No. 12-311

In The
Supreme Court of the United States

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

v.

Federal Election Commission and
United States Department of Justice

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

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Reply to Brief in Opposition

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Corporate Disclosure

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

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Introduction

As set out in RTAA's *Petition*, the FEC Commissioners are split 3-3 over the issues herein. Three oppose the "inconsistent[]" and "overbroad[]" application of 11 C.F.R. 100.22(b) and the erroneous "conflation" of the express-advocacy test with the appeal-to-vote test of *WRTL-II*,[1] which result in "reporting problems" and (coupled with problems with "the major-purpose test" enforcement policy) cause "confusion as to whether a group is required to register and report as a political committee." Pet.23 (citation omitted). These three would not enforce 100.22(b) because of questions about its constitutionality and statutory authority. Pet.16 n.5. They cite serious compliance problems caused by intercircuit nonacquiesence coupled with broadcasts reaching multiple jurisdictions resulting in the same ad being deemed an independent expenditure in one and an electioneering communication in another. Pet.23-24. And these three would restrict what the FEC may consider in determining a group's major purpose. Pet.32.

Yet Respondents ("Government") ignore this split, not showing why it alone does not qualify this case for certiorari review. The closest their *Opposition* ("Opp'n") comes is noting "disagreement among the FEC's six Commissioners regarding . . . communications," but it claims that disagreement does not demonstrate the inherent vagueness of 100.22(b) because of "close cases." Opp'n 15-16. That is erroneous, *see infra*, but

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[1] *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

the disagreement over specific ads is tangential to the failure of the Opposition to address an internal FEC split on the issues herein and show why that split does not warrant certiorari review.

Given this internal split, the *FEC Opposition* argues the view of only *three* Commissioners—at the expense of the three who challenge 100.22(b) and the PAC-status policy—though the Government refuses to acknowledge what it does.

I.

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

Another reason to grant certiorari is the great national importance of maintaining this Court's bright-line express-advocacy and major-purpose tests to protect core political speech and association. Pet.13-16. This Court's remand of this case for reconsideration in light of *Citizens United v. FEC*, 130 S.Ct. 876 (2010), was for reconsideration in light of an opinion that followed this Court's bright-line protection by

- repudiating FEC's conversion of *WRTL-II*'s electioneering-communication, appeal-to-vote test into a "a two-part, 11-factor balancing test," *id.* at 895,
- rejecting "FEC['s] . . . creat[ion of] a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests," *id.* at 896, and
- reviewing a provision triggering "onerous" PAC-burdens under strict scrutiny, *id.*

Pet.15-16. Though FEC's vague and overbroad expansion of this Court's appeal-to-vote test that *Citizens*

United rejected is like its obfuscation of this Court's express-advocacy and major-purpose tests at issue here, and though the regulation and policy at issue here also trigger PAC-burdens, the appellate court employed exacting scrutiny and returned the same holding that this Court vacated and ordered reconsidered in light of *Citizens United*. Pet.15.

The Government does not mention, let alone dispute, the necessity of bright-line tests to protect core political speech—conceding that requirement (as it must) though its defense of the challenged definition and policy violates that requirement.

The Government argues that *Citizens United* requires exacting scrutiny here. Opp'n 10. This fails because this Court applied strict scrutiny to *both* the electioneering-communication ban *and* the PAC-option, 130 S.Ct. at 897-98, and only applied exacting scrutiny to *non*-PAC disclosure, *id.* at 913-14. Thus, *Citizens United* drew the strict-scrutiny line not at the existence of a ban, *see* Opp'n 11, but at when government burdens free speech and association *beyond* the simple, one-time, event-driven disclosure imposed on electioneering communications—and especially when (as here) PAC-burdens are imposed.[2] The problem of courts invoking "mere disclosure" as a talisman to uphold any regulation short of a ban under complaisant exacting scrutiny is widespread, *see, e.g.*, App.11a, and this problem is, in itself, a reason for this Court to grant certiorari in order to correct this flawed analysis.

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[2] *Cf. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2824 (2011) (strict scrutiny for "substantial burden," not a ban).

The present case is not about the sort of mere "disclosure" to which *Citizens United* applied exacting scrutiny. It involves burdens requiring strict scrutiny. FEC's renewed enforcement of 11 C.F.R. 100.22(b) was central to *imposing* PAC-status on groups that had not considered themselves to be PACs (and so paid large fines for not having registered and operated as PACs). *See* Pet.24 (and cited materials). FEC's PAC-status policy *imposes* PAC-burdens. So strict scrutiny applies to both 100.22(b) and FEC's PAC-status policy.[3]

"But under *any* standard, FEC's regulation and policy are vague, overbroad, and inconsistent with this Court's holdings as to the nature of the express-advocacy and major purpose tests," Pet.15-16, as discussed

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[3] The Government argues that if RTAA were found, post facto, to have been a PAC, it would not have been subject to the requirement of using federal funds for its solicitations because of cases holding that independent-expenditure-only committees ("IE-PACs") may receive unlimited contributions, including from corporations and unions. Opp'n 10-11. The government thus tries to justify reduced scrutiny. The error is that IE-PACs are *still PACs*, subject to the organizational and reporting requirements that *Citizens United* listed and pronounced "onerous" and subject to "strict scrutiny" *without even mentioning* source-and-amount limits on contributions. *See* 130 S.Ct. at 897-98. And the funds that RTAA would have been required to use for fundraising—even if it *had* met the requirements for becoming an IE-PAC, which it had not—still would have been subject to the *remaining* "federal fund" requirements, e.g., no foreign-national contributions and contributions must have been received, processed, and reported as PAC funds. The government fails to disprove the post-facto trap of being declared a PAC when a group did not operate as one due to the challenged vague regulation and policy.

in Parts II and III. For example, even applying "exacting scrutiny," the Tenth Circuit held that a proper major-purpose test is required before PAC-burdens may be imposed. *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) ("*NMYO*"). This is because *Buckley*'s analysis in establishing the express-advocacy test (including in the *disclosure* context, 424 U.S. at 79-80) and the major-purpose test turned on whether the communications and groups at issue were "unambiguously campaign related." *NMYO*, 611 F.3d at 676-77 (quoting *Buckley v. Valeo*, 424 U.S. 1,79-81 (1976), an analysis that is independent of the level of scrutiny. And if, as here, the challenged provision and policy are unconstitutionally vague and overbroad and beyond statutory authority, there is no need to consider whether they are appropriately tailored to a sufficiently weighty interest.

II.

Express Advocacy Requires Magic Words.

A. The Holding Conflicts with Other Circuit Decisions.

The holding below conflicts with other circuits. Pet.16-17. The Government unsuccessfully attempts to evade these conflicts in three ways.

First, it tries to discount pre-*McConnell* decisions based on the notion that *McConnell v. FEC*, 540 U.S. 93 (2003), eliminated the express-advocacy test as a magic-words test. Opp'n 16. That argument was rebutted already, Pet.18-19, and will be addressed in Part II.B.

Second, it argues that post-*McConnell* decisions "address state statutes," Opp'n 17, which has no effect

on the analysis, and it attempts to show that these decisions do not consider the express-advocacy test a magic-words test. But, for example, *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), expressly said that "express advocacy" was a magic-words test:

> To understand . . . express advocacy . . . , we must look to . . . *Buckley* . . . . [T]o avoid overbreadth, the Court utilized a bright-line rule . . . that . . . referred only to expenditures using terms of express advocacy, which it defined as words such as vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, and reject.

Id. at 663-64 (citing 424 U.S. at 44 & n.52).

Third, the Government attempts prestidigitation: "[C]ourts of appeals . . . 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*." Opp'n 17 (emphasis added). But the issue here is whether the express-advocacy test is a magic-words test, not whether the Government can *also* require disclosure of electioneering communications.

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

This Court and members of this Court have repeatedly held and said that the express-advocacy test is a magic-words test. Pet.18-19. The Government fails to respond to, let alone rebut, this fact, which controls.

McConnell equated "express advocacy" with "magic words," Pet.18 (collecting cites), and used its discussion of *Buckley* to *add* electioneering-communication disclosure to the previous magic-words, express-advocacy

disclosure, not to eliminate magic-words express advocacy as a category of regulable speech. Pet.18. So the Government's linchpin argument—that *McConnell* changed everything—fails. The Government essentially concedes this by citing a *dissent* to support its point. Opp'n 16.

The Government argues that *McConnell* said that *Buckley*'s express-advocacy test was a product of statutory construction, not a constitutional requirement. Opp'n 12. But *Buckley*'s magic-words interpretation was a *saving* construction necessary to avoid vagueness and overbreadth by limiting regulable speech (including in the disclosure context) to that which the government has constitutional authority to regulate, i.e., that which is "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. So underlying both the express-advocacy and major-purpose tests lies this *constitutional mandate*. *See id.* at 79-81. And because *Buckley* gave "expenditure" a saving construction, the current definition of "independent *expenditure*" must follow that construction or be beyond statutory authority. *See infra.*

C. The Lower Court's Justification Is Flawed.

RTAA showed that the district court's reliance on similarities between 100.22(b) and *WRTL-II*'s appeal-to-vote test, 551 U.S. at 469-70, is flawed because the appeal-to-vote test was created as an *electioneering-communication* limitation and is unconstitutionally vague beyond the limits of the electioneering-communication definition. Pet.19 (citing *WRTL-II*, 551 U.S. at 474 n.7).

The Government argues that *WRTL-II* held that government may regulate "the functional equivalent of express advocacy," which the Government says is "de-

fined . . . as *communications* 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" Opp'n 12-13 (emphasis added) (citations omitted). But the "functional equivalent of express advocacy" was an *electioneering communication*, not a *communication*, that contained such an appeal to vote.[4] And the Government's assertion that *WRTL-II* "expressly rejected the contention that this test was 'impermissibly vague,'" Opp'n 13, fails to answer the controlling fact that "the test is impermissibly vague absent that definition." Pet.19 (citing 551 U.S. at 474 n.7). At the cited *WRTL-II* footnote, Chief Justice Roberts (joined by Alito, J.) responded to Justice Scalia's position (joined by Kennedy & Thomas, JJ.) that the test was unconstitutional for vagueness by "agree[ing] . . . on the imperative for clarity" and saying the bright-line requirement was met because, inter alia, "this test is only triggered if the speech meets the brightline requirements of [the electioneering-communication definition] in the first place." Thus, five members of this Court declared the test either unconstitutionally vague or only saved by being cabined within the electioneering-communication definition that *McConnell* found not vague. *See* 540 U.S. at 192. It is not a free-floating test that may be plucked from its saving context and inserted where that context is lacking.[5]

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[4] Thus, the Government is simply wrong that "'the functional equivalent' of express advocacy' [is] constitutionally indistinguishable from . . . 'expressly advocating.'" Opp'n 14. The functional *equivalent* of express advocacy cannot *be* express advocacy.

[5] The Government argues that "100.22(b) is narrower than [the appeal-to-vote test], as the regulation requires an 'unambiguous' electoral portion . . . , while . . . [*WRTL-II*]

Congress created, and this Court approved, a system in which three kinds of communications trigger disclosure obligations: (1) magic-words express advocacy; (2) electioneering communications; and (3) any communication made by a group whose major purpose is nominating or electing candidates (a "political committee"). FEC's attempt to *broaden* "express advocacy" with a test created to *narrow* "electioneering communication" creates confusion for those who must report—by definition "electioneering communication" excludes "express advocacy." Pet.20 n.9, 22.

The confusion and unconstitutional vagueness is evident in disagreement among FEC's Commissioners and between the court below and FEC over specific ads. Pet.20-24. The Government's "close cases" answer, Opp'n 16, dismisses a serious problem. The FEC Commissioners who insist an ad *is* express advocacy have not deferred to their "reasonable" colleagues who say it is *not*, as a reasonable-person requirement mandates. Instead, they would *impose* and *enforce* their opinion of the ad if they had the votes. Thus, the Government's recitation of the "*no reasonable interpretation*" standard rings hollow, as does its insistence that "100.22(b) . . . resolves cases of potential disagreement in favor of non-regulation." Opp'n 16. The constitutional solution to close cases is a speech-protective, bright-line test so that there *will be* no such ambiguity, not a vague test with an unenforced tie-breaker.

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refers to the 'mention' of an election and similar 'indicia of express advocacy' . . . ." Opp'n 13. But "electoral portion" is inherently vague and *Citizens United* rejected FEC's effort to convert *WRTL-II*'s appeal-to-vote test into "a two-part, 11-factor balancing test," 130 S.Ct. at 895, by erroneously incorporating such "indicia" into this Court's test.

FEC's attempted expansion of "express advocacy" is also beyond statutory authority, though the district court ignored this argument. Pet.21. The Government suggests that this Court cannot consider this argument because the district court ignored it, Opp'n 14, which is erroneous. Then it argues that "Congress . . . expressly approved . . . 100.22(b)," Opp'n 14-15, for which it cites BCRA's backup electioneering-communication definition. That definition is similar to 100.22(b) but adds that "[n]othing in this subparagraph shall be construed to affect the interpretation or application of . . . 100.22(b)." 2 U.S.C. 434(f)(3)(A)(ii). That is not "express[] approv[al]"—it merely leaves 100.22(b) as it was, which was a state of non-enforcement in some jurisdictions precisely because it was held to be *beyond* statutory authority.[6] The statutory argument is sufficient alone to resolve the challenge to 100.22(b), and certiorari should be granted to allow full briefing of this argument.

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

The Government fails to address the FEC split on the issues herein, *see* Introduction, which split is reason alone to grant certiorari. Pet.21-24.

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[6] Section 100.22(b) was held to be beyond *statutory* authority in *Maine Right to Life Committee v. FEC*, 914 F.Supp.2d 8, 13 (D.Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *FEC v. Christian Action Network*, 894 F.Supp. 946, 958 (W.D.Va. 1995), *aff'd*, 92 F.3d 1178 (4th Cir. 1996), and *Right to Life of Duchess County v. FEC*, 6 F.Supp.2d 248, 253-54 (S.D.N.Y. 1998). In MUR 5024R (Council for Responsible Government), FEC decided *after McConnell* that 100.22(b) was enforceable nationwide.

III.

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

The Government continues to argue that its PAC-status enforcement policy "is not subject to judicial review." Opp'n 18. Two district-court and appellate-court opinions herein have rejected this argument—as has this Court in granting certiorari, vacating, and remanding this case for reconsideration. If plaintiffs may challenge the policy, they may do so pre-enforcement. *See, e.g.*, *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). So the Government's argument that RTAA must await enforcement, Opp'n 19 (without cited authority), is erroneous.

As noted in the Introduction, *supra*, and the *Petition*, Pet.32, three FEC Commissioners cite problems with the FEC's PAC-status enforcement policy, which (coupled with 100.22(b)) creates "confusion as to whether a group is required to register and report as a political committee." Pet.23 (citation omitted). The Government's failure to respond to this leaves the identified problem unrebutted, and it is an important reason to grant review.

The Government's arguments about what should be considered in determining "major purpose" reveal precisely why this Court should grant certiorari. As RTAA urges, Pet.26, and the Fourth Circuit held, major purpose "is best understood as an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (emphasis added). Remarkably, the Government totally ignores *Leake* in this context, despite RTAA's em-

phasis on it and its important analytical summation. Instead, the Government argues, inter alia, that this Court's discussion of the major-purpose test in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), does not guide how major purpose should be determined by focusing on the amount of regulable speech in relation to MCFL's total activities. Opp'n 21. What is missing in the Government's argument is what is missing from the policy, i.e., constitutionally defensible standards as to what is considered in determining major purpose and the necessary bright-line protection for free speech and association.

Instead, the Government tries to say that the intrusive investigation required under FEC's vague totality-of-the-circumstances approach to resolving a complaint that a group's major purpose should make it a PAC will be "mitigated by . . . reliance on public documents . . . ." Opp'n 22. The Government cites "App.27a," which says nothing of the sort. And FEC's own *PAC-Status 2* document (*see* Pet.24), setting out its PAC-status policy, states that the "major purpose doctrine requires the Commission to conduct investigations into the conduct of specific organizations that *may reach well beyond publicly available advertisements*." 72 Fed. Reg. 5601 (emphasis added).[7]

There should be bright-line standards here to protect First Amendment rights from such a vague, overbroad, and intrusive enforcement policy. Certiorari is required to fix this problem.

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[7] That courts claim there is *no* major-purpose test raises no new issue but shows this case's national importance. *Compare* Pet.30 *with* Opp'n 22.

Conclusion

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

Respectfully submitted,

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