No. 09-724

In The
Supreme Court of the United States

The Real Truth About Obama, Inc., *Petitioner*

v.

Federal Election Commission and
United States Department of Justice

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

Reply to Brief in Opposition

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April 2, 2010

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Corporate Disclosure

The Real Truth About Obama, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns ten percent or more of its stock.

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, Regulations & Rules

Other Authorities

Reasons to Grant the Petition

Respondents' (collectively "FEC") Opposition raises broader issues than those posed by 11 C.F.R. 100.22(b) and FEC's PAC-status policy. FEC claims *broad* authority from *McConnell v. FEC*, 540 U.S. 93 (2003)—and from its authority "to 'formulate policy' with respect to FECA" (Opp'n 2 (citation omitted))—to regulate speech and speakers as it chooses without congressional action and despite court decisions. FEC's claim defies *Buckley v. Valeo*, 424 U.S. 1 (1976), *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"), *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *McConnell* itself, which all establish that FEC has *narrow* authority. FEC's broad claim of authority raises additional issues that this Court should decide in reconciling these case lines.[1]

I. This Court Should Review Whether *McConnell* Granted FEC Authority to Define Statutory "Express Advocacy" as It Chooses.

RTAO showed that *Buckley* and *MCFL* established a magic-words "express advocacy" test; that all mem-

[1] FEC will not enforce 11 C.F.R. 100.57 and 114.15. (Opp'n 5-7.) The former is unconstitutional and beyond statutory authority. *EMILY's List v. FEC*, 581 F.3d 1, 17-18, 21-22 (D.C. Cir. 2009). The latter was "precisely what *WRTL*[*-II*] sought to avoid," *Citizens*, 130 S. Ct. at 895-96, and lacks function after *Citizens* held corporate speech prohibitions unconstitutional. Claims regarding these are moot and should be handled as FEC suggests. (Opp'n 25.) But the district court's clear error of law as to them was abuse of discretion and RTAO should have received a preliminary injunction.

bers of this Court in *WRTL-II* and *McConnell* recognized that express advocacy requires "magic words"; that lower courts before and after *McConnell* recognized the express-advocacy test as a magic-words test; and that the only statutory authority is for a magic-words test. (Pet. 15-18.) To this must now be added the dissent's recognition (twice) of the same in *Citizens*: "If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley* . . . ," 130 S. Ct. at 935 n.8 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part); *id.* at 956 (equating express advocacy with "magic words"). But despite this, FEC argues that it is not bound by these cases because *McConnell* gave FEC broad authority to regulate *more* than express advocacy. (Opp'n 17.)

This is an important issue for this Court to decide. Did *McConnell* insist that the "express advocacy" test requires "magic words," as RTAO argues, or did *McConnell* give FEC broad authority to survey America's political speech and prohibit, by regulation, the speech it does not like, as FEC says it did here in adopting 11 C.F.R. 100.22(b)?

Furthermore, FEC justifies 100.22(b) as being like *WRTL-II*'s appeal-to-vote test (Opp'n 15), or more particularly, like FEC's *interpretation* of that test at FEC's unconstitutional rule at 11 C.F.R. 114.15. (Opp'n 16). FEC describes *WRTL-II*'s test as "look[ing] to the 'mention' of an election and similar 'indicia of express advocacy.'" (Opp'n 16.) However, that was *not* part of *WRTL-II*'s appeal-to-vote test. FEC's interpretation of the test (importing elements of a particular *application* of the test into the test) was "precisely what *WRTL*[*-II*] sought to avoid," *Citizens*, 130 S. Ct. at 896. By its new regulation, FEC converted the "objective 'appeal to vote' test" into a subjective "two-part, 11-factor balancing test," *id.* at 895, that was "onerous" and the "function[al] . . . equivalent of prior restraint by giving the FEC power analogous to licensing laws . . . ." *Id.* at 895-86.

Thus, this is an important issue for this Court to decide. Does the unconstitutional "two-part, 11-factor balancing test" in section 114.15 live on in FEC's alternate definition of "express advocacy," 100.22(b), or is it unconstitutional as *Citizens* explained? Furthermore, is the appeal-to-vote test a free-floating test that FEC may import into the express-advocacy context, or is it rather a gloss only on the electioneering-communication prohibition imposed by *WRTL-II*, 551 U.S. 449, as the Fourth Circuit held? *North Carolina Right to Life v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008). (Pet. 17).

FEC further claims that 100.22(b) is "identical to" the express-advocacy test stated in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (Opp'n 18), but it is not. *Furgatch* said "speech may only be termed 'advocacy' if it presents a clear plea for action, and . . . it must be clear what action is advocated[, i.e.,] . . . a vote for or against a candidate . . ."[2] Section 100.22(b) contains no clear-plea-for-action requirement that must be to

[2] *Furgatch* applied this to an anti-Nixon ad that proclaimed "DON'T LET HIM DO IT!" where the only way to "[not] let him do it" was to vote against him. The Ninth Circuit decided that there was a "clear plea for action" and the action solicited was "a vote for or against a candidate" so the communication at issue fit the test.

"vote." And the *Furgatch* test was narrowed by the Ninth Circuit, which held that "*Furgatch* . . . presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (emphasis in original).

Thus, this is an important issue for the Court to decide: Does the *Furgatch* test live on—after *McConnell*, *WRTL-II*, and *Citizens* held that express advocacy required magic words—to justify 100.22(b), and, if it does, does it faithfully impose the test in *Furgatch*, as explained in *Getman*?

This Court should accept this case to determine whether the express-advocacy test requires "magic words." It should accept the case to decide whether *McConnell* granted FEC authority to regulate speech as it chooses without congressional action—leaving regulation to FEC whim.[3] This Court should accept this case to eliminate chilling vagueness and provide protection for First Amendment activity. And this Court should accept this case to halt FEC's overreaching regarding the express-advocacy test, which is of a kind with its overreaching on the appeal-to-vote test. *See supra.*

II. This Court Should Review Whether FEC May Base PAC Status on the Sort of Factors Rejected in *Citizens*.

RTAO set out the bright-line, protective test for PAC status established in *Buckley*, 424 U.S. at 79, *MCFL*, 479 U.S. at 252 n.6, 262, and other federal court decisions, including the requirement that major

[3] "[W]e don't put our First Amendment rights in the hands of FEC bureaucrats . . . ." Transcript of Oral Argument at 66, *Citizens*, 130 S. Ct. 876 (No. 08-205) (Roberts, C.J.).

purpose be determined based on "an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (emphasis added). (Pet. 22-28.) Essentially, a group's status is readily determined based on whether its *regulable* disbursements for "contributions" or "independent expenditures" (express advocacy) exceed fifty percent of its annual disbursements.[4]

FEC, however, argues that it may employ a vague, case-by-case analysis that does not define "major purpose" as involving only an examination of regulable activity as fifty-percent or more of annual activity. FEC wants PAC status to be determined on undefined factors *other* than regulable speech and on something *less* than 50 percent of disbursements.[5]

This raises the problems identified in *Citizens*, which was decided after the Fourth Circuit decision in the present case. *Citizens* rejected regulations where

[4] Entities controlled by candidates or designated political committees in organic documents, e.g., as "separate segregated funds," would automatically be political committees.

[5] FEC based its PAC-status policy on regulations expanding the "contribution" (by 11 C.F.R. 100.57) and "expenditure" (by 11 C.F.R. 100.22(b)) that can trigger statutory "political status" under 2 U.S.C. 431(4) and on its ambiguous, case-by-case interpretation of "major purpose." *See* "Political Committee Status," 72 Fed. Reg. 5595 (2007). It used these expansive concepts to capture as PACs organizations that had not thought they were PACs, so had not complied with PAC regulations, and were thus subject to substantial penalties. *Id.* at 5604-05. Despite the demise of 100.57 and the unconstitutionality of 100.22(b), *supra*, FEC insists on defending its overly expansive enforcement policy as to "major purpose."

speech is chilled by an ambiguous, multi-factor test that is likely to lead to burdensome litigation and provides FEC unfettered discretion to determine (ex post facto) who may speak, all heightened by severe civil and criminal penalties. This approach provides no protection for speakers.

First, *Citizens* rejected approaches where "substantial time would be required to bring clarity to the application" of a regulation. 130 S. Ct. at 895. But FEC's case-by-case policy would require substantial time before it is clear what constitutes major purpose.

Second, *Citizens* rejects approaches not allowing for resolution within the "short timeframes in which speech can have influence" on elections, leaving speakers judicial relief "long after the opportunity to persuade primary voters has passed." *Id.* But FEC's policy lacks the bright lines for ready determination of status (instead relying on lengthy, expensive, intrusive investigations of all activities to determine status). And this present case demonstrates starkly the inability to obtain judicial relief in a timely fashion.

Third, *Citizens* requires recognition of "the primary importance of speech itself to the integrity of the election process" and accordingly rejects prolix and complex rules, subjective tests, balancing, and "the open-ended rough-and-tumble of factors' . . . [that] 'invite[es] complex arguments in a trial court and a virtually inevitable appeal.'" *Id.* at 895-96 (citation omitted). But FEC's policy is based on a pair of rambling, vague explanations in the Federal Register that rely on numerous poorly-defined factors to determine major purpose—just what *Citizens* rejected.

Finally, *Citizens* particularly rejects any "regime that allows [FEC] to select what political speech is safe

for public consumption by applying ambiguous tests" that have "[g]overnment officials por[ing] over each word of a text to see if, in their judgment, it accords with the 11-factor rest. *Id.* at 896. That is precisely what FEC's policy does as to speakers, allowing FEC to do the more intrusive and burdensome activity of poring over every internal detail of a group's activities to determine whether it comports with an even more vague major-purpose "test." "This is an unprecedented governmental intervention into the realm of speech." *Id.*

Thus, this Court should accept this case to decide the important issue of whether RTAO's bright-line, speech-protective manner of determining PAC-status or FEC's vague multi-factor ex post facto test is more consistent with this Court's precedent. This issue is particularly important because *Citizens* permits more groups to engage in political speech. They should not be subjected to the chill of having vague, subjective standards allowing ex post facto findings of PAC status (with substantial penalties) after burdensome, intrusive investigations.

III. This Court Should Review Whether the PAC Option Removes Irreparable Harm and What Interests Justify PAC Burdens.

In First Amendment cases, the other preliminary injunction factors should essentially follow from the finding as to likely success on the merits. The court below rejected that approach. Three FEC arguments highlight why this case should be reviewed.

First, RTAO sought pre-enforcement judicial relief both to *avoid* onerous PAC burdens and to *avoid* being deemed a PAC ex post facto and thereby liable for substantial civil and criminal penalties for noncompli-

ance with PAC requirements. FEC blithely asserts that RTAO has no irreparable harm because it can do all the activities it seeks to do by simply *being* a political committee! (Opp'n 21-22.) *Citizens*, however, pronounced PAC burdens "onerous," *id.* at 897-98, as did *WRTL-II*, 551 U.S. at 477 n.9 (controlling opinion) ("PACs impose well-documented and onerous burdens"). And the enormous penalties to which an ex post facto finding of PAC status would subject RTAO, when it did not comply with PAC requirements because it believed it was not a PAC, are clearly irreparable harm. This is true especially if the PAC-status enforcement policy is likely unconstitutional. Thus, this Court should accept this case to determine whether the rejection of the PAC option in *WRTL-II*, 551 U.S. at 477 n.9, and *Citizens*, 130 S. Ct. at 897—because it does not alleviate constitutional problems with restricting speakers—controls preliminary injunctions or whether availability of the PAC option means there is no irreparable harm because a speaker can do the same speech through a PAC (as FEC argues).

Second, *Citizens* reaffirms that the only type of corruption justifying speech restrictions is quid pro quo. 130 S. Ct. at 909-11. FEC claims, however, that imposing PAC restrictions is justified by "compelling interests in preventing . . . corruption, informing the public, and facilitating the Commission's enforcement of the law." (Opp'n 23.) Thus, FEC is claiming broad authority to regulate speech, based not just on quid pro quo corruption, but on two interests that have not been previously identified as "compelling" and have only been used so far to justify *simple* disclosure requirements. *Buckley*, 424 U.S. at 66-68. If mere public desire to *know* about a group's activities and FEC

desire to *enforce* PAC requirements are sufficient to justify PAC burdens, then PAC status may be imposed on anyone. This Court should accept this case to decide whether interests other than preventing quid pro quo corruption justify imposing PAC status.

Third, FEC argues that it is more important for likely-unconstitutional restrictions to remain in place near elections—because of the potential for public confusion and lack of confidence in campaign finance regulations—than for constitutional rights to be protected. (Opp'n 23-24.) *WRTL-II*, 551 U.S. at 469, and *Citizens*, 130 S. Ct. at 895, however, recognized the propriety of constitutional challenges near elections, where unconstitutional laws would be challenged and enjoined. Thus, this Court should accept this case to decide whether retaining confidence in campaign-finance regulations or in the Constitution itself must control in public-interest balancing in the preliminary injunction context—and whether there is any cognizable public interest in maintaining likely-unconstitutional restrictions in place before an election.

IV. Protective First Amendment Preliminary-Injunction Standards Are Required.

RTAO argued that the appellate court applied a *heightened* preliminary-injunction standard and placed a *heavy* burden on *RTAO* instead of the government to justify the preliminary injunction. (Pet. 8-11.) The court below said that *because* ("for that reason") campaign-finance law is "a difficult and complicated area of law that is still developing" RTAO's burden would be "heavy." (Pet. 9.) The court also used the "clear showing" requirement to elevate the "likely" requirement (as to success and harm) to a *highly* likely requirement. (Pet. 9-10.) FEC justifies this heavy bur-

den by saying that the standard is always "'stringent.'" (Opp'n 11 (citation omitted).) This case should be accepted to decide whether the standards in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), should be applied to campaign-finance litigation or whether a heavier burden should be imposed on First Amendment challenges to campaign-finance rules in order to obtain preliminary relief.

RTAO also argued that the appellate court failed to require that the government bear the burden of justifying its speech regulation. (Pet. 10-11.) FEC does not address who should have the burden regarding likely success on the merits, but it argues that RTAO had the burden regarding all other preliminary-injunction requirements. (Opp'n 12.) This case should be accepted to decide who has the burden as to likely success and the other elements of the preliminary-injunction standard in cases involving campaign-finance speech restrictions. This is important since preliminary injunctions in First Amendment challenges to campaign-finance laws are essential to timely protection of citizens' political-speech rights.

Finally, FEC argues that "petitioner appears to have no present need for [a preliminary injunction]," so review should be denied. (Opp'n 13.) However, FEC's arguments illustrate exactly why an appeal of a preliminary-injunction denial should be accepted for review. If improper standards are applied and improper interests considered to deny a preliminary injunction as to a particularly important opportunity for speech, then that moment will *always* be lost. RTAO has verified its intent to do similar future activity, so the need for preliminary injunctions to be considered under proper standards is capable of

repetition yet evading review. FEC's argument that no preliminary injunction is now required is simply a mootness argument in new guise and must be rejected if proper standards are to be put in place for the next opportune speech moment. *Citizens* expressly rejected any regime whereby a citizen group "learns . . . whether it could have spoken . . . long after the opportunity to persuade . . . has passed." 130 S. Ct. at 895.

Conclusion

This Court should grant the petition and decide the issues both as to abuse of discretion and on the merits —as there is no need to remand this case, which turns on issues of constitutional law. The Court should also decide how preliminary injunction standards must be applied in First Amendment cases.

Respectfully submitted,

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