No. _____

In The
Supreme Court of the United States

National Organization for Marriage, *Petitioner*

v.

Walter F. McKee et al., *Respondents*

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

Petition for a Writ of Certiorari

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Questions Presented

Citizens United v. FEC employed strict scrutiny to hold unconstitutional the ban on corporate political speech and the "onerous" political-committee ("PAC") option. 130 S.Ct. 876, 897-98 (2010) ("*Citizens*"). It employed exacting scrutiny to uphold one-time, event-driven reporting of electioneering communications. *Id.* at 914-16. The decision below upheld similar PAC-style requirements under exacting scrutiny and rejected the major-purpose test of *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), for PAC status. And it held that the terms "promoting," "support," "opposition," and "influencing" in campaign-finance laws are not unconstitutionally vague or overbroad. This raises these issues:

1. Whether a state may impose PAC-style burdens on groups lacking the major purpose of nominating or electing candidates and whether such imposition must pass strict scrutiny.

2. Whether the terms "promoting," "support," and "opposition" are unconstitutionally vague and overbroad in Maine's campaign-finance laws.

3. Whether the First Circuit erred in upholding Maine's use of "influencing" to define regulated political speech, given that

   (a) the legislature amended the relevant statutes to define "influence" as "to promote, support, oppose or defeat" before the First Circuit decision, making the challenge to the original "influence" language moot, and

   (b) "influencing" is unconstitutionally vague and overbroad.

4. Whether the district court abused its discretion in unsealing portions of the record that the parties and

the district court agreed to seal and which reveal strategic-planning information protected under free-speech and -association rights.

Parties to the Proceeding Below

The following was appellant, cross-appellee below: National Organization for Marriage, Inc.

The following were appellees, cross-appellants below: Walter F. McKee, Andre G. Duchette, Michael P. Friedman, Francis C. Marsano, and Edward M. Youngblood, in their official capacities as members of the Commission on Governmental Ethics and Election Practices; Mark Lawrence, Stephanie Anderson, Norman Croteau, Evert Fowler, R. Christopher Army, Geoffrey Rashly, Michael E. Pelvic, and Neal T. Adams, in their official capacities as Maine district attorneys; Janet T. Mills, in her official capacity as Maine Attorney General.

Corporate Disclosure

National Organization for Marriage, Inc. has no parent corporation and is a nonstock corporation, so no publicly held company owns 10 percent or more of its stock.

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Petition

National Association for Marriage ("NOM") requests review of *NOM v. McKee*, 649 F.3d 34 (1st Cir. 2011).

Opinions Below

The district court's Order is at 723 F.Supp.2d 245 (D. Me. 2010). The opinion below (App.1a) is at 649 F.3d 34. The order denying rehearing and rehearing en banc (App.68a) is unreported.

Jurisdiction

The decision below and judgment were filed August 11, 2011. NOM's motion for rehearing and rehearing en banc was denied September 6, 2011. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutions, Statutes & Regulations

Appended are the First (App.70a) and Fourteenth Amendments (App.70a); Me. Rev. Stat. ("MRS") 21-A, 1012(3)(A) (App.71a), 1012(4-A) (App.72a n.3), 1014 (1)-(2-A) (App.72a), 1019-B (App.74a), 1051-1052(4)-(5)(A) (App.77a), 1053-B (App.81a); and 94-270 Me. Code R. 10 (App.82a).

Statement of the Case

NOM is a national, nonprofit, issue-advocacy corporation that wanted to speak by radio, mail, and Internet about issues in Maine, but was chilled by Maine's onerous campaign-finance laws, including provisions:

(1) imposing PAC status and PAC-style administrative requirements by unconstitutionally vague and overbroad language without regard to whether an organization meets this Court's major-purpose test, *Buckley*, 424 U.S. at 79, *see* MRS 21-A, 1052(4)(A)(1)

("expenditure" definition triggering PAC status) and (5)(A)(4)-(5) (definitions of major-purpose and *non*-major-purpose PACs), 1053-B (imposing Maine PAC-burdens on out-of-state groups meeting Maine's PAC definitions);

(2) requiring reporting of independent expenditures with unconstitutionally vague and overbroad language, *see* MRS 21-A, 1012(3)(A)(1) (general "expenditure" definition), 1019-B (ordinary independent-expenditure reporting requirement); 94-270 Me. Code R. 10(2)(B) (ordinary independent-expenditure reporting requirement); and

(3) requiring, via unconstitutionally vague and overbroad language, attribution and disclaimer statements on certain communications, *see* MRS 21-A, 1014(1)-(2-A).

Because of these laws, NOM sought injunctive and declaratory relief in October 2009. The federal district court held unconstitutional a 24-hour reporting requirement (not at issue on appeal) and the phrase "for the purpose of influencing" (and variants), which it severed from numerous provisions. The district court then rejected the rest of NOM's constitutional claims, including challenges to the terms "promoting," "support," and "opposition," as unconstitutionally vague and overbroad. And it unsealed documents—subject to an agreed protective order under which NOM had not fought document production—including NOM's *Victory Plan*, which revealed its advocacy priorities, and information about its vendors, for whom NOM feared the sort of harassment experienced by vendors who worked for supporters of California's Proposition 8.

The First Circuit affirmed the holding that "promoting," "support," and "opposition" are not unconstitu-

tionally vague. And during the appeal, Maine amended its statutes to use this language in a new "influence" definition.

The First Circuit reversed the district court's holding in the cross-appeal, deciding that the "influence" language was not unconstitutionally vague or overbroad as construed by Maine to apply only to "communications and activities" "that clearly identify a candidate . . . and are susceptible of no reasonable interpretation other than to promote or oppose the candidate." App.50-56a.

After the appeal below was argued on April 5, 2011, Maine enacted an emergency law amending some challenged provisions to define "influence" as "mean-[ing] to promote, support, oppose or defeat." *See* MRS 21-A, 1012(4-A) (App.72a n.3), 1052(4-A) (App.78a n.9). Further, Maine changed "for the purpose of promoting, defeating or influencing in any way" in the non-major-purpose PAC definition to "for the purpose of influencing," as newly defined. *See* App.80a n.12.[1]

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[1] Maine did not notify the First Circuit of its June 20 changes. Thus, though the appellate court issued its decision on August 11, it decided the constitutionality of the pre-June 20 challenged provisions.

What is the effect of this change? The "influence" definition moots the cross-appeal on that language, *see, e.g.*, *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009) (dismissing appeal where new judicial canons replaced challenged ones), though if the Court believes that the cross-appeal is not moot, "influencing" and "influencing in any way" are unconstitutionally vague and overbroad under *Buckley*, 424 U.S. at 77-80. But the challenge to imposing PAC-status and burdens, without utilizing the major-purpose test, and to the constitutionality of the "promote,

On September 6, rehearing or rehearing en banc was denied.

The district court had jurisdiction. 28 U.S.C. 1331 and 1343(a). The appellate court had jurisdiction. 28 U.S.C. 1291.

Reasons to Grant the Petition

I.

Lower Courts are Vitiating *Citizens* by Subjecting Corporations to PAC-Style Administrative Requirements that Were Rejected as "Onerous" in *Citizens*, by Approving Vague and Overbroad Provisions, and by Using *Citizens* as an Excuse to Re-Regulate Issue-Advocacy Speech in Contravention of *Buckley* and *MCFL*.

Citizens restored to corporations and labor unions their unfettered First Amendment rights by declaring unconstitutional the ban on their independent political speech. *See* 130 S.Ct. at 896-914. This Court further reaffirmed that non-vague, campaign-related, political speech may be subject to ordinary, non-onerous disclosure, *see id.* at 914-16, which is consistent with *Buckley*'s requirement that disclosed expenditures be "unambiguously campaign related," 424 U.S. at 79-81.

But lower-court decisions are vitiating the mandate of *Citizens* by upholding PAC-style administrative burdens on groups daring to exercise the speech *Citizens* protected. This is accomplished by (a) rejecting *Buckley*'s major-purpose test for PAC-status, (b) demoting

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support, oppose" language is unaffected, as is the challenge to unsealing of NOM's documents.

PAC-burdens from "onerous" to non-onerous, and (c) substituting exacting scrutiny for strict scrutiny. Things have gone from bad to worse. Please note the progression.

Buckley decided that government may impose PAC-status and PAC administrative burdens only on groups that were candidate-controlled or whose "major purpose . . . is the nomination or election of a candidate." 424 U.S. at 79. In *FEC v. Massachusetts Citizens for Life*, this Court reaffirmed this major-purpose test, 479 U.S. 238, 252 n.6 (plurality), 262 (1986) ("*MCFL*"), deemed PAC-style burdens onerous, *id.* at 254-55 (plurality), 266 (O'Connor, J., concurring), and applied strict scrutiny to PAC-style burdens, *id.* at 256, 262.

In *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 786-94 (9th Cir. 2006) ("*ARLC*"), the Ninth Circuit paid lip-service to strict scrutiny for PAC-style administrative burdens, though it undercut the foundation for strict scrutiny by holding that they were non-onerous. As a result, it ignored the major-purpose test for imposing PAC-style burdens, apparently based on its notion that the organizational and reporting requirements were not PAC-style burdens.

Then *Human Life of Washington v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) ("*HLW*"), declared that exacting, rather than strict, scrutiny now governs PAC-style administrative burdens because of *Citizens*, and *HLW* held the burdens that *Citizens* deemed onerous were non-onerous. It also upheld PAC-style administrative burdens on issue-advocacy groups, in the ballot-initiative context, based on Washington's test that campaign advocacy only be "a primary purpose," rather than "the major purpose." At the same time, *HLW* questioned whether the major-purpose test even existed. 624 F.3d

at 1010-11. And it held these things based on the notion that *Citizens* had changed everything related to 'mere disclosure.'

Now the decision below brings the Ninth Circuit's flawed analysis to the First Circuit and extends it, upholding Maine's PAC-style burdens as 'mere disclosure' requirements under complaisant exacting scrutiny and holding that no major-purpose test exists, certainly not for *state*-imposed PAC-status. *See* App. 39-41a.

As a result of these rejections of the major-purpose test, the diminutions of the onerous nature of PAC-style administrative requirements, and the reduced level of scrutiny, this Court's promise in *Citizens* that corporations and unions may now make independent expenditures, 130 S.Ct. at 913, remains imperfectly fulfilled. This is so because vague and overbroad PAC definitions chill speech by requiring organizations to assume onerous PAC-status and PAC-style burdens, even though their major purpose is not nominating or electing candidates. What good is it to be free from the pre-*Citizens* ban if it is now illegal for organizations to do independent expenditures unless they are PACs?

How do courts evade this Court's holdings? They have made 'mere disclosure' into a magical talisman to "label[] burdensome regulations as a 'disclosure law.'" *Minnesota Citizens Concerned for Life v. Swanson*, 640 F.3d 304, 322 (8th Cir. 2011) (Riley, C.J., dissenting), *reh'g en banc granted and opinion vacated* (July 12, 2011) ("*MCCL*"). This talisman was crafted from the application of exacting scrutiny to ordinary attribution and disclaimer requirements and one-time, event-driven, and therefore non-onerous, reporting of electioneering communications, upheld in *Citizens*. 130

S.Ct. at 914-16. By labeling everything involving disclosure as 'mere disclosure,' they transmogrify onerous PAC-style administrative burdens into 'mere disclosure,' to which they apply complaisant exacting scrutiny and find it justified by the informational interests of *Buckley*, 424 U.S. at 66-67. The talisman vitiates this Court's holdings—that PAC-style burdens are onerous, subject to strict scrutiny, and unconstitutional for groups lacking the major purpose of nominating or electing candidates.

Lower courts are also using *Citizens*'s upholding of disclosure for federally defined "electioneering communications," 130 S.Ct. at 914-16, as carte blanche to impose vague regulations that sweep in issue advocacy. *See, e.g.*, *HLW*, 624 F.3d 990 (imposing PAC status on a ballot-initiative committee that simply communicated about the *issue* of physician-assisted suicide ("PAS") without ever expressly advocating for or against a PAS initiative).

This is contrary to decisions of this Court. In *Buckley*, this Court construed an "expenditure" definition (using "purpose of influencing" language in the disclosure context) to hold that only express advocacy must be reported. This assured that only "spending that is unambiguously related to the campaign of a particular federal candidate" need be reported. 424 U.S. at 80. This Court did so to avoid "encompassing both issue discussion and advocacy of a political result" in imposed PAC status and expenditure reporting. *Id.* at 79. Then *MCFL* applied its express-advocacy construction (implementing *Buckley*'s unambiguously-campaign-related requirement) to the "expenditures" banned by 2 U.S.C. 441b. 479 U.S. at 249 ("*Buckley* adopted the 'express advocacy' requirement to distin-

guish discussion of issues and candidates from more pointed exhortations to vote for particular persons.").

In *McConnell v. FEC*, this Court decided that the "vast majority of ads" fitting the electioneering-communication definition "are the functional equivalent of express advocacy." 540 U.S. 93, 206 (2003). And though *McConnell* held that the express-advocacy versus issue-advocacy line was "functionally meaningless," because of this fact, *id.* at 191-93, it in no way did away with its underlying unambiguously-campaign-related requirement nor with the notion that the express-advocacy construction would be necessary to fix vague and overbroad laws, *id.*

FEC v. Wisconsin Right to Life also recognized special First Amendment protection for issue advocacy, providing an appeal-to-vote test to protect it and providing an issue-advocacy definition. 551 U.S. 449, 469-70 (2007) (Roberts, C.J., joined by Alito, J.) ("*WRTL-II*").[2]

Thus, these cases and the First Amendment mean that *Citizens* did not, and could not, grant carte blanche to regulate issue advocacy in any manner desired.

An example shows the stark circuit splits. A nonprofit advocacy project to educate youth on "healthcare, clean elections, the economy, and the environment"

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[2] This principal opinion,"*WRTL-II*," states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977). *WRTL-II* defines issue advocacy: "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." 551 U.S. at 470.

sent out five mailings revealing elected officials' related votes and funding, but containing no express advocacy regarding any official's election (or even mention of elections). *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 671-72 (10th Cir. 2010) ("*NMYO*"). The group spent $6,000 of a million-dollar annual budget for the mailings. Nevertheless, an official complained and the state notified the group that its mailings triggered PAC status and the group must register as a PAC. The Tenth Circuit applied exacting scrutiny and this Court's unambiguously-campaign-related requirement to hold that the issue-advocacy mailings could not trigger PAC status under the major-purpose test, employing either of the two approved ways of determining major purpose. *Id.* at 676-79. Thus, the Tenth Circuit protected the issue-advocacy group from the onerous PAC-style administrative requirements. *Id.* at 673. The Tenth Circuit rejected the argument that *Citizens* had altered the analysis. *Id.* at 676 n.4.

But under the First Circuit decision below, the NMYO story would have had a different ending. Under its complaisant exacting scrutiny, with no major-purpose test or unambiguously-campaign-related requirement, NMYO would have been forced into PAC status, with its onerous administrative burdens, just for engaging in constitutionally protected issue advocacy.

This Court sought to deal with this growing problem in *Real Truth About Obama v. FEC*, by granting certiorari, vacating, and remanding for reconsideration in light of *Citizens*. 130 S.Ct. 2371 (2010) ("*RTAO*"). The vacated opinion, at 575 F.3d 342 (4th Cir. 2010), held that (1) the FEC's vague and overbroad alternate "expressly advocating" definition at 11 C.F.R. 100.22(b) was constitutional under *WRTL-II*'s appeal-to-vote test

and (2) the FEC's vague and overbroad way of determining "major purpose" for imposed PAC status was constitutional though it did not look solely at "regulable election-related speech," *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008), to determine major purpose.

This Court's certiorari grant, vacatur, and remand occurs where this Court finds "reason to believe" that there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). But the district court rejected this Court's suggestion that *Citizens* might change its ruling and simply held as it had before, allowing a vague and overbroad express-advocacy definition and PAC-status enforcement policy to remain in effect. *RTAO*, No. 08-483, 2011 WL 2457730 (E.D. Va. June 16, 2011). Thus, the effort to fix the problem by remanding *RTAO* has failed to convince the lower courts that it is not open season for vague and overbroad regulations of core political speech.

These issues are important for this Court to decide since they go to the heart of this Court's protection of core political speech.

II.

Government Is Imposing PAC-burdens Without *Buckley*'s Major-Purpose Test and Under Complaisant Scrutiny, Thereby Suppressing Political Speech that *Citizens* Protects.

Citizens is a speech-affirming, speech-liberating decision. Yet it is being turned on its head and used as a 'mere disclosure' talisman, thereby chilling speech by

permitting PAC-style administrative burdens when they are unconstitutional and by permitting vague and overbroad speech regulation in contravention of the long-standing, speech-protective holdings *Citizens* neither considered nor overturned.

A. PAC-burdens Require *Buckley*'s Major-Purpose Test, Clear Definitions, and Strict Scrutiny.

1. PAC-burdens May Be Imposed Only on Groups With *Buckley*'s "Major Purpose."

Buckley held that PAC status and PAC-style administrative burdens may be imposed only on groups "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. *MCFL* restated the major-purpose test, *see* 479 U.S. at 252 n.6 (plurality), 262. This Court implicitly reaffirmed the test in *McConnell*, 540 U.S. at 170 n.64.

It is vital that government require a group to endure PAC-style administrative burdens only if the group has *Buckley*'s "major purpose." 424 U.S. at 79. Otherwise, government could force an issue-advocacy group, such as MCFL, to bear burdens that no state interest justifies. After all, MCFL's "central organizational purpose [wa]s issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates." 479 U.S. at 252 n.6 (plurality). *MCFL* discussed this issue at length and held that PAC-burdens "must be justified by a *compelling state interest*," *id.* at 256 (emphasis added), and that "[t]he state interest in disclosure . . . can be met in a *manner less restrictive* than imposing the full panoply of regulations that accompany status as a political com-

mittee under the Act," *id.* at 262 (emphasis added). Thus, PAC-burdens survive strict scrutiny only as applied to groups having *Buckley*'s "major purpose":

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley,* 424 U.S., at 79. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

MCFL, 479 U.S. at 262.

MCFL dismissed the notion that PAC-style burdens are necessary to meet the government's informational interest for groups not properly PACs:

> [T]he FEC maintains that the inapplicability of [2 U.S.C.] § 441b to MCFL [and thus *not* compelling PAC-style registration, recordkeeping, and reporting] would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions. We see no such danger. Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify

> all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions.

MCFL, 479 U.S. at 262. This passage indicates (1) the nature of approved independent-expenditure reporting for non-PACs, i.e., one-time, event-driven reports of the expenditures,[3] and (2) that such ordinary reporting fulfills the government's informational interest unless the entity *itself* has the major purpose of "nominat[ing] or elect[ing]" candidates. *Buckley*, 424 U.S. at 79.

2. The Decision Below Conflicts with Decisions of this Court.

Some states have followed this Court in imposing PAC status and PAC-style administrative burdens only on groups whose major purpose is "nominat[ing] or elect[ing]" candidates.

But Maine imposes PAC status and burdens on both *major-purpose* groups, MRS 21-A, 1052(5)(A)(4),[4]

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[3] In contrast, "PAC-style administrative burdens" or "PAC-burdens" are requirements that go beyond this ordinary expenditure disclosure. *See infra* at 17 (discussing the three categories of PAC-style burdens).

[4] Under the new 2011 definition, a major-purpose PAC is "[a]ny organization, including any corporation or association, that has as its major purpose initiating or influencing a campaign and that receives contributions or makes expenditures aggregating more than $1,500 in a calendar year for that purpose . . . ." MRS 21-A, 1052(5)(A)(4) (App.80

and *non*-major-purpose groups, *id.* 1052(5)(A)(5).[5] And it imposes PAC-style administrative burdens on non-Maine groups qualifying as PACs under *either* Maine PAC definition, *id.* 1053-B. App.81a.

NOM challenged these definitions as being vague and as overbroad for imposing PAC status and its consequent burdens on NOM and other groups lacking the major purpose of nominating or electing candidates.

The decision below rejected the major-purpose test, holding that it was "dictum," App.39a, and "an artifact

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n.11).

Under the prior definition that the First Circuit upheld, a major-purpose PAC has "as its major purpose initiating, promoting, defeating or influencing a candidate election, campaign or ballot question" in Maine. App.79-80a.

The First Circuit held that NOM lacked standing to challenge the major-purpose definition because NOM lacked *Buckley*'s major purpose, but NOM disputes this because "major purpose" is impossible to determine under Maine law given the vague language as to what counts toward major purpose.

[5] Under the new 2011 definition, a *non*-major-purpose PAC is "[a]ny organization that does not have as its major purpose influencing candidate elections but that receives contributions or makes expenditures aggregating more than $5,000 in a calendar year for the purpose of influencing the nomination or election of any candidate to political office . . . ." MRS 21-A, 1052(5)(A)(5) (App.80a n.12).

Under the prior definition that the First Circuit upheld, a *non*-major-purpose PAC is a group receiving or expending more than $5,000 in a year "for the purpose of promoting, defeating or influencing in any way the nomination or election of any candidate to political office." App.80a.

of the Court's construction of a federal statute," App.40a, that this Court's concerns in *Buckley* "are not relevant to . . . First Amendment review of Maine's statutes," *id.*, and that "[t]he [Supreme] Court has never applied a 'major purpose' test to a state's regulation of PACs, nor have we," *id.* Thus, it facially upheld Maine's decision to impose PAC-status and PAC-burdens on groups lacking *Buckley*'s "major purpose." App.41a. And it upheld the imposition of PAC status and burdens on NOM, though it held that NOM lacked standing (which NOM challenges) to challenge the major-purpose PAC provision because it said NOM lacked the major purpose of nominating or electing candidates. App.17-18a.

3. The Decision Below Creates a Circuit Split.

The decision below—that there is no major-purpose test—creates a strong circuit split. On one side are the courts recognizing the major-purpose test (in varying degrees of precision): the Second, Fourth, Seventh, Ninth (previous panels), Tenth, Eleventh, and D.C. Circuits.[6] On the other side are now the First Circuit

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[6] *See FEC v. Survival Educ. Fund,* 65 F.3d 285, 295 (2d Cir. 1995); *United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972); *Leake*, 525 F.3d 274, 287 (4th Cir.); *Brownsburg Area Patrons Affecting Change v. Baldwin,* 137 F.3d 503, 505 n.5 (7th Cir. 1998); *California Pro-Life Counsel v. Randolph*, 507 F.3d 1172, 1177 (9th Cir. 2007) ("*CPLC-II*"); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) ("*CPLC-I*"); *NMYO*, 611 F.3d at 677-78 (10th Cir.); *Fla. Right to Life v. Lamar*, 238 F.3d 1288, 1289 (11th Cir. 2001) (*affirming Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th

and the recent decisions of the Ninth Circuit.[7]

This Court should grant certiorari to clearly reaffirm that PAC status and PAC-style administrative burdens cannot be imposed on groups that neither are under the control of a candidate nor have the major purpose of nominating or electing candidates.

B. PAC-Style Burdens Are Onerous and Require Strict Scrutiny.

1. This Court Holds PAC-Style Burdens "Onerous" and Requires Strict Scrutiny.

Under *MCFL*, PAC-burdens are deemed onerous. A four-Justice plurality listed, 479 U.S. at 252-55, the three kinds of PAC-style administrative burdens: (1) *organizational* (e.g., requiring registration,[8] appointing

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Cir. 1982); *Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir. 2010); *FEC v. Machinists Non-partisan Political League*, 655 F.2d 380, 392 (D.C. Cir. 1981); *FEC v. EMILY's List,* 581 F.3d 1, 16 n.15 (D.C. Cir. 2009). *See also National Federation of Republican Assemblies v. United States*, 218 F.Supp.2d 1300, 1330 (S.D. Ala. 2002); *Richey v. Tyson*, 120 F.Supp.2d 1298, 1327 (S.D. Ala. 2000); *South Carolina Citizens for Life v. Davis*, slip op., No. 3:00-0124-19 (D.S.C. 2000) (opinion and order granting preliminary injunction); *Volle v. Webster*, 69 F.Supp.2d 171, 174-77 (D. Me. 1999); *New York Civil Liberties Union v. Acito*, 459 F.Supp. 75, 83-85 (S.D. N.Y. 1978).

[7] *See ARLC*, 441 F.3d at 786-94 (did not apply test); *HLW*, 624 F.3d at 1011-12 (questioned test's existence).

[8] Requiring PAC *registration before speaking* is a prior restraint that is unjustifiable for groups not properly PACs under *Buckley*'s major-purpose test, 424 U.S. at 79. *See, e.g.*, *Citizens*, 130 S.Ct. at 895-96 ("onerous restrictions . . . equivalent of prior restraint").

a treasurer and records custodian, and termination requirements that require an entity to cease engaging in constitutionally protected speech and cease to exist to escape PAC status and duties), (2) *reporting* (including detailed recordkeeping and periodic, ongoing reporting of the entity's expenditures and other activities, not the ordinary, non-onerous reports of independent expenditures), and (3) *restricted fundraising* (e.g., corporate PACs, called "separate segregated funds," may solicit only "members," 479 U.S. at 254 (plurality), and federal PACs may not receive corporate and union contributions, *see, e.g.*, 2 U.S.C. 441b, unless they are independent-expenditure-only PACs, *see, e.g.*, *Leake*, 525 F.3d at 291-95). The *MCFL* plurality declared that

> [t]hese additional regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage.

479 U.S. at 254-55 (footnote omitted). These burdens described as chilling speech are the *organizational* and *reporting* burdens, not just *restricted fundraising*. And of these same burdens, the plurality said: "Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *Id.* at

255 (footnote omitted).[9] Thus, entirely *apart* from restricted fundraising, PAC-style organizational and reporting burdens chill core political speech.[10]

Citizens reaffirms that PAC-burdens are "onerous." 130 S.Ct. at 898. And they are "burdensome," *even apart from the restricted fundraising problem* for corporate PACs. *Citizens* pronounced PACs "burdensome" based on administrative burdens *without mentioning restricted fundraising*:

> PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. . . .

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[9] Justice O'Connor concurred as to organizational and restricted-fundraising burdens:

> [T]he significant burden on MCFL in this case comes . . . from the additional organizational restraints imposed . . . . [E]ngaging in campaign speech requires MCFL to assume a more formalized organizational form and significantly reduces or eliminates the sources of funding for groups such as MCFL with few or no "members." These additional requirements do not further the Government's informational interest in campaign disclosure . . . ."

479 U.S. at 266 (O'Connor, J., concurring).

[10] "PACs impose well-documented and onerous burdens, particularly on small nonprofits." *WRTL-II*, 551 U.S. at 477 n.9 (*citing MCFL*, 479 U.S. at 253-55).

> And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur: [quoting at length from *MCFL* as to detail of reporting requirements].

Id. at 897 (citations omitted).

This Court requires strict scrutiny for provisions imposing PAC-style organizational and reporting burdens. *MCFL* required a "compelling interest" and "less restrictive means" in reviewing PAC-style administrative burdens, which were the focus of the analysis and not just the ban of corporate independent expenditures at 2 U.S.C. 441b. 479 U.S. at 256, 262. "The FEC minimize[d] the impact of the legislation upon MCFL's First Amendment rights by emphasizing that the corporation remains free to establish a separate segregated fund . . . ." 479 U.S. at 252 (plurality). That was the focus of the analysis because, "[w]hile that is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts." *Id.* Thus, strict scrutiny applied to the PAC-style administrative burdens.

Austin v. Mich. Chamber of Commerce required strict scrutiny. 494 U.S. 652, 658 (1990) ("The Act imposes requirements similar to those in the federal statute involved in MCFL . . . Thus, they must be justified by a compelling state interest."), *overruled on other grounds*, *Citizens*, 130 S.Ct. at 913.

Citizens applied exacting scrutiny to ordinary attribution and disclaimer requirements and non-onerous reporting of electioneering communications. 130 S.Ct. at 914. But it applied strict scrutiny to both the corpo-

rate ban and the PAC-option. *Id.* at 897-98. It held that "[s]ection 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *Id.* at 897. It noted that PACs are separate legal entities and thus "do[] not allow corporations [themselves] to speak." *Id.* Then it scrutinized whether the PAC-option adequately protected free-speech rights "[e]ven if a PAC . . . allow[s] a corporation to speak." *Id.* at 897-98.

That *Citizens* did not apply complaisant exacting scrutiny to PAC-burdens is clear by simply applying the scrutiny the First Circuit employed below to the PAC-burdens at issue in *Citizens*. The First Circuit would have held that those PAC-burdens adequately protected First Amendment rights because (a) they were not onerous, App.35a, and (b) there was a substantial relationship to an informational interest, App.41a. But that did not happen. Thus, *Citizens* applied the same strict scrutiny to the ban and the PAC-option, holding that the PAC-option did not safeguard speech rights. 130 S.Ct. at 897.[11]

2. The Decision Below Conflicts with Decisions of this Court.

The decision below held that Maine's PAC-style organizational and reporting requirements[12] are non-

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[11] Thus, strict scrutiny applies here, too, though NOM should prevail under even *non-complaisant* exacting scrutiny. *See NMYO*, 611 F.3d at 676-79.

[12] Maine imposes PAC-burdens that are onerous. While Maine requires a single, simple report for ordinary independent expenditures, *see* MRS 21-A, 1019-B(4), PACs must comply with numerous administrative requirements including, **(1)** appointing a treasurer before registering as a PAC,

onerous. App.35a. It rejected strict scrutiny on two bases:

(1) It decided that, since Maine's PAC laws do not

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id. 1054; **(2)** registering within seven days of exceeding contribution/expenditure trigger amounts, *id.* 1053; **(3)** keeping detailed, extensive records for four years, *id.* 1057; **(4)** disclosing on registration forms (which must be re-filed in election years and promptly amended with changes) "its treasurer, its principal officers, the names of any candidates and legislators who have a significant role in fund raising or decision-making for the committee and all individuals who are the primary fund-raisers and decision makers for the committee," and "[a] statement indicating the positions of the committee, support or opposition, with respect to a candidate, political committee, or campaign," *id.* 1053(1); **(5)** file reports on a quarterly schedule, file pre- and post-election reports for primary and general elections (including for special elections), and file 24-hour reports for "any expenditure of $500 or more made after the 14th day before the election and more than 24 hours before 5:00 p.m. on the day of the election," *id.* 1059; **(6)** reporting all expenditures with complete details and aggregates, *id.* 1060; **(7)** reporting all contributions, with complete details, including the "[n]ames, occupations, places of business and mailing addresses of contributors who have given more than $50," except *non*-major-purpose PACs need only report "those contributions made to the organization for the purpose of influencing . . . the nomination or election of a candidate . . . ," *id.* And disturbingly, **(8)** all of these ongoing burdens may only be escaped by dissolving the entity by ceasing its advocacy and going out of business, i.e., "no longer accept-[ing] any contributions or mak[ing] any expenditures" and "dispos[ing] of any surplus prior to termination." *Id.* 1061. These are onerous standing alone, even though Maine does not limit contributions to PACs by source and amount. *See Citizens*, 130 S.Ct. at 897-98.

ban speech but merely require a form of disclosure, *Citizens* requires only "exacting scrutiny." App.32-33a (*quoting* 130 S.Ct. at 914).

(2) It decided that PAC organizational and reporting burdens that this Court held to be "onerous," *Citizens*, 130 S.Ct. at 897-98, are "not . . . onerous . . . , but merely require the maintenance and disclosure of certain financial information." App.34-35a. It based this on two flawed assertions.

(a) It said that *Citizens* "was considering a regime that required corporations to set up a separate legal entity and create a segregated fund prior to engaging in any direct political speech." App.34a.

But *Citizens* held that *even if* the PAC-option allowed corporate speech, the PAC organization and reporting burdens *per se* made the PAC form inadequate to protect free-speech rights. 130 S.Ct. at 897-98. *Both* federal and Maine law requires groups to be PACs before speaking. *See* 2 U.S.C. 433 (register within 10 days); MRS 21-A, 1053 (7 days). And having to *be* a PAC is not less onerous than having "to set up a separate legal entity" (App.34a). *See, e.g.*, *Citizens* 130 S.Ct. at 897-98.

(b) Since *Citizens* says that PAC-burdens are onerous without contribution restrictions, the First Circuit had to switch analysis from *Citizens* to *MCFL*, to which it pointed for some authority for PACs being burdensome in part because fundraising was limited to "member" contributions. App.35a. But *MCFL* declared the organizational and reporting requirements burdensome *apart* from the fundraising restriction, 479 U.S. at 254-55 (plurality), 266 (O'Connor, J., concurring). And *Citizens* listed "onerous" burdens *without* including the fundraising restrictions. *See* 130 S.Ct. at 897-

98. Maine imposes precisely the sort of burdens on PACs that *Citizens* deemed onerous.

Based on its flawed analysis, the First Circuit employed complaisant exacting scrutiny.[13] Under such scrutiny, it and other courts, *see infra*, are readily upholding burdens that this court deemed onerous because they are deemed related to an informational interest. And they are erroneously citing *Citizens* as authority for doing this.

3. The Decision Below Creates Circuit Splits.

The decision below joins the wrong side in a circuit split. On the right side, which follows this Court in holding that PAC-style administrative burdens are onerous and require strict scrutiny, are the Fourth, Ninth (previous cases), and Tenth Circuits.[14] On the wrong side, holding PAC-style burdens non-onerous and subject to exacting scrutiny, are now the First Circuit and recent decisions of the Ninth Circuits.[15] On

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[13] If exacting scrutiny applies, "onerous" provisions require high-level scrutiny, *see Davis v. FEC*, 554 U.S. 724, 744 (2008) (strictness varies with burden), and NOM still prevails. *See NMYO*, 611 F.3d at 676-79.

[14] *See Leake*, 525 F.3d at 286, 287-91 ("substantial" PAC-burdens requiring strict scrutiny); *CPLC-I*, 328 F.3d at 1101 n.16 ("severe" PAC-burdens requiring "strict scrutiny"); *CPLC-II*, 507 F.3d at 1187-89 (holding unconstitutional PAC-burdens imposed on groups in ballot-initiative context because California failed narrow-tailoring under strict scrutiny); *Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137, 1145 n.6, 1153 n.11 (10th Cir. 2007) (PAC status requires "significant changes" and regulating issue advocacy requires strict scrutiny).

[15] *See ARLC*, 441 F.3d at 788, 791 (questioning strict

this side also was a recent Eighth Circuit decision now vacated for rehearing en banc.[16]

An example from the right side is the Fourth Circuit's *Leake* decision, holding that "'the consequences' of being labeled a political committee are '*substantial*'" because, inter alia,

> [n]ot only must they appoint a treasurer who the State shall train before every election cycle, but they must also file a statement of organization that reveals all financial depository information. . . . [They] face costly and timely disclosure requirements that essentially allow a state to scrutinize in detail an organization's affairs. . . . [They] must self-identify as affiliated with a candidate, political party, or other political committee) . . . . [They] must keep detailed records of and report all disbursements, with additional requirements for 'media expenses' . . . . [They must file] reports . . . [with] detailed information about donors[]. Among other regulations, political committees also face limits on the amount of donations they can receive in any one election cycle from any individual or entity.
>
> Unsurprisingly, given the *burdensome* consequences of the appellation, "political committee"

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scrutiny of prior Ninth Circuit cases but applying purportedly strict scrutiny to burdens deemed not onerous); *HLW*, 624 F.3d at 1005, 1014 (exacting scrutiny of burdens deemed non-onerous).

[16] *See MCCL*, 640 F.3d 304 (applying complaisant exacting scrutiny to PAC-style separate segregated fund for corporations to make independent expenditures, which the panel deemed not really a PAC-style burden).

> is a term of art specifically defined . . . .

525 F.3d at 286 (citations omitted) (emphasis added). Based on the "burdensome" and "substantial" nature of the PAC-style administrative burdens, the Fourth Circuit followed this Court in striking down North Carolina's political-committee definition as vague and overbroad, in part for lacking a major-purpose test, *see id.* at 287-90, but also because there were "narrower means," i.e., the less-restrictive-means required by strict scrutiny, *id.* at 291. *See also id.* at 311 (Michael, J., dissenting) ("strict scrutiny" employed).

Two examples from the wrong side of the circuit split are the Ninth Circuit decisions in *ARLC* and *HLW*.

ARLC decided that the burdens imposed by Alaska's PAC-style organizational and reporting requirements—on "nongroup entities," i.e., *MCFL*-corporations,[17] 441 F.3d at 786—were "not particularly onerous," *id.* at 791. While *MCFL* held MCFL was exempt from both the corporate independent-expenditure ban and PAC-status (because it lacked *Buckley*'s "major purpose") and that the government's informational interest was satisfied by the simple, non-onerous independent-expenditure reports, 479 U.S. at 262, *ARLC* upheld law imposing registration before speaking, multiple, ongoing, detailed reports, and disclosure of contributors, 441 F.3d at 788-91, and that also imposed (though the court did not mention it) a termination provision that required the speaker to cease to speak and exist to escape ongoing reporting.[18] Despite

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[17] *MCFL*-corporations were not subject to the corporate independent-expenditure ban. 479 U.S. at 263-65.

[18] To discontinue periodic reporting, ARLC would have

these PAC-style regulations of ARLC as an *entity*, as opposed to the non-onerous reports of occasional *expenditures* approved in *MCFL*, the Ninth Circuit upheld these requirements on three bases: (1) Alaska imposed no amount-limits on contributions to "non-group entities"; (2) Alaska imposed no source-limits on contributions to such groups; and (3) Alaska's PAC-style requirements were purportedly quite like the non-onerous independent-expenditure reports that *MCFL* approved. 441 F.3d at 791. Of course, the non-onerous independent-expenditures reports that this Court described as applying to MCFL were decidedly *unlike* the registration requirements, the ongoing reporting mandates, and the entity-annihilating termination requirements that Alaska imposed.

The Ninth Circuit followed this same analysis in *HLW*, rejecting the argument that PAC requirements that were "materially identical" to Alaska's PAC requirements were "onerous" in the ballot-initiative context, instead pronouncing them "somewhat modest." 624 F.3d at 1013-14. In doing so, it split with *CPLC-II*, which had found unconstitutional California's PAC-style burdens on issue-advocacy groups in the ballot-initiative context because non-onerous independent-expenditure reports were a less-restrictive means to satisfy information interests. *See* 507 F.3d 1172. *HLW*

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had to file a declaration that it was "disbanding . . . ha[d] no plans to re-form and w[ould] be closing out [its] campaign account." Alaska Admin. Code tit. 2, §§ 50.384, 50.394. So AKRTL itself would have had to disband, never form again, dispose of its money in approved ways, and close its *general-fund* accounts to escape perpetual reporting. *Id.* This is a PAC-style requirement. *See Citizens*, 130 S.Ct. at 897-98.

asserted that *Citizens*, 130 S.Ct. 876, and *Doe v. Reed*, 130 S.Ct. 2811 (2010), had changed the analysis. *HLW*, 624 F.3d at 1005.

This Court should grant certiorari to reaffirm that the PAC-burdens it listed and declared onerous in *Citizens*, 130 S.Ct. at 897-98, are onerous and require strict scrutiny, including the principle that government may impose PAC status and burdens only on groups that are under the control of a candidate or whose major purpose is nominating or electing candidates, *Buckley*, 424 U.S. at 79.

III.

Issue Advocacy Is Being Regulated with Vague and Overbroad Provisions.

Though this Court requires brightline definitions of provisions regulating core political speech, states are increasingly employing, and courts are approving, vague and overbroad terms to regulate issue advocacy, as opposed to speech that is unambiguously related to a candidate's campaign,[19] under the erroneous view that *Citizens* gave the government carte blanche to impose disclosure requirements on issue advocacy.

Citizens only upheld attribution and disclaimer requirements on, and ordinary, non-onerous reporting of, "electioneering communications," 130 S.Ct. at 914-16, which *McConnell* had held not to be vaguely

[19] Meaning express advocacy, as defined in *Buckley*, 424 U.S. at 44 & n.52, 80, and federally defined electioneering communications, *Citizens*, 130 S.Ct. at 914-16. *See, e.g.*, *Leake*, 525 F.3d at 281-82 (addressing these two categories before *Citizens* removed the appeal-to-vote test as a constitutional limit on governmental power).

defined, 540 U.S. at 192.

This holding was consistent with *Buckley*'s rejection of vague and overbroad provisions to regulate speech, including "expenditure" definitions in both restriction and disclosure contexts. This Court rejected regulations of "expenditures" "'relative to a clearly identified candidate,'" 424 U.S. at 42, "'advocating the election or defeat of" a candidate," *id.* at 42-44, and "'for the purpose of . . . influencing' an election or nomination," *id.* at 79.

In construing "relative to" and "advocating" to save them from unconstitutionality in the restriction context, this Court imposed the "express words of advocacy" construction. *Id.* at 44 & n.52.

In construing the requirement that "every person" disclose "expenditures," *id.* at 77, this Court solved the constitutional problems with the "purpose of . . . influencing" language in two ways.

First, for political committees, it construed the nature of the spending *entity* that must disclose such "expenditures," i.e., groups controlled by candidates or with the major purpose of nominating or electing candidates." *Id.* at 79.

Second, for non-PAC groups, this Court construed the nature of the *expenditure*, holding that as defined

> the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of [the disclosure statute] is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of [the "expenditure" definition] to reach only funds used for communications that expressly advocate the election or de-

> feat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

Id. at 79-80 (footnote omitted).

When it comes to organizations that government may not define as political committees, *Citizens* holds that government may also regulate federally defined electioneering communications. 130 S.Ct. at 914-16. Nevertheless, Maine uses vague and overbroad terms —"promoting," "support," and "opposition"—in provisions defining PAC status and regulating core political speech, which the district court upheld and the First Circuit affirmed, relying on *McConnell*, 540 U.S. at 170 n.64, as holding that "PASO" (promote-attack-support-oppose) language is not vague. *See* App.47-50a (listing challenged provisions).

McConnell upheld PASO terms for federal candidates and political parties. *See* 540 U.S. at 170 n.64. This holding relied on the fact that "actions taken by political parties are presumed to be in connection with election campaigns." *Id.* (*citing Buckley*, 424 U.S. at 79, and reaffirming major-purpose test). But PASO terms that are clear for federal candidates and political parties are not clear elsewhere. NOM is not a federal candidate or political party, so PASO provisions are unconstitutional as applied to it. *McConnell*'s upholding of PASO language for federal candidates and political parties should not be extended to organizations that are neither.

Maine also uses "influence" language in numerous provisions, as listed by the First Circuit. *See* App.50a n.42. The district court held these uses unconstitutionally vague and severed them, but the First Circuit up-

held them, based on Maine's new construction of "influence" to reach only "communications and activities that expressly advocate for or against [a candidate] or that clearly identify a candidate by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate." App.55-56a.

Maine's new "influence" definition (effective June 20, 2011) moots the cross-appeal below on that language. *See, e.g.*, *Kansas Judicial Review*, 562 F.3d 1240. But if the Court believes that the cross-appeal is not moot, the "influencing" language in Maine's statutes remains unconstitutionally vague and overbroad for two reasons.

First, the First Circuit's new construction borrows, in part, from the appeal-to-vote test in *WRTL-II*, i.e., whether a communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 470 (Roberts, C.J., joined by Alito, J.). But that test is unconstitutionally vague at least when not limited by the federal "electioneering communication" definition. *Compare id.* at 474 n.7 (test not "impermissibly vague" because it "is only triggered if the speech meets the brightline requirements of [the electioneering-communication definition] in the first place") *with id.* at 492 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment) (holding the test "impermissibly vague" in all circumstances).

Second, the construction then abandons *WRTL-II*'s test because it substitutes—for *WRTL-II*'s focus on whether there is an "appeal to vote for or against" a candidate—a focus on whether there is "promot[ion] or oppos[ition]," which is unconstitutionally vague and

overbroad.

Moreover, the new 2011 statutory definition of "influence" abandons Maine's litigation position by defining "influence" as "mean[ing] to promote, support, oppose or defeat." App.78a n.9 (4-A). And the terms "promote, support, [and] oppose" are unconstitutionally vague and overbroad in the challenged contexts, e.g., determining who is subject to PAC-burdens and which independent expenditures can trigger PAC status or reporting requirements.

In addition, the First Circuit's upholding of PASO and "influencing" language creates circuit splits both pre- and post-*McConnell*. Pre-*McConnell* there is a circuit split with the Fourth Circuit, which specifically rejected PASO and "influence" language as vague and overbroad in a PAC definition,[20] and with multiple circuits holding that only express advocacy could be regulated.[21] Post-*McConnell* there is a circuit split with the Fourth, Fifth, Sixth, and Ninth Circuits, which have rejected vague and overbroad regulations of core political speech and held that the express-advocacy test

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[20] *See North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) (striking "support or oppose . . . or to influence or attempt to influence" as unconstitutionally vague and overbroad).

[21] *See Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Brownsburg Area Patrons Affecting Change v. Baldwin*,137 F.3d 503 (7th Cir. 1998); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001).

remains applicable to vague and overbroad provisions.[22]

This Court should grant certiorari to clarify that PASO terms applied to non-political committees are unconstitutionally vague and overbroad, as is (if not moot) "influencing" language, and to clarify that the appeal-to-vote test is unconstitutionally vague and overbroad, at least where not anchored by the bright-line federal electioneering-communication definition.

IV.

Strategic Plans and Private Associations of Groups Seeking to Vindicate Free-Speech Rights Are Being Disclosed, Which Creates a Circuit Split.

There is a serious, chilling First Amendment problem that is occurring when issue-advocacy groups seek to vindicate their free-speech and -association rights through litigation. The problem relates generally to the burdens and privacy loss of compelled discovery. Specifically here it is about the unsealing of NOM's *Victory Plan*, containing strategic information, although an agreed protective order at first safeguarded the information and NOM did not dispute discovery

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[22] *See Leake*, 525 F.3d at 281-83 (under *Buckley*'s unambiguously-campaign-related requirement, only "express advocacy" and "electioneering communication" have struck right balance between liberty and government interest); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (*McConnell* permits express- versus issue-advocacy distinction to cure vagueness and overbreadth); *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004) (same); *ACLU of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (same).

production based on that order. *See* App.63a.

WRTL-II took note of the burdens of such discovery, 551 U.S. at 468 n.5,[23] and sought to limit it, holding that free-speech litigation "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation," *id.* at 469 (*citing Virginia v. Hicks,* 539 U.S. 113, 119 (2003)), and that "the need to consider . . . [basic] background [information] should not become an excuse for discovery," *id.* at 474. *Citizens* also expressed concern for the costs of defending against investigations and protracted litigation. *See, e.g.*, 130 S.Ct. at 895 ("heavy costs of defending against FEC enforcement"), 896 ("considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation"). Yet courts continue to require chilled speakers to submit to burdensome discovery if they seek to vindicate their constitutional rights, leading to further chill.

Protective orders and sealed documents offer some protection. Here, NOM wanted to protect a document revealing strategic information. Defendants and a magistrate judge agreed to a protective order, under which NOM's *Victory Plan* was filed under seal. App.63a n.50. But the decision below found no abuse of discretion in the district court's unsealing the trial record on three bases: (1) a "common-law presumption in favor of public access to judicial records," App.63a; (2) the court's opinion that the *Victory Plan* revealed

[23] *WRTL-II* pronounced the burden "severe": "The District Court permitted extensive discovery . . . . WRTL also had to turn over many documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech." 551 U.S. at 468 n.5.

"little . . . that could advantage NOM's opponents going forward," App.66a; and (3) the court's decision that "NOM failed to make a compelling case that the specific vendors referenced in the documents have any reasonable privacy concerns relating to the disclosure of their business relationship with NOM," App.67a.

The decision below conflicts with decisions of this Court,[24] and it creates a circuit split with the Ninth and D.C. Circuits.[25]

This Court should grant certiorari to clarify that: (1) the presumption of public disclosure is reversed where chilled advocacy groups seek to vindicate their free-speech and -association rights, *see, e.g.*, *WRTL-II*, 551 U.S. at 469 ("give the benefit of any doubt to protecting rather than stifling speech"); (2) speakers are in a better position to determine whether their documents are strategic than a court; (3) the presumption must be against disclosure where the speaker seeks protection of strategic information; and (4) speakers and vendors

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[24] *See, e.g.*, *WRTL-II*, 551 U.S. at 468-69 (litigation and discovery are speech-chilling burdens); *Buckley*, 424 U.S. at 64 ("compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) (privacy essential to association right); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (same).

[25] *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1162-63 (9th Cir. 2010) (association right protects "right to . . . formulate strategies . . . in private"); *Machinists Non-Partisan Political League*, 655 F.2d at 389 (D.C. Cir.) (protecting "interest in privacy of political association"); *AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) (First Amendment prohibited FEC from releasing AFL-CIO's strategic materials subpoenaed in investigation).

must be able to protect the privacy of their association wherever there is a reasonable probability of harassment, *see, e.g.*, *Buckley*, 424 U.S. at 74, or that vendors will not provide services to speakers if their identification will be revealed.

Conclusion

For the reasons stated, this Court should grant this petition.

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