No. 09-724

In the Supreme Court of the United States

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

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QUESTION PRESENTED

Whether the district court abused its discretion by declining to preliminarily enjoin the Federal Election Commission (FEC) and the Department of Justice from enforcing, both facially and as applied:

(a) an FEC regulation defining the term "expressly advocating," 11 C.F.R. 100.22(b);

(b) an FEC regulation regarding contributions received in response to solicitations, 11 C.F.R. 100.57;

(c) the FEC's approach to determining political committee status, as explained in *Federal Register* notices; and

(d) an FEC regulation regarding corporation-funded "electioneering communications," 11 C.F.R. 114.15.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 575 F.3d 342. The opinion of the district court (Pet. App. 19a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on August 5, 2009. A petition for rehearing was denied on October 6, 2009 (Pet. App. 56a). The petition for a writ of certiorari was filed on December 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought a preliminary injunction against (1) enforcement of three regulations promulgated by the Federal Election Commission (FEC or Commission),

and (2) the Commission's approach to determining whether particular entities are "political committees" for purposes of federal campaign-finance laws. The district court denied preliminary injunctive relief, Pet. App. 19a-53a, and the court of appeals affirmed, *id.* at 1a-17a.

1. The FEC 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); see 2 U.S.C. 438(a)(8) and (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 the Act. See 2 U.S.C. 437g(d).

2. a. FECA defines the term "contribution" to include anything of value given "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i). Similarly, 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). Although FECA generally prohibits corporations from making any such expenditures, 2 U.S.C. 441b(a), this Court recently held that provision's restrictions on corporate independent expenditures to be unconstitutional, see *Citizens United* v. *FEC*, 130 S. Ct. 876, 913 (2010), and even before that decision the expenditure ban did not apply to corporations that qualified as "political committees," see 11 C.F.R. 114.12(a).

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court reviewed FECA's original prohibition on expenditures of more than $1000 "relative to" a federal candidate. *Id.* at 39-44. To avoid vagueness concerns, the Court construed that provision "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 by defining the term "independent expenditure" as a communication "expressly advocating the election or defeat of a clearly identified candidate." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 102(g)(3), 90 Stat. 479 (2 U.S.C. 431(17)).

The Commission subsequently promulgated a regulatory definition of the statutory term "expressly 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). Subsection (b) includes any communication that has an "electoral portion" that is "unmistakable [and] unambiguous" and cannot reasonably be construed to convey any meaning except to encourage a candidate's election or defeat. 11 C.F.R. 100.22(b).

Citing this Court's limiting construction of FECA's "expenditure" definition in *Buckley*, a number of lower courts held that Congress's constitutional authority to regulate campaign expenditures is limited to communications containing "magic words" of advocacy, such as "vote for" or "vote against." See, *e.g.*, *FEC* v. *Christian Action Network, Inc.*, 110 F.3d 1049, 1052-1055 (4th Cir.

1997). In *McConnell* v. *FEC*, 540 U.S. 93 (2003), however, this Court rejected the argument that the government's regulatory power is constitutionally limited to "magic words" of advocacy. *Id.* at 190-193. The Court explained that *Buckley*'s "express advocacy limitation * * * was the product of statutory interpretation rather than a constitutional command." *Id.* at 191-192.

b. Under FECA, any "committee, club, association, or other group of persons" that receives over $1000 in contributions or makes over $1000 in expenditures in a calendar year is a "political committee." 2 U.S.C. 431(4)(A). 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 under $200. See 2 U.S.C. 433, 434(a)-(b). No person may contribute more than $5000 per calendar year to any one political committee, other than a political party committee. 2 U.S.C. 441a(a)(1)(C).

In *Buckley*, this Court concluded 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—and may therefore receive contributions of more than $5000 per year from each donor—unless its "major purpose" is the nomination or election of federal candidates.

In February 2007, the Commission published in the *Federal Register* an Explanation & Justification explaining the Commission's decision not to promulgate a revised 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. *Political Committee Status*, 72 Fed. Reg. 5595; 26 U.S.C. 527(a) and (e)(1). The notice stated that the Commission, rather than promulgating a new regulation, would continue its longstanding practice of determining each organization's major purpose on a case-by-case basis. See 72 Fed. Reg. 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, and it explained that those descriptions cumulatively "provid[ed] considerable guidance to all organizations" regarding the criteria that are used to apply the "major purpose" test. See *id.* at 5595, 5605-5606.

c. FECA does not provide specific criteria for determining whether a particular donation is made "for the purpose of influencing any election" and therefore constitutes a "contribution." 2 U.S.C. 431(8)(A)(i). By regulation, the Commission has defined the term "contribution" to include a "deposit of money * * * made by any person in response to any communication * * * if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. 100.57(a).

On September 18, 2009, the D.C. Circuit declared that regulation unlawful. *EMILY's List* v. *FEC*, 581 F.3d 1, 17-18 (D.C. Cir. 2009). The Commission has accordingly announced that the regulation "will not be en-

forced." *FEC Statement on the D.C. Circuit Court of Appeals Decision in* EMILY's List v. Federal Election Commission (Jan. 12, 2010), http://www.fec.gov/press/press2010/20100112EmilyList.shtml. On March 11, 2010, the Commission approved the repeal of Section 100.57 in its entirety, effective April 18, 2010 (the required 30 days after publication in the *Federal Register*). See *Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees*, 75 Fed. Reg. 13,223 (2010).

d. The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, defines the term "electioneering communication," in the context of a presidential election, as a "broadcast, cable, or satellite communication" that (a) refers to a clearly identified presidential candidate, and (b) is made within sixty days before the general election or thirty days before a primary election or convention. 2 U.S.C. 434(f)(3)(A)(i). BCRA prohibited corporations (other than incorporated political committees) and unions from making any "direct or indirect payment * * * for any applicable electioneering communication." 2 U.S.C. 441b(b)(2).

This Court initially upheld the constitutionality of this financing restriction for electioneering communications "to the extent that the issue ads * * * are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206; see *id.* at 189-194, 203-208; *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 465 (2007) (*WRTL*). The Chief Justice's controlling opinion in *WRTL* explained that a communication is "the functional equivalent of express advocacy" if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551

U.S. at 469-470. The Commission then codified that standard in a regulation. 11 C.F.R. 114.15. Subsequently, however, this Court held the financing restriction unconstitutional in its entirety. See *Citizens United*, 130 S. Ct. at 913. The Commission has accordingly announced that it will no longer enforce either the regulation or the statutory restriction on the financing of electioneering communications. *FEC Statement on the Supreme Court's Decision in* Citizens United v. FEC (Feb. 5, 2010), http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

3. Petitioner The Real Truth About Obama, Inc., is a nonprofit Virginia corporation. Petitioner incorporated on July 24, 2008, and it filed its complaint in this case six days later. Pet. App. 2a.

In its complaint, petitioner alleged that it had developed two radio advertisements, entitled *Change* and *Survivors*. Pet. App. 20a-22a. *Change* purported to provide "the real truth about Democrat Barack Obama's position on abortion," using an "Obama-like voice." *Id.* at 20a-21a. That voice stated, in a first-person declaration, that then-Senator Obama wished to provide federal funds for every abortion performed in the United States, legalize partial-birth abortion, and "[g]ive Planned Parenthood lots more money." *Id.* at 20a. 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 21a. *Survivors* stated that 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 21a-22a.

Petitioner alleged that it intended to broadcast these advertisements during the 60-day period preceding the 2008 general election. See Pet. App. 21a. Petitioner further alleged that it had developed a fundraising solicitation. *Id.* at 22a-24a. Petitioner did not allege that it had raised, attempted to raise, or spent any funds toward the production or distribution of the ads, or for any other purpose.

4. Petitioner moved for a preliminary injunction to preclude implementation of the FEC regulations described above and the approach used by the Commission to determine whether particular entities are "political committees." Petitioner contended that those aspects of the FEC's regulatory regime are unconstitutional, both on their face and as applied to *Change* and to petitioner's planned solicitation. Petitioner later filed a second motion for a preliminary injunction, which sought to enjoin the Commission's enforcement of its regulations against *Survivors*.

In an order dated September 11, 2008, the district court denied the motions for preliminary injunctions. Pet. App. 54a-55a. On September 24, 2008, the district court issued a memorandum opinion holding that petitioner did not satisfy any of the requirements for preliminary injunctive relief. *Id.* at 19a-53a. Petitioner appealed the denial of its preliminary injunction motions and sought an injunction pending appeal, which both the district court and the court of appeals denied. Civ. No. 3:08-483 Docket entry No. 81 (E.D. Va. Sept. 30, 2008); 08-1977 Docket entry No. 35 (4th Cir. Oct. 1, 2008).

5. The court of appeals affirmed the denial of petitioner's preliminary-injunction motions. Pet. App. 1a-17a.

The court of appeals held that the case was governed by the test set forth in *Winter* v. *NRDC*, 129 S. Ct. 365 (2008), which requires a plaintiff seeking a preliminary injunction to "establish '[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" Pet. App. 4a (brackets in original) (quoting *Winter*, 129 S. Ct. at 374). The court held that *Winter* had effectively overruled its earlier precedent, *Blackwelder Furniture Co. of Statesville* v. *Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), under which the court had applied a "balance-of-hardship test" to preliminary-injunction motions. Pet. App. 4a-7a. Applying the *Winter* test, the court of appeals held that the district court had not abused its discretion in denying petitioners' motions.

The court of appeals first held that petitioner had not shown a likelihood of success on the merits of any of its claims. The court concluded that 11 C.F.R. 100.22(b) is "facially consistent with," and 11 C.F.R. 114.15 "mirrors," the test (*i.e.*, whether an advertisement "'is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,'" *WRTL*, 551 U.S. at 470 (opinion of Roberts, C.J.)) set forth in the controlling opinion in *WRTL*. Pet. App. 11a, 13a. Regarding 11 C.F.R. 100.57, the court noted that petitioner was unlikely to prevail on its claim that the language was unconstitutionally vague because the Fourth Circuit had "expressly sanctioned" the "support or oppose" standard in a prior case. Pet. App. 12a-13a (citing *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274, 301 (4th Cir. 2008)). The court also held that petitioner had failed to demonstrate a likelihood of suc-

cess on the merits as to the Commission's case-by-case approach to determining political-committee status, because of "the similarity [between] the [Commission's] approach * * * and the positions taken by the courts," including this Court, in applying the major-purpose test. *Id.* at 14a-15a. The court made clear that its likelihood-of-success analysis did not definitively resolve the merits of petitioner's constitutional challenges, which remain pending in the district court. *Id.* at 10a.

The court of appeals then considered the other preliminary-injunction factors. The court noted the district court's finding that petitioner faced no irreparable injury from the enforcement of the regulations because none of the challenged provisions imposed any limits on petitioner's spending and petitioner thus "was free to disseminate its message and make expenditures as it wished." Pet. App. 16a; see *id.* at 51a. The court of appeals did not decide "whether the district court was correct in this regard." *Id.* at 16a. Instead, the court held that the district court had reasonably concluded that the public-interest factor of the analysis favored continued enforcement of the regulations while this litigation is pending and outweighed any harm that petitioner might anticipate during that period. *Id.* at 16a-17a.

DISCUSSION

The Fourth Circuit correctly stated and applied the preliminary-injunction standards established by this Court. As a result of intervening decisions of this Court and the D.C. Circuit, however, the FEC has since determined that it will no longer enforce two of the regulatory provisions at issue in this case. With respect to those regulations, the Court should grant the petition, vacate the judgment below, and remand with instructions to

dismiss petitioner's claims as moot. In all other respects, the petition should be denied.

1. The Fourth Circuit correctly stated and applied *Winter*'s preliminary injunction standard. See Pet. App. 4a, 5a-7a, 10a, 15a-16a. Focusing on a snippet of the court of appeals' discussion, in which the court characterized the preliminary-injunction standard as "stringent" and the movant's burden as "heavy," *id.* at 10a, petitioner argues (Pet. 8-10) that the court of appeals erroneously "substituted" a "*heightened* version" of this standard. That argument lacks merit. The court below set forth the *Winter* test verbatim (Pet. App. 4a; see *id.* at 7a, 15a-16a) and faithfully applied it to the facts of this case. This Court has long described the preliminary-injunction standard as "stringent." *E.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). And the court of appeals characterized the movant's burden as a "heavy" one in explaining *Winter*'s holding that a mere possibility of success is not enough, see Pet. App. 10a (citing *Winter*, 129 S. Ct. at 375-376), and that more permissive standards—including the court of appeals' own former standard—conflict with *Winter*, *id.* at 5a-7a.[1]

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[1] Petitioner also asserts (Pet. 11-14) that this Court's review is warranted to decide whether "speech-protective standards" should replace the ordinary preliminary-injunction factors in First Amendment cases. A similar contention is raised in the petition for a writ of certiorari in *Doe* v. *Reed*, No. 09-559 (to be argued Apr. 28, 2010), which also involves review of a preliminary injunction in a First Amendment case. See Pet. at i, 29-31, *Doe*, *supra* (No. 09-559). There is no need to hold the petition in this case pending the disposition of *Doe*, however. The petitioners in that case have not addressed the issue any further in their merits brief, see Pet. Br. at 54, *Doe*, *supra* (No. 09-559) (stating that "further development of this argument is precluded by space limitations"),

There is also no merit to petitioner's contention (Pet. 10-11) that the court of appeals' references to petitioner's burden conflict with *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Petitioner suggests that, because it has asserted First Amendment claims as to which the government bears a heightened burden of justifying the challenged regulations, petitioner cannot be required to demonstrate that the criteria for a preliminary injunction have been satisfied. The decision in *O Centro*, however, did not alter the settled principle that a plaintiff who seeks a preliminary injunction must show that it is likely to suffer irreparable injury, that the balance of equities tips in its favor, and that an injunction is in the public interest. That principle applies regardless of the nature and source of the plaintiff's substantive claims. See, *e.g.*, *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (even when the plaintiff's claim on the merits triggers strict scrutiny, the court "considers whether the plaintiff has shown irreparable injury" in considering preliminary injunctive relief); see generally *Winter*, 129 S. Ct. at 374. In any event, petitioner is incorrect in asserting that all of its claims trigger strict scrutiny. See, *e.g.*, Pet. App. 12a, 13a, 43a, 48a (discussing petitioner's vagueness challenges); *id.* at 46a (discussing petitioner's challenge to the FEC's statutory authority).[2]

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making it unlikely that the holding in *Doe* will meaningfully affect this case.

[2] There is no need for plenary review simply to reaffirm the importance of preliminary injunctions in time-sensitive election cases, which petitioner emphasizes at length (Pet. 11-12, 14, 34). The courts below recognized the time-sensitivity of this case: petitioner was denied preliminary relief in the district court and court of appeals four times in the 64-day period between petitioner's filing of its complaint on July 30,

2. The court of appeals correctly held that the district court did not abuse its discretion in declining to preliminarily enjoin the enforcement of 11 C.F.R. 100.22(b) or the FEC's approach to determining political-committee status. Further review is not warranted.

a. As an initial matter, the current posture of the case weighs heavily against this Court's review. The court of appeals made clear that it was not ruling definitively on the merits of petitioner's claims, but rather holding only that petitioner had not shown a sufficient likelihood of success to be eligible for preliminary injunctive relief. Pet. App. 10a. In addition, the candidate against whom petitioner sought to advertise—then-Senator Obama—is not currently on the ballot anywhere. Although petitioner may well be able to show that its claims remain justiciable if petitioner plans to run the same or similar advertisements in future elections, see *WRTL*, 551 U.S. at 461-464; *id.* at 504 n.1 (Souter, J., dissenting), petitioner appears to have no present need for the extraordinary remedy of a preliminary injunction. Proceedings in the district court are stayed and will be free to resume once the court of appeals' mandate issues.

b. The court of appeals correctly concluded that petitioner was not likely to prevail in its challenge to 11 C.F.R. 100.22(b). Petitioner contends that it is at risk of being deemed a political committee by virtue of spending at least $1000 on communications that "expressly advocat[ed]," within the meaning of Section 100.22(b), against then-Senator Obama, a federal candidate. See

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2008, and the Fourth Circuit's denial of an injunction pending appeal on October 1, 2008. See p. 8, *supra*.

2 U.S.C. 431(4)(A) and (17). Section 100.22(b) covers any communication that

> [w]hen taken as a whole * * * could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Petitioner contends that the First Amendment does not permit communications meeting that definition to be regulated, and that petitioner was therefore likely to succeed on the merits in its challenge to Section 100.22(b). Petitioner asserts that the regulation is invalid because it (a) allegedly encompasses communications that are not "unambiguously campaign related" (Pet. 30-33), and (b) is not limited to electoral advocacy that contains "magic words" (Pet. 14-18). Both contentions lack merit.

i. As the court of appeals suggested (Pet. App. 12a), Section 100.22(b) comports with petitioner's proffered "unambiguously campaign related" test. On its face, the regulation requires that "[t]he electoral portion of the communication [be] unmistakable, unambiguous, and suggestive of only one meaning," *i.e.*, "advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. 100.22(b). Any communication that unambiguously encourages the defeat of a specific candidate is, by definition, unambiguously campaign-related. Thus, even if the Constitution prohibits regulation of

communications that are not unambiguously campaign-related, Section 100.22(b) would not extend beyond that limit.

The correctness of the court of appeals' conclusion is confirmed by the lead opinion in *WRTL*. That opinion reiterated *McConnell*'s holding that Congress may regulate the funding of certain communications that are "the functional equivalent of express advocacy," *i.e.*, that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-470. Petitioner acknowledges (Pet. 32-33) that the First Amendment permits regulation of communications that meet the standard set out in *WRTL* (which petitioner calls the "appeal-to-vote test"). See *WRTL*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.) (rejecting vagueness concern). But the *WRTL* standard is nearly identical to the test in Section 100.22(b): Each inquires whether a particular communication can reasonably be interpreted as something other than candidate advocacy. Pet. App. 11a-12a.[3] To the extent the standards differ, Section 100.22(b) is narrower than the *WRTL* test, as the regulation requires an "unambiguous" electoral portion, 11 C.F.R. 100.22(b)(1), while the lead opinion in *WRTL* looks to the "mention" of an elec-

[3] Both tests avoid vagueness by refusing to consider the subjective intent of the speaker. Compare *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,295 (1995) (explaining that "the subjective intent of the speaker is not a relevant consideration"), with *WRTL*, 551 U.S. at 472 (opinion of Roberts, C.J.) ("To the extent th[e] evidence goes to WRTL's subjective intent, it is again irrelevant.").

tion and similar "indicia of express advocacy." See *WRTL*, 551 U.S. at 470.[4]

This Court's recent decision in *Citizens United* does not change the analysis. Although the Court held 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 *WRTL* test—and are not unambiguously campaign-related—can constitutionally be subject to other forms of regulation, such as disclosure requirements. *Id.* at 915.

ii. Petitioner also argues (Pet. 15-18) that the regulation of express advocacy is constitutionally limited to

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[4] Petitioner asserts that the lead opinion in *WRTL* "specifically acknowledged that the [*WRTL*] test is impermissibly vague" as applied to any speech other than electioneering communications. Pet. 17 (citing *WRTL*, 551 U.S. at 474 n.7). The lead opinion in *WRTL* says no such thing, and indeed dedicates the entire cited footnote to *rebutting* the argument that the only sufficiently clear constitutional standard would be a magic words test. The lead opinion did not hold that its own test would be impermissibly vague if not tethered to BCRA's statutory criteria for electioneering communications. And although, as petitioner asserts (Pet. 33), language in *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008), might be read to suggest that the statutory definition of an electioneering communication also has constitutional significance, see *id.* at 297-299, the court of appeals here saw no conflict with its own precedent. See Pet. App. 12a (distinguishing *Leake*). Even if the court of appeals' discussion of petitioner's likelihood of success could be said to conflict with the holding of *Leake*, an intracircuit conflict would not warrant this Court's review. Petitioner's other attempts to establish a conflict with Fourth Circuit decisions (Pet. 15, 23, 24) similarly would not justify review.

"magic words" of advocacy.[5] But as the foregoing discussion demonstrates, the regulation of election-related communication is not so confined. Six Members of the Court in *WRTL* 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). Petitioner is therefore wrong to attach controlling significance to the fact that Section 100.22 defines the statutory term "expressly advocating," rather than "electioneering communication" or "functional equivalent of express advocacy." See Pet. 17, 33. That fact lacks significance in the First Amendment analysis: what matters, as the court of appeals recognized, is that the functional equivalent of express advocacy may constitutionally be regulated.

In *McConnell*, this Court squarely held that Congress's authority to regulate election-related communications extends beyond communications that contain "magic words." See *McConnell*, 540 U.S. at 190-194.[6]

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[5] Petitioner asserts as well (Pet. 18) that "Section 100.22(b) is also beyond statutory authority." The thrust of petitioner's argument in the court of appeals, however, was that Section 100.22(b) is an impermissible exercise of the Commission's statutory authority because it transgresses *constitutional* limits on the regulation of campaign-related speech. See Pet. C.A. Br. 20-29. The Fourth Circuit so understood petitioner's argument: the court explained that petitioner had failed to show a likelihood of success on the merits of its challenge to Section 100.22(b) because the court "cannot conclude that [the regulation] is likely unconstitutional." Pet. App. 11a; see *id.* at 10a-12a.

[6] Congress expressly provided in BCRA that amending FECA to reach electioneering communications had no effect on the Commission's regulatory definition of express advocacy. 2 U.S.C. 434(f)(3)(A)(ii)

As Justice Thomas noted in dissent, that holding "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). Those decisions included *Christian Action Network*, *supra*; *Virginia Society for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (relying on *Christian Action Network*); and the other pre-*McConnell* cases that petitioner cites (Pet. 15-16 & nn.8 & 10) for the purported disagreement among the courts of appeals on this issue. As Justice Thomas further noted, the only express-advocacy decision that *McConnell* did not cast into doubt was *FEC* v. *Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987)—the case from which the Commission derived the test codified at Section 100.22(b), see *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292-35,295 (1995).

The three post-*McConnell* court of appeals cases (none of which involved preliminary injunctions or FECA) on which petitioner relies (Pet. 16 & n.9) do not support the proposition that express advocacy "is a magic-words test." In one of those decisions, the court of appeals recognized in dicta that the court in *Furgatch* had construed express advocacy under FECA in a manner identical to Section 100.22(b). See *ACLU* v. *Heller*, 378 F.3d 979, 985 (9th Cir. 2004). In the other two cases, the courts of appeals applied a magic-words interpretation of express advocacy to cure vagueness problems in a state statute, while recognizing that such an interpre-

("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.").

tation "is not constitutionally mandated." *Center for Individual Freedom* v. *Carmouche*, 449 F.3d 655, 665-666 & n.7 (5th Cir. 2006), cert. denied, 549 U.S. 1112 (2007); accord *Anderson* v. *Spear*, 356 F.3d 651, 664-665 (6th Cir.), cert. denied, 543 U.S. 956 (2004).

c. The court of appeals also correctly held that petitioner was not likely to prevail in its challenge to the Commission's explanation of how it applies the major-purpose test for political-committee status.

i. Under the Administrative Procedure Act (APA), courts may hear challenges only to "final agency action." 5 U.S.C. 704. Final agency action consummates the agency's decision-making process and determines the rights and obligations of parties. *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). But the primary purpose of the Commission's notice was to explain why a broad regulation was *not* created; the notice does not purport either to establish a binding norm or to decide any entity's legal status. Rather, 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 p. 5, *supra*. Petitioner thus has not identified any final agency action subject to APA review.[7]

ii. Even if the Commission's notice regarding political-committee status were subject to an APA challenge, the court of appeals did not err in concluding that such a challenge is unlikely to succeed.

Under the major-purpose test, an organization will not be regulated as a political committee unless its "major purpose * * * is the nomination or election of a can-

[7] Although the final-agency-action point was raised in the courts below, see, *e.g.*, Gov't C.A. Br. 37-39, neither court addressed the point.

didate." *Buckley*, 424 U.S. at 79. Petitioner contends that this test can be satisfied only if an entity spends more than half of its funds on magic-words express advocacy (see Pet. 24-28) or if its "organic documents" reveal an "express intention to operate as a political committee" (Pet. 27).[8]

In support of this argument, petitioner cites *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), and *Colorado Right to Life Committee, Inc.* v. *Coffman*, 498 F.3d 1137 (10th Cir. 2007). Pet. 24-25. But the major-purpose test was not at issue in *MCFL*, 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 MCFL'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 rather based political-committee status only on annual expenditures. See 498 F.3d at 1153-1154. To the

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[8] Petitioner states (Pet. 27) that such an "express intention" would be shown if an organization's internal documents designated the organization as a "separate segregated fund." But that purported illustration is meaningless, for a "separate segregated fund" has already, by definition, designated itself as a political committee. See 2 U.S.C. 431(4)(B). The major-purpose test is therefore irrelevant to such entities.

extent that the court discussed the major-purpose test, it emphasized that this Court in *MCFL* 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; see *Shays* v. *FEC*, 511 F. Supp. 2d 19, 26-31 (D.D.C. 2007) (upholding Commission's approach to major-purpose test); *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 spending to influence federal elections); *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."). The court of appeals in this case was thus correct in stating that the case-by-case analysis described in the Commission's notice was properly "adopted from Supreme Court jurisprudence that takes a fact-intensive approach to determining the major purpose" of an organization, and that the agency's approach is consistent with "the positions taken by the courts." Pet. App. 14a-15a.

d. Even if the court of appeals' conclusions about petitioner's likelihood of success implicated a circuit conflict or were otherwise suitable for this Court's review, reversing those conclusions ultimately would make no difference in this preliminary-injunction appeal. The district court correctly held that petitioner had failed to demonstrate a likelihood of irreparable harm because all of petitioner's planned activities would have been legal even if petitioner had actually been deemed a political

committee under the FEC's enforcement approach. See Pet. App. 51a. The Fourth Circuit noted the district court's holding on this issue but did not rule directly on it. Rather, the court of appeals explained that any harm created by petitioner's doubt about the legality of its intended activities was outweighed by the public interest in enforcement of the restrictions at issue. *Id.* at 16a. On either the district court's reasoning or the court of appeals', petitioner was not entitled to a preliminary injunction.[9]

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 129 S. Ct. at 376. Petitioner alleges that it will suffer irreparable harm in the form of an unspecified "loss of First Amendment rights to engage in core political speech in the form of highly-protected issue advocacy at the most opportune time." Pet. 34; see Pet. 13, 33. But even if the FEC's approach to political-committee status had caused petitioner to be designated as a political committee, that designation would not have prohibited petitioner from making and paying for any "political speech" it desired. As a political committee, petitioner could have engaged in *unlimited* independent campaign advocacy, including any communications constituting express-advocacy independent expenditures under 11 C.F.R. 100.22(b). See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 490-501 (1985) (striking down spending limits on independent expendi-

[9] Petitioner had the burden of showing both a likelihood of irreparable injury and that the public interest favors an injunction. See p. 12, *supra*.

tures by political committees).[10] Thus, as the district court held, petitioner would remain "free to disseminate [its] message and make any expenditures [it] wish[ed]." Pet. App. 51a.[11]

As the district court explained (Pet. App. 52a), entry of a preliminary injunction during the period immediately before the 2008 general election would have impeded the Commission's performance of its governmental functions and disserved the public interest. The regulations governing political committees ensure that such entities abide by contribution limits and disclose their receipts and disbursements to the public. Those limits and disclosure requirements serve compelling interests in preventing actual and apparent corruption, informing the public, and facilitating the Commission's enforcement of the law.

Enjoining application of the Commission's approach to determining political-committee status could have confused political actors, facilitated excessive contribu-

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[10] Indeed, under the legal regime in effect at the time of the rulings below, petitioner's designation as a political committee would have *increased* its ability to engage in independent electoral advocacy, since political committees are exempt from FECA's generally applicable restrictions on independent electioneering by corporations. See 11 C.F.R. 114.12(a). Because the Court in *Citizens United* struck down those statutory restrictions on independent corporate electioneering, see 130 S. Ct. at 913, that exemption for political committees no longer confers any practical advantage. As before, however, designation as a political committee does not preclude an organization from engaging in any form of electoral advocacy.

[11] Petitioner cannot demonstrate any irreparable harm arising from the $5000 limit on contributions to political committees, see 2 U.S.C. 441a(a)(1)(C), since petitioner did not allege (much less demonstrate) that its fundraising would have been significantly impaired by enforcement of that limit.

tions, deprived the public of important information, and undermined the public's confidence in the federal campaign finance system. "Court orders affecting elections * * * can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) (vacating pre-election preliminary injunction and noting that "the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases"). As the court of appeals recognized (Pet. App. 16a-17a), the district court did not abuse its discretion in recognizing and according weight to these harms to the Commission and the public.

3. Petitioner's remaining challenges, to 11 C.F.R. 100.57 and 114.15, are moot. In light of the decisions in *Citizens United* and *EMILY's List*, the Commission has announced that it will no longer enforce those regulations. See pp. 6, 7, *supra*. Because petitioner cannot show that it currently faces "any concrete actual or threatened harm" from Sections 100.57 and 114.15, its challenge to those provisions is no longer justiciable. *Alvarez* v. *Smith*, 130 S. Ct. 576, 581 (2009).[12]

Because these claims were mooted by the outcome of separate litigation to which petitioner was not a party, it would be appropriate for this Court to vacate the judgment below to the extent it addressed the merits of petitioner's challenges to Sections 100.57 or 114.15. See *Alvarez*, 130 S. Ct. at 582-583. Accordingly, with respect

[12] Indeed, petitioner's challenge to Section 100.57 was never justiciable, since petitioner's proposed solicitation (Pet. App. 22a-24a) did not "indicate[] that any portion of the funds received [in response] will be used to support or oppose the election of a clearly identified Federal candidate." 11 C.F.R. 100.57(a); see Gov't C.A. Br. 31.

to those claims, the Court should grant the petition, vacate the judgment below, and remand with instructions to dismiss those claims as moot.

CONCLUSION

With respect to petitioner's challenges to 11 C.F.R. 100.57 and 114.15, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to dismiss those claims as moot. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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