No. 13-772

In the Supreme Court of the United States

FREE SPEECH, PETITIONER

v.

FEDERAL ELECTION COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

LISA J. STEVENSON
Deputy General Counsel
KEVIN DEELEY
Acting Associate General Counsel
ERIN CHLOPAK
Acting Assistant General Counsel
CHARLES KITCHER
Attorney
Federal Election Commission
Washington, D.C. 20463

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's constitutional challenge to the Federal Election Commission's approach to determining political-committee status, as described in *Federal Register* notices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 720 F.3d 788. The opinion of the district court (Pet. App. 5-23) is published as part of the court of appeals' opinion, but is not published separately.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2013. A petition for rehearing was denied on September 30, 2013 (Pet. App. 43). The petition for a writ of certiorari was filed on December 30, 2013 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Commission (FEC or Commission) is vested with statutory authority over the administration, interpretation, and civil enforce-

ment 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 FECA. See 2 U.S.C. 437g(d).

Under FECA, any "committee, club, association, or other group of persons" that receives more than $1000 in "contributions" or makes more than $1000 in "expenditures" in a calendar year is a "political committee." 2 U.S.C. 431(4)(A); see 11 C.F.R. 100.5(a). FECA defines "contribution" and "expenditure" to include any payment of money to or by any person "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i) and (9)(A)(i). A political committee must register with the Commission and file periodic reports for disclosure to the public of all receipts and disbursements, with exceptions for most transactions of less than $200. 2 U.S.C. 433, 434(a)-(b). FECA also places certain constraints on contributions to political committees. 2 U.S.C. 441a(a)(1)(C), 441b(a).

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court explained that defining political-committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad

application by reaching "groups engaged purely in issue discussion." *Id.* at 79 (footnotes omitted). The Court therefore concluded that FECA'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 must register as a political committee only if the group (1) crosses the $1000 threshold of contributions or expenditures and (2) has as its "major purpose" the nomination or election of federal candidates.

In March 2004, the Commission issued a notice of proposed rulemaking. That notice sought comment on whether the FEC should, *inter alia*, promulgate a regulatory definition of "political committee" that would encompass all "527" groups—*i.e.*, political organizations holding tax-exempt status under Section 527 of the Internal Revenue Code. *Proposed Rules: Political Committee Status*, 69 Fed. Reg. 11,736, 11,748-11,749 (Mar. 11, 2004); see 26 U.S.C. 527(a) and (e)(1). In February 2007, after receiving comments and hearing testimony, the Commission published in the *Federal Register* a Supplemental Explanation and Justification explaining its decision not to promulgate such a regulation. *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007). The notice stated that the Commission would instead continue its longstanding practice of determining an organization's major purpose through case-by-case adjudication. See *id.* at 5596-5597. The notice then discussed a number of prior administrative and civil matters in which the Commission or a court had analyzed a group's major purpose. The notice explained

that those decisions taken together "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.

2. Petitioner is an unincorporated Wyoming nonprofit association that was formed in 2012 and that identifies itself as a "political organization" under Section 527 of the Internal Revenue Code. Pet. App. 6, 25. Petitioner's bylaws require it to operate independently of political candidates, committees, and political parties. *Id.* at 6. Petitioner alleges a desire to advocate views on various political issues and, in particular, to disseminate a variety of political advertisements without complying with certain FECA disclosure requirements, including the registration and reporting requirements applicable to political committees. 12-cv-00127 Docket entry No. 24 (D. Wyo. July 26, 2012) (Am. Compl.). Petitioner asked the Commission for an advisory opinion about whether, *inter alia*, its proposed activities would require it to register with the Commission as a political committee. Pet. App. 28. Although the Commission rendered opinions on certain other matters, it was unable to approve by the necessary number of votes an opinion addressing the political-committee issue. *Id.* at 24-42.

Petitioner filed this lawsuit seeking declaratory and injunctive relief against, *inter alia*, the Commission's approach to determining political-committee status, on the ground that the approach violates the First Amendment. Pet. App. 6; Am. Compl. 2. The district court granted the Commission's motion to dismiss. Pet. App. 5-23. The court explained that because, "[a]t their core," the "challenged rules and policies implement only disclosure requirements,"

they "'impose no ceiling on campaign-related activities'"; "'do not prevent anyone from speaking'"; and are thus constitutional so long as they bear "'a substantial relation'" to "'a sufficiently important governmental interest.'" *Id.* at 9-10 (quoting *Citizens United* v. *FEC*, 558 U.S. 310, 366-367 (2010)). The court concluded that the Commission's case-by-case adjudicatory approach to determining political-committee status satisfies that standard. *Id.* at 20-22.

The district court reasoned that because *Buckley*, which "create[d] the major purpose test," had "not mandate[d] a particular methodology for determining an organization's major purpose," the Commission "was free to administer FECA political committee regulations either through categorical rules or through individualized adjudications." Pet. App. 21 (quoting *The Real Truth About Abortion, Inc.* v. *FEC*, 681 F.3d 544, 556 (4th Cir. 2012), cert. denied, 133 S. Ct. 841 (2013) (*RTAA*)). The court upheld the Commission's adoption of the latter approach, observing that "[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task," and that "judicial decisions applying the major purpose test * * * have used the same fact-intensive analysis that the Commission has adopted." *Ibid.* (quoting *RTAA*, 681 F.3d at 556-557).

3. The court of appeals affirmed on the reasoning of the district court. Pet. App. 1-4. The court concluded that the district court had applied the correct standard of review and had "comprehensively analyzed and correctly resolved [petitioner's] constitutional challenges." *Id.* at 3. The court of appeals

additionally rejected petitioner's contention that the district court had erred in relying on the Fourth Circuit's decision in *RTAA*, *supra*, which had rejected similar First Amendment claims. *Id.* at 3 n.1; see *RTAA*, 681 F.3d at 548-558. The court found no support for petitioner's "conclusory assertions" that the record in this case distinguishes it from *RTAA*. Pet. App. 3 n.1.

ARGUMENT

Petitioner challenges (Pet. 8-40) the FEC's approach to determining political-committee status.[*] The lower courts' rejection of that challenge reflects a straightforward application of this Court's precedents, and it is consistent with every other circuit-court decision that has addressed the issue following *Citizens United* v. *FEC*, 558 U.S. 310 (2010). This Court recently denied certiorari in *RTAA*, which presented the same political-committee-status issue and on which the decision below relied. See 133 S. Ct. 841 (2013) (No. 12-311). Further review is not warranted.

1. Petitioner has identified no proper basis for judicial review in this case of the Commission's approach to determining political-committee status. The

[*] Petitioner asserts (Pet. 26 n.3) that it is also preserving challenges it raised below to the FEC's definitions of "express advocacy" and to the standard applied by the FEC in determining whether a particular communication is a "solicitation" for a contribution. See Pet. 26-28 (discussing express-advocacy determinations). The questions presented, however, address only political-committee status, see Pet. i; petitioner presents no sustained argument about why the additional issues would warrant this Court's review; and the Court recently denied a petition for certiorari challenging the express-advocacy definition, *RTAA*, 133 S. Ct. 841 (2013) (No. 12-311); see Br. in Opp. at 11-18, *RTAA*.

Administrative Procedure Act (APA), on which petitioner appears to rely, authorizes courts to hear challenges only to "final agency action"—*i.e.*, action that consummates the agency's decisionmaking process and determines the rights and obligations of parties. 5 U.S.C. 704; see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997); see also Am. Compl. 33-34. The Commission has not expressed any view, let alone a "definitive statement of position," *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 241 (1980), about petitioner's political-committee status. Rather, the Commission declined to take any view on that question. Pet. App. 41-42. Petitioner's repeated references (Pet. 3, 21, 26 n.4, 27-28, 32) to *draft* advisory opinions, which were never issued by the Commission, do not identify any "final agency action" subject to review under the APA.

The *Federal Register* notice describing the Commission's case-by-case adjudicatory approach to political-committee-status determinations also is not final agency action under the APA. The Commission's notice does not purport either to establish a binding norm or to decide any entity's legal status. The primary purpose of the notice was to explain why a broad regulation was *not* created, and the notice simply provides guidance about political-committee status and the major-purpose test based on specific administrative and civil enforcement precedents. 72 Fed. Reg. at 5604; see pp. 3-4, *supra*. The publication of *Federal Register* notices describing the results of the Commission's adjudications does not permit petitioner to make a preemptive challenge to the adjudicatory process in the absence of some final determination about petitioner's own status. Rather, if the Commission ever initiates an enforcement proceeding against

petitioner—which it has not done, and may never do—petitioner will be entitled to raise all of its challenges to the Commission's approach in that context.

2. Even if the Commission's approach to determining political-committee status were subject to APA review, the lower courts correctly rejected petitioner's challenge. Petitioner agrees (*e.g.*, Pet. 36) that determination of political-committee status should be governed by the major-purpose test, under which an organization is not regulated as a political committee unless its "major purpose * * * is the nomination or election of a candidate." *Buckley* v. *Valeo*, 424 U.S. 1, 79 (1976) (per curiam). The Commission has consistently determined on a case-by-case basis whether an organization's major purpose is the nomination or election of candidates. See 72 Fed. Reg. at 5596. Petitioner essentially contends (Pet. 8-9) that the burdens of political-committee status, in combination with a perceived indeterminacy about whether the Commission will find any particular organization to be a political committee, causes the current administrative regime to violate the First Amendment. That argument lacks merit.

a. Petitioner acknowledges (Pet. 10 n.1) that strict scrutiny does not apply in this case. As the district court correctly observed, the definition of "political committee," even if applicable to petitioner, would ultimately affect only the disclaimer and disclosure requirements (if any) to which petitioner would be subject. Pet. App. 9; see p. 2, *supra*. Because petitioner does not make campaign contributions or otherwise coordinate its advocacy with candidates or parties, Pet. App. 6, the FEC could not enforce the limitations of 2 U.S.C. 441a(a)(1)(C) on petitioner's

collection and spending of its money. See *SpeechNow.org* v. *FEC*, 599 F.3d 686, 696 (D.C. Cir.) (en banc), cert. denied, 131 S. Ct. 553 (2010).

Although "[d]isclaimer and disclosure requirements may burden the ability to speak," they "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (internal quotation marks and citations omitted); see *McCutcheon* v. *FEC*, No. 12-536 (Apr. 2, 2014), slip op. 35-36. Indeed, disclosure requirements can improve political discourse by creating "transparency" that "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. This Court accordingly has subjected such requirements only to "'exacting scrutiny,'" rather than strict scrutiny, upholding them so long as the government can show "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 366-367 (quoting *Buckley*, 424 U.S. at 64, 66); see *ibid.* (citing *McConnell* v. *FEC*, 540 U.S. 93, 231-232 (2003), overruled in part by *Citizens United*, 558 U.S. at 310).

Petitioner is wrong in suggesting (Pet. 14-18) that the lower courts applied too "lax" a standard of review here. Quoting this Court's decision in *Citizens United*, the district court explained that it was applying "exacting scrutiny" by examining whether the disclosure requirements at issue bear a "substantial relation" to a "sufficiently important governmental interest." Pet. App. 10 (quoting *Citizens United*, 558 U.S. at 366-367). The court correctly upheld the political-committee disclosure requirements under that standard, recognizing that they "provide the transparency

that 'enables the electorate to make informed decisions and give proper weight to different speakers and messages,'" and that the major-purpose test is "essential" to "narrowly, but effectively identifying" the organizations that should be covered by those requirements. *Id.* at 22 (quoting *Citizens United*, 558 U.S. at 371). Petitioner's suggestion (Pet. 14-18) that other courts would apply a different approach simply identifies fact-specific applications of a settled standard, not disagreements as to the standard itself.

b. To the extent petitioner contends that case-by-case adjudication under the major-purpose test is *per se* unlawful, that argument is unsound. This Court's precedents give agencies discretion to administer the law through individual adjudications rather than by promulgating categorical rules. See, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."); *Shays* v. *FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007) ("[P]laintiffs have been unable to cite any case where a court, absent a clear directive from Congress, required an agency to institute rulemaking in the place of adjudication. This Court will not be the first.").

The Commission has reasonably determined that an adjudicatory approach is the best way to make the inherently context-specific determination of an organization's "major purpose." See Pet. App. 21-22 ("The determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task, and in most instances it

will require weighing the importance of some of a group's activities against others.") (quoting *RTAA*, 681 F.3d at 556); *Shays*, 511 F. Supp. 2d at 31 (concluding that the FEC's "decision not to employ rulemaking" in this context "is not arbitrary and capricious"). In making such determinations, the Commission has consulted sources such as a group's public statements, government filings (*e.g.*, IRS notices), statements of purpose, and spending in particular election campaigns. See 72 Fed. Reg. at 5601-5602, 5605 (describing prior cases). These are the same sources that courts have considered in applying *Buckley*'s major-purpose test. See, *e.g.*, *FEC* v. *Malenick*, 310 F. Supp. 2d 230, 234-237 (D.D.C. 2004) (basing major-purpose determination on, *inter alia*, organization's statements in brochures, fax alerts sent to potential and actual contributors, and activities to influence federal elections), rev'd in part on recons., No. Civ. A. 02-1237, 2005 WL 588222 (D.D.C. Mar. 7, 2005); *FEC* v. *GOPAC, Inc.*, 917 F. Supp. 851, 859 (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.").

Petitioner's objection to the asserted lack of predictability in the Commission's approach is, at bottom, a challenge to the standard that this Court itself adopted in *Buckley*. The application of that standard to different factual scenarios will necessarily produce circumstance-specific results. Assessing which of a group's purposes is its major purpose "is inherently a comparative task." Pet. App. 21 (quoting *RTAA*, 681 F.3d at 556). The possibility that the Commission's

determination might differ from an organization's own view of its political-committee status—or the possibility that, as in this case, individual Commissioners might disagree with each other about a particular organization's political-committee status—does not render the Commission's approach unconstitutional. This Court has squarely rejected the suggestion that "the mere fact that close cases can be envisioned renders a [law] vague." *United States* v. *Williams*, 553 U.S. 285, 305 (2008); see *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930) ("Whenever the law draws a line there will be cases very near each other on opposite sides.").

Petitioner's practical concerns about the Commission's approach are substantially overstated. First, as petitioner acknowledges, the major-purpose test "'serves as an additional *hurdle* to establishing political committee status.'" Pet. 39 (quoting Pet. App. 20-21). Thus, unless the Commission (or a court, or both) makes an *affirmative* determination that an organization's major purpose is the nomination or election of candidates, the organization cannot be found to have violated the registration and reporting requirements that FECA places on political committees. Second, contrary to petitioner's assertions (Pet. 5, 29), the disclosure requirements applicable to political committees are not unduly burdensome for groups of petitioner's size. FEC data for the 2012 election cycle reflect, for example, that nearly half of the political committees that made only independent expenditures (*i.e.*, expenditures not coordinated with a candidate or party) had receipts smaller than petitioner's anticipated budget of $41,000. FEC, *Disclosure Data Catalogue*, www.fec.gov/data/ZCommitteeSummary.do

(last visited Apr. 2, 2014); see Am. Compl. 6-7, 18 (describing plans to spend $41,286). To assist such groups, the FEC's Information Division publishes lay handbooks and maintains toll-free phone lines. FEC, *Federal Election Commission Campaign Guide for Nonconnected Committees* (May 2008), www.fec.gov/pdf/nongui.pdf.

c. Petitioner asserts (Pet. 36) that this Court should grant certiorari to "re-affirm" the major-purpose test. That would not serve any useful purpose. No one disputes the existence, or constitutional importance, of that test. Although petitioner criticizes (Pet. 38-39) the Commission's reliance on particular factors in applying the test, it does not argue that any of those factors is improper, it does not provide any reason to believe that the Commission is treating substantially identical organizations differently, and it does not offer any alternative formulation of the major-purpose test that would eliminate the need for case-by-case adjudication.

Petitioner's apparent objective is to obtain an articulation of the major-purpose test that would exempt petitioner itself, should it undertake the activities alleged in its complaint, from classification as a political committee. That is essentially a request that this Court apply its previously announced major-purpose test to the particular (alleged) facts of this case. Such a fact-bound issue does not warrant this Court's review. See Sup. Ct. R. 10.

3. As discussed above, the result in this case is consistent with this Court's decision in *Buckley*, which both adopted the major-purpose test, 424 U.S. at 79, and held that FECA's disclosure requirements for political committees "directly serve substantial gov-

ernmental interests," *id.* at 68. To the extent petitioner suggests (Pet. 32-40) that the decisions below are in tension with *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *Citizens United*, that suggestion is unfounded. The major-purpose test was not at issue in *Massachusetts Citizens for Life*, where it was "undisputed" that the plaintiff's "central organizational purpose" was not candidate-related and that the organization therefore could not be regulated as a political committee. *Id.* at 252 n.6. The major-purpose test was not even mentioned in *Citizens United*, which concerned regulation of direct corporate expenditures for election-related speech. 558 U.S. at 318-319. Indeed, the Court expressly distinguished between a ban on direct political speech by a corporation (which the Court struck down as unconstitutional) and the government's authority to "regulate corporate political speech through disclaimer and disclosure requirements" (which it upheld). *Id.* at 318; see *id.* at 367-371.

The decision below does not conflict with any decision of another court of appeals. Petitioner appears to acknowledge (Pet. 6, 13-14, 36-37) that the decision below is generally in accord with the decisions of other circuits. The only circuit it contends to be on the other side of a conflict is the Eighth Circuit. See Pet. 6. But the Eighth Circuit decision on which petitioner relies, *Minnesota Citizens Concerned for Life, Inc.* v. *Swanson*, 692 F.3d 864 (2012) (en banc), simply concluded that a state statute that imposed political-committee-style disclosure requirements without any major-purpose constraint was "most likely unconstitutional." *Id.* at 874-877. The Eighth Circuit distinguished that state statute from disclosure require-

ments for federal political committees, *id.* at 875 nn.9-10. The Eighth Circuit's particular application of exacting scrutiny in that context does not suggest that it would perceive any constitutional infirmity in the FEC's approach to determining political-committee status under federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LISA J. STEVENSON
Deputy General Counsel
KEVIN DEELEY
Acting Associate General Counsel
ERIN CHLOPAK
Acting Assistant General Counsel
CHARLES KITCHER
Attorney
Federal Election Commission

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