No. 11-1426

In The

Supreme Court of the United States

National Organization for Marriage, Inc. and **American Principles in Action, Inc.**, *Petitioners*,

v.

Walter F. McKee, et al., *Respondents*.

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

Reply to Brief in Opposition

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Corporate Disclosure

Neither NOM nor APIA has a parent corporation. Both are non-stock corporations so no publicly held company owns 10 percent or more of either corporation's stock.

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The Commission on Governmental Ethics and Election Practice ("Commission") characterizes this case as unworthy of this Court's review because it "does not raise any serious issues" nor "show a genuine circuit split." (Opposition ("Opp'n") 17.)

But this case involves the constitutional issue of whether a State may burden a nonprofit groups' speech about ballot measures, and the lower court's decision either creates or adds to a circuit split on several important sub-issues, including (1) the appropriate level of scrutiny for reviewing laws that burden, but do not completely ban, core political speech relating to ballot questions; and (2) whether this Court's "major purpose" analysis applies to state laws. The questions presented in the Petition are of national interest and of wide-reaching effect. Without this Court's guidance, the confusion will deepen and the speech of Petitioners and groups like them will continue to be chilled.

I. This Case Presents Important Questions Requiring the Court's Review.

The Commission downplays the questions presented by the Petition and urges this Court to deny certiorari "[j]ust as the Court denied certiorari in [*National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), *cert denied*, 132 S.Ct. 1635 (2012)]" ("*NOM-I*"). (Opp'n 3.) Yet this Court has recognized the importance of the issues presented, twice now having called for a response. Order of July 3, 2012, *National Organization for Marriage v. McKee*, No. 11-1426 ("*NOM-II*"); Order of Dec. 29, 2011, *NOM-I*, No. 11-599. Moreover, there is

a very important difference between *NOM-I* and this case that makes the case for considering the issues presented here even stronger: *NOM-I* involved the regulation of speech about *candidates*, whereas this case involves the regulation of speech about *ballot questions*. As such, the regulations invoke different state justifications. (Pet. 13-14.) Ballot question advocacy is pure issue advocacy, and should receive the highest protection afforded by the Constitution.

Finally, the Commission's Opposition highlights the harms presented in the Petition, namely, that states are classifying, and some lower courts are upholding, broad laws burdening speech as mere "disclosure." This Petition should be granted to allow this Court to clarify, for example, (1) the appropriate level of scrutiny for laws burdening, yet not entirely banning, speech; and (2) the justifications for burdening ballot-measure speech.

A. The Court Should Clarify the Appropriate Scrutiny for Laws Burdening Political Speech.

The lower court, in evaluating Maine's ballot question committee ("BQC") provisions under exacting scrutiny, is inconsistent with this Court's precedent. (Pet. 8-13.) *See Citizens United v. FEC*, 130 S.Ct. 876, 897-98 (2010).

To evade the conflict, the Commission classifies the BQC provisions as merely requiring "modest disclosures" and, therefore, evaluates them under exacting scrutiny. (Opp'n 2, 17-21.) In so doing, the Commission frames the BQC provisions as "pure disclosure," (Opp'n at 3), and believes the lower

court's decision is consistent with *Citizens United*. (Opp'n 2, 16.)

In *Citizens United*, the requirements imposed on federal PACs were deemed so burdensome as to not be a viable alternative for otherwise banned corporate speech. Those requirements included: (1) registration requirements; (2) recordkeeping requirements; and (3) detailed, ongoing, contribution reporting requirements. *Id*. at 897. The Court then evaluated these laws under strict scrutiny. *Id.* at 898.

Maine's BQC provisions likewise impose: (1) registration requirements, § 1056-B, § 1061; (2) recordkeeping requirements, § 1056-B(4); and (3) detailed, ongoing reporting requirements, § 1056-B, § 1059. (Pet. 9-10.)

The Commission relies instead on Part IV of the *Citizens United* opinion, which upheld some truly minimal disclosure requirements: basic attribution ("not authorized by any candidate") and disclosure ("paid for by xxx organization") requirements. It was "these requirements" that the Court subjected to "exacting scrutiny," not the more onerous PAC reporting requirements characterized as "onerous" in Part III of the opinion. *Citizens United*, 130 S.Ct. at 913-16.

The real concern here is that the "disclosure" requirements are being imposed not for informational purposes but to subject donors far removed from the particular ballot initiative to threats of reprisal, thereby chilling their speech to contribute generally to organizations whose missions they support. This Court acknowledged that real

concern, in *Citizens United*, citing an *amicus curiae* brief submitted by the Alliance Defense Fund discussing "recent events in which donors to certain causes [namely, support for traditional marriage] were blacklisted, threatened, or otherwise targeted for retaliation" and finding those examples "cause for concern" about the chilling effect on speech that disclosure of such donors would have. *Citizens United*, 130 S.Ct. at 916.

Contrary to the Commission's claim, the disclosure provisions upheld in *Citizens United* are not "similar to those at issue here in ballot-question elections." (Opp'n 2, 16.) But the fact that both Petitioners and the Commission rely on *Citizens United* for their diametrically-opposed positions demonstrates the need for further clarity in this area. This Petition should be granted so that this Court may provide the clarification only it can give.

B. Circuits Are Split on the Scrutiny for Laws Burdening Political Speech.

Furthermore, the lower court's decision deepens the circuit split on this issue. On one side is the Fourth Circuit.[1] On the other side are the Ninth and, now, the First Circuit. (Pet. 11-13.)

Regarding the Fourth Circuit authority relied upon by Petitioners, the Commission attempts to dismiss it as irrelevant because it "predates *Citizens United* and involves a state law that imposed limits on contributions and expenditures." (Opp'n 20.) But

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[1] Although not included in the Petition, the Tenth Circuit has also applied strict scrutiny to laws that burden political speech. *See Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007).

such an attempt at dismissal does not address the Fourth Circuit's statements regarding the severe burdens that come from political committee status. *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 286 (4th Cir. 2008). Just as the statutes evaluated in *Leake*, the BQC provisions impose substantial burdens and should be evaluated under strict scrutiny. (Pet. 11-12.)

The Commission, in passing, cites a Fourth Circuit decision issued after the Petition was filed that analyzed provisions imposing "disclosure and organizational requirements" under exacting scrutiny. *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 548-49 (4th Cir. 2012) ("*RTAA*"). Instead of addressing any intra-circuit conflict, the Commission implies that *RTAA*'s holding is *a result of Citizens United*. (Opp'n 21.) However, the Fourth Circuit found that "*even after Citizens United*, it *remains* the law that provisions imposing disclosure obligations are reviewed under . . . exacting scrutiny." *RTAA*, 681 F.3d at 549 (emphasis added) (citation and quotation omitted). The Fourth Circuit did not find that *Citizens United* overruled *Leake*; rather, it found that the disclosure and organizational requirements applied to RTAA were subject to the lesser "exacting" scrutiny. *Id*. If *Leake* and *RTAA* are in conflict, the earlier panel opinion should control. *See McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004), *cert denied*, 554 U.S. 974 (2005).

Moreover, the Eighth Circuit is currently reviewing *en banc* a case where the majority concluded, and the dissent disagreed, that the challenged restrictions, labeled "disclosure" by the

State, were subject to lesser scrutiny. *Minnesota Citizens Concerned for Life v. Swanson*, 640 F.3d 304, 321 (8th Cir. 2011) (Riley, J. *dissenting*), *pet'n for reh'g en banc granted and opinion vacated*, 2011 U.S. App. LEXIS 26399 (July 12, 2011). The State chose not to address this uncertainty.

As the Petition showed, (Pet. 12-13), there is growing confusion regarding how to evaluate laws burdening speech. This case presents an opportunity for this Court to eliminate the confusion and clarify the appropriate level of scrutiny for such laws.

C. The Court Should Clarify Whether the Informational Interest Justifies the Burdens Imposed by the BQC Provisions.

The Commission does not dispute that the only potential state interest to justify the BQC provisions is the informational interest. (Pet. 14; Opp'n 21.) But the Commission mischaracterizes Petitioners' position. Petitioners seek clarification on whether, even under a lowered scrutiny, the informational interest justifies the imposition of the onerous BQC provisions given the ballot-measure context.

The Commission's reliance on *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), for the implication that the informational interest justifies the BQC provisions is misplaced. (Opp'n 21.) First, that case involved this Court carefully reviewing, and only upholding some, disclosure provisions. *ACFL*, 525 U.S. at 203. This Court left intact those disclosure provisions that inform voters of "the source and amount of money spent by proponents to get a measure on the ballot." *Id*. The Court found that the informational benefit of

the other provisions (requiring "the names of paid circulators and amounts paid") was "hardly apparent and ha[d] not been demonstrated." *Id*.

Similarly, the informational "benefit" of the BQC provisions is not apparent. This is especially true of Maine's ongoing reporting requirement. §§ 1056-B, 1059. The Commission does not explain how ongoing reporting requirements, even when there is no activity to report, provide *any* informational benefit to the public.

The Commission defends the BQC provisions by stating that this "Court has never held that a state's interest in disclosure fails to justify the type of registration and periodic reporting requirements" found in the BQC provisions. (Opp'n 23.) This statement is a truism. Petitioners agree this case presents an important question for this Court to settle.

II. This Court Should Clarify the Thresholds Subjecting PAC Burdens.

This case presents the important question of whether the threshold tests for determining PAC status in the candidate context (i.e. that the organization is either under the control of a candidate or has affecting the outcome of elections as its "major purpose") should apply in the ballot measure context. (Pet. 17-19.)[2]

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[2] The Commission claims that Petitioners' argument has "shifted from what they argued below" and is therefore "foreclosed." (Opp'n at 25.) As is evident in the lower court's opinion, (App. 8a, n.5), Petitioners' argument is not new. Petitioners' argument remains based upon this Court's holding in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

The Commission asserts that Petitioners' are "read[ing] far too much in *Buckley*." (Opp'n 25.) Under the Commission's reading, this Court's analysis in *Buckley* has no bearing on state regulations. Yet this Court's precedent must have meaning beyond case-specific facts as evidenced by the courts that have applied *Buckley*'s major-purpose test to state law. *See*, *e.g.*, *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008); *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010) ("*NMYO*"). (*See also* Pet. at 18-19.) And the *Buckley* Court rendered the judgment it did in order to avoid serious constitutional concerns that otherwise existed if the federal statute were read broadly to cover groups without a major electioneering purpose—the very broad scope that Maine has adopted for itself.

The Commission next asserts that the lower court in *NOM-I* was right to find that the major-purpose test was inapplicable as to apply it would "'yield perverse results.'" (Opp'n 26.) Yet it is the lack of a brightline constitutional threshold that may lead to a perverse result, not the opposite. Indeed, First Amendment chill, as experienced here by NOM and APIA, cannot be accepted in place of holding states to constitutional standards. The Commission fails to explain why Maine is unable to craft appropriate disclosure requirements, ones that do not impose onerous political committee status and the attendant burdensome regulations on non-PAC organizations, in order to cure the apparent harm it seeks to correct. If, as here, Maine chooses to impose political committee status, such designations should comply

with the widely-recognized constitutional guideline articulated in *Buckley*.

As explained in the Petition, there is an ever-widening circuit split as to the applicability of *Buckley*'s major-purpose test. (Pet. 18-19.) The Commission attempts to dismiss the cases that simply apply or reference the major-purpose test. (Opp'n at 27-28). Petitioners maintain that the lower court's decision is in conflict with these cases. (Pet. 18-19).

The only cases the Commission discusses in any detail are *Leake* and *NMYO*. (Opp'n 28-30.) Regarding *Leake*, the Commission admits that the Fourth Circuit applied *Buckley*'s major-purpose test to North Carolina law. (Opp'n 28-29.) Yet it argues that, because Maine's law "differs substantially from the North Carolina statute," the First and Fourth Circuits are not in conflict. (Opp'n 29.) But the Commission has highlighted the circuit split: the First Circuit found *Buckley*'s major-purpose test to be "'an artifact'" (App. 9a) and the Fourth Circuit called it a "directive." *Leake*, 525 F.3d at 287. The circuit split is clear.

Regarding the Tenth Circuit, the Commission tries to distinguish *NMYO* based on its specific facts and statutory scheme. (Opp'n 29-30.) But the Commission cannot help but acknowledge that the Tenth Circuit found New Mexico's statute to be "incompatible with *Buckley*." (Opp'n 29.) The Commission claims there is no circuit split because New Mexico's statute "does not resemble Maine's BQC law." (Opp'n 30.) But the fact that Maine has a $5,000 trigger and New Mexico had only a $500

trigger is not material. Both statutes involve artifical triggers that are not based on the nature of the organization itself. Moreover, the specific facts of *NMYO* highlight the inconsistencies amongst the circuits. Under the lower court's opinion, the *NMYO* plaintiffs could be regulated as a political committee as they spent "approximately $15,000," *NMYO*, 611 F.3d at 679, well over Maine's $5,000 trigger.

This Court should grant this Petition in order to provide guidance on the important question of the proper threshold tests for defining organizations as political committees in the ballot measure context.

III. The Court Should Resolve Whether PAC Status May Be Imposed Based on Subjective Donor Intent.

The Commission contends that Maine's contribution definition is not infirm as it "depends on the 'objectively reasonable meaning' of the language of petitioners' solicitation." (Opp'n 30.) That, of course, is not the interpretation of Maine's statute given recently by a Maine court. As the Commission itself had to acknowledge, a Maine state court judge recently acknowledged that a "donor's knowledge and belief may be part of the inquiry under section 1056-B(2-A)." (Opp'n 30, n.7.) Apparently this Court's holding in *FEC v. Wisconsin Right to Life* that a campaign finance regulation which is triggered by subjective donor intent is un-constitutionally vague requires further clarification, and this case presents a clean opportunity to provide it. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 473-74 (U.S. 2007) ("*WRTL-II*").

Similarly, this Court's decision in *WRTL-II*, precludes campaign finance restrictions that consider "intent and effect" and "context" to determine whether contributions and expenditures are made for the purpose of supporting or opposing a particular ballot question. *WRTL-II*, 551 U.S. at 467-73. That the Commission claims that the lower court's decision is "faithful to [*WRTL-II*]" (Opp'n 31), only highlights the need for further clarity from this Court.[3]

Finally, the Commission contends that a portion of Petitioners' vagueness challenge is moot because of an amendment to the Maine statute at issue. But the amendment was enacted in June 2011, seven months *before* the First Circuit rendered its decision below. The First Circuit correctly recognized that the amendment simply "streamlined" the language of the statute, noting that "[t]he changes do not in any way affect the outcome of this case." (App. 3a n.1.) Before June 2011, BQC status was triggered when an organization received contributions or made expenditures totaling $5,000 "for the purpose of initiating, promoting, defeating, or influencing in any way a campaign." Me. Pub. Laws 2011, ch. 389, § 38. After the amendment, the BQC status was triggered when the contributions or expenditures were made "for the purpose of initiating or influencing a campaign," *id.*, and "influence" was defined to mean "promote, support, oppose, or defeat," *id.* at § 8. That change does not affect

[3] That Petitioners did not press their facial challenge in the Petition creates no vehicle problem for consideration of its as-applied challenge, of course, which the lower court fully addressed, as the Commission itself recognizes. (Opp'n 14.)

Petitioners' vagueness challenge to the fact that the statute is triggered by the subjective intent of the donor.

This Court should grant this Petition to clarify that the State may not burden speech with tests based not on speech itself but on donor's unspecified "intent."

IV. The Circuits Are Split on the Standard of Review and the Substance of Assessing Low Dollar Triggers for Reporting of Contributions Received and Expenditures Made by Non-PACs in Ballot-Measure Campaigns.

Petitioners noted in their Petition that there was a circuit split even with regard to the standard of review to be applied in assessing the threshold dollar amount that triggers reporting of contributions and expenditures. The First Circuit applied a "wholly without rationality" standard, while the Fourth Circuit has applied "exacting scrutiny" to that inquiry. The Commission acknowledges that the Fourth Circuit applied the heightened scrutiny, but apparently discounts the circuit split on *that* issue because the Fourth Circuit upheld a much greater reporting threshold. (Opp'n 36-37.) That does not eliminate but rather confirms the circuit split on the standard of review issue.

On the merits, the issue is whether the state's informational interests in ballot-measure campaigns is weaker than in candidate elections. On that substantive point, the Tenth Circuit in *Sampson v. Buescher* clearly held that the informational interest supporting low thresholds in candidate elections "does not apply in the ballot-measure context, where

'[n]o human being is being evaluated.'" 625 F.3d 1247, 1256 (10th Cir. 2010). That the Tenth Circuit dealt with an even lower threshold than the $100 threshold in Maine's statute at issue here does not alter that unambiguous holding, which is at odds with the First Circuit's view that the state's informational interests in candidate and ballot-measure elections are the same.

Certiorari is warranted both to address the standard of review to be applied to the reporting thresholds, and whether the deference this Court has given in the candidate-campaign context applies to the same extent in issues campaigns.

Conclusion

For the foregoing reasons stated above and previously, the petition for certiorari should be granted.

Respectfully submitted,

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