No. 11-14193-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR MARRIAGE, INC.,
Plaintiff-Appellant,

v.

KURT S. BROWNING, *ET AL*.
Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District of Florida
Case No. 1:10-CV-00192-SPM-GRJ

BRIEF *AMICUS CURIAE* FOR CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

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The following are interested persons herein:

- Browning, Kurt S., defendant in his official capacity as Florida secretary of state.
- Bopp, Jr., James, Plaintiff's counsel.
- Campaign Legal Center, *Amicus Curiae*. No stock ticker symbol.
- Cruz-Bustillo, Jorge, former defendant in his official capacity as Florida Elections Commission chair.
- Davis, Ashley E., counsel for Defendant Browning.
- DeWolf, Diane G., Defendants' counsel.
- Elf, Randy, Plaintiff's counsel.
- Faraj-Johnson, Alia, defendant in her official capacity as Florida Elections Commission member.
- Glogau, Jonathan A., Defendants' counsel.
- Hebert, J. Gerald, counsel for *Amicus Curiae* Campaign Legal Center.
- Hepworth, Austin J., Plaintiff's counsel.

- Holladay, Tim, defendant in his official capacity as Florida Elections Commission chair.
- Hollimon, William, defendant in his official capacity as Florida Elections Commission member.
- Jacobs, Jr., Leon, defendant in his official capacity as Florida Elections Commission member.
- Kane, Julie, defendant in her official capacity as Florida Elections Commission member.
- King, Gregory, defendant in his official capacity as Florida Elections Commission member.
- Malloy, Tara, counsel for *Amicus Curiae* Campaign Legal Center.
- Mickle, Stephan P., district judge.
- Mihet, Horatio G., Plaintiff's counsel.
- National Organization for Marriage, Inc. ("NOM"), Plaintiff. No stock ticker symbol.
- Nordby, Daniel E., counsel for Defendant Browning.
- Roberts, Dawn, former defendant in her official capacity as Florida secretary of state.

- Ryan, Paul S., counsel for *Amicus Curiae* Campaign Legal Center
- Rodriguez, Jose Luis, defendant in his official capacity as Florida Elections Commission vice chair.
- Rossin, Thomas, former defendant in his official capacity as Florida Elections Commission member.
- Seymour, Brian, defendant in his official capacity as Florida Elections Commission member.
- Staver, Mathew D., Plaintiff's counsel, and
- Upton, C. B., counsel for Defendant Browning.

The Campaign Legal Center (CLC) is a nonprofit, nonpartisan corporation. The CLC has no parent corporation and no stock. No publicly held corporation has any form of ownership interest in the CLC.

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STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to strengthen the laws governing campaign finance and political disclosure. The CLC has participated in numerous past cases addressing disclosure, including *Citizens United v. FEC*, 130 S. Ct. 876 (2010), *FEC v. Wisconsin Right to Life (WRTL),* 551 U.S. 449, 127 S. Ct. 2652 (2007) and *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003). *Amicus* thus has a longstanding, demonstrated interest in the laws at issue here.[1]

All parties have consented to the participation of the CLC as *amicus curiae*.

STATEMENT OF THE ISSUES

- Are the definitions of "electioneering communication" ("EC"), FLA. STAT. § 106.011(18), and "electioneering communications organization" ("ECO"), *id*. § 106.011(19), under Florida law vague and overbroad because they include the "appeal-to-vote" test formulated by the Supreme Court in *WRTL*?
- Does strict scrutiny apply to the review of Florida's definitions of "EC" and "ECO" although such definitions effectuate only reporting, registration and record-keeping requirements ("ECO disclosure law")?

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* affirms that no party's counsel authored the brief in whole or in part, and no person – other than the *amicus* – contributed money that was intended to fund the preparation or submission of the brief.

- Is Florida's ECO disclosure law overbroad because it applies to groups that do not have as their "major purpose" the nomination or election of a candidate?

SUMMARY OF ARGUMENT

The National Organization for Marriage (NOM) is free to spend as much money as it wishes on ECs to influence Florida elections, and to raise money for this purpose without restriction. NOM's sole complaint in this case is that it is required to provide complete and timely disclosure about the financing of its ECs to the voters of Florida.

In an apparent attempt to reframe the central issue here, NOM styles its case as an as-applied and facial challenge to the definitions of "EC" and "ECO" under Florida law. *See* Plaintiff-Appellant NOM's Principal Brief (filed Oct. 31 2011), at 24. But it does not deny that these definitions effectuate only campaign finance reporting and registration requirements under Florida law. *See* FLA. STAT. §§ 106.03, 106.022, 106.0703. NOM's rhetorical sophistry should not obscure that this case concerns only political transparency.

And there is no support in Supreme Court precedent for NOM's attempt to evade its disclosure obligations to the public. In 2010 alone, the Supreme Court twice upheld, both times by 8-1 votes, laws requiring political disclosure, reiterating that such "transparency" "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens*

United, 130 S. Ct. at 916 (upholding federal "EC" disclosure law); *see also Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding Washington state law authorizing disclosure of ballot referenda petitions). As disclosure measures, the laws challenged here are unequivocally supported by this recent precedent. The district court below was thus correct in rejecting NOM's challenge to the ECO disclosure law. *Nat'l Org. For Marriage v. Roberts*, No. 1:10-cv-00192 (N.D. Fla. Aug. 8, 2011); *see also Nat'l Org. For Marriage v. Roberts*, 753 F. Supp. 2d 1217 (N.D. Fla. 2010) (denying plaintiff's motion for preliminary injunction).

First, NOM has no basis for asserting that the inclusion of the "appeal-to-vote" test in Florida's EC definition renders the law overbroad and unconstitutionally vague. *See* FLA. STAT. § 106.011(18) (defining EC as a communication that, *inter alia*, refers to "a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate") (emphasis added). As noted by the district court, this test was "created and applied by the United States Supreme Court" in *WRTL* and *Citizens United*. *NOM*, slip op. at 6. To invalidate this definition would therefore effectively require overruling a Supreme Court decision.

Also untenable is NOM's attempt to characterize the ECO disclosure law as imposing "political-committee-like burdens" and consequently subject to both

strict scrutiny and the "major purpose" test developed in *Buckley v. Valeo*, 424 U.S. 1, 79, 96 S. Ct. 612 (1976). It is black-letter law that disclosure requirements are the "least restrictive" campaign finance regulations, *id.* at 68, and hence subject only to "exacting scrutiny." The district court thus properly held that "[s]trict scrutiny does not apply because the Florida statutes being challenged would not prohibit NOM from engaging in its proposed speech." *NOM*, slip op. at 9. Furthermore, as discussed in detail in Section II *infra*, Florida's ECO disclosure law is not remotely comparable to the broad range of restrictions applicable to federal political committees (or "PACs"). Hence, as the district court found, "[t]here is no major purpose requirement because the statutes do not impose full-fledged political-committee like burdens upon NOM, and the limited burdens imposed are triggered only by communications that are unambiguously campaign related." *NOM*, 753 F. Supp. 2d at 1222.

For all these reasons, the district court's decision should be affirmed.

ARGUMENT

I. Florida's Disclosure Law Is Not Unconstitutionally Vague.

The definition of "EC" under Florida law is virtually identical to that of federal law. *Compare* FLA. STAT. § 106.011(18) *to* 2 U.S.C. § 434(f)(3). The only material difference is that Florida has narrowed and refined its definition by adding the "appeal-to-vote" test that was formulated by the Supreme Court in its 2007

decision in *WRTL*. NOM does not dispute either of these points. Nevertheless, NOM maintains that the inclusion of the Supreme Court's "appeal-to-vote" test represents a constitutional defect in the Florida definition, suggesting that the test was "rendered unconstitutionally vague" by *Citizens United*. Appellant Br. at 42. In the alternative, NOM argues that the "appeal-to-vote" test, and by extension, the Florida definition of "EC," is vague insofar as it applies under state law to speech not covered by the federal definition of "EC." Appellant Br. at 36 n.12, 39.

Neither argument has any legal merit.

First, the "appeal-to-vote" test included in the Florida definition of "EC" is the product of a Supreme Court decision. NOM's request that this court invalidate this part of the definition is tantamount to a demand that this court override the Supreme Court.

In *WRTL*, the Supreme Court reviewed Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited the use of corporate or union treasury funds to pay for an EC. 2 U.S.C. §§ 434(f)(3), 441b(b)(2). This Title II funding restriction had been upheld by the Supreme Court in its 2003 *McConnell* decision against a facial challenge. 540 U.S. at 207. Consequently, the plaintiff WRTL brought an as-applied challenge to the restriction, asserting that it was unconstitutional as applied to its three proposed ECs because the communications did not represent the "functional equivalent of express advocacy." Chief Justice

Roberts, writing the controlling opinion for the Court, agreed with the plaintiff, and interpreted *McConnell* as upholding the Title II funding restriction only insofar as ECs constituted "the functional equivalent of express advocacy." 551 U.S. at 456. The Chief Justice then formulated the "appeal-to-vote" standard to delineate the speech that would qualify as "the functional equivalent of express advocacy," holding that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70 (emphasis added). Applying this "appeal-to-vote" test, the Court held that WRTL's ads were not the functional equivalent of express advocacy and accordingly were exempt from the funding restriction. *Id.* at 476.

Citizens United further confirmed the validity of *WRTL*'s "appeal-to-vote" test. In fact, far from "render[ing] vague" the test, as NOM alleges, Appellant Br. at 42, the *Citizens United* Court actually applied the test to the communications at issue there. *See Real Truth About Obama (RTAO) v. FEC*, -- F. Supp. 2d --, 2011 WL 2457730, *11 (E.D. Va. 2011) (noting that the Supreme Court "applied the appeal-to-vote test in *Citizens United*") (emphasis added), *appeal docketed,* No. 11-1760 (4th Cir. July 11, 2011). In the district court, Citizens United challenged the federal EC funding restriction as applied to its film, *Hillary: the Movie*, but in its petition for Supreme Court review, it broadened its case to implicate the federal

restriction on corporate spending in its entirety, *see* 2 U.S.C. § 441b. To determine how broadly the Court would have to rule in order to decide the expanded case, the *Citizens United* Court applied the *WRTL* test to *Hillary*. Had *Hillary* not met *WRTL*'s test for the "functional equivalent of express advocacy," then the film would not have been prohibited by the EC funding restriction, and the case could have been resolved on these "narrower grounds." 130 S. Ct. at 888. The Court ultimately determined, however, that "[u]nder the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy," and decided it was obligated to review the broader challenge to § 441b. *Id.* at 890. Importantly, however, the fact that the *Citizens United* Court applied the *WRTL* test without difficulty belies NOM's suggestion that the Court considered this test vague.

Indeed, NOM never actually explains what part of the *Citizens United* decision allegedly "rendered vague" the *WRTL* test. The Supreme Court did not overrule or even criticize the *WRTL* test, and NOM does not allege that this occurred. NOM's "argument" that *Citizens United* "abolished" the *WTRL* test consists of nothing more than a general citation of several pages in the decision. *See* Appellant Br. at 44, *citing* 130 S. Ct. at 889-990, 915.[2]

[2] NOM cites sections in *Citizens United* in which the Court struck down the federal corporate expenditure restriction, and upheld the federal EC disclosure requirements. Appellant Br. at 44, *citing* 130 S. Ct. at 889-990, 915; *see also id*. at

Second, in the alternative, NOM argues that the Florida EC definition is vague insofar as it applies the "appeal-to-vote" test to speech not covered by the federal "EC" definition. According to NOM, the Florida definition "reaches beyond" the federal definition, and the "appeal-to-vote" test is impermissible

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39-40 n. 15. Neither section, however, suggests that the Supreme Court "rendered vague" the "appeal-to-vote" test.

Section 441b prohibited corporations from using treasury funds to engage in two types of election-related spending: (1) "independent expenditures," *i.e.,* communications containing "express advocacy," and (2) "ECs," *i.e*., communications meeting the federal definition of "EC" and the *WRTL* "appeal-to-vote" test. 2 U.S.C. § 441b. In the first section of *Citizens United* cited by NOM, the Court struck down this federal prohibition in its entirety. 130 S. Ct. at 913. But because the Court ruled broadly that all corporate spending was protected by the First Amendment and did not limit its ruling to the EC funding restriction, the Court had no reason to even consider whether the *WRTL* test for "the functional equivalent of express advocacy" was vague.

NOM also suggests that the Court's decision to uphold the federal EC disclosure requirements as to all "electioneering communications" casts doubt on the "appeal-to-vote" test. Appellant Br. at 39-40 n. 15, *citing* 130 S. Ct. at 915. NOM is correct that the Supreme Court "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy," and instead found that all electioneering communications could constitutionally be subject to disclosure. 130 S. Ct. at 915. But this holding cuts against NOM's position. By finding that disclosure could extend beyond speech that was the "functional equivalent of express advocacy," the Court granted states like Florida greater authority to require disclosure of speech. Florida could have required disclosure in connection to all ECs, as defined by federal law, without regard to whether they constituted the "functional equivalent of express advocacy." That Florida chose to enact a narrower disclosure law that requires reporting only in connection to ECs meeting the "appeal-to-vote" test indicates more careful tailoring than necessary, and if anything, puts its law on a more secure constitutional footing.

where the state definition exceeds the bounds of the federal definition. Appellant Br. at 39.

But Justice Roberts did not suggest that the validity of his test depended on its use in conjunction with the federal "EC" definition. To the contrary, responding to Justice Scalia's concurrence in *WRTL*, the Chief Justice noted that his test met "the imperative for clarity in this area," explaining that the "express advocacy" standard formulated in *Buckley* was not "the constitutional standard for clarity." 551 U.S. at 474 n.7. Following this precedent, the Fourth Circuit has found that a federal regulation, *see* 11 C.F.R. § 100.22(b), that closely resembles the "appeal-to-vote" test is not unconstitutionally vague even though it is used independently of the federal "EC" definition. *RTAO*, 575 F.3d 342, 349 (4th Cir. 2009), *vacated for consideration of mootness by* 130 S. Ct. 2371 (2010); *see also RTAO*, 2011 WL 2457730, *9 (reaffirming that § 100.22(b) was not vague because it "is consistent with *Wisconsin Right to Life*'s appeal-to-vote test"). NOM thus is incorrect in asserting that the constitutionality of the "appeal-to-vote" test is dependent on its use with the federal EC definition.

Furthermore, even if this were the case, Florida in fact only utilizes the "appeal-to-vote" test in connection to ECs – and the definition of "EC" under state

law is virtually identical to the definition of "EC" under federal law.[3] NOM never bothers to state how the Florida definition even "reaches beyond" the federal definition. It mentions in an unrelated footnote that the federal definition covers only broadcast, cable and satellite communications, whereas Florida law also covers print communications. Appellant Br. at 36 n.12. But it does not – and cannot – explain why the inclusion of print communications in the Florida EC definition would render the "appeal-to-vote" test vague. The language and substance of the test remains the same regardless of whether an advertisement is distributed via broadcast media or print.[4]

The district court was thus correct in rejecting NOM's vagueness and overbreadth challenges to Florida's "EC" definition. If the *WRTL* test is

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[3] NOM does not dispute that the federal definition of "EC" is sufficiently clear. *See* Appellant Br. at 36 n.12 (noting that the Supreme Court has approved regulation of "[e]lectioneering communications as defined in FECA").

[4] Florida's circumscribed use of the "appeal-to-vote" test also distinguishes this case from *Center for Individual Freedom v. Tennant*, -- F.Supp.2d ---, 2011 WL 2912735 (S.D.W. Va. July 18, 2011) ("*CIF*"), *appeal docketed*, No. 11-1952 (4th Cir. Sept. 8, 2011). There, a district court found that West Virginia's use of a "free-standing" appeal-to-vote test to define "express advocacy" was vague because it was not cabined "within the confines of BCRA's 'electioneering communication' definition." *Id*. at *20. *Amicus* believes this case is contrary to the Chief Justice's opinion in *WRTL*, and notes that the *CIF* decision is currently under appeal. However, even if the reasoning of *CIF* is accepted *arguendo* by this court, the decision is inapplicable here, because Florida has indeed "cabined" the application of the "appeal-to-vote" to ECs, and Florida's definition of "EC" is virtually identical to that of federal law.

constitutional – and *Citizens United* only further supports its validity – then so too is Florida's definition.

II. Florida's Disclosure Law Is Not Tantamount to Federal "Political Committee" Status.

Throughout its brief, NOM labors mightily to equate Florida's ECO disclosure law with the federal political committee requirements discussed in *Citizens United* and *WRTL*. Indeed, almost all of NOM's legal arguments rely on its claim that the ECOs required for ECs under state law are equivalent to the PACs previously mandated for corporate ECs under federal law. Appellant Br. at 49 (citing *Citizens United*, 130 S. Ct. at 898; *WRTL*, 551 U.S. at 477 n.9); *see also id.* at 148, 50, 54-58, 62. But Florida's ECO disclosure requirements are not comparable to the range of restrictions applicable to federal political committees, and this court should reject this analogy.

The federal political committees discussed in *Citizens United* and *WRTL* are subject to three basic categories of regulations under the Federal Election Campaign Act (FECA): (1) substantive fundraising restrictions, including contribution limits and source restrictions; (2) organizational requirements, such as formation and termination protocols; and (3) disclosure requirements, including registration, reporting and record-keeping. Florida's ECO law involves only a fraction of the disclosure requirements applicable to federal political committees,

and does not impose either the substantive fundraising restrictions or organizational requirements of federal law.

First and most importantly, a federal political committee is subject to strict fundraising restrictions, whereas an ECO is bound by no such restrictions. A non-candidate, non-party federal political committee is permitted to raise only up to $5,000 per contributor per calendar year. *See* 2 U.S.C. § 441a(a)(1)(C). A federal committee is also barred from accepting contributions from corporations, unions or other prohibited sources.[5] 2 U.S.C. § 441b(a); *see also id.* at § 441c (prohibiting contributions from government contractors).

Further, the corporate PACs that NOM specifically invokes in its analogy, *see* Appellant Br. at 49, were subject to yet greater fundraising restrictions. *See FEC Campaign Guide for Corporations and Labor Organizations* (January 2007), *available at* http://fec.gov/pdf/colagui.pdf. Prior to *Citizens United*, FECA prohibited corporations and unions from using treasury funds to make either political contributions, or political expenditures or ECs. 2 U.S.C. § 441b; *id*. §§ 431(8)(A)(i), (9)(A)(i), 434(f)(3). To make either political contributions or expenditures, a corporation or union was required to establish a PAC, or "separate

[5] In response to *Citizens United* and *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied Keating v. FEC*, 131 S. Ct. 553 (2010), the FEC recently issued a pair of advisory opinions ruling that political committees making only independent expenditures are no longer bound by the federal contribution limits, nor by the corporate and union contribution source restrictions. FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten).

segregated fund." *Id*. § 441b(b)(2). The PAC was required to finance its political activity exclusively with voluntary contributions from individuals raised under the federal contribution limits. *See* 2 U.S.C. § 441a(a)(1); 11 C.F.R. §§ 110.1(d), 114.5(f). Further, it was not permitted to solicit contributions from the general public for this purpose, but only from its sponsor's "restricted class," which in the case of a corporation, was the corporation's executive and administrative personnel, and shareholders. 2 U.S.C. § 441b(b)(4); 11 C.F.R. §§ 114.5-114.8. Following *Citizens United*, corporations and unions are now permitted to make expenditures in elections without restriction, but still must establish a separate segregated fund to make contributions to federal candidates. 2 U.S.C. § 441b.

Thus, the crucial distinction between the federal law applicable to political committees and the ECO disclosure law at issue here is that the ECO disclosure law in no way regulates how an organization finances its political activities.

Second, federal political committees are also subject to extensive organizational requirements under FECA that far exceed those applicable to ECOs under Florida law. Most basically, a PAC, unlike an ECO, is an independent legal entity, and typically takes the form of a nonprofit corporation organized under Section 527 of the Internal Revenue Code. 26 U.S.C. § 527. In the case of a separate segregated fund, the PAC is thus independent of its corporate or union sponsor. *See, e.g.*, *Citizens United*, 130 S. Ct. at 897 (corporate PAC is "a separate

association from the corporation"). By contrast, Florida's law does not require that ECOs be independent from their sponsor organizations; this is underscored by the fact that the sponsoring organization need not even open a new bank account for the ECO, but rather may use its own checking account. Electioneering Communications Organization Handbook, FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS (July 2010) ("ECO handbook"), at 12, 14, *available at* http://election.dos.state.fl.us/publications/pdf/2010/2010_ECO_Handbook.pdf.

The legal independence of a federal political committee is also manifest in the extensive regulations governing its dissolution. A PAC may terminate only upon filing a written notice with the FEC, 11 C.F.R. § 102.3(a)(1), and termination is only permitted if the PAC settles, or submits a plan to settle, any "outstanding debts and obligations." *Id*. §§ 102.3(a)(1), 116.7, 116.8; *cf. id*. at § 102.4 (outlining FEC administrative termination process). Florida law, by contrast, establishes no comparable termination requirements for an ECO, and only requires that an ECO include in its Statement of Organization its plan for the disposition of residual funds in the event of dissolution. FLA. STAT. § 106.03(2)(j).

Finally, even the disclosure requirements applicable to ECOs fall short of the disclosure requirements applicable to PACs. To be sure, an ECO must register and file periodic reports with the appropriate election authority. FLA. STAT. §§ 106.03(1)(b), 106.0703. But the level of detail required in the periodic report of a

federal non-candidate, non-party political committee (32 separate categories of reporting) greatly exceeds that of the periodic report of an ECO (11 categories). *Compare* 2 U.S.C. § 434(b) (reporting for non-authorized committees) *and* FLA. STAT. § 106.0703(3)(a). In addition, the record-keeping requirements applicable to PACs and ECOs differ radically. FECA requires political committees to keep records of contributions in excess of $50, *e.g.*, a copy or digital image of each contribution check, and disbursements in excess of $200, *e.g.*, a receipt or invoice; and to maintain such records for three years. 11 C.F.R. § 102.9(a)(4), (b)(2), (c). An ECO, by contrast, is subject to no formal record-keeping requirement beyond the requirement that it retain its bank statements. *See* FLA. STAT. §§ 106.0703(3)(a)(10), (5); ECO Handbook, at 18.

In short, an ECO serves simply as an internal accounting mechanism to facilitate the disclosure of money spent by organizations for ECs. It cannot be credibly analogized to a federal political committee, which is a separate legal entity, bound by extensive fundraising restrictions and subject to far more "onerous" organizational and disclosure requirements than at issue here.

III. Strict Scrutiny Is Not Applicable to This Court's Review of Florida's Disclosure Law.

NOM asserts that strict scrutiny applies to the challenged definitions based on its claim that the law imposes "political-committee-like burdens." Appellant Br. at 48, 50. But the term "political-committee-like burdens" is so imprecise as to

be meaningless. It is the substantive requirements imposed by a law that determines the level of scrutiny to be applied, not the label a plaintiff attempts to affix to such law. Here, the challenged definitions trigger only reporting and registration obligations, and consequently are subject only to exacting scrutiny.

The Supreme Court applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. Expenditure restrictions, as the most burdensome campaign finance regulations, are subject to strict scrutiny and reviewed for whether they are "narrowly tailored" to "further a compelling interest." *WRTL*, 551 U.S. at 476; *see also Buckley*, 424 U.S. at 44-45. Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162, 123 S. Ct. 2200 (2003) (internal quotations omitted). Disclosure requirements are the "least restrictive" campaign finance regulations. *Buckley*, 424 U.S at 68. As a result, they are subject only to "exacting scrutiny," which requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914, *quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted). The Supreme Court twice reaffirmed last year that "exacting scrutiny" applies to disclosure requirements in the spheres

of campaign finance law and ballot referenda. *See Citizens United*, 130 S. Ct. at 914; *Reed*, 130 S. Ct. at 2818.

NOM does not dispute this analytical framework, but it attempts to blur the distinctions between expenditure restrictions, contribution restrictions and disclosure requirements for the purposes of judicial review by categorizing all such regulations as "political-committee-like burdens." Appellant Br. at 49-50. As an initial matter, Florida ECO disclosure law does not impose federal-law-like "political committee status," *see* Section II *supra*. But even accepting this description of the challenged law for the sake of argument, the phrase "political-committee-like burdens" does not advance the analysis because it could refer to multiple substantive regulations, each of which may be subject to a different standard of scrutiny. For instance, a federal political committee is subject to disclosure requirements, 2 U.S.C. §§ 432, 433, 434(a)(4), as well as contribution limits, 2 U.S.C. §§ 441a(a)(1), (2), and source prohibitions, 2 U.S.C. § 441b(a). The applicable standard of scrutiny will turn on the nature of the specific "political-committee-like burden" at issue.

This principle is well illustrated by the decision of the D.C. Circuit Court of Appeals in *SpeechNow.org*. There, the Court of Appeals reviewed both the contribution limits connected to federal political committee status, and the registration, reporting and organizational requirements connected to such status. It

struck down the contribution limits as applied to political committees making only independent expenditures after reviewing such limits under the heightened scrutiny appropriate for contribution limits. 599 F.3d at 692 (noting that contribution limits must be "closely drawn to serve a sufficiently important interest") (citing *Davis v. FEC*, 554 U.S. 724, 740 n.7, 128 S. Ct. 2759 (2008)). By contrast, the Court of Appeals upheld the political committee disclosure requirements under a more relaxed standard, stating that "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation' to the disclosure requirements." *Id*. at 696. The appropriate standard of scrutiny thus turned on the nature of the substantive regulation associated with political committee status, not "PAC status" itself, as NOM contends.

In this case, the only regulations at issue are registration and reporting requirements and hence only exacting scrutiny is required. *See* FLA. STAT. §§ 106.03, 106.022, 106.0703. NOM's facile attempt to label these requirements "political-committee-like burdens" does not change the nature of the challenged laws, nor justify application of strict scrutiny.

The Ninth Circuit Court of Appeals recently rejected a similar argument in *Human Life of Washington v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010). There, the plaintiffs challenged Washington State's disclosure law that required groups that supported or opposed candidates or ballot propositions to register as political

committees and to satisfy detailed reporting and organizational requirements. 624 F.3d at 997-98. Although the challenged law thus imposed "political-committee-like burdens," in the words of NOM, the Court of Appeals rejected HLW's assertion that strict scrutiny applied. It noted that "confusion" had "emerged" in the Ninth Circuit regarding the scrutiny applicable to political disclosure laws. *Id.* at 1003-04. But, as the Court of Appeals noted, the decisions in *Citizens United* and *Reed* "have eliminated the apparent confusion as to the standard of review applicable in disclosure cases" by confirming that "a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest." *Id*. at 1005 (emphasis added).

This has also been the approach of a number of courts that have heard challenges post-*Citizens United* to disclosure-related requirements accompanying state "political committee" status. For instance, in *Nat'l Org. For Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), the First Circuit Court of Appeals reviewed Maine's disclosure-only political committee statute under exacting scrutiny, noting that "[b]ecause Maine's PAC laws do not prohibit, limit, or impose any onerous burdens on speech, but merely require the maintenance and disclosure of certain financial information, we reject NOM's argument that strict scrutiny should apply." *Id.* at 56. *See also RTAO*, 2011 WL 2457730, at *8 (applying exacting

scrutiny to the federal definition of "express advocacy" and FEC's implementation of the "major purpose" test because both "effectuate[] disclosure requirements"); *Iowa Right to Life Committee, Inc. (IRTL) v. Tooker*, -- F. Supp. 2d ---, 2011 WL 2649980, *7 (S.D. Iowa June 29, 2011); *Yamada v. Kuramoto*, 2010 WL 4603936, *11 (D. Haw. Oct. 29, 2010).

This Court should follow the clear guidance of *Buckley*, *Citizens United* and the weight of recent case law and apply exacting scrutiny to the challenged law.

IV. The "Major Purpose" Test Does Not Apply.

NOM's final line of attack is its assertion that Florida's ECO disclosure law imposes "political committee status," and therefore may not be applied to groups whose "major purpose" does not relate to the nomination or election of a candidate. Appellant Br. at 58-63. But the "major purpose" test was formulated as a narrowing construction to the specific definition of "political committee" in FECA. Further, the test was developed in light of the full panoply of regulations applicable to federal political committees, including contribution limits and source restrictions. *See* Section II *supra*. Here neither the language of federal law nor the substantive restrictions that attend federal PAC status are at issue.

A. The Major Purpose Test Was a Statutory Cure.

The "major purpose" test was formulated by the Supreme Court in *Buckley* to address the constitutional concern that FECA's definition of the term "political

committee" was vague and overbroad to the extent it relied upon the statutory definition of "expenditure." FECA defined a "political committee" as a group that "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). The statute in turn defined "expenditure" as any spending "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(9)(A)(i) (emphasis added). The Court recognized that this expansive definition of "expenditure" caused "line-drawing problems" by potentially "encompassing both issue discussion and advocacy of a political result." 424 U.S. at 78-79. Furthermore, it feared that the "political committee" definition "could raise similar vagueness problems," because it relied upon the vague term "expenditure," and thus "could be interpreted to reach groups engaged purely in issue discussion." *Id*. at 79.

To resolve these constitutional concerns, the *Buckley* Court imposed two different limiting constructions. First, it narrowed the definition of "political committee" to encompass only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* (emphasis added). For such "major purpose" groups, there was no vagueness concern about the statutory "for the purpose of influencing" definition of "expenditure" because, the Supreme Court held, disbursements by such "major purpose" groups "can be assumed to fall within the core area sought to be

addressed by Congress. They are, by definition, campaign related." *Id.* Second, "when the maker of the expenditure is *not* within these categories – when it is an individual other than a candidate or a group other than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80 (emphasis added).

The objective of the *Buckley* Court was thus to save from claims of vagueness the FECA definition of "political committee," as well as the definition of "expenditure" upon which the "political committee" definition relied. The "major purpose" test was the Court's cure for the specific constitutional defects of the federal statute.

But the "major purpose" text is not, as NOM claims, a free-floating constitutional requirement for "political-committee-like burdens" that automatically applies regardless of the language of the underlying campaign finance law or the requirements the law imposes. As the First Circuit stated, "We find no reason to believe that this so-called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the Court's construction of a federal statute." *McKee*, 649 F.3d at 59.

Florida's ECO disclosure statute does not raise the vagueness or overbreadth concerns that necessitated the Supreme Court's application of the "major purpose"

test to the definition of "political committee" under FECA. The federal definition of political committee rested on the term "expenditure," which was found to be both unconstitutionally vague and overbroad. Under Florida law, an ECO is defined as "any group, other than a political party, political committee, or committee or continuous existence, whose election-related activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications…" FLA. STAT. § 106.011(19) (emphasis added). The definition of ECO thus rests on the state law definition of "EC," and this term is neither vague nor overbroad, as explained in Section I, *supra*. The state law EC definition largely mirrors the federal EC definition – which NOM concedes is constitutional. *See*, *e.g.*, Appellant Br. at 36 n.12. In fact, the state EC definition is even narrower than the federal definition due to its inclusion of the "appeal-to-vote" test, and thus poses no danger of "encompassing both issue discussion and advocacy of a political result." Because the definition of ECO does not rely on vague or overbroad terminology, it does not require the narrowing construction of the "major purpose" test.

Florida's law also stands in stark contrast to the state "political committee" statutes reviewed in the cases cited by NOM in support of the "major purpose" test. *See* Appellant Br. at 55 n.26 (citing *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010), *North Carolina Right to Life (NCRTL) v. Leake*, 525

F.3d 274 (4th Cir. 2008), and *Colorado Right to Life Comm. (CRLC) v. Coffman*, 498 F.3d 1137 (10th Cir. 2007)). Many of the statutes at issue mirrored the defects of federal law, and relied on terminology that the reviewing courts determined was vague or overbroad. In *Herrera*, for instance, the New Mexico statute at issue defined a "political committee" as, *inter alia*, "an organization of two or more persons that within one calendar year expends funds in excess of five hundred dollars ($500) to conduct an advertising campaign for a political purpose." 611 F.3d at 673, *citing* N.M. Stat. § 1-19-26(L) (emphasis added). But the statutory definition of "political purpose," *i.e.*, "influencing or attempting to influence an election or pre-primary convention including a constitutional amendment or other question submitted to the voters," *see* N.M. Stat. § 1-19-26(M), was found to be vague and overbroad. 611 F.3d at 674. Thus, the New Mexico statute was analogous to the federal statute in *Buckley* in that it relied on vague and overbroad terminology, and consequently applied to groups, like the plaintiff NMYO, that ran only issue advertising unrelated to an election. *Id.* at 671-72. *See also NCRTL*, 525 F.3d at 280-83, 286-87 (considering North Carolina definition of "political committee," which relied upon a definition of "expenditure" that was deemed vague and overbroad).

By contrast, Florida's ECO requirements are triggered by a bright-line definition of "EC," and therefore will be "directed precisely to that spending that is

unambiguously related to the campaign of a particular … candidate." *Buckley*, 424 U.S. at 80. The major purpose test is not needed.

B. Florida's Disclosure Law Is Not Comparable to the Federal Political Committee Requirements.

Even if Florida's ECO disclosure law raised the same vagueness and overbreadth concerns as the original FECA definition of "political committee," however, the challenged disclosure statute does not impose "political-committee-like burdens" within the meaning of federal law. Because the ECO disclosure law does not entail the contribution restrictions or organizational burdens that attend federal political committee status, the major purpose test is inapplicable.

As discussed in Section II *supra*, federal political committees are subject to strict fundraising requirements, including contribution limits and source restrictions.[6] Further, federal political committees must comply with organizational requirements that have no analog in Florida's ECO disclosure law. As the district court found, the challenged ECO law simply "do[es] not impose full-fledged political-committee like burdens upon NOM." *NOM*, 753 F. Supp. 2d at 1222. Indeed, as detailed in Section II, even the disclosure requirements

[6] As noted in n.5 *supra*, the FEC recently ruled that political committees making only independent expenditures are no longer bound by the federal contribution limits or source restrictions. However, when *Buckley* formulated the "major purpose" test, all federal political committees were subject to these contribution restrictions under FECA.

imposed by the ECO disclosure law fall far short of the disclosure requirements entailed in federal PAC status.

The district court below is not alone in its conclusion that disclosure requirements such as reporting, registration and record-keeping are not tantamount to federal political committee regulation. In reviewing state statutes requiring reporting and registration from groups engaged in independent spending, most courts have distinguished the state statutes from federal PAC status. For instance, as the First Circuit held, Maine's "non-major-purpose committee" disclosure law, unlike federal PAC law, "does not condition political speech on the creation of a separate organization or fund, establishes no funding or independent expenditure restrictions, and imposes three simple obligations on an entity qualifying as a PAC: filing of a registration form disclosing basic information, quarterly reporting of election-related contributions and expenditures, and simple recordkeeping." *McKee*, 649 F.3d at 56; *see also Human Life*, 624 F.3d at 1009-1010; *IRTL*, 2011 WL 2649980, at *9 n.29.

The decisions cited by NOM in support of the major purpose test do not contradict this guidance, because the state statutes reviewed in those cases extended beyond disclosure requirements and imposed additional substantive requirements on "political committees." For instance, in evaluating North Carolina's definition of "political committee," the Fourth Circuit specifically noted

that "political committees" were subject not only to disclosure requirements under North Carolina law, but also "face limits on the amount of donations they can receive in any one election cycle from any individual or entity." *NCRTL*, 525 F.3d at 286. Similarly, as noted by the district court in *CRTL*, "political committee" status under Colorado law entailed strict contribution requirements. *CRTL v. Davidson*, 395 F. Supp. 2d 1001, 1020-21 (D. Colo. 2005) (noting that political committees were prohibited from accepting contributions of over $500 per election cycle). And in *Florida Right to Life, Inc. v. Mortham*, 1999 WL 33204523,*4-5 (M.D. Fla. Dec. 15, 1999), *aff'd*, 238 F.3d 1288 (11th Cir. 2001), *and rev'd on other grounds*, 273 F.3d 1318 (11th Cir. 2001), the court dealt with the imposition of "political committee" status under an earlier Florida law, *see* FLA. STAT. § 106.011(1) (1999), which entails not only disclosure requirements, but also contribution restrictions, *see id.* § 106.08(1)(a).[7] Because the restrictions imposed by these challenged state statutes thus more closely resembled the burdens of federal PAC status, it was reasonable for the reviewing court to hold that, under *Buckley*, these statutes could be permissibly applied only to groups with a "major purpose" to influence elections.

[7] *See also Florida Right to Life, Inc. v. Mortham*, 2000 WL 33733256, *6 (M.D. Fla. March 20, 2000) (unreported) (upholding $500 limit on contributions to state political committees).

Thus, the relevant cases – including even NOM's citied authority – understand "political-committee-like burdens" to include not simply registration and reporting requirements, but also fundraising restrictions and organizational obligations. And recognizing its lack of support in the law, NOM is forced to entirely re-conceive the meaning of "political committee status." It asserts that the registration and reporting required by Florida's ECO law is alone sufficient to constitute PAC status, even in the absence of fundraising restrictions or more stringent organizational requirements. *See* Appellant Br. at 56-57 ("Political-committee . . . requirements are burdensome and onerous even if they include 'only' – so to speak – (1) registration … (2) recordkeeping, or (3) extensive reporting requirements yet not (4) limits or (5) source bans on contributions received."). This notion of "PAC status," however, has no support in FECA or the case law. Indeed, the entire theory rests on NOM's observation that the *Citizens United* court enumerated mostly disclosure and organizational requirements when discussing the "onerous" nature of federal corporate PACs. *Id.*, *citing* 130 S. Ct. at 897. But this observation proves nothing at all. The *Citizens United* Court was not providing a comprehensive description of the regulations applicable to federal political committees, and it certainly was not determining which of these regulations could be imposed only on "major purpose" groups. Instead, the Court was explaining why the "PAC option" under federal law did not provide

corporations subject to 2 U.S.C. § 441b with a constitutionally sufficient alternative for their electoral spending.

Finally, NOM's attempt to limit "PAC status" to disclosure requirements underscores that its major purpose argument is inherently self-contradictory. The only reason NOM offers for the application of the major purpose test in connection to Florida's ECO disclosure law is the ECO's alleged similarity to federal political committees. But by attempting to redefine the legal burdens that are essential to federal political committee status, NOM effectively acknowledges that the state law does not impose the same requirements on ECOs as federal law imposes on PACs. It cannot rest its argument for the major purpose test on an analogy between ECOs and federal PACs while simultaneously acknowledging that ECOs are materially different from federal PACs.

In short, in this case, where only disclosure requirements are at issue, not the full range of burdens applicable to federal political committees, application of the "major purpose" test is not constitutionally required.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6836 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I certify that on December 15, 2011, the foregoing BRIEF *AMICUS CURIAE* OF CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE and the required number of copies were sent to the clerk via First Class Mail, postage prepaid.

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