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SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT UTTER and FAITH IRELAND in the name of the STATE OF
WASHINGTON

Petitioners,

vs.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

PETITIONER'S RESPONSE TO BRIEFS OF AMICI CURIAE OF
WASHINGTON STATE LABOR COUNSEL *ET AL.* AND THE
INSTITUTE OF JUSTICE

SMITH & LOWNEY, PLLC

By: Knoll D. Lowney
WSBA No. 23457

2317 East John Street
Seattle WA 98112-5412

(206) 860-2883

LAW OFFICES OF MICHAEL W.
WITHEY

By: Michael W. Withey
WSBA No. 4787

601 Union Street, Suite 4200
Seattle WA 98101-4036

(206) 405-1800

Attorneys for Petitioners

Filed
Washington State Supreme Court

MAY - 5 2014

Ronald R. Carpenter
Clerk

 ORIGINAL

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I. INTRODUCTION.

Petitioners, retired Justices Robert Utter and Faith Ireland, respectfully submit this response to the briefs of *amici curiae* submitted by the Washington State Labor Council and various labor unions¹ (“Labor”) and the National Institute for Justice (“Institute”).

II. RESPONSE.

Voters of Washington State, with the help of this Court, have struck the balance that controls this case: “the public’s right to know of the financing of political campaigns ... far outweighs any right that these matters remain secret and private,” RCW 42.17A.001(10), and that “[t]he provisions of this chapter [the Fair Campaign Practices Act (“FCPA”)] shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns ... so as to assure continuing public confidence of fairness of elections and governmental processes ...” RCW 42.17A.001.

Given the unique facts of this case, including BIAW’s well-documented secret fundraising and its \$6.6 million in reported political contributions, this is not the time to address hypothetical scenarios involving entities that dabble in politics. The people can reasonably and

¹ SEIU Healthcare 775NW, UFCW 21, Washington Education Association, SEIU Healthcare 1199NW, and SEIU Local 925

constitutionally demand some basic reporting from an organization that decides to turn virtually all of its efforts and over six million dollars of resources towards a short-term political campaign.

In bringing its national campaign against reporting requirements to this Court, the Institute failed to acknowledge that Washington's political committee reporting requirements have survived a vigorous constitutional challenge before the Ninth Circuit and U.S. Supreme Court.

A. Washington's political committee reporting requirements have been vigorously challenged and found to be constitutional.

The Institute suggests that the FCPA's political reporting requirements should be deemed unconstitutional unless the Court abandons its twenty years of precedent and adopts a "bright-line, objective standard for determining when an organization becomes a political committee under Washington Law." Institute brief at 2. It fails to mention that the Ninth Circuit analyzed the Act's political committee registration requirements and found them to be constitutional, specifically rejecting the proposal for a "bright-line" rule, and the U.S. Supreme Court declined to review this well reasoned decision. *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1008-1014 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 1477; 179 L.Ed.2d 302 (2011).

The Ninth Circuit evaluated all of the political committee reporting requirements to hold “Washington State’s political committee disclosure requirements are ... narrowly tailored,” “not unduly onerous” and “quite modest.” 624 F.3d at 1012-1013, 1022. The Court noted that registering for a political committee requires only a two page form. *Id.* at 997. These requirements “survive exacting scrutiny.” *Id.* at 1012-13, 1022.

Brumsickle directly addressed whether the constitution permitted regulation of entities which have more than one primary purpose. The Ninth Circuit acknowledged that the Act “imposes obligations on an entity when *one of its* 'primary purposes' is 'to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.’” *Id.* at 1001 (emphasis added) (citing *Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn.App. 586, 903 (2002)).

The Ninth Circuit held that “We disagree with Human Life's reading of *Buckley*, and we reject its invitation to adopt a bright-line rule prohibiting all regulation of groups with ‘a’ primary purpose of political advocacy. ... Having rejected the notion that the First Amendment categorically prohibits the government from imposing disclosure requirements on groups with more than one major purpose, we turn to the crux of the applicable constitutional analysis – whether there is a

substantial relationship between Washington State's informational interest and its decision to impose disclosure requirements on organizations with a primary purpose of political advocacy. We conclude that there is.” *Id.* at 1011.

The Court noted that “The Disclosure Law does not extend to all groups with ‘a purpose’ of political advocacy, but instead is tailored to reach only those groups with a ‘primary’ purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy. Under this statutory scheme, the word ‘primary’ – not the words ‘a’ or ‘the’ – is what is constitutionally significant.” *Id.*

Human Life of Washington petitioned the United States Supreme Court to review the Ninth Circuit’s decision, making the same arguments that the Institute has advanced here. Attached is a brief excerpt from the State of Washington’s brief opposing *certiorari*, demonstrating that the Institute’s arguments and the constitutionality of the political committee test were vigorously debated before the Supreme Court. Ultimately the United States Supreme Court allowed the Ninth Circuit decision to stand, closing the door on the Institute’s (and BIAW’s) vague constitutional claims. *Brumsickle* also precludes the argument that registering as a

political committee poses a significant burden, let alone one with constitutional dimensions.

Brumsickle confirms that the constitution merely requires that electoral work be one of BIAW's *primary* purposes in order to protect groups that "only incidentally engage in such advocacy." BIAW's two years of fundraising and campaigning, and its \$6.6 million in contributions cannot be considered an "incidental engagement" in politics.

As the Seattle Times wrote in mid-October 2008, "The Building Industry Association of Washington is a bigger force in this year's election than the state Republican Party. The builders group has spent far more supporting Dino Rossi for governor than the party has spent on all races this year. And with \$6.3 million sunk into its political-action committee — \$3.8 million just this week — the BIAW has thrown more into the race than any other interest group."²

Despite the State's largest paper reporting BIAW to be a "bigger force" in the 2008 election than the state Republican Party, voters looking at the PDC website found no information about the BIAW. Only political committees are required to provide basic information about themselves to the PDC. Because it failed to register as a political committee, BIAW filed no such information with the PDC. The magnitude of BIAW's

² http://seattletimes.com/html/nationworld/2008276966_biaw17m0.html

donations were knowable only because the political committee receiving the donations reported them.

But the FCPA is designed not just to disclose the magnitude of donations, but also to ensure that “the electorate has *information about groups* that make political advocacy a priority.” 624 F.3d at 1011 (emphasis added). Certainly the electorate should have this information about a group whose spending rivaled a major political party.

Given the role of the BIAW in the 2008 cycle, voters had a strong interest in receiving the basic information required from political committee registration under RCW 42.17A.205, such as: the name and address of the committee, and its affiliated committees, an identification of its officers and treasurer, and information about who authorized expenditures. Having failed to register as a political committee, BIAW provided the PDC and voters with *none* of this information.

The confusion that the BIAW spins in this case would have been avoided if BIAW had registered as a political committee. As a political committee, BIAW would have been required to file objective and certified information about itself and its funding. It would not have been able to later claim (falsely) that a different organization made the donations. The political committee filings are designed to create accountability and prevent such equivocation.

Similarly, the political committee rules would have required BIAW to report its fundraising and contributions under oath in a timely manner, providing key information to voters. Without the political committee designation, BIAW was not required to provide voters with any of this information. BIAW disclosed contributions only on its lobbying disclosures, which are not designed to assist voters. Lobbying disclosures include significantly less detail and are not required on the election timeline.

Failing to report as a political committee, BIAW reported the majority of its political contributions *after the election*. It was not until a week after the election that BIAW submitted its lobbying disclosures that for the first time acknowledged making \$4.4 million of contributions to ChangePAC. Appendix 101 *et seq.* (11/17/2008 L2 Lobbying Report). The BIAW did not tally up its political spending for the cycle until months after the election when it submitted its L3 lobbying report on February 29, 2009. Appendix 60 *et seq.* (2/26/2009 L3 Lobbying Report). Had BIAW been filing as a political committee, it would have provided the voters with this information with increasing frequency *before the election*. See RCW 42.17A.235(2)(a) (contributions and expenditures must be reported “on the twenty-first day and the seventh day immediately preceding the date on which the election is held.”).

The Institute suggests that the political committee definition itself has led to various decision-makers coming to different conclusions about whether BIAW was a political committee. Institute brief at 2. However, the confusion in this case came from the fact that the BIAW took responsibility for \$6.6 million in expenditures, both publicly and in official filings, but then falsely denied the representations contained in those reports after this case was brought. The decision-makers who found that BIAW was not a political committee, including the PDC, relied exclusively upon BIAW's false claim that it had engaged in no political activity. BIAW's failure to report as a political committee created a gap of reliable information and allowed BIAW to peddle this revisionist history.

Finally, had the BIAW reported as a political committee, voters could have easily determined BIAW's political expenditures. Since BIAW did not file, its spending remained unclear. The Seattle Times calculated that BIAW had spent \$6.3 million by mid October.³ It later reported that the contributions were “around \$7 million.”⁴ Petitioners have found \$6.6 million in BIAW expenditures through forensic analysis of other committee's reporting, lobbying reports, and independent expenditure

³ http://seattletimes.com/html/nationworld/2008276966_biaw17m0.html

⁴

http://seattletimes.com/html/localnews/2011444472_apwarossipdc2ndldwritethru.html

reports. But BIAW's failure to file as a political committee denied voters this information during the election, when it mattered.

While political committee registration would have provided voters with unequivocal information about the BIAW and its political activities, it would not have dramatically impacted its operations. For example, registration would not have required BIAW to report all of its income and financial transactions, as *amici* suggest. RCW 42.17A.240 requires political committees to disclose “contributions” and “expenditures,” which are defined to mean *political* contributions and *political* expenditures. Compare RCW 42.17A.240 (reporting requirements) and RCW 42.17A.005 (definitions). Such requirements are not onerous, *Brumsickle*, 624 F.3d at 997, and cannot justify BIAW withholding from voters all information about itself and its political activities.

B. This Court need not decide the attribution rule issue.

Division One’s decision on the attribution rule was clearly *dicta*, since it ultimately denied Petitioners’ appeal based upon the investigatory preclusion rule. This Court should withdraw Division One’s decision on the attribution rule, but need not decide the matter. As described in Petitioners’ Supplemental Brief, this Court should hold that BIAW was legally responsible for \$6.6 million in political expenditures because BIAW publicly reported making these expenditures, and it should not be

allowed to impeach its own reporting. Moreover, BIAW's Board of Directors authorized the BIAW to make political contributions from the Marketing Assistance Fee ("MAF"), which belonged to BIAW (not BIAW-MS), as confirmed by *In re Washington Builders Benefit Trust*, 173 Wn.App. 34 (2013), *review denied*, 2013 Wash.LEXIS 521 (July 9, 2013) ("In re WBBT"). BIAW never even produced admissible evidence to support its claim that contributions were moved through BIAW-MS.

Thus, there is no need for the Court to address the question of whether the BIAW would be responsible for contributions of BIAW-MS under the attribution rules. This case is about BIAW's responsibility for its own contributions.

C. Division One's opinion on attribution is overly broad.

Division One's published opinion on the attribution rule, albeit *dicta*, is overly broad and will have consequences that should be avoided. While Division One originally suggests a dispute over the second sentence of RCW 42.17A.455(2), it ultimately holds that no part of that statute applies to the political committee test. *Compare Utter* ¶¶ 24, 25 and 34.

Indeed, if left unchanged, the published opinion will stand for the proposition that all of the provisions of Initiative 134 are only relevant to contribution limits. *See id.* ¶¶ 33-36. Division One limits the application of RCW 42.17A.455 because it erroneously holds that I-134 was only

about expenditure limits. *Id.* ¶ 34. In fact, I-134 made changes throughout the Act. Adopting expenditure limits was just one of many important reforms enacted by initiative 134, and even Part III of I-134, although titled “Contributions,” addressed far more than just expenditure limits. *See* I-134 §§ 14-32.

I-134 was selective and intentional in directing that the attribution rules apply “for the purpose of this chapter,” *compare* I-134 §§ 3 and 6, and this explicit direction should not be abandoned based upon clearly erroneous reasoning, and where only a hypothetical controversy exists.

While the attribution rules do not apply to independent expenditures, this drafting decision does not prove that the rules were intended only to apply to spending caps and not chapter-wide as they state. A better explanation is that the drafters did not yet understand the threat posed by independent expenditures or see the need for the attribution rule in that context. Moreover, the attribution rules apply in other contexts not subject to spending limits. For example, they apply to all types of political committees, not just candidate authorized committees, so in many cases the committee will not be subject to any limits.

Moreover, Division One’s opinion may cause significant unintended consequences. Labor asks that “attributed” contributions be reportable for contribution limits, but not for the purpose of determining

who is a political committee. Yet, it fails to explain how this is workable, where there is only one definition of contribution and only one set of reporting requirements. Who would determine which contributions to report and for which purpose? How would a reader of the reports, be it a citizen or the PDC, determine which kind of contribution is being reported and which are being omitted? Every report would be rendered ambiguous by the Division One decision.

Finally, Division One's holding may have the unintended consequence of hiding key information from voters about the sponsors of electioneering communications. Currently such communications must list the "top five" contributors, and the attribution rules – especially RCW 42.17A.455(1) – may be key in ensuring that voters learn truthful information. Neither Division One nor Labor has analyzed this issue.

A better approach is for this Court to withdraw Division One's erroneous opinion on this issue and let it be decided in a case that presents an actual justiciable controversy.

D. Labor's concerns are already addressed.

Labor is concerned that the attribution rules could turn every labor union that sponsors a PAC into a political committee. This fear is unfounded. All of these labor unions have properly reported their contributions to their affiliated PACs. Thus, they are undeniably "makers

of contributions” and the attribution rule does nothing to increase the chance that they will be deemed a political committee. Already a maker of contributions, a labor union will be deemed a political committee only if electoral activities becomes one of its primary purposes.

The primary purpose test, not the attribution rule, will determine whether a labor union becomes a political committee. This is a test that looks at the totality of circumstances, assisted by the non-exclusive list of analytical tools provided in *Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn.App. 586, 599-600 (2002). These tools “are intended to reach all relevant evidence, but they are not exclusive. For example, by examining the totality of the circumstances, a fact finder may look at all of the organization's actions, including those in addition to its stated goals. If the activities of an organization reveal that a majority of its efforts are put toward electoral political activity, the fact finder may disregard the organization's stated goals to the contrary.” *Id.*

The attribution rule should have no discernible impact on a trial court's conclusion under this totality of circumstances test. Certainly a trial court is not going to deem a labor union to be a political committee merely because it gave funds to a political committee that it finances or controls, as Labor suggests. Under the primary purpose test a labor union will be judged on its own political activities.

Yet, there are cases, like this one, where the attribution rule is important for determining who is a political committee. For example, where a political contributor makes a contribution through a conduit and then claims, as BIAW has, that this prevents it from even becoming a “maker of contributions.” In that case it is critical that the attribution rules apply to ensure that the actual contributor is held legally responsible for the contributions. This makes the entity a maker of contribution, but it still must meet the primary purpose test to be deemed a political committee.

As discussed in Petitioners’ supplemental brief, there are simple steps that unions can and do take to avoid the application of the attribution rule, and to avoid having electoral work become a primary purpose. If at some point a union does exceed that primary purpose threshold, as the BIAW did, voters will have a legitimate interest in obtaining basic information about that union and its political activities.

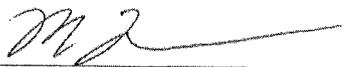
Should political players decide that they desire more certainty about reporting requirements, they should approach the PDC and the legislature. In the case at bar, existing rules had clear application. Voters had a legitimate right to obtain clear and unequivocal information about the BIAW by virtue of its role in the 2008 election. When a small organization devotes years of fundraising and efforts, and \$6.6 million to

an election campaign, the voters right to have information about that group and its political financial spending far outweighs the right of that entity to keep such information secret and private. *See* RCW 42.17A.001.

Respectfully submitted this 1st day of May, 2014.

SMITH & LOWNEY, PLLC

LAW OFFICES OF MICHAEL W.
WITHEY

By: 

Knoll D. Lowney
WSBA No. 23457
Marc Zemel
WSBA No. 44325.

By: _____
Michael W. Withey
WSBA No. 4787

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 1, 2014 I caused plaintiffs' Response to Amici Curiae to be served in the above-captioned matter upon the parties herein via by United State mail, postage prepaid, and electronic mail:

Harry J. F. Korrell
Matthew Clark
Robert Maguire
Davis Wright Tremaine, LLP
1201 3d Ave., Ste. 2200
Seattle, WA 98101

Howard Mark Goodfriend
Smith Goodfriend PS
1619 8th Ave. N
Seattle, WA 98109-3007

Katherine George
Harrison-Benis LLP
2101 4th Ave., Suite 1900
Seattle, WA 98121-2315

William R. Maurer
Institute for Justice/WA State Chapter
10500 NE 8th St., Suite 1760
Bellevue, WA 98004-4309

Dmitri Iglitzin
James D. Oswald
Schwerin Campbell Barnard Iglitzin & Lavitt, LLP
18 W. Mercer St., Suite 400
Seattle, WA, 98119

Stated under oath this 1st day of May 2014.

Jessie C. Sherwood

Attachment A

No. _____

In The
Supreme Court of the United States

Human Life of Washington, Inc., *Petitioner*

v.

Chair Bill Brumsickle et al., *Respondents*

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

Petition for Writ of Certiorari

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Kaylan L. Phillips
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Petitioner

November 22, 2010

Questions Presented

Human Life of Washington, Inc. (“HLW”) has long opposed physician-assisted suicide (“PAS”). In 2008, public interest in HLW’s issue was high as a ballot initiative legalizing PAS was being debated. HLW wanted to express its views on this issue but self-censored because Washington would have deemed it to be a “political committee” (“PAC”)—even though it is not HLW’s major purpose to support or oppose ballot measures and even though its proposed ads neither mentioned nor expressly advocated the passage or defeat of the initiative—and because of the severe penalties for noncompliance. There are four issues:

1. Whether the PAC definition, Wash. Rev. Code (“RCW”) § 42.17.020(39)—and its implementing “a primary purpose” and “receiver of contributions” tests—are unconstitutionally vague and overbroad under the First and Fourteenth Amendments, which limit PAC-status to groups with “*the* major purpose” of regulable election-related speech. *Buckley v. Valeo*, 424 U.S. 1 (1976) (emphasis added).

2. Whether the “independent expenditure” definition, RCW § 42.17.100, is unconstitutionally vague and overbroad under the First and Fourteenth Amendments because it lacks a bright-line, speech-protective test.

3. Whether the “political advertising” definition, RCW § 42.17.020(38), is unconstitutionally vague and overbroad under the First and Fourteenth Amendments because it lacks a bright-line, speech-protective test.

4. Whether the reporting requirement for communications containing “a rating, evaluation, endorsement,

or recommendation for or against a candidate or ballot measure,” Wash. Admin. Code (“WAC”) § 390-16-206, is unconstitutionally vague and overbroad under the First and Fourteenth Amendments because it lacks a bright-line, speech-protective test.

Attachment B

NO. 10-686
IN THE SUPREME COURT OF
THE UNITED STATES

Human Life of Washington, Inc.,
Petitioners,

v.

CHAIR BILL BRUMSICKLE ET AL.,
Respondents.

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

BRIEF OF THE RESPONDENTS IN OPPOSITION

Linda A. Dalton <i>Senior Assistant Attorney General</i>	Robert M. McKenna <i>Attorney General</i>
Nancy J. Krier <i>Special Assistant Attorney General</i>	Jay D. Geck <i>Deputy Solicitor General *Counsel of Record</i>
Callie A. Castillo <i>Assistant Attorney General</i>	PO Box 40100 Olympia, WA 98504-0100 (360) 664-9006

BRIEF OF THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The appellate opinion is reprinted in the Appendix (“Pet. App.”) at 1a and available at 624 F.3d 990 (9th Cir. 2010). The district court opinion, Pet. App. 65a, is unreported but available at No. C08-0590, 2009 WL 62144 (W.D. Wash. Jan. 8, 2009).

STATEMENT

A. Washington’s Campaign Finance Disclosure Law

Washington voters enacted Initiative 276 in 1972 and determined “[t]hat the public’s right to know of the financing of political campaigns and lobbying . . . far outweighs any right that these matters remain secret and private.” Wash. Rev. Code § 42.17.010(10). The “Disclosure Law,” Wash. Rev. Code § 42.17, continues to serve this fundamental purpose of allowing the public and voters to follow the money in elections by providing timely information about campaign financing.

1. Definition of Political Committee

Like most states and the federal government, Washington requires committees involved in political campaigns to register and disclose certain contributions and expenditures. See Wash. Rev. Code §§ 42.17.040, -.060, -.080, -.090; see generally <http://www.fec.gov/> (federal laws) and <http://disclosure.law.ucla.edu> (summary of state laws). Under Washington’s statute, a political committee is a

person or organization (other than the candidate) having “the expectation of receiving contributions or making expenditures in support of, or opposition to . . . any ballot proposition.” Wash. Rev. Code § 42.17.020(39); *see also* Wash. Rev. Code § 42.17.020(4) (definition of ballot proposition).¹

Washington courts have recognized that the statute provides two alternative prongs under which an organization may be a political committee. An organization is a political committee when: (1) the organization expects to receive or receives contributions in support of or opposition to any candidate or ballot measure (the “receiver of contributions” prong); or (2) when the organization expects to expend or expends funds in support of or opposition to a candidate (the “expenditures prong”). *Evergreen Freedom Found. v. Washington Educ. Ass’n*, 49 P.3d 894 (Wash. Ct. App. 2002), *review denied*, 66 P.3d 639 (Wash. 2003) (“*EFF*”). *See also* *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm’n*, 166 P.3d 1174 (Wash. 2007), *certiorari denied*, 553 U.S. 1079 (2008) (“*VEC*”) (rejecting vagueness challenge to definition of political committee).

With regard to the “making of expenditures” prong, the state supreme court has narrowed this definition by ruling that the organization making expenditures must have as its “*primary or one of its primary purposes . . . to affect, directly or indirectly,*

¹ The definition of political committee applies to “any person.” The term “person” is defined to include “any other organization or group of persons, however organized[.]” Wash. Rev. Code § 42.17.020(36). For purposes of clarity, this brief will discuss application of the definition to “organizations.”

governmental decision-making by supporting or opposing candidates or ballot propositions[.]” *State v. (1972) Dan. J. Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976) (emphasis added). The state court of appeals in *EFF* set out a detailed framework to evaluate the *Evans* court’s primary purpose analysis. *EFF*, 49 P.3d at 903. *EFF* rejects a formulaic approach (such as a percentage of expenditures) to determine an organization’s primary purpose. Instead, the framework examines the stated goals and mission of the organization and whether electoral political activity was a primary means of achieving the stated goals and mission during the period in question. *EFF*, 409 P.3d at 903. The non-exhaustive list of analytical tools include (1) the content of the stated goals and mission of the organization; (2) whether the organization’s actions further its stated goals and mission; (3) whether the stated goals and mission would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission. *Id.*

2. Disclosures and Reporting Under Washington Law

A political committee must make certain disclosures. A political committee must file a one-page “statement of organization” with the Washington State Public Disclosure Commission (“PDC”), disclosing the name of the organization, related or affiliated committees or other persons, identification of officers and titles, and identification of a treasurer. Wash. Rev. Code § 42.17.040(2). A political committee must make periodic reports of the contributions it receives and the expenditures it makes relating to its support

or opposition of the ballot measure.² Wash. Rev. Code §§ 42.17.065, -.080.

Disclosure requirements apply only during the period that the group acts as a political committee. *EFF*, 49 P.3d at 904. Moreover, these requirements apply only to political committees that raise or spend more than \$5,000 in a calendar year or that intend to raise more than \$500 from any one contributor. Wash. Admin. Code § 390-16-105(2). Committees spending or raising funds below those amounts have the option of even fewer reporting requirements. Wash. Rev. Code § 42.17.370(8); Wash. Admin. Code §§ 390-16-105 through -125.

The Disclosure Law also requires disclosure of certain “independent expenditures” of \$100 or more that support or oppose a ballot measure or candidate. Wash. Rev. Code § 42.17.100. Independent expenditures include certain political advertising, defined as “any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for

² The term “contribution” is statutorily defined and includes receipt of anything of value contributed for the purpose of supporting or opposing an election campaign, including a ballot measure. Wash. Rev Code §§ 42.17.020(15) (“contribution”) and (18) (“election campaign”). The term “expenditure” is defined at Wash. Rev Code § 42.17.020(22) with reference to “furthering or opposing any election campaign.”

financial or other support or opposition in any election campaign.” Wash. Rev. Code § 42.17.020(38).³

The Disclosure Law requires ease of access to campaign finance information. Wash. Rev. Code § 42.17.367. The PDC website provides information related to laws and rules, filer assistance, manuals, training videos, and free electronic filing software, plus a searchable database of campaign finance information. PDC staff provide assistance to any person regarding reports and filing, and any person can obtain guidance from the PDC through requests for informal advisory opinions, declaratory orders (Wash. Rev. Code § 34.05.240; Wash. Admin. Code § 390-12-250), and PDC interpretations (Wash. Rev. Code § 34.05.230). The public and news media make extensive use of disclosed information.

Violations of Wash. Rev. Code § 42.17 may be pursued through an administrative or trial court action, and may be initiated by the PDC, the state attorney general, local prosecutors, or citizens acting on behalf of the state. Wash. Rev. Code §§ 42.17.395, -.400. Only civil remedies and sanctions are available in such administrative and judicial proceedings. Wash. Rev. Code §§ 42.17.360, -.390, -.400.

³ Wash. Admin. Code § 390-16-206, which is the object of Question 4 of the Petition, provides that certain ratings or endorsements do not need to be reported, including some persons who make an expenditure to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition. The exceptions include certain news media exemptions provided in Wash. Rev. Code §§ 42.17.020(15)(b)(iv), (21)(c) and exceptions for specified political advertising.

139a. Count 2 challenged the definition of “independent expenditure” as vague and overbroad because it uses the terms “support” and “oppose.” Pet. App. 142a. Count 3 challenged the definition of “political advertising” as vague and overbroad because it uses the terms “support” and “oppose,” the phrase “directly or indirectly,” and the phrase “mass communication.” Pet. App. 142-143a. Count 4 challenged a PDC rule, Wash. Admin. Code § 390-16-206, because the rule included the terms “support” and “oppose.”

The complaint and evidence submitted to the district court confirmed that HLW sought to spend money to engage in an advertising campaign directed at defeating I-1000 in the months leading up to the November 2008 election. The district court denied HLW’s request for a preliminary injunction, denied HLW’s motion for summary judgment, and granted summary judgment to the state defendants on all counts. Pet. App. 64-123a.

D. Proceedings in the Ninth Circuit Court Of Appeals

HLW appealed. The court of appeals stayed oral argument until this Court’s decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). By its stay order, the court of appeals authorized the parties to file supplemental briefing on any impact *Citizens United* would have on the issues, and both parties submitted additional briefing. Following argument, the court of appeals affirmed the district court. Pet. App. 1-63a.

As a threshold matter, the court of appeals held that the case was not moot, and that HLW met the requirements for standing and ripeness,

notwithstanding the passage of I-1000. Pet. App. 14-18a. Turning to HLW's challenges, the court of appeals held first that "exacting scrutiny" applied to HLW's arguments that the disclosure provisions of the law were unconstitutional. The court of appeals explained that *Buckley v. Valeo*, 424 U.S. 1 (1976), provided a clear endorsement that exacting scrutiny applies to challenges to campaign finance disclosure requirements. Pet. App. 21a. The Court also relied on *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) ("*Doe v. Reed*"), and *Citizens United*, which "clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important government interest." Pet. App. 24a (citing *Doe v. Reed*, 130 S. Ct. at 2828, and *Citizens United*, 130 S. Ct. at 914).

Applying exacting scrutiny, the court of appeals held that the challenged provisions "advance the important and well-recognized governmental interest of providing the voting public with" information relevant to voting. Pet. App. 31a. The state has an even higher interest in informing the electorate about the source of campaign money in the context of ballot measures. *Id.* Additionally, it held that Washington similarly has "sufficiently important" interests in disclosure of campaign finance information, and that the challenged disclosure provisions bore a substantial relationship to those important interests. Pet. App. 39a.

With regard to HLW's challenge to the definition of political committee, the court of appeals concluded that "[t]he Disclosure Law . . . is tailored to reach only those groups with a 'primary' purpose of

political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy.” Pet. App. 37a. The court of appeals rejected HLW’s argument that *Buckley* should be read to limit disclosure requirements on political committees that have “*the*” major purpose⁴ of election activities, ruling that the First Amendment does not categorically prohibit government from imposing disclosure requirements on groups with more than one major purpose. Pet. App. 34-36a (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”). The court of appeals explained that “the word ‘primary’ - not the words ‘a’ or ‘the’ - is what is constitutionally significant” because the government’s informational interest in disclosure is just as strong (or stronger) for groups with a primary purpose of election advocacy. Pet. App. 37a. Further, it explained that Washington’s definition served an important public interest by ensuring that such groups would not circumvent and evade disclosure requirements. Pet. App. 38a.

Next, the court of appeals rejected HLW’s argument that the disclosure requirements are unconstitutionally “onerous,” again following this

⁴ The phrase from *Buckley* reads: “To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” *Buckley*, 424 U.S. at 79.

Court's decision in *Citizens United*. Pet. App. 40a. "Like the requirements in *Citizens United*, Washington State's political committee disclosure requirements are not unconstitutionally burdensome relative to the government's informational interest. Rather, they are narrowly tailored such that the required disclosure increases as a political committee more actively engages in campaign spending and as an election nears." Pet. App. 42a. The court of appeals concluded that the Disclosure Law's "somewhat modest political committee disclosure requirements" meet exacting scrutiny because they "are substantially related to the government's interest in informing the electorate[.]" Pet. App. 44a.

The court of appeals then turned to, and rejected, HLW's argument that the Disclosure Law's definitions for "independent expenditure" and "political advertising" are vague or overbroad and lack a substantial relation to important government interests. Pet. App. 44a. HLW's vagueness and overbreadth argument claimed that the statutory definitions would reach issue advocacy, rather than express advocacy. The court of appeals concluded first that the proposed advertisements were the functional equivalent of express advocacy and subject to regulation under this Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003) ("*McConnell*") and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"). Pet. App. 46-47a. But, even if the communications proposed by HLW were "issue advocacy," the court of appeals ruled that this Court has previously rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of

express advocacy.” Pet. App. 47-48a (citing *Citizens United*, 130 S. Ct. at 915).

The court of appeals then held that the requirements imposed on “independent expenditures” and “political advertising” are substantially related to Washington’s important informational interests. Pet. App. 49a. “As in *Citizens United*, Washington voters’ interest in knowing who is speaking about physician-assisted suicide shortly before they vote on a ballot initiative that proposes to legalize that practice is sufficient to support the Disclosure Law’s requirements.” Pet. App. 51a. In particular, a ballot measure involves voters acting as legislators where “the government has a vital interest in providing the public with information about who is trying to sway its opinion.” Pet. App. 51a. Furthermore, the court of appeals explained that there is less danger of disclosure regulations sweeping too broadly in the context of a ballot measure. Pet. App. 52a. The Disclosure Law “target[s] only those expenditures and advertisements made in conjunction with an ongoing election or vote.” Pet. App. 53a. The requirements on groups, like HLW, are related to the existence of a ballot initiative campaign and the date of the election. Pet. App. 53a.

Next, the court of appeals rejected HLW’s other vagueness arguments. It rejected HLW’s challenge to the word “expectation,” which is used in the definition of political committee. Under controlling Washington case law, the standard provides “concrete, discernible criteria necessary to prevent arbitrary and discriminatory enforcement[.]” Pet. App. 58a. Similarly, the court of appeals rejected HLW’s objection to the term “mass communication” in the

definition of “political advertising,” ruling that the term is clear because it is part of a list of ordinary and well-understood communications. Pet. App. 60a.

Finally, the court of appeals rejected HLW’s as-applied challenge to the Disclosure Law, finding that HLW had offered no evidence to support such a challenge. The verified complaint cited by HLW was “devoid of information” to show the Disclosure Law was unconstitutional as applied to HLW. Pet. App. 61a. Moreover, the record did not establish that the complaint had been verified by a person with personal knowledge. Pet. App. 61a.⁵ Thus, the only evidence in the record showed that HLW could easily meet the requirements of the law, and that the reporting requirements imposed by the law are “quite modest.” Pet. App. 61a.

HLW filed its Petition For A Writ Of Certiorari with this Court on November 22, 2010.

REASONS FOR DENYING THE PETITION

The court of appeals concluded that Washington’s disclosure requirements do not limit speech by an organization like HLW, and that the disclosure requirements are tailored to the well-recognized important interests of providing information to voters regarding who is financing the support of and opposition to a ballot measure. In reaching this conclusion, the court of appeals opinion

⁵ The CEO of HLW, who signed the verified complaint, could not, in fact, verify many sections of the complaint. He acknowledged that he did not have personal knowledge of certain factual contentions and that he could not verify the legal contentions.

closely follows this Court's rulings and presents no conflict with any decision of this Court. Nor does it present any genuine or important conflict with a decision by another circuit.

A. The Decision Below Is An Unremarkable Application of This Court's Precedent

HLW makes a number of arguments to claim that the court of appeals decision conflicts with decisions of this Court. As shown in this section, the decision below closely follows the Court's controlling precedent. HLW's claims of conflict are based on inapposite cases, on standards that are not supported by decisions of this Court, and on alleged standards that have been affirmatively rejected by this Court.

1. Consistent With This Court's Decisions, The Circuit Court Ruled That The Challenged Disclosure Requirements Are Subject To Exacting Scrutiny

HLW argues that the court of appeals determination that exacting scrutiny applies to the disclosure requirements in this case conflicts with decisions of this Court. Pet. 26-30. To the contrary, the court of appeals follows the Court's decisions from *Buckley* through *Citizens United* and *Doe v. Reed*, where this Court has held that exacting scrutiny applies to campaign finance disclosure requirements. Pet. App. 25a.

In *Citizens United*, the Court held that exacting scrutiny applies to the disclosure requirements. As the Court explained, "Disclaimer and disclosure requirements may burden the ability to speak, but

they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.” *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citations omitted). The opinion in *Citizens United* demonstrates that the formulation of exacting scrutiny used by the court of appeals, Pet. App. 25a, is well-established. “[E]xacting scrutiny,’ . . . requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Citizens United*, 130 S. Ct. at 914 (citing *Buckley*, 424 U.S. at 64, 66, and *McConnell*, 543 U.S. at 231-32).

In *Doe v. Reed*, the Court applied exacting scrutiny to Washington’s law requiring public disclosure of the names of persons signing referendum petitions. *Doe v. Reed*, 130 S. Ct. at 2818. As in *Citizens United*, the Court distinguished between state laws that prohibit or limit speech and laws that compel disclosure, holding that exacting scrutiny applied because disclosure of the public records was not a “prohibition on speech[.]” *Id.*⁶

HLW’s conflict argument is not premised on a claim that the Disclosure Law involves a prohibition on speech. Pet. 29. Instead, HLW seeks to bypass *Citizens United* and *Doe v. Reed* and apply strict scrutiny to Washington’s disclosure laws. HLW’s argument misreads *Citizens United*, citing to this Court’s application of strict scrutiny to the federal law prohibiting corporations from spending money, where the Court rejected the FEC’s argument that the

⁶ The public records disclosure provisions at issue in *Doe v. Reed* were enacted as part of the same initiative, I-276, that put in place the Disclosure Law.

corporation had the option to create a political committee. Based on this element of *Citizens United*, HLW claims strict scrutiny applies to disclosure requirements on political committees. Pet. 29.

HLW's argument is an unsound reading of *Citizens United*. While the Court in *Citizens United* addressed the option of creating a separate entity, it concluded that this option did not overcome the fact that federal law prohibited speech by the corporation. *Citizens United*, 130 S. Ct. at 898. The opinion makes it clear that the trigger for strict scrutiny is the prohibition on speech. This is also made obvious when the Court applies exacting scrutiny to examine the disclaimer and disclosure requirements on the same corporations, and explains that disclosure is a "less restrictive alternative to more comprehensive regulations of speech[.]" *Citizens United*, 130 S. Ct. at 915 (citing to *MCFL*, 479 U.S. at 262).

HLW's reliance on *MCFL* suffers from the same flaw as its reading of *Citizens United*. Both *Citizens United* and *MCFL* considered 2 U.S.C. § 441b, a statute prohibiting corporations from spending corporate treasury funds to advocate for or against federal candidates absent forming a separate and segregated fund. See 2 U.S.C. § 441b(b)(2), (4); 11 C.F.R. § 114.1 through -8. As in *Citizens United*, the *MCFL* Court applied strict scrutiny based on the prohibition on corporate expenditures. *MCFL*, 479 U.S. at 252 (plurality opinion) ("corporation is not free to use its general funds for campaign advocacy purposes"). Thus, the court of appeals decision is not in conflict with *Citizens United* or *MCFL* because HLW does not claim (and did not show) that the Disclosure Law prevents it from speaking in its own name or

using its own funds. Indeed, HLW's Petition would simply reargue the Court's recent rulings that exacting scrutiny provides the relevant framework for reviewing disclosure requirements.

Alternatively, HLW argues that the Court has viewed the registration and disclosure for some political committees as "onerous" and contends that exacting scrutiny cannot apply to onerous burdens. Pet. 27. This proposal of a special standard based on the term "onerous" is again contrary to the Court's ruling in *Citizens United* that exacting scrutiny applies to disclosure requirements. *Citizens United*, 130 S. Ct. at 914. HLW can cite no case where this Court uses an "onerousness" standard, instead of exacting scrutiny, to compare disclosure requirements to state interests.⁷

HLW's argument in favor of two tiers of exacting scrutiny for disclosure provisions should likewise be rejected. Pet. 30 (suggesting that there is both "complaisant" and "high" exacting scrutiny). HLW does not show that any court follows its anomalous approach or that there is any confusion related to different tiers of exacting scrutiny. Further, there is nothing in the court of appeals opinion addressing these supposedly different tiers; instead, the formulation by the court of appeals

⁷ As an additional matter, HLW's repeated arguments that the disclosure requirements are onerous are not suitable for certiorari because no evidence supports HLW. As the court of appeals explained, HLW's case mounted only a facial challenge to the disclosure requirements. Pet. App. 60a. Virtually all the evidence in the record was supplied by the state and it showed that the requirements for political committees and independent expenditures are "modest." Pet. App. 44a.

squarely follows this Court's formulation of exacting scrutiny. Pet. App. 24a.

2. Washington's Construction of Political Committee Does Not Conflict With Opinions Of This Court

As discussed above at pp. 2-3, an organization is a "political committee" under the expenditures prong of the Disclosure Law if its "primary or one of the primary purposes" is "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *EFF*, 49 P.3d at 903 (quoting *Evans*, 546 P.2d at 79). HLW argues that *Buckley* holds that no organization can be required to register and provide disclosure as a political committee unless "the" major purpose of the organization is the nomination or election of a candidate. Pet. 16. HLW claims its view of *Buckley* is supported by *MCFL* and *McConnell*. *Id.* The court of appeals decision does not conflict with *Buckley*, *MCFL*, or *McConnell* because those cases do not support HLW's view that the First Amendment categorically prohibits a state from designating an organization as a "political committee" unless the organization's sole major purpose is campaign advocacy.⁸

The Court in *Buckley* used the phrase "the major purpose" to provide a narrowing construction to

⁸ HLW did not challenge below the constitutionality of the state's definition of political committee as it related to the "receiver of contributions" prong. Although HLW mentions this prong for the first time in the Petition at 8-9, it has not supported any challenge to the contributions prong with argument or authority.

the specific statutory definition of “political committee” in the Federal Election Campaign Act (“FECA”), 2 U.S.C. § 431, *et seq.* *Buckley*, 42 U.S. at 79-80. As the court of appeals concluded, nothing in *Buckley* suggests that the phrase is an absolute limit on when a state may seek disclosure by an organization involved in support of or opposition to a ballot measure. Pet. App. 34-35a. Instead, as the court of appeals found, Washington satisfies the constitution because its definition “is tailored to reach only those groups with a ‘primary’ purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy.” Pet. App. 37a.

HLW’s reliance on *MCFL* to mandate use of “*the*” major purpose is also unsound because that case did not address that issue. *MCFL* dealt with an expenditure limit, which imposed a significantly higher First Amendment burden and, therefore, involved a higher level of scrutiny. Pet. App. 35a. As the court of appeals recognized, the Court in *MCFL* “considered whether the burden of a corporate campaign *expenditure limitation* was unconstitutional as applied to an ideological nonprofit; it did not consider a facial challenge to a disclosure requirement imposed on entities engaging in political advocacy.” Pet. App. 35a (citing *MCFL*, 479 U.S. at 241) (emphasis added).⁹

⁹ HLW also argues for a conflict based on the phrase “the major purpose” by citing FEC notices that summarized case law. Pet. 18 (citing 72 Fed. Reg. 5595). Putting aside whether the FEC notices could be the basis to demonstrate a conflict, the notices do not endorse HLW’s view that the Constitution requires rigid focus on “*the* major purpose.”

HLW also contends that the Disclosure Law's use of the terms "support" and "oppose" are vague and overbroad, and that *Buckley* limits the State to examining only the organization's "expenditures and contributions of a single year" in order to determine an organization's political committee status. Pet. 24-25. HLW's argument is contrary to this Court's holding that the terms "support" or "oppose" are not vague or overbroad. See, e.g., *McConnell*, 540 U.S. at 170 n. 64 (explicitly holding that the terms "support" and "oppose" are not vague). In no case has the Court determined that disclosure laws regarding political committees are invalid by virtue of using the terms "support" or "oppose."

This Court has also never adopted HLW's purported tests for determining whether an organization is a political committee. Nor has any court held that only one particular method is appropriate for making such a determination. As discussed, *Buckley* provides a narrowing construction of a specific federal statute, not a singular approach that must be exported to every state's regulation of every type of political committee. This reading of *Buckley* is confirmed by *MCFL*, where the Court identifies other methods that could be used to ascertain an organization's "major purpose." *MCFL*, 479 U.S. at 252, n. 6 and 262); see also *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d

Instead, the FEC notice simply reviews case law and concludes that the "Court's major purpose test from *Buckley* has not been eliminated by federal legislation or case law." 72 Fed. Reg. at 5597 (discussing *McConnell*, 540 U.S. at 203-04). Read in context, the FEC notice falls far short of endorsing HLW's stringent use of "the" major purpose.

1137, 1152 (10th Cir. 2007) (“*CRLC*”) (reviewing how *MCFL* provided additional non-exclusive suggested methods).¹⁰

To claim that Washington’s determination of primary purpose is unclear, HLW baldly asserts that Washington law does not provide adequate guidance. Pet. 23. This mischaracterizes the issue raised by this case because it ignores the record, the controlling construction of Washington’s definition, and the wealth of guidance available. The record shows that since 1973, Washington’s statute defining “political committee” has been interpreted to consider an organization’s “primary purposes.” See Wash. AGO 1973 No. 14, 1973 WL 153939 (Wash. Att’y Gen. June 8, 1973). As discussed previously and also by the court of appeals, state appellate decisions and PDC guidance have implemented primary purpose using objective factors. See *supra* 3-5.¹¹

¹⁰ The state supreme court relied on *McConnell* to reject a challenge to the terms “support” and “oppose” as used in Washington’s definition of political committee. *VEC*, 166 P.3d at 1184 (citing *McConnell* and holding that “support” and “oppose” are not unconstitutionally vague).

¹¹ The Court should also look past HLW’s criticism of the court of appeals for citing an HLW email, where HLW argues that Washington does not regulate emails as “expenditures.” Pet. 22. This email alone would not make an organization into a political committee under Washington law and that is not suggested by the court of appeals. In context, the court of appeal addresses the email as part of a larger record showing that HLW’s primary purpose in 2008 would be to expend funds to oppose I-1000. Pet. App. 3-6a; 60-62a.

HLW's challenge to the Disclosure Law's definitions of independent expenditure and political advertising, which enable disclosure, presents no conflict with decisions of this Court in order to warrant certiorari.

B. The Decision Below Creates No Circuit Conflict

HLW claims a conflict with the decisions of other circuits with regard to the lower court's application of "exacting scrutiny" and its rejection of HLW's rigid focus on "*the*" major purpose for political committee determination. See Pet. 19-21, 31-32. The circuit court cases cited by HLW, however, present no genuine conflict on the level of scrutiny required for disclosure provisions. With regard to evaluation of *Buckley's* "major purpose" analyses, the decisions are unique to the particular state statutes and do not reflect any genuine conflict.

1. HLW principally relies on a Fourth Circuit decision that predates critical decisions of this Court and creates no genuine conflict

HLW relies on the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) to support its circuit split contention. In *Leake*, a two-judge majority struck down North Carolina's definition of political committee based, in part, on its conclusion that, under *Buckley*, a political committee must be limited to organizations with "*the* major purpose" of electing or defeating a candidate. *Leake*, 525 F.3d at 287. The Fourth Circuit panel read *Buckley* to require that "the burdens of political committee designation

only fall on entities whose primary, or only, activities are within the ‘core’ of Congress’s power to regulate elections.” *Id.* at 288. For a number of reasons, the *Leake* decision does not reflect a genuine conflict with the decision below.

As an initial matter, *Leake* pre-dates both *Citizens United* and *Doe v. Reed*. The Fourth Circuit has not had the opportunity to consider this Court’s most recent holdings regarding disclosure, and the important governmental and voter interests served thereby. The Ninth Circuit recognized that fact, stating that *Leake* “predates *Citizens United* and *Reed* and therefore is unpersuasive in the disclosure context.” Pet. App. 45a, n.5. Further, no conflict is presented because the majority in *Leake* does not analyze the phrase “exacting scrutiny.” HLW’s claim of conflict on the level of scrutiny relies solely on the dissenting judge’s argument that the majority inappropriately relied on strict scrutiny cases. Pet. 31. The Fourth Circuit should be allowed to address the level of scrutiny and apply *Citizens United* and *Doe v. Reed* before this Court concludes that a genuine conflict has developed.

With regard to the precise phrase “the major purpose” from *Buckley*, *Leake* presents no conflict because the majority expressly recognized that its conclusion regarding North Carolina’s definition would not apply to Washington’s definition of political committee. Responding to the dissent, the majority states that the Washington statutes addressed in the dissent’s case law contain “none of the infirmities” the panel found in the North Carolina laws. *Leake*, 525 F.3d at 299 (citing to *VEC*). Furthermore, the majority in *Leake* relied on

a finding that North Carolina had not provided “potentially regulated entities with any idea of how to comply with the law.” *Leake*, 525 F.3d at 289. This is distinguishable from Washington and the record below, which showed no such difficulties in complying with Washington’s definition or its modest disclosure requirements for political committees.

The absence of a genuine or developed conflict between the Fourth and Ninth Circuits is further shown by the Fourth Circuit’s rejection of various “bright-line” tests for determining major purpose. Similar to HLW’s arguments, Pet. 22-26, the plaintiffs in *Leake* asked the court to hold that an organization could fall within the ambit of *Buckley*’s major purpose test only if “(1) the organic documents of the organization list electoral advocacy as the organization’s major purpose or (2) if the organization spends over 50% of its money on influencing elections.” *Leake*, 525 F.3d at 289, n.6. The Fourth Circuit expressly declined those standards for determining whether an organization’s major purpose is the support or opposition of candidates. *Id.* (“[w]e need not determine in this case whether [the plaintiffs’ standard] is the only manner in which North Carolina can apply the teachings of *Buckley*”).¹³

Finally, prior panels in the Fourth Circuit have not accepted a rigid view of “*the*” major purpose

¹³ HLW asserts that *Leake* also held that the “*only* two regulable communications” are the “*federally* defined” terms of “independent expenditures” and “electioneering communications.” Pet. 34 (emphasis added), citing to *Leake* at 525 F.3d at 284. HLW significantly misstates *Leake*, which contains no such sweeping holding.

as did *Leake*. Specifically, in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the court of appeals determined that *Buckley*'s definition of "political committee" was construed to include only those entities that have as "a major purpose" engaging in express advocacy in support of a candidate. *Bartlett*, 168 F.3d at 712.¹⁴ The Ninth Circuit's reading of *Buckley* is thus similar to the Fourth Circuit in *Bartlett*. See Pet. App. 32a-33a.

2. The decision below comports with other circuit court opinions

Once *Leake* is addressed, there is no substance to HLW's other claims of conflict between the circuits.

HLW cites the Tenth Circuit's ruling in *CRLC*, *supra* at p. 20, to claim a conflict regarding exacting scrutiny. Pet. 31-32. But first, the *CRLC* decision is a pre-*Citizens United* and *Doe v. Reed* decision and thus presents no conflict. Second, the Tenth Circuit in *CRLC* applied strict scrutiny to a provision similar to that at issue in *MCFL*, whereby corporations were banned from making electioneering expenditures. *CRLC*, 498 F.3d at 1141, 1146. HLW's complaint does not involve such restrictions. Third, the Tenth Circuit has applied exacting scrutiny in a more recent case challenging disclosure requirements, which dispels HLW's claim that the Tenth Circuit would apply strict scrutiny in a challenge to

¹⁴ In the Petition, HLW cites *Bartlett* as standing for the "major purpose". Pet. 20. The quotation provided in the Petition obscures the fact that *Bartlett* used the word "a" before "major purpose." See *Bartlett*, 168 F.3d at 712 ("a major purpose").

Washington's Disclosure Law. *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010).

HLW broadly asserts, without discussion, that five other circuit courts "recognize" "the" major purpose test. Pet. 19 and n.18 (citing decisions of the Second, Seventh, Tenth, Eleventh, and D.C. circuits). However, like the Ninth Circuit below, the majority of these circuit courts cite *Buckley's* "major purpose" analysis as a judicial construction to narrow what was an otherwise unconstitutional specific federal statutory definition of political committee. Pet. App. 34a-35a; *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995); *CRLC*, 498 F.3d at 1153; *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981), *certiorari denied*, 454 U.S. 897 (1981); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010). These courts have not, as HLW implies, interpreted *Buckley* as a constitutional mandate that an entity must only have "the major purpose" of supporting or opposing an election in order to be regulated as a political committee.

HLW also cites to the Tenth Circuit in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) ("*NMYO*"). Pet. 20. The *NMYO* court struck down a state law "as applied" to an organization that was deemed a political committee. *NMYO*, 611 F.3d at 677 & n.5. New Mexico argued that its \$500 per year expenditure rule, standing alone, would prove an organization's major purpose. *Id.* at 677. In rejecting New Mexico's unique view of determining "major purpose," the Tenth Circuit did not endorse a rigid requirement of "the" major

purpose. It cites *Leake*, but merely for a broad proposition that, under *Buckley*, classification as a political committee should reflect major purposes, not an expenditure trigger like \$500 per year. In light of the court's discussion and the fact-bound nature of the ruling, *NMYO* is not comparable to the decision below.

Finally, HLW argues that there is conflict within the Ninth Circuit. Pet. 32. This argument has no merit. The Ninth Circuit addresses and resolves prior circuit cases by adopting and following this Court's cases. Pet. App. 20a-25a. There is also no merit to HLW's claim that the court of appeals opinion here conflicts with its prior opinion in *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) ("*CPLC-II*"). Pet. at 20. *CPLC-II* specifically held that "irrespective of the major purpose of an organization, disclosure requirements may be imposed." Pet. App. at 34a (quoting *CPLC-II*, 507 F.3d at 1180 n.11).

HLW's claimed conflict with other circuits regarding the level of scrutiny and the major purpose analysis has no merit, and does not warrant review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Robert M. McKenna
Attorney General

Linda A. Dalton
*Senior Assistant
Attorney General*

Jay D. Geck
*Deputy Solicitor General
Counsel of Record

Nancy J. Krier
*Special Assistant
Attorney General*

PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

Callie A. Castillo
Assistant Attorney General

January 12, 2011

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Attachments: 90152-0 Amended Ltr 4-30-14.pdf

Importance: High

Amended Letter as to Petitioner's Address

Counsel and Clerk

Attached is a copy of the letter issued by the Clerk or Deputy Clerk on this date in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail. When filing documents by email with this Court, please use the main email address at supreme@courts.wa.gov

Lisa Marie
Washington State Supreme Court
lisa.thomas@courts.wa.gov