No. 10-145

In The
Supreme Court of the United States

SPEECHNOW.ORG, *et al.*,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The central question presented by the petition in this case is whether the D.C. Circuit's decision requiring SpeechNow.org to become a PAC merely to make independent expenditures can be squared with this Court's precedents. Petitioners made clear in their petition that it cannot be, for two key reasons. First, as this Court held in *Citizens United v. FEC*, the obligations of PACs – the same obligations that apply to SpeechNow.org – impose significant burdens on speech. *See* Pet. at 10. Second, that burden can be justified only by the government's interest in combating corruption. *Id.* at 13. SpeechNow.org unquestionably poses no threat of corruption because, like Citizens United, it will only make independent expenditures. Moreover, SpeechNow.org will satisfy the interest in disclosure by complying with disclosure provisions nearly identical to those upheld in *Citizens United*. *See* Pet. at 3; App. 22. It follows that SpeechNow.org cannot be required to comply with the PAC burdens that this Court struck down in *Citizens United* unless there is some constitutionally significant difference between the corporations at issue in *Citizens United* and groups like SpeechNow.org.

The D.C. Circuit found no such difference. Indeed, it recognized the obvious applicability of *Citizens United* to this case in striking down the contribution limits that accompanied SpeechNow.org's designation as a PAC. *See* App. 20. But when it came to the remaining provisions of PAC status that applied to SpeechNow.org, the D.C. Circuit inexplicably upheld

them as mere "disclosure" laws despite this Court's conclusion in *Citizens United* that they burden speech. *See id.* Indeed, the D.C. Circuit did essentially what this Court refused to do in *Citizens United*: It carved up the restrictions that apply to groups that must become PACs in order to make independent expenditures, excising the contribution limits but leaving in place the remaining burdens of PAC status. *Cf. Citizens United v. FEC*, 130 S. Ct. 876, 891-92 (2010) (refusing to carve out a narrow exception to § 441b for certain corporations). The result will inevitably be what this Court sought to avoid in *Citizens United* – a slew of new rules, legal tests, and litigation to determine who must endure burdensome PAC regulations in order to speak and who may speak freely.[1]

The government has now made clear that this is precisely what will happen as a result of the D.C. Circuit's decision. According to the government, not only must SpeechNow.org become a PAC in order to make independent expenditures, but *any* group – "incorporated and unincorporated alike" – must do so if it has the "major purpose" of making independent expenditures. *See* Resp. Br. at I (question presented), 21-23. As a result, groups that only occasionally make

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[1] Since the D.C. Circuit's decision, a district court in Minnesota has held that, to make independent expenditures, corporations must either create what amounts to a PAC under state law or contribute to other PACs. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, Civ. No. 10-2938, 2010 U.S. Dist. LEXIS 98498, at *21-29 (D. Minn. Sept. 20, 2010).

independent expenditures need not become PACs and may disclose their independent expenditures and the contributions that fund them under §§ 434(c) and 441d. *Id.* at 17. However, groups like SpeechNow.org that wish to spend the majority of their funds on independent speech must comply not only with those disclosure provisions, but with the registration, organizational, and reporting obligations for PACs as well. *See id.* at 15-16.

The government attempts to justify this position by arguing that *Citizens United* involved entirely different statutory provisions and thus has no bearing on whether any group, corporate or otherwise, must become a PAC under the provisions that apply to SpeechNow.org. *Id.* at 12-13. But this is a distinction without a difference, in that the law treated groups like SpeechNow.org substantially similarly to corporations prior to *Citizens United*. Under § 441b, corporations were prohibited from making independent expenditures themselves, but were permitted to make them through PACs that were subject to source and amount limits on funds and the other obligations of PACs. *See* 2 U.S.C. § 441b(a), (b)(2)(C). Although there is no outright prohibition on unincorporated groups making independent expenditures, SpeechNow.org is defined as a PAC because it intends to raise or spend more than $1,000 and has a "major purpose" of making independent expenditures. *See* App. 55 (2 U.S.C. § 431(4)); App. 224 (FEC Draft Advisory Opinion). Thus, groups like SpeechNow.org faced the same alternative as corporations – refrain

from making independent expenditures or make them through PACs that are subject to funding limits and the other obligations that applied to PACs. This Court held in *Citizens United* that the government could not impose such a choice on corporations. The same principle should apply here.

The government also contends that the Court in *Citizens United* struck down the PAC requirement for corporations because PACs are separate entities. Resp. Br. at 12-13. But that was only one of two grounds on which the Court concluded that PACs were inadequate alternatives to the ban on independent expenditures. As the Court in *Citizens United* stated, "[e]ven if a PAC could somehow allow a corporation to speak – and it does not – the option to form PACs does not alleviate the First Amendment problems with § 441b" because PACs are burdensome. 130 S. Ct. at 897. The Court specifically listed the registration, organizational, and disclosure provisions for PACs as burdensome, and it relied on a portion of the plurality opinion in *MCFL* that focused almost entirely on those same requirements. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 330-32 (2004) (Kennedy, J., dissenting in part) (quoting *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 253-54 (1986) (plurality opinion))). The clear conclusion is that the registration, organizational, and disclosure provisions for PACs – that is, the provisions that apply to SpeechNow.org – impose significant burdens on speech as a matter of law. That is true whether a

group is a corporation or an unincorporated association.

Ultimately, the only salient difference between SpeechNow.org and the corporations at issue in *Citizens United* is the percentage of their budgets they will devote to political speech. SpeechNow.org will devote most of its funds to independent expenditures, so it must become a PAC. Groups like Citizens United, which only occasionally engage in independent speech, need not do so.

The government contends that this is justified because PAC burdens are mere "disclosure" laws. Resp. Br. at 10-11. This is wrong, as Petitioners have made clear, Pet. at 14-21, but regardless of the label or even the level of scrutiny one applies to PAC burdens, the fact remains that no constitutional principle permits the government to impose greater burdens on speakers simply because they decide to devote more resources to protected speech.

Buckley does not support this proposition. As the government admits, the Court in *Buckley* used "major purpose" as a narrowing construction to limit the reach of PAC status in order to avoid vagueness and overbreadth. Resp. Br. at 22. But as *Buckley* itself shows, even laws that are not vague or overbroad can still be unconstitutional. *See Buckley v. Valeo*, 424 U.S. 1, 44-51 (1976); *see also* Pet. at 33-34.

MCFL does not support the government's position. *MCFL* held that the government cannot bar nonprofit corporations that posed no concerns about

corruption from making independent expenditures. *MCFL*, 479 U.S. at 263. The "major purpose" dicta at the end of *MCFL* simply cannot be transformed into a holding that protected speech is subject to burdensome regulations because a party engages in too much of it. This Court rejected that basic premise in *Citizens United* in overturning *Austin v. Michigan Chamber of Commerce*. *See* 130 S. Ct. at 913. Indeed, the Court even noted that the *MCFL* Court had erroneously relied on the "corporate distortion" rationale in discussing § 441b. *See id.* at 883, 912. The *MCFL* dicta can thus be seen as consistent with this erroneous view, in that it implies that the more of its budget a group spends on speech, the more it can be regulated. *See MCFL*, 479 U.S. at 262. That dicta thus cannot justify the government's position.

Finally, *Citizens United* provides no support for the government's position. Nowhere in that decision did this Court even hint that PACs are burdensome only for groups that make only occasional independent expenditures. Indeed, this Court rejected an argument in *Citizens United* that is very similar to the result the government supports in this case. As an alternative to striking down § 441b, the government urged the Court to carve out an exception to the statute for certain nonprofits that would allow them to operate under the Snowe-Jeffords Amendment. 130 S. Ct. at 891. Under that approach, those nonprofits would avoid § 441b's expenditure ban if they only accepted individual donations and maintained those funds in a separate segregated account. *Id.* Here, the

government grudgingly accepts that SpeechNow.org prevailed on its challenge to contribution limits below, yet it contends that in order to make unlimited independent expenditures, SpeechNow.org will have to become a PAC – a far more burdensome option than the segregated account under Snowe-Jeffords. *Compare* 2 U.S.C. § 441b(c)(2)-(3) *with* App. 72-93 (2 U.S.C. §§ 432-434(a)). In *Citizens United*, the Court rejected that approach not only because it would require a tortured interpretation of the statute, but also because it would "require case-by-case determinations" and would chill "archetypical political speech." 130 S. Ct. at 892. This Court should reject the government's and the D.C. Circuit's approach here for the same reason.

The government's claim that PAC burdens are mere disclosure laws, *see* Resp. Br. at 11-12, does not rejuvenate its otherwise unsupportable position. First, that claim is factually incorrect, as the burdens that apply to PACs go well beyond disclosure. *See Citizens United*, 130 S. Ct. at 897-98. In any event, this Court has never held that the government has an interest in requiring the disclosure of every aspect of a group's operations – to say nothing of requiring it to appoint a treasurer, keep all records for three years, open a separate bank account, and comply with a host of other regulations – simply because it wishes to engage in independent political speech. *Cf. NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288, 307-08 (1964) (preventing Alabama from obtaining a civil rights group's membership list in order to protect rights of

association). Indeed, in *Citizens United*, *McConnell*, and *Buckley*, the Court held that disclosure laws nearly identical to those with which SpeechNow.org will comply provided voters with all the information they need about those who engage in independent political speech. *See Citizens United*, 130 S. Ct. at 916; *McConnell*, 540 U.S. at 196-97; *Buckley*, 424 U.S. at 68. Neither the government nor the D.C. Circuit cited any case that would justify imposing more comprehensive and burdensome disclosure laws on speakers simply because they spend more of their money on protected speech.[2]

Thus, even under intermediate scrutiny, the government's and the D.C. Circuit's position would fail. While intermediate scrutiny is less rigorous than strict scrutiny, the government still must show a substantial relationship between the law and its interest and that its interest justifies the burden the law imposes. *See Citizens United*, 130 S. Ct. at 914; *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008). Yet applying disclosure laws – especially as part of the burdensome regulatory scheme for PACs – based *solely* on a group's major purpose of making independent expenditures makes no sense for several reasons.

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[2] The government claims that the FEC and the regulated community have come to rely on the major purpose test. *See* Resp. Br. at 22. However, "reliance interests are important considerations in property and contract cases," but they do not justify restrictions on speech. *Citizens United*, 130 S. Ct. at 913.

First, neither the government nor the public has an interest in knowing more about a group simply because the group devotes more of its resources to independent speech, and the government cites no case to the contrary. Indeed, under the government's approach, smaller groups would be much more likely to be subjected to more comprehensive and burdensome regulations than larger groups, because the costs of any given independent expenditure will necessarily comprise a larger portion of their budgets. *Cf. Citizens United*, 130 S. Ct. at 907-08 (noting that the effect of § 441b is often to prevent smaller and nonprofit corporations from having the same voice in politics as their larger competitors).

Second, the government's and D.C. Circuit's concern that groups that do not report as PACs may "hide" contributions for administrative expenses, *see* Resp. Br. at 17, would apply to any group, whether or not it had a major purpose of making independent expenditures. Donations earmarked for administrative expenses would be just as beneficial to groups with a major purpose as to those without one, so tying disclosure to major purpose is nonsensical.

The same point applies to the government's claim that without PAC reporting, it will not be able to keep track of whether groups that make independent expenditures violate contribution limits or accept contributions from foreign nationals. Resp. Br. at 15. This is equally true whether the group makes a lot of independent expenditures or only a few. Indeed, because SpeechNow.org does not make direct contributions,

there is no reason to single it out as more likely to violate contribution limits than any citizen or group who speaks out about any topic. *Cf. Buckley*, 424 U.S. at 80-81 (holding that independent-expenditure disclosure is not designed to facilitate enforcement of contribution limits). In any event, making contributions above the limits and accepting contributions from foreign nationals are already illegal. *See* 2 U.S.C. §§ 441a(f), 441e(a)(2). Even so, if for some reason SpeechNow.org were to accept a contribution of more than $200 from a foreign national for its independent expenditures, it would still have to disclose that contribution under § 434(c).

At bottom, in the government's view, groups that spend too high a percentage of their funds on independent speech – no matter how small in absolute dollars – are inherently suspicious and thus properly subjected to far-reaching regulation of all their operations. But, as demonstrated above, this view is fundamentally irrational, and it finds no support in this Court's precedents. *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (invalidating speech regulation under intermediate scrutiny "because of the overall irrationality" of the regulatory scheme).

The government also claims, as did the D.C. Circuit, that becoming a PAC would not be much of a burden on David Keating. Resp. Br. at 19-20. Even if this were true, however, it would be irrelevant, because *Citizens United* held that PACs are burdensome as a matter of law. *See* 130 S. Ct. at 894 (stating that it would decide claims facially). Neither the

government nor the lower courts are entitled to decide that PAC regulations are not too burdensome in a particular case, any more than they may decide that independent expenditures sometimes do pose a threat of corruption or that some candidates can be subjected to expenditure limits. As this Court held in *Citizens United*, "[c]ourts, too, are bound by the First Amendment" and may not "draw, and then redraw, constitutional lines" based on the particular speaker or medium of expression. 130 S. Ct. at 891.

The PAC requirements to which this Court referred in *Citizens United* are just as burdensome for SpeechNow.org as they would have been for Citizens United. Indeed, all of the burdens that this Court listed in *Citizens United* will apply to SpeechNow.org.[3] And even if David Keating can "handle" those burdens without being completely silenced, Mr. Keating may not always be available to serve as SpeechNow.org's treasurer, a position for which he receives no compensation.[4] The government simply ignores the reality

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[3] The government correctly notes that, at present, David Keating need not charge SpeechNow.org for the costs of his home, telephone, and Internet because he is currently volunteering his time. *See* 11 C.F.R. § 100.74, .94. That would change, however, if Mr. Keating were one day able to hire others or to be paid himself to operate SpeechNow.org. *See* 11 C.F.R. § 100.52(d)(1). Furthermore, FEC regulations would not exempt costs associated with a fundraiser conducted from Mr. Keating's home. *See* App. 50-51; 11 C.F.R. §§ 100.76-.77.

[4] The government argues that SpeechNow.org's status as a 527 organization shows that the PAC requirements impose little burden on it. *See* Resp. Br. at 20 n.7. But as this Court has

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confronted by many groups forced to operate as PACs. *See* Comm. for Truth in Politics Amicus Br. at 9-20; *see also MCFL*, 479 at 255 n.8 (noting that PACs are burdensome for many groups even if not always for any particular group).

Moreover, as this Court noted in *Citizens United*, time is of the essence during elections. *See* 130 S. Ct. at 898. Groups may not be able to get their message out quickly enough if they must first form burdensome PACs. *See id.* Indeed, under the major purpose test – which requires an intensive case-by-case analysis to determine whether a group must become a PAC – many groups will not even know in advance whether they must form PACs in order to speak. *See* Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5601-02 (Feb. 7, 2007). The uncertainty and burden of a process such as this will surely chill speech. *See Citizens United*, 130 S. Ct. at 892.

CONCLUSION

The D.C. Circuit's decision conflicts with *Citizens United* and *Buckley* and finds no support in this Court's other precedents. The government's defense of that decision shows precisely how the decision will undermine *Citizens United* and the principles on which it was based. This case thus involves both a

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noted, a group's tax status has no bearing on the FEC's authority to regulate it. *See MCFL*, 479 U.S. at 256 n.9.

direct conflict with this Court's decisions and a matter of national importance that justifies this Court's review.

Respectfully submitted,

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