No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Citizens United v. FEC*, this Court held that the government cannot require a corporation to speak through a political committee or "PAC" as an alternative to banning the corporation's speech outright. In direct conflict with that holding, the D.C. Circuit held that SpeechNow.org – an unincorporated group that makes only independent expenditures and thus poses no risk of corruption or its appearance – must organize as a political committee in order to speak.

The question presented is whether, under the Free Speech Clause of the First Amendment, the federal government may require an unincorporated association that makes only independent expenditures to register and report as a political committee despite the fact that a more narrowly tailored means of disclosing its independent expenditures exists in 2 U.S.C. § 434(c).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following five individuals were parties in the court of appeals proceeding: David Keating, Fred M. Young, Jr., Edward H. Crane III, Brad Russo, and Scott Burkhardt.

The parties to this proceeding are the five individuals listed above and the Federal Election Commission. Because SpeechNow.org was not a party to the D.C. Circuit's ruling under 2 U.S.C. § 437h, but rather a party to a consolidated appeal of a preliminary injunction denial, the organization itself is not a party to this petition. It remains in the caption only because it is the caption that was used by the court below. However, David Keating, SpeechNow.org's president and treasurer, is subject to both official and personal liability if SpeechNow.org violates the law, and therefore has standing to assert SpeechNow.org's claims. *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 3-6 (Jan. 3, 2005); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 187 n.6 (1981).

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PETITION FOR A WRIT OF CERTIORARI

David Keating, Fred M. Young, Jr., Edward H. Crane III, Brad Russo, and Scott Burkhardt respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-26) is reported at 599 F.3d 686. The decision of the district court certifying Petitioners' constitutional questions (App. 31-53) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." Sections 431 and 432 through 434 of Title 2

of the United States Code are reproduced in the appendix to this petition. App. 54-115.

STATEMENT OF THE CASE

This case raises the question of whether the government may impose the full panoply of burdensome requirements that apply to political committees or "PACs" on a group that makes only independent expenditures. The group – known as SpeechNow.org – will willingly comply with the same sort of disclosure and disclaimer provisions that Congress provided for groups, other than PACs, that make independent expenditures. These provisions, which are very similar to those this Court upheld in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), as they applied to corporations, are far less burdensome than the PAC requirements that the Court struck down in *Citizens United*. The question is thus whether the government can impose burdensome PAC requirements on groups like SpeechNow.org when this Court, in *Citizens United*, just held that those same requirements cannot be applied to corporations.

I. Background

Petitioner David Keating, the president and treasurer of SpeechNow.org, is a long-time political activist and supporter of First Amendment rights. App. 4. Along with Petitioner Edward Crane and others, Mr. Keating founded SpeechNow.org in October 2007 to

give individuals the opportunity to protect the First Amendment at the ballot box by advocating the election or defeat of candidates based on their support for free speech. App. 34, 37, 180-81.

SpeechNow.org is an unincorporated association organized under section 527 of the Internal Revenue Code. App. 4. SpeechNow.org will make only independent expenditures – that is, expenditures made without consultation or coordination with any candidate or party – which it will fund with donations from individuals such as Messrs. Keating and Crane and Petitioners Fred Young, Brad Russo, and Scott Burkhardt. App. 35-37; *see also* 2 U.S.C. § 431(17). Under its bylaws, SpeechNow.org is required to maintain the independence of its expenditures under relevant campaign finance regulations, and it is prohibited from making direct contributions to candidates. App. 36. As a result, SpeechNow.org poses no threat of corruption. *See Citizens United*, 130 S. Ct. at 909 (2010).

SpeechNow.org's operations are transparent. It will disclose its independent expenditures and the contributions that fund them under 2 U.S.C. § 434(c), which applies to persons other than political committees, and it will include disclaimers on its communications under 2 U.S.C. § 441d. App. 51-52. Moreover, because SpeechNow.org's bylaws prevent it from accepting earmarked donations, all of its donors who contribute more than $200 will be disclosed under § 434(c). App. 41, 43-44.

Despite these facts, federal law requires Speech Now.org to become a "political committee" or "PAC" because it has a "major purpose" of federal campaign activity and will raise or spend more than $1,000 toward that end. *See* 2 U.S.C. § 431(4); Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007). PACs are subject to limits on the contributions they receive and must register with the Federal Election Commission ("FEC") and comply with detailed administrative, organizational, and continuous reporting requirements. *See* 2 U.S.C. §§ 432, 433, 434(a).

As this Court held in *Citizens United*, "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." 128 S. Ct. at 897. Those burdens are at least as significant when applied to unincorporated groups such as SpeechNow.org as they are when applied to corporations. David Keating has a full-time job and runs SpeechNow.org from his home in his spare time. App. 274. SpeechNow.org has no affiliated corporation to help defray its start-up and fundraising costs or pay its administrative expenses. App. 50; *see also* 11 C.F.R. § 114.5(b). Among many other burdens imposed by PAC status, Mr. Keating will be required to register with the FEC before speaking and keep detailed records of contributions and expenditures. 11 C.F.R. §§ 102.1(d), 102.9(a)(4)(i)-(ii), 102.9(b)(2), 102.9(c), 103.3. He will also have to account for the fair-market value of the portion of his home used by the group – including such things as telephone and Internet

connections – in much the same way an individual would have to account for a home office on his income taxes. App. 50-51. Even to terminate SpeechNow.org's operations, Mr. Keating will have to obtain approval from the FEC. 11 C.F.R. § 102.3(a)(1).

PACs are also subject to complicated reporting obligations, which apply regardless of whether the PAC spends money on federal elections during any election season. 11 C.F.R. § 104.1(a). The disclosure form for PACs – FEC Form 3X – consists of five pages of summary information on receipts and disbursements followed by sixteen different "schedules" and 31 pages of instructions. 11 C.F.R. § 104.2(e)(3).[1] These disclosures are due multiple times a year, and at different times depending on the year or the elections in which the PAC is participating. 11 C.F.R. § 104.5(c). In addition to this general reporting, PACs must separately disclose any independent expenditures they make. 11 C.F.R. § 104.5(g).

In contrast, groups other than PACs – such as *MCFL* groups[2] and, after *Citizens United*, corporations and unions – may operate free of the organizational, administrative, and reporting requirements

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[1] FEC Form 3X is available at http://www.fec.gov/pdf/forms/fecfrm3x.pdf. Instructions and Related Schedules are available at http://www.fec.gov/pdf/forms/fecfrm3xi.pdf.

[2] *MCFL* groups are 501(c)(4) corporations that meet certain additional criteria announced in this Court's ruling in *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986). *See* 11 C.F.R. § 114.10(c) (defining "qualified nonprofit corporations").

that apply to PACs. Those groups need only report their independent expenditures as they are made. *See* 2 U.S.C. § 434(c). FEC Form 5, which is used for reporting independent expenditures, is six pages long, including instructions. App. 48-49. As a 527 group, SpeechNow.org must also report certain information to the IRS. *See* 26 U.S.C. § 527(j). However, those reporting obligations apply only when a group reasonably anticipates that it will have gross receipts of $25,000 or more during a taxable year. *Id.* § 527(j)(5)(D). Moreover, a 527 group is subject to reporting requirements only so long as it wishes to maintain its tax-exempt status. *Id.* § 527(j)(1).

In November 2007, SpeechNow.org filed an Advisory Opinion Request with the FEC seeking approval to operate SpeechNow.org free of the onerous requirements and funding limitations that apply to PACs. App. 179-221. Along with the request, Speech Now.org submitted two scripts for proposed advertisements calling for the defeat of United States Senator Mary Landrieu (D-LA) and United States Representative Dan Burton (R-IN), both of whom had supported anti-free-speech campaign finance laws in the past. App. 42-43. The group also submitted price quotes for the production and airing of the advertisements, which SpeechNow.org wanted to air during the 2008 election season. App. 43. SpeechNow.org had received enough pledges of support from the individual Petitioners and one other individual to finance the production and airing of the ads in the relevant locales. However, because SpeechNow.org

was considered a PAC under the campaign finance laws and subject to contribution limits, it could not accept the proposed donations to produce and air its ads. App. 45-46.

In January 2008, the FEC denied SpeechNow.org's advisory opinion request. App. 222-23.

II. Proceedings Below

Petitioners filed this case in the United States District Court for the District of Columbia on February 14, 2008, alleging that the campaign finance laws violated the First Amendment as applied to SpeechNow.org and its donors by both limiting the amount any individual could contribute to Speech Now.org and by requiring SpeechNow.org to register with the FEC and operate as a PAC. App. 286. Specifically, Petitioners challenged the registration, administrative, and continuous reporting requirements for PACs contained in 2 U.S.C. §§ 431(4), 431(8), 432, 433, and 434(a) and the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3).

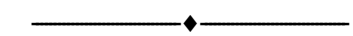
Along with their complaint, Petitioners filed a motion to preliminarily enjoin the contribution limits, which prevented SpeechNow.org from accepting the funds necessary to finance its planned advertisements. App. 286-87. The district court denied that motion on July 1, 2008. App. 294-95. As a result, SpeechNow.org was unable to produce and broadcast its advertisements during the 2008 election cycle.

SpeechNow.org intends to produce and broadcast similar ads during the 2010 election cycle and other elections in the future. App. 5. Petitioners timely appealed the district court's denial of their preliminary injunction motion. App. 296.

While that appeal was pending, the merits of the case proceeded in the district court pursuant to 2 U.S.C. § 437h. Under that provision, district courts "immediately shall certify" certain constitutional challenges to the Federal Election Campaign Act ("FECA") "to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." On June 27, 2008, Petitioners made a motion to certify five questions to the D.C. Circuit, arguing that no discovery or further factual development was necessary. App. 294. On July 29, 2008, the district court granted the motion to certify Petitioners' five questions, but ordered that the FEC be permitted to conduct discovery and develop a factual record. App. 297. On February 3, 2009, the parties completed briefing on proposed findings of fact. App. 310. The FEC's proposed findings of fact comprised 137 pages, including 452 proposed facts and over 2,000 pages of exhibits. App. 301. Roughly six months later, the district court ordered the parties to submit a list of disputed and undisputed facts, and, on September 28, 2009, the court entered 65 factual findings and submitted the case to the D.C. Circuit. App. 31-53.

On October 26, 2009, the D.C. Circuit consolidated the merits with Petitioners' preliminary injunction appeal. App. 6. On March 26, 2010, the en

banc D.C. Circuit issued its ruling. Recognizing that SpeechNow.org's independent expenditures raise no concerns about corruption, the court held that the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) were unconstitutional as applied to SpeechNow.org and its individual contributors. App. 20. As a result, the court vacated the district court's order denying the Petitioners' motion for preliminary injunction. The D.C. Circuit also held, however, that SpeechNow.org could constitutionally be required to register and operate as a PAC as soon as it raised more than $1,000 to fund its independent expenditures. App. 25.



REASONS FOR GRANTING THE PETITION

The court of appeals disregarded recent Supreme Court precedent on an issue of national importance – political speech – where burdensome regulations and uncertainty pose an unacceptable risk of chilling the exercise of core First Amendment rights.

In *Citizens United v. FEC*, this Court recently reaffirmed a fundamental constitutional principle: Independent expenditures are core political speech that create no concerns about corruption and thus may not be limited. 130 S. Ct. 876, 909 (2010). As a result, the Court struck down 2 U.S.C. § 441b, which prohibited corporations from making independent expenditures unless they created separate segregated funds or "PACs" to do their independent spending for

them. "PACs," the Court recognized, "are burdensome alternatives" which are "expensive to administer and subject to extensive regulations." *Id*. at 897. Just as the government may not ban speech directly, held the Court, so it may not achieve the same result through indirect means such as requiring a corporation to speak through a heavily regulated PAC. *Id*. at 897-98.

Roughly two months later, the D.C. Circuit decided *SpeechNow.org v. FEC*. The court followed *Citizens United* in striking down a limit on contributions to the group. App. 20. However, despite recognizing that SpeechNow.org poses no threat of corruption and will comply with relevant disclosure and disclaimer laws, the D.C. Circuit held that the government could require the group to become a PAC in order to make independent expenditures. App. 24-25.

The D.C. Circuit's decision conflicts with *Citizens United* in at least two significant ways. First, whereas *Citizens United* concluded that PACs are "burdensome alternatives" as a matter of law, the D.C. Circuit concluded that requiring SpeechNow.org to speak through a PAC did not amount to a significant burden on its speech. App. 22-25.

Second, whereas *Citizens United* subjected the PAC alternative to strict scrutiny, the D.C. Circuit treated PAC status as merely a disclosure law that triggered only intermediate scrutiny. App. 20-21. This alone was erroneous, but the D.C. Circuit also misapplied intermediate scrutiny, both by placing the

onus on SpeechNow.org to demonstrate that the PAC requirements burdened its speech and by ignoring the more narrowly tailored disclosure and disclaimer provisions in 2 U.S.C. §§ 434(c) and 441d that Congress created for individuals and groups that make only independent expenditures. Section 441d is the very same disclaimer provision this Court upheld for corporations in *Citizens United*. Section 434(c) is substantially similar to § 434(f), the disclosure provision upheld in *Citizens United*, 130 S. Ct. at 914, except that § 434(c) provides more information because its disclosure thresholds are lower. As a result, there is simply no constitutionally adequate grounds for requiring SpeechNow.org to become a PAC.

In many ways, the D.C. Circuit's decision turned *Citizens United* on its head. In *Citizens United*, this Court concluded that PAC requirements are too burdensome for corporations, yet the D.C. Circuit has now concluded that those same requirements are *not* too burdensome for a small association of individuals. In *Citizens United*, this Court held that First Amendment rights cannot turn on the identity of the speaker, yet, following the D.C. Circuit's ruling, an unincorporated association like SpeechNow.org must become a PAC in order to make unlimited independent expenditures, while corporations and unions may do so without becoming a PAC. In *Citizens United*, this Court recognized that complex rules chill speech, and noted that the "[c]ampaign finance regulations now impose 'unique and complex rules' on '71 distinct entities.'" 130 S. Ct. at 895. Yet the D.C.

Circuit has now created distinct entity number 72: the "independent expenditure PAC," which is not subject to limits on amounts contributed to it but still must comply with the other regulations that apply to PACs.

The D.C. Circuit's decision raises important issues of national significance, because its effect will be to chill speech that this Court has long sought to protect. The result of the decision is the imposition of greater burdens on unincorporated associations that wish to make independent expenditures than now exist for large corporations and unions that wish to do the same thing.

Furthermore, the D.C. Circuit's decision exacerbated an already confusing standard for determining who is and who is not a PAC. The FEC has long used the so-called "major purpose" test to determine which groups must become PACs. Under this test, if the FEC determines, after a fact-intensive, case-by-case analysis, that a group has spent a sufficiently large percentage of its funds on federal campaign activity – even entirely independent advocacy – it must become a PAC. *See* Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007).

Although the D.C. Circuit's conclusion that Speech Now.org can constitutionally be required to become a PAC was not based expressly on the group's "major purpose," the court's decision will allow the FEC to make every unincorporated group a PAC if it spends too much money on independent expenditures. Indeed,

the D.C. Circuit's decision raises the question of whether any group, corporate or non-corporate, must become a PAC if the group either cannot demonstrate that PAC status is sufficiently burdensome or spends enough money on independent expenditures to cross the "major purpose" threshold. Accepting this case for review would give the Court the opportunity to clarify that the proper constitutional touchstone for PAC status is not the amount of independent speech in which a group engages, but whether it poses a threat of corruption.

This Court's decision in *Citizens United* was crystal clear: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." 130 S. Ct. at 904. Petitioners are a group of citizens who wish to spend their own money on their own political speech. Under the D.C. Circuit's ruling, they must become a PAC – and must register with the government and comply with numerous regulatory burdens – just to be able to speak. *Cf. id.* at 895-96 (analogizing complex campaign finance laws to a prior restraint). The D.C. Circuit's ruling conflicts with *Citizens United* and should be reversed.

I. In Holding That an Association of Citizens Must Become a PAC in Order to Make Unlimited Independent Expenditures, the D.C. Circuit's Decision Directly Conflicts with This Court's Decision in *Citizens United v. FEC*.

A. The D.C. Circuit disregarded this Court's holding that PACs are burdensome as a matter of law.

For over twenty years, this Court has recognized the significant burdens PACs impose on those who wish to spend money on speech. *See, e.g.*, *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 253-55 (1986) (plurality opinion); *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 477 n.9 (2007). As the Court held in *Citizens United*,

> PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organizational statement and report changes to this information within 10 days. And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur[.] . . . PACs have to comply with these regulations just to speak.

130 S. Ct. at 897 (internal citations omitted).

As a result, despite the existence of the PAC alternative, the Court concluded that "[§] 441b's prohibition on corporate independent expenditures is thus a ban on speech." *Id*. at 898; *see also id.* at 897 (stating that "the option to form PACs does not alleviate the First Amendment problems with § 441b"). Accordingly, the Court treated both § 441b's outright ban on corporate independent expenditures and the PAC alternative as essentially indistinguishable for First Amendment purposes and subjected both to strict scrutiny. *Id.* at 898. Because Citizens United's independent expenditures posed no threat of corruption, the Court struck down both requirements as a violation of the First Amendment. *Id.* at 897-98, 913. Later, the Court upheld the disclosure and disclaimer provisions for those who make electioneering communications as the appropriately narrowly tailored means of achieving the government's interest in disclosure. *Id.* at 913-916.

The same approach should logically apply to an unincorporated group like SpeechNow.org. While the precise statutory provisions that apply to Speech Now.org are different from those that applied to corporations, the result is the same: SpeechNow.org is prohibited from making unlimited independent expenditures unless it becomes a PAC. As a group that will devote the majority of its funds to express advocacy, SpeechNow.org is defined as a "political committee" and may not make independent expenditures without complying with all the organizational

and reporting obligations for a PAC. *See* 2 U.S.C. § 431(4); App. 235-40.

The PAC requirements are thus every bit as burdensome for groups like SpeechNow.org as they were for corporations. Like corporations prior to *Citizens United*, SpeechNow.org must register with the FEC, appoint a treasurer, and comply with all the other expensive and onerous restrictions that apply to PACs. *See* 2 U.S.C. §§ 432, 433, 434(a). Like corporations, SpeechNow.org and similar groups must first establish a PAC "before they can speak." *Citizens United*, 130 S. Ct. at 898. And "[g]iven the onerous restrictions" of PAC status, SpeechNow.org or other groups "may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign." *Id.* The PAC requirement therefore operates as a "restriction on the amount of money" that SpeechNow.org may spend during a campaign, just as it would for a corporation. *Id.*

The D.C. Circuit disregarded *Citizens United* on this point entirely and treated PAC status as a run-of-the-mill disclosure requirement. Noting that Speech Now.org "intends to comply with the disclosure requirements applicable to those who make independent expenditures" under § 434(c), the D.C. Circuit upheld the PAC requirements on the ground that they allegedly imposed little additional burden on SpeechNow.org. App. 23.

The D.C. Circuit thus ignored a central point of this Court's entire analysis of the PAC requirements

in *Citizens United* – that PACs are unduly burdensome and thus a significant regulation of speech *as a matter of law*. Indeed, the Court in *Citizens United* concluded that PAC status burdens speech despite the fact that Citizens United itself had previously operated a PAC. *See* 130 S. Ct. at 929 (Stevens, J., dissenting) (noting that Citizens United operated a PAC "with millions of dollars in assets"). The Court came to similar conclusions in both *MCFL* and *WRTL II*. As it explained in *MCFL*, the group's previous operation of a political committee did not change the conclusion that PAC status is burdensome "for [its] speech may well have been inhibited due to its inability to form such an entity before that date. Furthermore, other organizations comparable to MCFL may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent political speech." *MCFL*, 479 U.S. at 255 n.8; *see also WRTL II*, 551 U.S. at 477 n.9.

In stark contrast to this Court's long recognition that PAC requirements are burdensome for groups, like MCFL and Citizens United, that make independent expenditures, the D.C. Circuit stated "[b]ecause SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal." App. 23. Indeed, the D.C. Circuit went as far as to directly contradict this Court's conclusion that PAC regulations such as the necessity of appointing a treasurer and retaining records are burdensome. *Citizens United*, 130 S. Ct.

at 897. As the D.C. Circuit stated, "[n]or do the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate." App. 23.[3]

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[3] The D.C. Circuit claimed that Petitioners conceded at oral argument that PAC reporting will not impose an additional burden on SpeechNow.org. App. 23. However, the question posed at this point in the argument was not whether the burdens of PACs were minimal, but whether, assuming SpeechNow.org were relieved of *all other aspects of PAC status*, reporting independent expenditures in the same manner as a PAC would constitute much of an additional burden over reporting on the forms used by non-PACs.

> Judge Sentelle: Assume you don't have to be a [PAC], assume you've won that part . . . and we're just talking about whether you're nonetheless required under the reporting requirements. . . . So, just calling you a [PAC] . . . and not making you do anything except the reporting is not really going to impose an additional burden on you, right? If everything else [is] unconstitutional except that, the reporting requirement by itself –

App. 129. The answer, as counsel stated several times during oral argument, is that the precise forms that PACs use to report independent expenditures are similar to the form other groups use. App. 123-25, 129-30. But as counsel also pointed out, it is not "appropriate then to conclude from that that the burden is the same." App. 124. The additional burdens associated with being a PAC are, among other things, the "burden that the Supreme Court talked about [in *Citizens United*], having to plow through hundreds of rules to decide all of your obligations," App. 124-25; "appointing a treasurer [and] having to forward all receipts to the treasurer within a certain amount of time," App. 126-27; "the time that it takes to set up the committee," App.

(Continued on following page)

If the D.C. Circuit's treatment of PAC status as a mere incremental burden over other disclosure laws were appropriate, this Court would have undoubtedly taken the same approach in *Citizens United*. Citizens United had to comply with the far less burdensome provisions of 2 U.S.C. § 434(f), which require disclosure for those who make electioneering communications. *See Citizens United*, 130 S. Ct. at 914. Like the D.C. Circuit, this Court could have concluded that PAC regulations were simply additional disclosure requirements and thus a mere incremental burden over the other disclosure laws with which Citizens United had to comply. Indeed, the Court could have done the same thing in *MCFL*. *See* 479 U.S. at 262 (noting that MCFL would disclose under § 434(c)).

The Court did not take this approach, however. In *Citizens United*, it recognized PAC status for what it was – a uniquely burdensome regulation of speech that will "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the

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128; having to track and report every penny that goes through the organization, App. 135-36; and having to comply with these burdens before even knowing whether the group has raised enough money to speak. App. 131-32. In short, as counsel stated during oral argument, Petitioners' argument "is precisely the point the Supreme Court made in *Citizens United*. In other words, we aren't saying that it's just a matter of filling out a precise form and that one form is more burdensome than another, we are saying that the entire mechanism of having to spend through a [PAC], create a separate [PAC], become an entirely different type of organization" is the burden. App. 122.

audience reached." 130 S. Ct. at 898 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)). This conclusion applies regardless of the precise circumstances and abilities of particular speakers for "[p]rolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Id.* at 889 (second alteration in original); *see also id*. at 890-91 (declining to adopt standards based on particular circumstances of particular speakers). Accordingly, this Court did not hold that corporations could only make independent expenditures through their PACs; it held that they could make unlimited independent expenditures without the necessity of creating PACs at all.

In holding to the contrary, the D.C. Circuit applied precisely the case-by-case approach that this Court rejected in *Citizens United*. *See id.* at 891 ("Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.") As this Court stated, "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Id*. (quoting *WRTL II*, 551 U.S. at 469).

B. The D.C. Circuit failed to apply strict scrutiny to the PAC requirements and it misapplied intermediate scrutiny.

It is black-letter First Amendment law that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 130 S. Ct. at 898 (quoting *WRTL II*, 551 U.S. at 464); *see also Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008); *MCFL*, 479 U.S. at 256, 261. Consistent with this general rule, the Court in *Citizens United* subjected both § 441b's outright ban on corporate independent expenditures and the PAC alternative to strict scrutiny and struck them down. 130 S. Ct. at 897-98, 913. Later, applying intermediate scrutiny, the Court upheld narrower and far less burdensome disclosure and disclaimer provisions. *Id*. at 913-16.

SpeechNow.org should be treated the same as the corporation at issue in *Citizens United*. SpeechNow.org's independent expenditures pose no threat of corruption. The PAC requirements that apply to SpeechNow.org are virtually identical to those that applied to Citizens United. *See* 11 C.F.R. § 100.5(b) (defining "separate segregated funds" as PACs). And SpeechNow.org will comply with disclosure and disclaimer provisions that are virtually identical to those this Court upheld in *Citizens United*. This case is therefore on all fours with *Citizens United* and the outcome should be the same.

The D.C. Circuit did not reach the same result, however. Inexplicably, the D.C. Circuit chose to carve out PAC requirements as they applied to Speech Now.org and to treat them like simple disclosure laws rather than the inherently burdensome speech restrictions that they are. App. 20-25. In so doing, the D.C. Circuit not only failed to apply strict scrutiny to the PAC requirements; it completely misapplied even intermediate scrutiny. In short, under any level of scrutiny, SpeechNow.org cannot be required to become a PAC simply to make independent expenditures.

Intermediate scrutiny is not an invitation to uphold any laws that can be described as serving the ends of disclosure. Indeed, as this Court held in *Davis v. FEC*, disclosure laws "'cannot be justified by a mere showing of some legitimate governmental interest.'" 128 S. Ct. at 2775 (quoting *Buckley*, 424 U.S. at 64). Instead, the government must show a "substantial relation" between its interests in disclosure and the information sought to be disclosed. *Id*. Further, the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*.

As shown in the previous section, the D.C. Circuit ignored this Court's conclusion from *Citizens United* that PACs are burdensome as a matter of law. But the D.C. Circuit also misunderstood how the narrowly tailored disclosure provisions that Congress itself created for those who make independent expenditures – 2 U.S.C. §§ 434(c) & 441d – affected

the constitutional analysis. *Davis* is instructive on this point. In *Davis*, this Court struck down disclosure requirements that were designed to implement the "millionaires amendment," which the Court had also invalidated. 128 S. Ct. at 2775. The government argued that the disclosure requirements should be upheld because they would yield additional relevant information, even though the candidates subjected to the amendment were already required to disclose under provisions that applied to all candidates. Brief of Appellee at 28, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320). The Court rejected this argument, however, and concluded that without the millionaires amendment, "the burden imposed by [the amendment's disclosure requirements] cannot be justified." 128 S. Ct. at 2775.

Both *Davis* and *Citizens United* support the principle that disclosure laws must be narrowly tailored to fit their legitimate ends. *See also, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (recognizing that the government must demonstrate narrow tailoring under intermediate scrutiny). Moreover, everything the D.C. Circuit claimed as a justification for requiring SpeechNow.org to become a PAC – for example, that SpeechNow.org could allegedly avoid reporting contributions made exclusively for administrative expenses[4] and that requiring Speech

[4] In fact, because SpeechNow.org does not accept earmarked donations, it will end up disclosing all contributions that come within the terms of § 434(c). App. 120-21, 268.

Now.org to become a PAC would facilitate the detection of violations of other laws – could just as easily be said about Citizens United or any *MCFL* group. Yet in both cases, this Court refused to require such groups to become PACs. *See Citizens United*, 130 S. Ct. at 897-98; *MCFL*, 479 U.S. at 252-56 (plurality opinion).

The D.C. Circuit also misapplied *Buckley* and *McConnell v. FEC*, 540 U.S. 93 (2003), on which it relied for the proposition that this Court "has consistently upheld organizational and reporting requirements against facial challenges." App. 21. In fact, both cases support Petitioners' argument.

The portion of *Buckley* on which the D.C. Circuit relied did not facially uphold PAC requirements, as the court implied. *See* App. 21 (citing *Buckley*, 424 U.S. at 66). Instead, it was a discussion of the "general principles" that apply to disclosure. Indeed, this Court ended that discussion with a point that supports Petitioners' argument – that "disclosure requirements, *as a general matter*, directly serve substantial governmental interests" but "[i]n determining whether these interests are sufficient to justify the requirements *we must look to the extent of the burden that they place on individual rights*." 424 U.S. at 68 (emphasis added). It then went on to uphold a narrowly tailored disclosure requirement – old § 434(e) – that imposed a limited burden on First Amendment rights. *Id*. at 75-82. Section 434(e) is the

precursor to § 434(c), which Petitioners believe *should* apply to SpeechNow.org.[5]

Similarly, in the portion of *McConnell* on which the D.C. Circuit relied, this Court upheld the same narrow disclosure and disclaimer provisions that it upheld in *Citizens United*. *See* 540 U.S. at 196. Those provisions require the same disclaimers SpeechNow.org will utilize for its independent expenditures and disclosures that are substantially the same as those required by § 434(c). *See id*.

In short, *Buckley*, *McConnell*, *Davis*, and *Citizens United* confirm that SpeechNow.org cannot be forced to become a PAC simply for the sake of disclosure. SpeechNow.org will comply with the same disclosure and disclaimer provisions that apply to any speaker who poses no threat of corruption. No matter what level of scrutiny applies, there are no good grounds for requiring SpeechNow.org to become a PAC anymore than there were for Citizens United.

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[5] In 1979, Congress amended § 434(e), raising the reporting threshold from $100 to $250 and renumbering the provision as § 434(c). *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (Jan. 8, 1980).

II. This Case Raises Important Issues of National Significance Regarding the Scope of Regulation of Groups That Make Independent Expenditures.

The D.C. Circuit disregarded the importance of independent political speech under our constitutional scheme. The perverse result of the D.C. Circuit's decision is that unincorporated associations like SpeechNow.org face a greater burden in making independent expenditures than do corporations or unions. That result cannot be squared with this Court's precedents.

Citizens United stands not only for the proposition that the government may not ban certain speakers from making independent expenditures, but also that it may not so burden independent political speech that speakers will avoid the effort altogether. *See* 130 S. Ct. at 898-99. Indeed, the principle that burdensome laws chill speech virtually leaps out from every page of the Court's decision. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day." *Id*. at 889. "[P]olitical speech . . . is stifled if the speaker must first commence a protracted lawsuit." *Id*. at 895. "As additional rules are created for regulating political speech, any speech arguably within their reach is chilled." *Id*. The campaign finance laws "function as the equivalent of prior restraint by giving the FEC power analogous to

licensing laws implemented in 16th- and 17th-century England . . . ." *Id*. at 896.

Citizens United is not alone in this respect. This Court has long recognized that speech needs breathing room to survive. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). Indeed, in *Buckley*, the Court upheld limits on direct contributions because they focused on "the narrow aspect of political association where the actuality and potential for corruption have been identified *while leaving persons free to engage in independent political expression*." 424 U.S. at 28 (emphasis added); *see also Citizens United*, 130 S. Ct. at 901-02 (relying on *Buckley*'s distinction between direct contributions and independent expenditures); *id.* at 908 (stating that "[l]imits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption").

As the Court stated in *Citizens United*, "it is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 911. Put more simply, "the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 474; *see also Citizens United*, 130 S. Ct. at 898 (stating that "political speech must prevail against laws that would suppress it, whether by design or inadvertence").

The D.C. Circuit simply did not give this principle the weight it deserves. In ruling that groups like SpeechNow.org must become PACs in order to make unlimited independent expenditures, the D.C. Circuit

has ensured that the independent speech of such groups will be chilled. As this Court noted in *Citizens United*, the burden of PAC regulations "might explain why fewer than 2,000 of the millions of corporations in this country have PACs." *Citizens United*, 130 S. Ct. at 897. Supporting the Court's insight, a study of the 2000 election cycle found that PACs spend approximately half of their total revenues on compliance costs and fundraising. *See* Stephen D. Ansolabehere *et al.*, *Why Is There So Little Money in American Politics?*, 17 J. Econ. Persp. 105, 108 (2003). Indeed, during the 2005-2006 election cycle, there were only 1,797 PACs that, like SpeechNow.org, were not affiliated with corporations or unions (otherwise known as "non-connected" PACs). App. 323.

The effect of the D.C. Circuit's ruling is to create yet another distinct regulated entity – the "independent expenditure PAC." Other groups have already begun asking the FEC's permission to operate such PACs, which will prompt "[g]overnment officials [to] pore over each word" of an advisory opinion request to determine whether the speakers may take advantage of the D.C. Circuit's ruling. *Citizens United*, 130 S. Ct. at 896.[6] It is still unclear whether existing

[6] *See* FEC Advisory Op. Request 2010-09 (Club for Growth), *available at* http://saos.nictusa.com/aodocs/1139699.pdf; FEC Advisory Op. Request 2010-11 (Commonsense Ten), *available at* http://saos.nictusa.com/aodocs/1140639.pdf. The FEC's responses to these requests are available at http://saos.nictusa.com/aodocs/AO%202010-09.pdf and http://saos.nictusa.com/aodocs/AO%202010-11.pdf.

rules will govern these new committees or whether the FEC will issue a new set of rules that apply to them. *See* Amanda Adams, *FEC Will Eventually Consider Guidance for Disclosing Independent Expenditures*, OMB Watch (July 16, 2010), http://www.ombwatch.org/node/11141. What is clear is that many groups will refrain from speaking rather than undertaking the effort to discover how they will be regulated if they speak about politics. *See Citizens United*, 130 S. Ct. at 895-96 (noting that the necessity of filing advisory opinion requests and navigating complicated rules chill speech).

The D.C. Circuit has held, in effect, that although PACs impose too great a burden on corporations that wish to make independent expenditures, the burden is entirely acceptable for small, unincorporated associations of citizens like SpeechNow.org. That result will chill political speech, and cannot be squared with this Court's decision in *Citizens United*.

III. This Case Provides the Court with the Opportunity to Clarify the Scope and Application of the "Major Purpose" Test.

The FEC has long taken the position – and, indeed, argued in this case – that it is constitutionally permissible to require groups like SpeechNow.org to become PACs so long as they have the "major purpose" of "Federal campaign activity" and otherwise meet the definition of political committee. App. 224. Under this test, the FEC conducts a far-reaching

inquiry to determine whether a group's spending on federal campaign activity predominates over its other speech and activities. *See* Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

SpeechNow.org does not dispute that its major purpose is to make independent expenditures, but it does dispute that this purpose answers the question of whether it can be required to become a PAC. Under *Citizens United*, corporations and unions are now entitled to make unlimited independent expenditures without creating PACs. It follows that SpeechNow.org must be treated the same. Absent any threat of corruption – which SpeechNow.org does not present – the government cannot justify requiring it to speak through a PAC.

Although the D.C. Circuit did not rely on Speech Now.org's "major purpose" in upholding the PAC requirements, this case provides the Court with the opportunity to bring much needed clarity to the scope and application of the so-called "major purpose" test. The FEC has relied on an incorrect reading of *Buckley* and *MCFL* – in this case and others – in concluding that "major purpose," rather than a threat of corruption, is the proper constitutional touchstone for determining whether a group can be required to become a PAC in order to speak. *See* 72 Fed. Reg. at 5597. The D.C. Circuit's decision compounded this error by upholding the application of PAC status to SpeechNow.org despite the fact that the group will only make independent expenditures, as corporations

and unions are now entitled to do. The D.C. Circuit's decision thus raises questions as to whether corporations and unions, even after *Citizens United*, will be required to become PACs once they cross the major purpose threshold. Resolving the question presented in this case in SpeechNow.org's favor would bring clarity to the law and would preserve free speech by making clear that *only* groups whose activities pose a threat of corruption need register as PACs.

A. Originally introduced as a shield for political speech, "major purpose" has since become a sword wielded by the government as a regulatory tool.

This Court first used the term "major purpose" in *Buckley*. But it did so not as part of a holding that major purpose was the sole or even primary factor for determining whether a group could constitutionally be required to become a PAC. Instead, the Court used major purpose as a means of demonstrating that the definition of "political committee," like the definitions of other terms in FECA, was appropriately limited to certain types of federal campaign activity in order to avoid problems of vagueness and overbreadth. In short, the purpose of this discussion in *Buckley* was to narrow the definition of political committee to provide a shield for free speech. Major purpose is thus, at most, a necessary condition for the imposition of PAC status, but it is far from constitutionally sufficient in all cases.

The Court's discussion of major purpose in *Buckley* did not arise in the context of a challenge to the definition of political committee at all, because the definition was not challenged in the case. *See* 424 U.S. at 60-61. It arose in the context of a challenge to 2 U.S.C. § 434(e), a disclosure provision that applied to persons, other than political committees, who spent money "for the purpose of influencing" the nomination or election of federal candidates. *See* 424 U.S. at 77. In assessing that challenge, the threshold question was whether the phrase "for the purpose of influencing" rendered § 434(e) vague and overbroad.

In answering that question, the Court took essentially the same approach it had taken with the terms "contribution" and "expenditure" – it sought to determine whether it could construe § 434(e) narrowly and remain "consistent with the legislature's purpose." *Id*. at 78. Thus, the Court first noted that it had construed the definitions of "contribution" and "expenditure" in a manner that reached only activity that was within the core area Congress sought to regulate. *Id*. at 79-80. It then did the same thing with the term "political committee" and noted that lower courts had construed the definition to avoid chilling the speech of advocacy groups. *Id*. at 79 & n.106. As the Court stated, "To fulfill the purposes of the Act ["political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id*. at 79. So limited, the expenditures of political committees are "within the core area

sought to be addressed by Congress. They are, by definition, campaign related." *Id*.

Buckley does not support the FEC's view that it is constitutional to apply PAC status to a group so long as it raises or spends in excess of $1,000 and has the major purpose of federal campaign activity. That is so for two reasons. First, the actual language this Court used was far narrower than campaign activity or even express advocacy. It pertained only to groups "under the control of *a* candidate" or whose major purpose is "the nomination or election of *a* candidate." *Id*. (emphasis added). The Court's use of the singular here is significant, for it is consistent with one of the purposes for which FECA was enacted – to prevent the proliferation of committees used by candidates to skirt contribution limits and disclosure provisions. *See id*. at 62 n.71; *see also* Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* 25-26 (4th ed. 1992). As narrowed in *Buckley*, the definition of political committee applies to groups controlled by a candidate or whose purpose is to elect a specific candidate, thereby preventing candidates from using multiple committees to raise funds outside the limits or to avoid disclosure. *Cf*. *Buckley*, 424 U.S. at 56 ("Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions.").

Second, avoiding vagueness and overbreadth through a narrowing construction does not render a statute constitutional in other respects. *See, e.g.*,

United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 373 (1971) (stating that courts impose narrowing constructions specifically "to avoid decision of constitutional questions"). The Court's approach to expenditure limits in *Buckley* makes that clear. Even after narrowing the definition of expenditure to cover spending for express advocacy, the Court still applied strict scrutiny and struck the expenditure limits down. *See* 424 U.S. at 43-44, 51.

Buckley's discussion of major purpose thus supports – at most – the proposition that a major purpose of supporting or opposing a candidate is necessary for the imposition of PAC status, but it is not constitutionally sufficient standing alone. Nevertheless, the FEC has long relied on dicta from *MCFL* in which the Court stated, "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." 479 U.S. at 262 (emphasis added). As a statutory matter, this statement is a truism that supports, at most, the proposition that a different analysis might apply in the event that MCFL's spending increased. Read in this manner, the *MCFL* dicta is consistent with the Court's understanding in *Buckley* that a limiting construction, such as major purpose, is not the last step in the constitutional analysis, but the first. *See* 424 U.S. at 45-51.

Indeed, the FEC's position is not supported by *MCFL* itself. In *MCFL*, the Court held that the government could not ban a small nonprofit corporation's

independent expenditures or require it to speak through a PAC because the group posed no threat of corruption. 479 U.S. at 263. The Court did not hold that a major purpose of federal campaign activity was a separate and independent constitutional ground for requiring such a group to speak through a PAC. Indeed, the Court could not have done so, because the FEC conceded that MCFL had no such major purpose. *See id*. at 252 n.6. As this Court stated in *McConnell*, "[w]e have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, for the nature of judicial review constrains us to consider the case that is actually before us." 540 U.S. at 192 (internal quotation marks and citation omitted).

In sum, the FEC has turned rulings from *Buckley* and *MCFL* that protected speech on their heads. Major purpose, once a shield against overregulation, has become the justification for regulating independent expenditures that this Court has said may not be limited.

B. The "major purpose" test as currently applied is inconsistent with this Court's decisions in *Buckley* and *Citizens United*.

The major purpose test is an invitation to the FEC to conduct a profoundly burdensome inquiry into every aspect of a group's activities. Granting certiorari in this case would allow this Court to

provide clarity to the law and appropriate protection for political speech by ruling that the potential for corruption, not major purpose alone, is the appropriate constitutional touchstone for determining PAC status. Groups such as SpeechNow.org, that make no direct contributions to candidates and that will disclose under § 434(c), cannot be required to become political committees in order to speak.

The major purpose test conflicts with this Court's precedents in three respects.

First, the major purpose test replaces the strict scrutiny that typically applies to laws that burden speech with a case-by-case inquiry that turns on the extent to which a group engages in protected speech. *Compare* 72 Fed. Reg. at 5596-97, 5601-02 *with WRTL II*, 551 U.S. at 478 ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech.") (emphasis in original). The major purpose test requires no demonstration of a compelling interest or narrow tailoring, and essentially places the burden on groups to demonstrate that they have not spent too much money on speech.

Second, in direct conflict with *Citizens United*, *Davis*, and *Buckley*, the major purpose test imposes restrictions on speakers based on the amount of money they spend on speech. As this Court stated in *Citizens United*, the First Amendment's protections do not depend on the speaker's financial ability to engage in public discussion. 130 S. Ct. at 904; *see also*

Davis, 128 S. Ct. at 2773-74; *Buckley*, 424 U.S. at 49. The major purpose test violates this principle in a particularly perverse manner, by making it far more likely that smaller groups that make independent expenditures will be forced to become PACs than larger groups.

For example, General Motors could spend millions on independent expenditures without ever coming close to having the major purpose of electoral advocacy. SpeechNow.org or a similar group will cross the major purpose threshold with expenditures that are only a tiny fraction of that amount. The result is a de facto burden based on the identity of the speaker in that small, ideological groups will virtually always be required to become PACs, while large business corporations will almost never be required to do so. *Cf. Citizens United*, 130 S. Ct. at 905 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity"); *id.* at 907-08 (noting that prohibition on corporate speech fell hardest on small corporations).

Third, the major purpose test requires precisely the sort of "intricate case-by-case determinations" that the Court refused to allow in *Citizens United*. *Id.* at 892. As the FEC has admitted, "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." 72 Fed. Reg. at 5601. To determine a group's major

purpose, the FEC conducts a "fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns." *Id*. This analysis looks to "public statements" and other conduct going "well beyond publicly available advertisements." *Id*. It examines "the form and nature" of a group's statements as well as "the speaker's position within the organization" and how the group "characterize[s] its activities and purposes." *Id*. It may focus on federal or nonfederal spending, "fundraising appeals," "fundraising solicitations," the "sources of [a group's] contributions," and the full range of its activities. *Id.* at 5604-05.

The FEC has refused to issue rules governing the major purpose inquiry because of "the flexibility needed to apply the major purpose doctrine appropriately." *Id.* at 5602. Even a "list of factors" to be considered would be inappropriate, according to the FEC, because it would not be "exhaustive" enough "as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters." *Id.* at 5602. If an organization wants guidance on how to apply the major purpose test, according to the FEC, it can "look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases." *Id.* at 5604.

This epitomizes the process that this Court decried in *Citizens United* when it stated that the "the FEC has created a regime that allows it to select what political speech is safe for public consumption

by applying ambiguous tests." 130 S. Ct. at 896; *see also WRTL II*, 551 U.S. at 469-77. If parties wish to avoid litigation or fines under this process "they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question" which invites officials to scrutinize their speech-related activities. *Citizens United*, 130 S. Ct. at 896. "This is an unprecedented government intervention into the realm of speech." *Id.*; *see also id*. at 889 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day"). In *Citizens United*, this Court recognized that "onerous restrictions [can] function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws." *Id.* at 895-96. The major purpose inquiry gives the FEC – whose "business is to censor," *id.* at 896 – precisely this sort of power.

Granting certiorari in this case would give this Court the opportunity to clarify that groups, like SpeechNow.org, do not have to endure this burdensome process in order to speak.

CONCLUSION

For the reasons stated above, the Court should grant certiorari.

Respectfully submitted,

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