No. 12-311

In the Supreme Court of the United States

THE REAL TRUTH ABOUT ABORTION, INC., FKA
THE REAL TRUTH ABOUT OBAMA, INC., PETITIONER

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's constitutional challenges to (1) a Federal Election Commission (FEC) regulation that defines the term "expressly advocating," 11 C.F.R. 100.22(b), and (2) the FEC's approach to determining political-committee status, as described in *Federal Register* notices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 681 F.3d 544. The opinion of the district court (Pet. App. 31a-62a) is reported at 796 F. Supp. 2d 736.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2012. The petition for a writ of certiorari was filed on September 10, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Election Commission (FEC or Commission) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2

U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8), 438(a)(8); see 2 U.S.C. 438(d); to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f; and to civilly enforce FECA, 2 U.S.C. 437g. The Department of Justice prosecutes criminal violations of FECA. See 2 U.S.C. 437g(d).

b. FECA defines the term "expenditure" to include any payment of money made "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court reviewed a provision in the original version of FECA that prohibited expenditures of more than $1000 "relative to" a federal candidate. *Id.* at 39-44. To avoid vagueness concerns, the Court construed that prohibition "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44.

Shortly thereafter, Congress codified that holding in its definition of a new statutory term, "independent expenditure." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 479 (2 U.S.C. 431(17)). FECA defines an "independent expenditure" as a communication "expressly advocating the election or defeat of a clearly identified candidate" that is made without coordinating with the candidate or a political party. 2 U.S.C. 431(17). When an entity "makes a disbursement for the purpose of financing

communications expressly advocating the election or defeat of a clearly identified candidate," it must identify itself within the communication. 2 U.S.C. 441d(a) and (d)(2). And any entity that spends more than $250 to finance independent expenditures must file with the Commission a disclosure report that includes, *inter alia*, the date and amount of each expenditure and anyone who contributed more than $200 to further it. See 2 U.S.C. 434(c)(1), (2)(A) and (C); 11 C.F.R. 109.10(e).

The Commission has promulgated a regulatory definition of the statutory term "[e]xpressly advocating." 11 C.F.R. 100.22. Subsection (a) of the definition encompasses communications that use phrases or campaign slogans such as "'re-elect your Congressman'" or "'support the Democratic nominee,' * * * which in context can have no other reasonable meaning than to urge the election or defeat" of a candidate. 11 C.F.R. 100.22(a). Phrases of this sort, to which the *Buckley* Court referred in describing its limiting construction of the original version of FECA, see 424 U.S. 44 n.52, are sometimes referred to as "magic words" of electoral advocacy, see, *e.g.*, Pet. App. 13a. Subsection (b) of the definition reaches communications that have an "electoral portion" that is "unmistakable [and] unambiguous" and "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. 100.22(b).

c. Under FECA, any "committee, club, association, or other group of persons" that receives more than $1000 in contributions or makes more than $1000 in expenditures in a calendar year is a "political committee." 2 U.S.C. 431(4)(A); see 11 C.F.R. 100.5(a); see also 2 U.S.C. 431(8)(A)(i) (defining "contribution" to include

any payment of money made "for the purpose of influencing any election for Federal office"). A political committee must register with the Commission and file periodic reports for disclosure to the public of all receipts and disbursements, with exceptions for most transactions of less than $200. 2 U.S.C. 433, 434(a)-(b). FECA also places certain constraints on contributions to political committees. 2 U.S.C. 441a(a)(1)(C) and (a)(3), 441b(a). The D.C. Circuit has held, however, that those contribution restrictions cannot constitutionally be applied to a political committee that makes only independent expenditures. *SpeechNow.org* v. *FEC*, 599 F.3d 686, 696 (en banc), cert. denied, 131 S. Ct. 553 (2010).

In *Buckley*, this Court explained that if political-committee status were defined "only in terms of amount of annual 'contributions' and 'expenditures,'" FECA's political-committee provisions might be applied overbroadly to reach "groups engaged purely in issue discussion." 424 U.S. at 79. The Court therefore concluded that the Act's political-committee provisions "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." *Ibid.* Under that limiting construction, an entity that is not controlled by a candidate need not register as a political committee unless its "major purpose" is the nomination or election of federal candidates.

In March 2004, the Commission issued a notice of proposed rulemaking. That notice sought comment on whether the FEC should, *inter alia*, promulgate a regulatory definition of "political committee" that would encompass all "527" groups—*i.e.*, political organizations holding tax-exempt status under Section 527 of the Internal Revenue Code. *Proposed Rules: Political Com-*

mittee Status, 69 Fed. Reg. 11,736, 11,748-11,749 (Mar. 11, 2004); see 26 U.S.C. 527(a) and (e)(1). In February 2007, after receiving comments and hearing testimony, the Commission published in the *Federal Register* an Explanation and Justification explaining its decision not to promulgate such a regulation. *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007). The notice stated that the Commission would instead continue its longstanding practice of determining an organization's major purpose through case-by-case adjudication. See *id.* at 5596-5597. The notice then discussed a number of prior administrative and civil matters in which the Commission or a court had analyzed a group's major purpose. The notice explained that those descriptions cumulatively "provid[ed] considerable guidance to all organizations" regarding the criteria that are used to apply the major-purpose test, with further guidance available through the advisory-opinion process. See *id.* at 5595, 5605-5606.

2. Petitioner The Real Truth About Abortion, Inc. is a nonprofit Virginia corporation, organized under Section 527 of the Internal Revenue Code. Pet. App. 3a. Petitioner's articles of incorporation prohibit it from making any contributions directly to candidates but permit it to make "independent communications." *Id.* at 47a n.4. Petitioner incorporated under the name The Real Truth About Obama, Inc. on July 24, 2008, and filed its complaint in this case a few days later. *Id.* at 3a-4a.

Petitioner's complaint asserted facial and as-applied constitutional challenges to three FEC regulations, including the definition of "expressly advocating" in 11 C.F.R. 100.22(b), as well as the Commission's approach to determining political-committee status. Pet. App. 4a.

Petitioner alleged that it had developed two radio advertisements, entitled *Change* and *Survivor*, about then-candidate Obama's positions on abortion. *Id.* at 4a-5a. *Change* purported to provide "the real truth about Democrat Barack Obama's position on abortion," using an "Obama-like voice." *Ibid.* Near the end of the advertisement, a woman's voice asked: "Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?" *Id.* at 5a. *Survivor* stated that then-Senator Obama "has been lying" about his voting history regarding abortion, thereby demonstrating "callousness" and "a lack of character and compassion that should give everyone pause." *Id.* at 5a-6a. Petitioner alleged that it intended to broadcast those advertisements during the 60-day period preceding the 2008 presidential election. *Id.* at 6a.

The district court denied petitioner's motion for a preliminary injunction, and the court of appeals affirmed. Pet. App. 6a; see 575 F.3d 342 (2009). Petitioner then sought review in this Court. Pet. App. 6a. While that petition for certiorari was pending, the D.C. Circuit, in *EMILY's List* v. *FEC*, 581 F.3d 1 (2009), found unconstitutional one of the regulations petitioner was challenging, and this Court, in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), found unconstitutional the portion of FECA on which another of the challenged regulations depended. The FEC accordingly announced that it would no longer enforce those regulations. See *Rules and Regulations: Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (Mar. 19, 2010); *FEC Statement on the Supreme Court's Decision in* Citizens United *v.* FEC (Feb.

5, 2010), http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

The government informed this Court of those developments and urged the Court to (1) grant the petition with respect to the affected claims, vacate the court of appeals' judgment, and remand with instructions to dismiss those claims as moot; and (2) deny the petition with respect to the remaining claims. Br. in Opp. 25 (No. 09-724). The Court ultimately granted the petition, vacated the court of appeals' judgment, and remanded for further consideration in light of *Citizens United* and the government's suggestion of mootness. 130 S. Ct. 2371 (2010).

3. On remand, petitioner withdrew its challenges to the regulations that the Commission no longer intended to enforce. Pet. App. 38a n.3. The district court then granted summary judgment for the government on petitioner's remaining claims, which challenged 11 C.F.R. 100.22(b)'s definition of "expressly advocating" and the Commission's approach to determining political-committee status. Pet. App. 45a-62a.

The court of appeals affirmed. Pet. App. 1a-30a. The court determined as an initial matter that petitioner's constitutional challenges should be reviewed "under the intermediate scrutiny level of 'exacting scrutiny,'" rather than under strict scrutiny. *Id.* at 10a; see *id.* at 8a-11a. The court explained that strict scrutiny was inapplicable because the administrative practices petitioner challenged would impose "disclosure and organizational requirements" on petitioner but would not restrict petitioner's campaign activities or contributions and expenditures. *Id.* at 9a; see *id.* at 11a (explaining that "even after *Citizens United*, it remains the law that provisions imposing disclosure obligations are reviewed under the

intermediate scrutiny level of 'exacting scrutiny'") (citing, *inter alia*, *Doe* v. *Reed*, 130 S. Ct. 2811, 2818 (2010)). That intermediate level of scrutiny requires only "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 11a (quoting *Citizens United*, 130 S. Ct. at 914).

The court of appeals rejected petitioner's overbreadth and vagueness challenges to Section 100.22(b). Pet. App. 11a-22a. The court substantially relied on three of this Court's decisions: *McConnell* v. *FEC*, 540 U.S. 93 (2003), overruled in part by *Citizens United*, 130 S. Ct. 876; *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); and *Citizens United*. Pet. App. 11a-22a. First, the court of appeals observed that the Court in *McConnell*—in the course of upholding restrictions on "electioneering communications" enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81—had held that "Congress could permissibly regulate not only communications containing the 'magic words' of *Buckley*, but also communications that were 'the functional equivalent' of express advocacy." Pet. App. 13a-14a (quoting *McConnell*, 540 U.S. at 193, 206). Second, the court of appeals explained that the "language of § 100.22(b) is consistent with the test for the 'functional equivalent of express advocacy' that was adopted in *Wisconsin Right to Life*, a test that the controlling opinion specifically stated was not 'impermissibly vague.'" *Id.* at 16a (quoting *Wisconsin Right to Life*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.)). Third, the court of appeals observed that the Court in *Citizens United* had applied the functional-equivalency test from *Wisconsin Right to Life* and had "also upheld BCRA's disclosure requirements for all electioneering communications—including those that

are *not* the functional equivalent of express advocacy." *Id.* at 15a (citing *Citizens United*, 130 S. Ct. at 914-916). The Court reasoned that the constitutionality of the disclosure requirements at issue here followed *a fortiori*. *Id.* at 16a.

The court of appeals also rejected petitioner's challenge to the FEC's approach for determining political-committee status. Pet. App. 22a-30a. The court agreed with petitioner that the Commission's approach constituted "final agency action" subject to judicial review under the Administrative Procedure Act. *Id.* at 23a n.4. The court concluded, however, that the FEC's approach was consistent with this Court's precedents. The court observed that the Court in *Buckley* "did not mandate a particular methodology for determining an organization's major purpose." *Id.* at 25a. The court reasoned that "the Commission was free to administer FECA political committee regulations either through categorical rules or through individualized adjudications," *ibid.* (citing *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947)), and that the FEC "had good and legal reasons" for choosing case-by-case adjudication, *id.* at 26a. The court recognized that the major-purpose inquiry "is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others." *Ibid.*

Petitioner contended that, in applying the "major purpose" test, the FEC could permissibly consider only two factors: (1) whether "campaign-related speech amounts to 50% of all [the organization's] expenditures," and (2) "the organization's central purpose revealed by its organic documents." Pet. App. 22a-23a. The court of appeals rejected that argument, concluding that the precedents on which petitioner relied did not limit the

Commission's discretion in that manner. *Id.* at 27a-28a. The court of appeals saw "little risk that the Commission's existing major purpose test will chill political expression." *Id.* at 28a. The court explained that the Commission would typically apply the test only to political groups that had disbursed more than $1000 in either expenditures or contributions; that investigation of a group's major purpose "would not necessarily be * * * intrusive" due to the heavy reliance on publicly available materials; and that classification as a political committee would impose only "'minimal' reporting and organizational obligations." *Id.* at 29a (citing *SpeechNow.org*, 599 F.3d at 697-698).

ARGUMENT

The court of appeals' decision reflects a straightforward application of this Court's precedents, and it is consistent with every other post-*Citizens United* circuit-court decision that has addressed similar issues. Further review is not warranted.

1. Contrary to petitioner's contention (Pet. 15), strict scrutiny does not apply in this case. As the court of appeals correctly observed, the definitions of "expressly advocating" and "political committee," even if applicable to petitioner or its activities, would ultimately affect only the disclaimer and disclosure requirements (if any) to which petitioner is subject. Pet. App. 9a; see pp. 2-4, *supra*. Petitioner asserts (Pet. 9) in passing that designation as a political committee would also trigger certain limitations on how it can collect and spend money. But because petitioner does not make campaign contributions or otherwise coordinate its advocacy with political campaigns or parties, see Pet. App. 47a n.4, the FEC could not enforce those limitations with respect to petitioner. See *SpeechNow.org* v. *FEC*, 599 F.3d 686, 696

(D.C. Cir.) (en banc) (holding restrictions unconstitutional as applied to a political committee that made only independent expenditures), cert. denied, 131 S. Ct. 553 (2010).

Although "[d]isclaimer and disclosure requirements may burden the ability to speak," they "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United* v. *FEC*, 130 S. Ct. 876, 914 (2010) (internal quotation marks and citations omitted). Indeed, disclosure requirements can improve political discourse by creating "transparency" that "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916. The Court accordingly has subjected such requirements only to "'exacting scrutiny,'" rather than strict scrutiny, upholding them so long as the government can show "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 64, 66 (1976) (per curiam)); see *ibid.* (citing *McConnell* v. *FEC*, 540 U.S. 93, 231-232 (2003), overruled in part by *Citizens United*, 130 S. Ct. 876).

2. Petitioner contends (Pet. 16-24) that the definition of "expressly advocating" in 11 C.F.R. 100.22(b) is unlawful because it goes beyond a mere magic-words test and is unconstitutionally vague. The court of appeals correctly rejected that argument.

a. In *Buckley,* this Court construed an expenditure limitation in the original version of FECA "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44. The Court explained in a footnote that this construction would restrict application of the provision "to communications containing ex-

press words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Citing that limiting construction, some lower courts in the wake of *Buckley* held that Congress's constitutional authority to regulate campaign expenditures was limited to communications containing such "magic words." See, *e.g.*, *FEC* v. *Christian Action Network, Inc.*, 110 F.3d 1049, 1052-1055 (4th Cir. 1997).

In *McConnell*, this Court rejected that interpretation of *Buckley*. 540 U.S. at 190-193. The Court considered the constitutionality of BCRA's definition of the term "electioneering communication," which was not limited to magic words and which was relevant to the imposition of both disclosure requirements and expenditure limitations. *Id.* at 189-190. The Court explained that *Buckley*'s "express advocacy limitation * * * was the product of statutory interpretation rather than a constitutional command," and "in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id.* at 191-193. The Court in *McConnell* accordingly upheld the restrictions on the financing of electioneering communications to the extent that the communications were "the functional equivalent of express advocacy." *Id.* at 206.

The lead opinion in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 469 (2007), reiterated *McConnell*'s holding that Congress may regulate the funding of certain communications that are "the functional equivalent of express advocacy." *Id.* at 474 n.7 (opinion of Roberts, C.J.). It additionally defined the "functional equivalent of express advocacy" as communications "susceptible of no reasonable interpretation other than as an appeal to

vote for or against a specific candidate." *Id.* at 469-470. It expressly rejected the contention that this test was "impermissibly vague." *Id.* at 474 n.7.

b. The test from *Wisconsin Right to Life* is nearly identical to 11 C.F.R. 100.22(b). Each inquires whether a particular communication can reasonably be interpreted as something other than candidate advocacy and, if so, excludes the communication from its scope. Pet. App. 16a-17a. Both tests also avoid vagueness by refusing to consider the subjective intent of the speaker. Compare *Rules and Regulations: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 16, 1995) (*1995 Rules and Regulations*) (explaining that "the subjective intent of the speaker is not a relevant consideration"), with *Wisconsin Right to Life*, 551 U.S. at 472 (opinion of Roberts, C.J.) (holding that evidence related to speaker's "subjective intent" is "irrelevant"). To the extent the standards differ, Section 100.22(b) is narrower than the *Wisconsin Right to Life* test, as the regulation requires an "unambiguous" electoral portion, 11 C.F.R. 100.22(b)(1), while the lead opinion in *Wisconsin Right to Life* refers to the "mention" of an election and similar "indicia of express advocacy," *Wisconsin Right to Life*, 551 U.S. at 470 (opinion of Roberts, C.J.).

The Court's decision in *Citizens United* does not change the analysis. Although the Court held in *Citizens United* that corporations cannot be prohibited from *financing* express advocacy or its functional equivalent, 130 S. Ct. at 913, it did not redefine the types of election-related communications that may be subject to other forms of regulation. To the contrary, the Court confirmed that even communications that are *not* "the

functional equivalent of express advocacy" under the *Wisconsin Right to Life* test—and are not unambiguously campaign-related—can constitutionally be subject to other forms of regulation, such as disclosure requirements. *Id.* at 915.

c. As the foregoing discussion demonstrates, petitioner is wrong in contending (Pet. 18-19) that the court of appeals' decision conflicts with the decisions of this Court. Six members of the Court in *Wisconsin Right to Life* rejected the proposition, raised in Justice Scalia's separate opinion, that the only permissible constitutional standard is a magic-words test. 551 U.S. at 474 n.7 (opinion of Roberts, C.J.); *id.* at 513-520 (Souter, J., dissenting). To the extent petitioner attaches controlling significance to the precise terminology of Section 100.22—*i.e.*, that it defines the statutory term "expressly advocating," rather than "electioneering communication" or "functional equivalent of express advocacy"—petitioner's focus is misplaced. As the court of appeals recognized, what matters in the First Amendment analysis is that the communications this Court has defined as "the functional equivalent of express advocacy" are constitutionally indistinguishable from the communications the Commission has defined as "expressly advocating."

Petitioner alternatively contends (Pet. 21) that Section 100.22(b) exceeds the Commission's statutory authority. The lower courts, however, apparently understood the thrust of petitioner's arguments to be constitutional and did not address any statutory arguments. Pet. App. 11a-22a, 45a-56a; see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). In any event, Congress has expressly approved of Section 100.22(b). The BCRA provision that

amended FECA to reach electioneering communications expressly preserved Section 100.22(b). See 2 U.S.C. 434(f)(3)(A)(ii) ("Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations."). Petitioner's argument that Congress has not authorized Section 100.22(b) cannot be reconciled with the statutory text demonstrating Congress's intent that the regulation be enforced as written.

Petitioner further contends that the lead opinion in *Wisconsin Right to Life* "specifically acknowledged" that its standard for identifying the functional equivalent of express advocacy (which Section 100.22(b) essentially replicates) "is impermissibly vague" as applied to any speech that does not also meet BCRA's definition of "electioneering communication." Pet 19 (citing *Wisconsin Right to Life*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.)). But the lead opinion did not hold that its own test would be impermissibly vague if not tethered to BCRA's criteria for electioneering communications. To the contrary, the footnote on which petitioner relies was dedicated entirely to *rebutting* the argument that the only sufficiently clear standard would be a magic-words test. And this Court confirmed the viability of the *Wisconsin Right to Life* test by applying it in *Citizens United*. 130 S. Ct. at 889-890.

Petitioner also argues (Pet. 19-24) that disagreement between the Commission and the district court as to whether petitioner's *Change* advertisement met the Section 100.22(b) standard, as well as disagreement among the FEC's six Commissioners regarding other communications, illustrates the regulation's unconstitutional vagueness. The "basic mistake" of that argument—which would necessarily imply that the *Wisconsin Right*

to Life standard was also impermissibly vague—"lies in the belief that the mere fact that close cases can be envisioned renders a [law] vague." *United States* v. *Williams*, 553 U.S. 285, 305 (2008). "That is not so." *Id.* at 305-306; see *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930) ("Whenever the law draws a line there will be cases very near each other on opposite sides."). A vagueness argument based on the potential for disagreement is particularly misplaced with respect to Section 100.22(b), which by its terms expressly resolves cases of potential disagreement in favor of non-regulation. See Pet. App. 22a (noting that Section 100.22 "applies only *when reasonable people could not disagree* about a communication's status"); see also *Wisconsin Right to Life*, 551 U.S. 474 n.7 ("[W]e agree with JUSTICE SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate.").

d. Contrary to petitioner's contention (Pet. 16-17 & n.6), the court of appeals' conclusion that Section 100.22(b) is constitutional does not conflict with any decision of another court of appeals. Most of the decisions cited by petitioner pre-date *McConnell*. As Justice Thomas noted in dissent, *McConnell* "overturned" the court of appeals decisions that had read *Buckley* as limiting regulation to magic words. *McConnell*, 540 U.S. at 278 n.11 (Thomas, J., concurring in the judgment in part and dissenting in part). As Justice Thomas further noted, see *ibid.*, the only express-advocacy decision that *McConnell* did not necessarily overturn was *FEC* v. *Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987)—the case from which the Commission de-

rived the test codified at Section 100.22(b). See *1995 Rules and Regulations*, 60 Fed. Reg. at 35,292-35,295.

None of the four post-*McConnell* decisions cited by petitioner—all of which address state statutes, not FECA—supports its position. One is from the same court that decided *Furgatch* and recognizes in dicta that *Furgatch* construed express advocacy in a manner identical to Section 100.22(b). See *ACLU* v. *Heller*, 378 F.3d 979, 985 (9th Cir. 2004). Two applied a magic-words limiting construction to cure vagueness and overbreadth problems in particular state statutes, while recognizing that the First Amendment would permit broader regulation. *Center for Individual Freedom* v. *Carmouche*, 449 F.3d 655, 665-666 & n.7 (5th Cir. 2006), cert. denied, 549 U.S. 1112 (2007); *Anderson* v. *Spear*, 356 F.3d 651, 664-665 (6th Cir.), cert. denied, 543 U.S. 956 (2004). And the remaining decision is from the same court of appeals that decided this case. See *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008). The Fourth Circuit has explained why the decision below is consistent with that one, see Pet. App. 17a-20a, and an asserted intra-circuit conflict would not justify further review in any event, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In accord with the decision below, courts of appeals that have addressed the issue since *Citizens United* have unanimously held that the First Amendment does not impose an express-advocacy limitation—much less a magic-words limitation—on disclosure requirements. See *Center for Individual Freedom* v. *Madigan*, No. 11-3693, 2012 WL 3930437, at *12-*14 (7th Cir. Sept. 10, 2012); *National Org. for Marriage* v. *McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011), cert. denied, 132 S. Ct. 1635 (2012); *Human Life of Wash. Inc.* v. *Brumsickle*,

624 F.3d 990, 1016 (9th Cir. 2010), cert. denied, 131 S. Ct. 1477 (2011); *National Org. for Marriage, Inc.* v. *Roberts*, 753 F. Supp. 2d 1217, 1220-1222 (N.D. Fla. 2010), aff'd *sub nom. National Org. for Marriage Inc.* v. *Cruz-Bustillo*, No. 11-14193, 2012 WL 1758607 (11th Cir. May 17, 2012) (per curiam). That uniform and correct application of this Court's precedents does not warrant further review.

3. This Court's intervention is likewise not warranted to review petitioner's challenge (Pet. 24-32) to the Commission's approach to determining political-committee status.

a. As a preliminary matter, the *Federal Register* notice describing the Committee's case-by-case adjudicatory approach is not subject to judicial review. The Administrative Procedure Act (APA) authorizes courts to hear challenges only to "final agency action"—*i.e.*, action that consummates the agency's decisionmaking process and determines the rights and obligations of parties. 5 U.S.C. 704; see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). The Commission's notice does not purport either to establish a binding norm or to decide any entity's legal status. The primary purpose of the notice was to explain why a broad regulation was *not* created, and the notice simply provides guidance about political-committee status and the major-purpose test based on specific administrative and civil enforcement actions. 72 Fed. Reg. at 5604; see pp. 4-5, *supra*.

The court of appeals found APA review to be proper on the understanding that petitioner was challenging the practices described in the *Federal Register* notices, rather than the notices themselves. Pet. App. 23a n.4. But the publication of *Federal Register* notices describing the results of the Commission's adjudications does not

permit a party that has not yet been subject to the adjudicatory process to challenge that process preemptively. Rather, if the Commission ever initiates any enforcement proceedings against petitioner—which it has not done, and may never do—petitioner will be entitled to raise all of its challenges to the Commission's approach in that context.

b. Even if the Commission's statements regarding political-committee status were subject to APA review, the court of appeals correctly rejected petitioner's challenge. Under the major-purpose test, an organization is not regulated as a political committee unless its "major purpose * * * is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. The Commission has consistently determined on a case-by-case basis whether an organization's major purpose is the nomination or election of candidates. See 72 Fed. Reg. at 5596. To the extent petitioner contends that such case-by-case adjudication is *per se* unlawful, that contention lacks merit. As the court of appeals correctly recognized (Pet. App. 25a-26a), this Court's precedents give agencies discretion to administer the law through individual adjudications rather than by promulgating categorical rules. See, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."); see also *Shays* v. *FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007) ("[P]laintiffs have been unable to cite any case where a court, absent a clear directive from Congress, required an agency to institute rulemaking in the place of adjudication. This Court will not be the first.").

Here, the Commission has reasonably determined that an adjudicatory approach is the best way to make

the inherently context-specific determination of an organization's "major purpose." See Pet. App. 26a ("The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others."); *Shays*, 511 F. Supp. 2d at 31 (concluding that the FEC's "decision not to employ rulemaking" in this context "is not arbitrary and capricious"). In making such determinations, the Commission has consulted sources such as a group's public statements, government filings (*e.g.*, IRS notices), statements of purpose, and spending on particular election or issue-advocacy campaigns. See 72 Fed. Reg. at 5601-5602, 5605 (describing prior cases). These are the same sources that courts have considered in applying *Buckley*'s major-purpose test. See *FEC* v. *Malenick*, 310 F. Supp. 2d 230, 234-237 (D.D.C. 2004) (basing major-purpose determination on, *inter alia*, organization's statements in brochures, fax alerts sent to potential and actual contributors, and activities to influence federal elections), amended on reconsideration, No. Civ. A. 02-1237, 2005 WL 588222 (D.D.C. Mar. 7, 2005); *FEC* v. *GOPAC, Inc.*, 917 F. Supp. 851, 859, 864-866 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.").

c. Petitioner contends that the major-purpose test can be satisfied only if an entity spends more than half of its funds on magic-words express advocacy (see Pet. 29-30), or if its "organic documents" reveal an "express intention to operate as a political committee" (Pet. 30).

In support of that argument, petitioner cites *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *Colorado Right to Life Comm., Inc.* v. *Coffman*, 498 F.3d 1137 (10th Cir. 2007). Pet. 27-30. But the major-purpose test was not at issue in *Massachusetts Citizens for Life*, where it was "undisputed" that the plaintiff's "central organizational purpose" was not candidate-related. 479 U.S. at 252 n.6. In suggesting that the plaintiff's "independent spending" could theoretically "become so extensive that the organization's major purpose may be regarded as campaign activity," *id.* at 262, this Court neither stated nor implied that express-advocacy communications are the only kind of "campaign activity" that can satisfy the major-purpose test. Nor did the Court establish a rigid rule that an organization must devote more than 50% of its funds to campaign-related spending in order for such spending to be deemed "extensive."

The Tenth Circuit in *Coffman* invalidated a state statute that did not use the major-purpose test at all, but instead based political-committee status only on annual expenditures. See 498 F.3d at 1153-1154. To the extent that the court discussed the major-purpose test, it emphasized that this Court in *Massachusetts Citizens for Life* had "suggested two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent spending with overall spending." *Id.* at 1152. As discussed above, determining the "central organizational purpose" of a group is precisely how the Commission and the lower courts have made their major-purpose determinations.

Petitioner's argument that the Commission's approach chills speech and association (Pet. 31-32) is like-

wise misplaced. As discussed above, see pp. 10-11, *supra*, if petitioner were classified as a political committee, that classification would subject it only to disclaimer and disclosure requirements, not to direct restrictions on its speech. And any concerns about the potential intrusiveness of the inquiry into an organization's major purpose are substantially mitigated by the Commission's general reliance on public documents as evidence of the organization's goals. Pet. App. 27a.

d. Contrary to petitioner's assertion (Pet. 26-28, 30-31), the question presented here is not the subject of any circuit conflict. Other than *Coffman*, the only decisions petitioner specifically asserts to be in conflict with the Commission's methodology are other decisions by the same court of appeals that decided this case. See Pet. 28. The panel below perceived no intra-circuit conflict, Pet. App. 27a-28a, and any such conflict would not warrant this Court's review, see *Wisniewski*, 353 U.S. at 902. Petitioner also briefly mentions (Pet. 12) the Eighth Circuit's recent en banc decision in *Minnesota Citizens Concerned for Life, Inc.* v. *Swanson*, 692 F.3d 864 (2012), but that decision simply struck down a state statute that imposed political-committee-style disclosure requirements without any major-purpose constraint. *Id.* at 875 nn.9-10 (distinguishing state statute from disclosure requirements for federal political committees).

Petitioner also suggests (Pet. 30) that the Court should grant certiorari to resolve a circuit conflict about whether "there *is* a major-purpose test." But no party in this case has previously disputed the existence of the test or its application to political-committee determinations under 2 U.S.C. 431(4)(A), and the court of appeals did not address that issue. See, *e.g.*, *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213

(1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily address them.") (citations omitted). In any event, the absence of such a test would not benefit petitioner. The decisions petitioner cites suggest that organizations may be regulated even when they do *not* have the major purpose of nominating or electing candidates. See *McKee*, 649 F.3d at 59; *Human Life of Wash. Inc.*, 624 F.3d at 1009-1011; see also *Cruz-Bustillo*, No. 11-14193, 2012 WL 1758607, at *1 (agreeing with *McKee*). Adoption of that rule obviously would not insulate petitioner from the disclaimer and disclosure requirements that are the subject of petitioner's complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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