No. 13-8033

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FREE SPEECH,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(JUDGE SCOTT W. SKAVDAHL)

APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

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September 3, 2013

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Free Speech's petition for rehearing en banc fails to identify any conflict between the panel's decision and a decision of the Supreme Court, of this Court, or even of another court of appeals. The petition instead relies on Free Speech's incorrect contention that the campaign-finance regulation and policies it challenges prevent it from speaking. But as the panel correctly concluded after examining the substance of Free Speech's claims, this case implicates only disclosure requirements, not speech restrictions. Applying the well-established "exacting scrutiny" standard under which courts assess disclosure provisions, the panel properly determined that the Federal Election Commission's longstanding policy of evaluating political-committee status on a case-by-case basis is constitutional and consistent with all of the Supreme Court and appellate precedents that Free Speech now invokes as conflicting. Consequently, Free Speech has failed to justify its request for the extraordinary procedure of en banc rehearing. The Court should deny the petition.

BACKGROUND

A. Political-Committee Status

The Federal Election Campaign Act ("FECA") defines a "political committee" — commonly known as a "PAC" — as any "association[] or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). PACs are required to comply with certain organizational and reporting requirements: Most relevant for purposes of the instant petition, PACs must register with the Commission and file periodic reports publicly disclosing their receipts and

disbursements (with limited exceptions for most transactions below $200). *See* 2 U.S.C. §§ 433, 434.

As enacted, FECA also limited the annual amount that an individual could contribute to a PAC. *See* 2 U.S.C. § 441a(a)(1)(C). That limit, however, is no longer in effect for groups that engage only in independent electoral spending and make no contributions to candidates. *See SpeechNow.org v. FEC*, 599 F.3d 686, 692-97 (D.C. Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 553 (2010).

In *Buckley v. Valeo*, the Supreme Court noted that defining PAC status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in overbroad application by reaching "groups engaged purely in issue discussion." 424 U.S. 1, 79 (1976) (per curiam) (footnotes omitted). The Court therefore concluded that FECA's political-committee definition should be narrowed to "only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate*." *Id.* (emphasis added). Accordingly, a group that is not controlled by a candidate must register as a PAC only if the group (1) crosses the $1,000 threshold of contributions or expenditures and (2) has as its "major purpose" the nomination or election of federal candidates.

In 2004, the Commission issued a notice of proposed rulemaking that asked whether it should promulgate a regulatory definition of "political committee" to establish categorical rules regarding the application of *Buckley*'s "major purpose" requirement to certain tax-exempt organizations. *See* FEC, *Political Committee Status*, 69 Fed. Reg. 11,736, 11,743-49 (Mar. 11, 2004). In 2007, after receiving public comments, the

Commission decided not to promulgate such a regulation, which would have classified groups like Free Speech as political committees *per se* based on their registration as "political organizations" under section 527 of the Internal Revenue Code. FEC, *Supplemental Explanation & Justification for the Regulations on Political Committee Status*, 72 Fed Reg. 5595 (Feb. 7, 2007). The notice explaining this decision stated that instead of creating categorical regulations that might lead to overbroad or underinclusive PAC-status determinations, 72 Fed. Reg. at 5597-5601, the Commission would continue its longstanding practice of determining an organization's major purpose on a case-by-case basis, *see id*. at 5596-97. The notice also explained that although the major-purpose requirement can be satisfied "through sufficiently extensive spending on Federal campaign activity," *id.* at 5601 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*")), a fact-specific analysis of an organization's conduct — including its public statements, fundraising appeals, and spending on other activity — can be necessary to evaluate whether the organization's major purpose is the nomination or election of candidates. *Id.* Finally, the notice discussed several prior matters in which the Commission had examined a group's major purpose, explaining that these matters cumulatively "provid[ed] considerable guidance to all organizations" regarding the Commission's application of the major-purpose test. *See id*. at 5595, 5603-06.

The Commission's case-by-case approach was challenged and upheld in *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007). It was upheld again by the Fourth Circuit in *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013), and by the panel in this case.

B. Free Speech's Advisory Opinion Request

Free Speech is an unincorporated nonprofit association that was formed in 2012. (App. 66-67.) It does not intend to contribute money directly to candidates but would like to disseminate certain political advertisements without complying with many of FECA's disclosure requirements, including the registration and reporting requirements applicable to PACs. (*See* App. 70-71, 78-79.) Free Speech also wishes to solicit donations to finance additional advertisements. (App. 67-68.)

In February 2012, Free Speech requested from the Commission an advisory opinion as to whether, *inter alia*, certain proposed activities would require Free Speech to register with the Commission as a PAC. (App. 102-07.) In its response to the request, the Commission explained that it was unable to approve an answer regarding Free Speech's PAC status by the required four affirmative votes of the FEC's six Commissioners, 2 U.S.C. §§ 437c(c), 437d(a)(7). (App. 282.)

C. Procedural History

Free Speech filed this lawsuit on June 14, 2012. The suit challenged a Commission regulation and two Commission policies,[1] including the Commission's

[1] The remainder of Free Speech's advisory opinion request had asked (a) whether any of eleven proposed advertisements would be deemed "express advocacy," 11 C.F.R. § 100.22(b); and (b) whether any of four proposed donation requests would be deemed "solicitations," 2 U.S.C. § 441d(a). The Commission unanimously concluded that two of the eleven proposed ads were express advocacy, four of the ads were not express advocacy, and that two of the four proposed donation requests were not solicitations under FECA. (App. 282.) The Commission reached no decision concerning the remaining five proposed ads and two proposed donation requests. (*Id.*) When Free Speech then filed its lawsuit, its "main focus" was a challenge to the Commission's express-advocacy regulation. (App. 65 (Compl. ¶ 3).) Free Speech also challenged the

method of determining whether a group satisfies the major-purpose test for PAC status. (*Id.* at 94-97.) Free Speech sought a preliminary injunction against the Commission's application of the challenged regulation and policies, and the Commission cross-moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

On October 3, 2012, the district court denied Free Speech's preliminary-injunction motion. Free Speech interlocutorily appealed to this Court (No. 12-8078). After the briefing of that appeal was completed, but before the panel heard oral argument, the district court granted the Commission's motion to dismiss for failure to state a claim. Free Speech separately appealed that decision (No. 13-8033). The panel then dismissed the preliminary-injunction appeal as moot, substituted the briefs from that appeal into the instant matter, and ordered supplemental briefing. The panel heard oral argument on May 7, 2013.

On June 25, 2013, the panel unanimously affirmed and adopted in full the district court's "comprehensive[]" and "correct[]" opinion granting the FEC's motion to dismiss. *Free Speech v. FEC*, 720 F.3d 788, 790-91 (10th Cir. 2013).[2] The panel rejected Free Speech's argument that its challenges should be analyzed under the strict-scrutiny

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Commission's method of analyzing solicitations. (*Id.* at 91-95.) The district court rejected these claims, and the panel of this Court affirmed. *Free Speech v. FEC*, 720 F.3d 788, 790-91, 793-98 (10th Cir. 2013). Free Speech's petition does not even attempt to identify any conflict between these portions of the panel's decision and any precedent of the Supreme Court or this Court, nor does the petition present any independent argument as to why rehearing en banc would be appropriate for either of these issues. (*See* Pet. at 9 n.3.)

[2] The panel's decision adopting the district court's opinion, along with the adopted opinion itself, are collectively referred to herein as the panel opinion.

standard that applies to limitations on political speech. *Id.* at 792-93. The panel explained that the question in this case "is not whether [Free Speech] can make expenditures for the speech it proposes or raise money without limitation, but simply whether it must provide disclosure of its electoral advocacy." *Id.* at 792. Relying on *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010), and *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) — both of which applied the lower "exacting scrutiny" standard to disclosure provisions — the panel stated that "exacting scrutiny" was the proper standard "to determine whether the regulations and policies at issue are constitutional." *Free Speech*, 720 F.3d at 793.

Applying that standard, the panel rejected Free Speech's constitutional challenges and upheld the regulation and policies at issue, explaining that each served the need "to provide the electorate with information and to insure that the voters are fully informed about the person or group who is speaking." *Id.* at 798 (citing *Citizens United*, 130 S. Ct. at 915). The panel concluded that the challenged regulation and policies are "essential components to narrowly, but effectively identifying those entities, ads and solicitations that fall within the FEC's . . . disclosure requirements" — requirements that the decision noted are "essential and necessary to enable informed choice in the political marketplace." *Id.*

Regarding PAC status specifically, the panel noted that although "'*Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose.'" *Id.* at 797 (quoting *RTAA*, 681 F.3d at 556). Indeed, the panel observed, "'[t]he determination of whether the election or defeat

of federal candidates for office is *the* major purpose of an organization, and not simply *a* major purpose, is inherently a comparative task.'" *Id*. (quoting *RTAA*, 681 F.3d at 556). The panel therefore agreed with the Fourth Circuit and the Commission that the major-purpose determination requires a "'fact-intensive analysis,'" and is "'incompatible with a one-size-fits-all rule.'" *Id*. at 797 (quoting *RTAA*, 681 F.3d at 556; 72 Fed. Reg. at 5601). Accordingly, the panel upheld the Commission's "'sensible'" and "'flexibl[e] . . . case-by-case'" method of determining an organization's major purpose. *Id.* at 797-98 (quoting *RTAA*, 681 F.3d at 558; 72 Fed. Reg. at 5601).

ARGUMENT

Free Speech has failed to demonstrate that this case warrants the "extraordinary procedure" of en banc rehearing. *See* Fed. R. App. P. 35(a)-(b); 10th Cir. R. 35.1. Free Speech's petition strives to manufacture conflict between the panel's unanimous decision and other precedent by relying on an assemblage of generalities about the importance of speech. Amid these abstractions, however, Free Speech fails to concretely identify any actual conflict. To the contrary, because the panel's decision faithfully adheres to all of the precedents cited in Free Speech's petition, "the asserted conflict . . . is not present." *AG Servs. of Am., Inc. v. Nielsen*, 235 F.3d 559, 560 (10th Cir. 2000) (denying petition for rehearing en banc). Free Speech has failed to present any reason for the Court to rehear this case en banc.

I. THE PANEL CORRECTLY FOLLOWED CONTROLLING PRECEDENT BY APPLYING EXACTING SCRUTINY

There is no speech restriction at issue here: Nothing in FECA or the Commission's regulations prevents Free Speech from engaging in unlimited political activity. Rather, "[the] challenged rules and policies implement only disclosure requirements," *Free Speech*, 720 F.3d at 792, by determining whether some of Free Speech's activities trigger mandatory disclosure. As the Supreme Court has held, such requirements "'impose no ceiling on campaign-related activities,'" and, contrary to Free Speech's rhetoric, "'*do not prevent anyone from speaking*.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell v. FEC*, 540 U.S. 93, 201 (2003)) (emphasis added); *see also Free Speech*, 720 F.3d at 792 (quoting *Citizens United*). Indeed, this Court and numerous others have specifically recognized that the obligations attendant upon PAC status do not "limit the amount of speech a group may undertake." *Herrera*, 611 F.3d at 676 (citing *Buckley*, 424 U.S. at 64); *see also RTAA*, 681 F.3d at 548-49; *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 486-91 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55-57 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1003-05 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *SpeechNow*, 599 F.3d at 698.

The Supreme Court has consistently held that the standard for assessing "[d]isclaimer and disclosure requirements" under the First Amendment is "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67

(citing *Buckley*, 424 U.S. at 64, 66; *McConnell*, 540 U.S. at 231-232). This Court has reached the same conclusion, *Herrera*, 611 F.3d at 672-73, 676 (holding that state regulations defining and governing political committees "require disclosure" and accordingly "must pass 'exacting scrutiny'"), and so have the other courts of appeals that have addressed the issue since *Citizens United*, *see, e.g.*, *RTAA*, 681 F.3d at 555, 558 (applying exacting scrutiny to uphold Commission's method of determining PAC status); *McKee*, 649 F.3d at 56-70; *Brumsickle*, 624 F.3d at 1003-19; *SpeechNow*, 599 F.3d at 698; *Madigan*, 697 F.3d at 477; *Worley v. Florida Secretary of State*, 717 F.3d 1238, 1245 (11th Cir. 2013).

The panel and the district court explicitly "applie[d] exacting scrutin[y] to determine whether the regulations and policies at issue are constitutional." *Free Speech*, 720 F.3d at 793. Free Speech faults the panel for supposedly failing to apply the "correct precedential standards" (Pet. at 13), but Free Speech cites no case in which the Supreme Court or this Court has applied a standard *other* than exacting scrutiny to political disclosure provisions. Instead, Free Speech relies on generalized assertions that "First Amendment freedoms" are "cherished" and "'delicate and vulnerable,'" and therefore that "heightened standards" are warranted. (*Id.* at 7, 12.) Such bland abstractions do not demonstrate that the panel erred by applying the standard mandated by Supreme Court and Tenth Circuit precedent.

Free Speech also argues that even if exacting scrutiny is the appropriate standard, the panel "appl[ied] a *relaxed* level of exacting scrutiny." (Pet. at 4 (emphasis added).) The panel did no such thing. It correctly held that exacting scrutiny requires that the

disclosure requirement bear a "'substantial relation'" to an "'important governmental interest.'" *Free Speech*, 720 F.3d at 792-93 (quoting *Citizens United*, 130 S. Ct. at 914). The panel held that the disclosure requirements at issue — including the Commission's method of applying the major-purpose test — are not only substantially related, but actually "essential," to "narrowly[] but effectively identifying those entities" falling within FECA's disclosure requirements. *Id.* at 798. Those requirements, in turn, "provide the transparency" that is "essential and necessary to enable informed choice in the political marketplace." *Id*. (citing *Citizens United*, 130 S. Ct. at 917); *see also Buckley*, 424 U.S. at 68 (holding that FECA's disclosure requirements for PACs "directly serve substantial governmental interests"); *SpeechNow*, 599 F.3d at 698 (holding that PAC disclosure furthers public's "interest in knowing who is speaking about a candidate and who is funding that speech," and "deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals"). The panel therefore held that the Commission's application of the major-purpose test satisfied the Supreme Court's exacting-scrutiny standard by being substantially related to these important governmental interests.[3] Nothing about the panel's faithful application of the proper level of scrutiny remotely warrants en banc review.

[3] The same is true with respect to the resolution of Free Speech's challenges to other disclosure triggers: The panel applied exacting scrutiny and found that they are "necessary to provide the electorate with information and to insure that the voters are fully informed about the person or group who is speaking." *Free Speech*, 720 F.3d at 798; *see also id*. at 796 (explaining that disclosure requirements for solicitations serve important First Amendment values by clarifying who is speaking).

II. THE PANEL'S DECISION DOES NOT CONFLICT WITH *BUCKLEY*, *MCFL*, *CITIZENS UNITED*, OR ANY DECISION OF THIS COURT

Free Speech asserts that the panel's decision calls into question whether "citizens may still rely on the doctrinal protection of political speech found in *Buckley*, *MCFL*, and *Citizens United*." (Pet. at 7.) Yet Free Speech fails to identify any way in which the panel ignored or contravened the "protection of political speech" mandated by these cases or by any decision of this Court. That is because the panel did nothing of the sort.

First, the panel properly concluded that the Commission's application of the major-purpose test is consistent with *Buckley*. "'Although *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose.'" *Free Speech*, 720 F.3d at 797 (quoting *RTAA*, 681 F.3d at 556). Because assessing which of a group's purposes is its major purpose "'is *inherently* a comparative task,'" the Commission has the discretion to determine PAC status "'either through categorical rules or through individualized adjudications.'" *Id.* (quoting *RTAA*, 681 F.3d at 556) (emphasis added). To make that assessment, the Commission consults sources such as the group's public statements, government filings, charters, and bylaws. *See* 72 Fed. Reg. at 5601, 5605 (describing sources). All three courts to have considered this methodology (including the panel of this Court) have upheld it as a lawful implementation of *Buckley*. *Shays*, 511 F. Supp. 2d at 29-31; *RTAA*, 681 F.3d at 558; *Free Speech*, 720 F.3d at 797-98.

Free Speech does not articulate *any* error in these holdings, much less identify a specific conflict between the panel's holding and *Buckley*. Instead, Free Speech relies on

generalized abstractions, *see supra* p. 9, and attempts to caricature the Commission's approach as permitting roving application of PAC requirements to "every coffee klatch." (Pet. at 9-10.)[4] But "[t]he necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *RTAA*, 681 F.3d at 557 (collecting cases).[5] Even Free Speech has conceded that it is "undoubtedly true that in conducting the major purpose analysis, fact-intensive inquiries are often appropriate." (App. 47, 49.) Thus, there is no support for Free Speech's claim that the panel's upholding of the Commission's case-by-case approach to the major-purpose test permits overbroad application of FECA's disclosure requirements or otherwise conflicts with *Buckley*.

Second, Free Speech's assertion that the panel's decision conflicts with the discussions of PAC burdens in *Citizens United* and *MCFL* is entirely misguided. Those cases involved direct speech restrictions, i.e., statutes that banned corporate electioneering but permitted corporations to finance political advocacy through PACs. In

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[4] Free Speech invokes "the still-ongoing Internal Revenue Service controversy" as demonstrating "the evils of unfettered disclosure," (Pet. at 7 n.2), but IRS actions bear no connection to the law or facts of the case at hand. Free Speech once again lacks "factual support" for its "conclusory assertions." *Free Speech*, 720 F.3d at 790 n.1.

[5] As the Commission explained when it reaffirmed its case-by-case approach, these judicial decisions, along with administrative matters in which the Commission has analyzed a group's major purpose, "provide considerable guidance to all organizations" regarding how the Commission applies the major-purpose test. *See* 72 Fed. Reg. at 5595, 5605-06. This guidance belies Free Speech's assertion (Pet. at 5) that the Commission has simply left Free Speech's PAC status "to the best guesses" of its members. *Cf. RTAA*, 681 F.3d at 557 (rejecting argument that major-purpose test requires "bright-line" rule). In any event, whether or not Free Speech would qualify as a PAC has no bearing on its ability to engage in unlimited electoral speech. *See supra* p. 8.

both cases, the Supreme Court described *speaking* through a corporate PAC as a burdensome alternative to *speaking* directly with corporate treasury funds. *See Citizens United*, 558 U.S. at 337; *MCFL*, 479 U.S. at 253. That context is "significantly different" (*RTAA*, 681 F.3d at 549) from the one facing political organizations like Free Speech — entities that, after *Citizens United* and *SpeechNow*, can directly finance advocacy for and against candidates and receive unlimited contributions to do so. *See RTAA*, 681 F.3d at 549 (explaining that *Citizens United* addressed PAC status only as to "the burden . . . on the corporation's own speech" and did not call into question "PAC disclosure requirements"); *McKee*, 649 F.3d at 56 (distinguishing *Citizens United* and *MCFL* as involving statutes that "condition[ed] political speech on the creation of a separate organization or fund," not disclosure requirements). Indeed, *Citizens United* expressly upheld disclosure requirements for independent electoral advertising (like Free Speech's), *see* 558 U.S. at 366-71, and the disclosure obligations for PACs do not "impose much of an additional burden" beyond the requirements *Citizens United* upheld, *SpeechNow*, 599 F.3d at 697-98. The en banc D.C. Circuit in *SpeechNow* accordingly relied on *Citizens United* in upholding PAC disclosure requirements as applied to independent-expenditure-only groups like Free Speech, observing that the additional reporting requirements that are triggered for groups qualifying as PACs are "minimal," and "the public has an interest in knowing who is speaking about a candidate and who is funding that speech." *Id.* at 696-98; *see also RTAA*, 681 F.3d at 558. The panel's decision is therefore of a piece with the First, Fourth, and D.C. Circuit's holdings that mandatory PAC disclosure is consistent with *Citizens United* and *MCFL*. Free Speech demonstrates no error in any

of these holdings — much less in all of them — and en banc review is not warranted to further examine this uniform case law.

Finally, contrary to Free Speech's assertions (Pet. at 1, 4, 11), the panel's upholding of the Commission's approach to determining PAC status is also consistent with this Court's decisions in *Colorado Right To Life Comm., Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), and *Herrera*. *Coffman* and *Herrera* struck down state statutes that, unlike the federal policy challenged by Free Speech, defined groups as PACs based solely on their meeting an expenditure threshold, without *any* consideration of their major purpose. *Coffman*, 498 F.3d at 1153; *Herrera*, 611 F.3d at 673. In describing the major-purpose requirement missing from these state provisions, *Coffman* and *Herrera* noted the Supreme Court's endorsement of "two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's independent [express advocacy] spending with overall spending." *Coffman*, 498 F.3d at 1152 (citing *MCFL*, 479 U.S. at 252 n.6); *Herrera*, 611 F.3d at 677-78 (citing *Coffman*). Because the Commission determines a group's major purpose by analyzing each "organization's central organizational purpose," the Commission's approach conforms not only with these decisions, but also with *MCFL* and every other decision cited by Free Speech.

CONCLUSION

For the foregoing reasons, the Court should deny Free Speech's petition.

Respectfully submitted,

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September 3, 2013

CERTIFICATE OF DIGITAL SUBMISSION

I certify that no privacy redactions were required for this response and that the digital ECF version of the foregoing is an exact copy of the written document filed with the Clerk of the Court. I further certify that the digital submission has been scanned for viruses with the most recent version of McAfee VirusScan Enterprise Version 8.7i (updated September 3, 2013), a commercial virus scanning program, and according to the program, the digital submission is virus-free.

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation of Fed. R. App. P. 35(b)(2) that applies to petitions for rehearing en banc, because the response is limited to 15 pages in length and uses the typeface Microsoft Word 13-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September 2013, I caused Appellee's Response to Petition for Rehearing En Banc in *Free Speech v. FEC*, No. 13-8033, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

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I further certify that I caused 12 copies to be delivered to the Clerk of the Court by UPS Next Day Air Delivery.

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