an advisory opinion).

### C. The lower court's holding allows continued application of the "major purpose" test by the Federal Election Commission, which chills non-corrupting speech.

The Court should take the opportunity to hold that PAC registration and the full panoply of PAC burdens may not be imposed on non-corrupting speech, regardless of the major purpose of the association. Such a holding would serve two important

purposes. First, it would avoid the imposition of PAC burdens on organizations engaging in non-corrupting speech. Second, it would declare the "major purpose" test irrelevant whenever non-corrupting speech is at issue. This would provide associations a ready defense to intrusive and burdensome "major purpose" investigations, which themselves may violate the First Amendment. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters."); *see also AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) (*quoting FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)) ("Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity – 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.' ").

Currently, associations are subjected to onerous investigations into what their true "major purpose" is, regardless of the fact that their protected speech poses no threat of corruption. If anyone wants to silence the organization's speech, it need only employ a weapon in the political arsenal – an FEC complaint. *See* Testimony of Jan Baran, FEC Public Hearing on Agency Practices and Procedures at 6 (Jan. 14, 2009) <http://www.fec.gov/law/policy/enforcement/2009/01141509 hearingtranscript.pdf> ("I think it's a serious problem.

I think that there is with some regularity, and I think Bob Bauer even suggested that complaints get filed in the heat of a campaign in order to grab a headline.").

There are many examples from which to choose, but a recent complaint highlights this danger well. The American Leadership Project (ALP), a § 527 organization, ran ads in Ohio calling on Senator Clinton to "keep on fighting" for certain issues. MUR 6005 at 2. On April 30, 2008, counsel for Obama for America filed a complaint against the organization, alleging it violated the FECA by failing to register as a PAC. On February 25, 2009, the Commission voted to take no further action and closed the case. However, the complaint fulfilled its purpose – it tied ALP up in the FEC's enforcement process until well after the convention. *See Statement for the Record of Commissioner Smith*, FEC MUR 4624 at 2 (Nov. 6, 2001) <http://eqs.nictusa.com/eqsdocs/0000018E.pdf> ("These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing 'corruption or the appearance of corruption.' ").

One practitioner correctly points out the fear that non-PACs face: "All unregistered organizations of whatever kind that are seen to influence elections – or that are suspected of this activity – will undergo extensive examination." Robert Bauer, More Soft Money Hard Law at ¶9 (Feb. 1, 2007) <http://www.moresoftmoneyhardlaw.com/news.html?AID=920>. Complaints lead to FEC investigations, which are costly and chilling, and which consists of "an extensive

examination of the organization," to determine its major purpose. FEC, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007).

The burdens arising out of these investigations clearly demonstrate that the "major purpose" test should not be permitted to be used as a political weapon to silence opponents. If this Court holds that independent expenditure groups do not trigger PAC registration no matter what their major purpose, then the major purpose test need not be applied if only non-corrupting speech is involved. This will enable citizen groups to avoid a burdensome investigation into their major purpose if their speech is non-corrupting, as a matter of law. While it may be true that post-*Citizens United* associations can speak freely, the practical reality is just the opposite. Until the application of the major purpose test is limited to corrupting speech, the threat of PAC status, and the intrusive investigation that precedes it, is always there.

This Court should grant *certiorari* and reverse the lower court's holding that PAC registration and reporting requirements are not unduly burdensome for citizen associations that only make independent expenditures.

## CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

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