

No. 89462-1

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT

William R. Maurer, WSBA #25451
INSTITUTE FOR JUSTICE
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004
(425) 646-9300

Counsel for Amicus Curiae

Filed *E*
Washington State Supreme Court

MAY - 5 2014 *b/h*

Ronald R. Carpenter
Clerk

ORIGINAL

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iii
I. IDENTITY AND INTEREST OF AMICUS.....	1
II. ISSUE OF CONCERN TO AMICUS	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT AND AUTHORITY	5
A. Washington’s “Political Committee” Law And Its Requirements	5
B. Washington’s Standard For Determining When An Organization Is A Political Committee Is Vague And Raises “Serious Constitutional Issues”	7
1. The U.S. Supreme Court, The FEC, And Federal Appellate Courts Use A Clear Standard To Determine When An Organization Is A Political Committee	8
2. Some Courts, Including This One, Have Not Applied <i>Buckley’s</i> Holding And Have Created The Vagueness Problem The U.S. Supreme Court Sought To Avoid.....	14
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Pages:</u>
<i>Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett</i> , 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011)	1
<i>Am. Civil Liberties Union v. Jennings</i> , 366 F. Supp. 1041 (D.D.C. 1973), <i>vacated as moot</i> , <i>Staats v. Am. Civil Liberties Union</i> , 422 U.S. 1030, 95 S. Ct. 2646, 45 L. Ed. 686 (1975)	9
<i>Buckley v. Valeo</i> , 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed.2d 659 (1976)	<i>passim</i>
<i>Citizens United v. FEC</i> , 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)	1, 18
<i>Ctr. for Individual Freedom v. Madigan</i> , 697 F.3d 464 (7th Cir. 2012)	17
<i>Davenport v. Washington Education Association</i> , 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007)	1
<i>Doe v. Reed</i> , 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010)	19
<i>Family PAC v. McKenna</i> , 685 F.3d 800 (9th Cir. 2012)	19
<i>Farris v. Seabrook</i> , 677 F.3d 858 (9th Cir. 2012)	1
<i>Fed. Election Comm’n v. Mass. Citizens for Life, Inc.</i> , 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed.2d 539 (1986)	10, 18
<i>Human Life of Wash., Inc. v. Brumsickle</i> , 624 F.3d 990 (9th Cir. 2010)	17
<i>Iowa Right To Life Comm. v. Tooker</i> ,	

717 F.3d 576 (8th Cir. 2013)	13
<i>McConnell v. Fed. Election Comm'n</i> , 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed.2d 491 (2003).....	10
<i>Minnesota Citizens Concerned for Life, Inc. v. Swanson</i> , 692 F.3d 864 (8th Cir. 2012)	12, 13
<i>N.M. Youth Organized v. Herrera</i> , 611 F.3d 669 (10th Cir. 2010)	12
<i>Nat'l Org. for Marriage v. McKee</i> , 649 F.3d 34 (1st Cir. 2011).....	17
<i>North Carolina Right To Life v. Leake</i> , 525 F.3d 274 (4th Cir. 2008)	11, 12
<i>San Juan County v. No New Gas Tax</i> , 160 Wn.2d 141, 157 P.3d 831 (2007).....	1
<i>State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n</i> , 111 Wn. App. 586, 49 P.3d 894 (2002).....	15
<i>State v. The (1972) Dan J. Evans Campaign Committee</i> , 86 Wn.2d 503, 546 P.2d 75 (1976).....	14, 15
<i>U.S. v. Nat'l Comm. for Impeachment</i> , 469 F.2d 1135 (2d Cir. 1972).....	9, 10
<i>Utter v. Building Indus. Ass'n of Wash.</i> , No 66439-5-1 (Wash. Ct. App. Oct. 29, 2012).....	4, 7
<i>Utter v. Building Indus. Ass'n of Washington</i> , 176 Wn. App. 646, 310 P.3d 829 (2013).....	4-5

STATUTES AND RULES

RCW 42.17A.005.....	6
RCW 42.17A.205.....	6
RCW 42.17A.210.....	6
RCW 42.17A.215.....	6

RCW 42.17A.225.....	6
RCW 42.17A.235.....	6, 13
RCW 42.17A.240.....	6, 9
RCW 42.17A.750	7
RCW 42.17A.765.....	4, 7

OTHER AUTHORITIES

Benjamin Barr & Stephen R. Klein, <i>Publius Was Not A PAC: Reconciling Anonymous Political Speech, The First Amendment, And Campaign Finance Disclosure,</i> 14 Wyoming L. Rev. 253 (2014)	18
Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595 (Feb. 7, 2007)	10
Washington Public Disclosure Commission, <i>Political Committees: Campaign Disclosure Instructions</i> (March 2014)	7, 13
Washington State Attorney General, 14 Op. Att’y Gen. 25 (1973).....	15

I. IDENTITY AND INTEREST OF AMICUS

The Institute for Justice (the “Institute”) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of this mission, the Institute has litigated cases here and across the country challenging laws that burden Americans’ ability to peacefully communicate political messages to one another, including directly representing parties in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011), *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012), and *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 157 P.3d 831 (2007). The Institute has also filed amicus curiae briefs in numerous campaign-finance cases, including *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), and *Davenport v. Washington Education Association*, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

Given the Institute’s experience in cases involving the First Amendment and campaigns, the Institute believes that its perspective will provide this Court with valuable insights regarding how the interpretation of the term “political committee” affects political participation.

II. ISSUE OF CONCERN TO AMICUS

This case demonstrates the need for a bright-line, objective standard for determining when an organization becomes a political committee under Washington law. This Court should avoid vagueness problems and hold that an entity becomes a political committee only when it has the major purpose of electoral activity.

Here, the trial court, the court of appeals, the Washington Public Disclosure Commission (PDC), Petitioners, Respondent, and amici have come to varying conclusions on whether Respondents are a political committee under Washington law. This lack of consensus regarding the scope of a statute that regulates First Amendment rights is constitutionally impermissible. Rather than establishing a clear rule as to when an entity becomes a political committee, Washington uses a subjective test that lends itself to inconsistent applications. When the law's lack of specificity is combined with Washington's "private enforcement" mechanism, through which private parties may prosecute their political opponents, the end result is a "KEEP OUT" sign for Washingtonians wishing to engage in politics. Surely, someone viewing this ongoing six-year saga resulting from the actions of Respondent Building Industry Association of Washington (BIAW) in a long-since-passed campaign could conclude that participating in Washington elections is a dangerous game.

This Court should clarify when an entity becomes a political committee so that speakers, the government, and private litigants may objectively determine the organization's status. Under the test used by the U.S. Supreme Court, the Federal Election Commission, and numerous federal courts of appeals, there is no question of fact that the BIAW is not, and was not, a political committee.

III. STATEMENT OF THE CASE

One of the issues in this case is whether BIAW had as one of its primary purposes electoral activity and is therefore a “political committee” under the Fair Campaign Practices Act (FCPA).¹ The final tally below is five PDC commissioners, PDC staff, and one trial court judge have concluded that BIAW does not have as one of its primary purposes electoral activities. Two court of appeals judges believe that there is a question of fact whether it does. One court of appeals judge has come to both conclusions. The parties—sophisticated participants in Washington politics—do not agree on the answer or on what evidence should be examined to arrive at it. Seven amici disagree with the court of appeals and Petitioners. *See* BIAW's Supp. Br., exs. A and B.

Specifically, after an investigation, the PDC concluded that BIAW did not have as one of its primary purposes electoral activity. CP 57, 59,

¹ The Institute assumes, for the purposes of this brief, that Petitioners' suit is not preempted by RCW 42.17A.765(4).

69. The trial court concluded likewise. CP 833-36.² On appeal, two court of appeals' judges concluded that there was an issue of material fact whether BIAW had as one of its primary purposes electoral activities because of "evidence from which it may be inferred that supporting Rossi's campaign was a top priority for BIAW leading up to the 2008 election and that BIAW made significant efforts towards that end." *Utter v. Building Indus. Ass'n of Wash.*, No 66439-5-1, slip op. at 16 (Wash. Ct. App. Oct. 29, 2012) (attached to Petitioners' Petition for Review). This evidence was statements from BIAW personnel about the importance of the governor's race for BIAW—the court did not measure BIAW's electoral activities against all its other activities. Judge Grosse dissented, arguing that there was "insufficient evidence in this record to support such a finding or findings." *Id.* at 1 (Grosse, J., dissenting). He also concluded that Washington's law, and the courts' interpretation of it, "are anything but clear in their direction." *Id.* He asked the PDC to "clarify[] obligations of participants in the political dialogue to attempt to avoid largely irrelevant litigation." *Id.* at 2. On rehearing, however, Judge Grosse joined his colleagues to conclude that there was an issue of fact as to whether BIAW did have a primary purpose of electoral activities. *Utter*

² Neither the PDC nor the trial court explicitly stated that the BIAW does not have electoral activities as one of its primary purposes. However, as discussed below, that conclusion is inherent in the determination that the BIAW is not a political committee under Washington law.

v. Building Indus. Ass'n of Washington, 176 Wn. App. 646, 669, 310 P.3d 829 (2013).

The confusion does not stop there. The parties disagree as to the BIAW's primary purposes and even as to what evidence should be considered in coming to that conclusion. *Compare* Appellants' Opening Br. 30-33 (discussing statements by BIAW officers), *with* Resp.'s Reply Cross-Pet. Rev. 7 (discussing the non-political activities of the BIAW). Similarly, the PDC and the court of appeals used different tests to answer this question. *Compare* CP 57 (PDC considered BIAW's expenditures from 2006 to 2008), *with Utter*, 176 Wn. App. at 669 (using BIAW statements to determine primary activities).

The fact that no one can objectively say whether or not the BIAW is a political committee demonstrates that Washington's standard for determining when an entity is a political committee is unacceptably indeterminate. Such a vague standard, when combined with the "citizen's suit" mechanism, creates an intolerable barrier to political participation in this state that this Court should remove.

IV. ARGUMENT AND AUTHORITY

A. Washington's "Political Committee" Law And Its Requirements

Washington law defines "political committee" as "any person (except a candidate or an individual dealing with his or her own funds or

property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005(37).

The consequences of being labeled a political committee are significant, especially for active organizations with a broad range of activities. Political committees must file a statement of organization with the PDC within two weeks of having its expectation to, or actually receiving or making, contributions or expenditures and list its name and address, its affiliated organizations, the names and addresses of its officers, the name and address of its bank, and it must identify what political effort it supports. RCW 42.17A.205. It must appoint a treasurer, RCW 42.17A.210, and choose a bank. RCW 42.17A.215. The committee must file monthly reports with the PDC until it dissolves. RCW 42.17A.225. This report must contain a list of all contributions received and expenditures made in the month, as well as pledges, loans, promissory notes, transferred funds, any debts, and what it does with surplus funds. RCW 42.17A.235, .240. During election years, it must report its bank deposits weekly. RCW 42.17A.235. As Judge Grosse recognized, these

requirements are “detailed” and “burdensome.” *Utter*, slip op. at 2 (Grosse, J., dissenting). This puts it mildly.³

Failure to register as a political committee can have significant consequences. A person who violates the FCPA can be penalized up to \$10,000 for each violation and an amount equal to the amount not reported. RCW 42.17A.750(1)(c) and (e). The PDC may also refer the committee for criminal prosecution under certain conditions. RCW 42.17A.750(2). The election in which the political committee participated could be voided. RCW 42.17A.750(1). In addition to government prosecution, Washington law allows political opponents to sue each other for purported violations of campaign finance laws, thus permitting private parties to subject their opponents to potentially years of litigation and to interfere with their speech at critical times. RCW 42.17A.765(4).

B. Washington’s Standard For Determining When An Organization Is A Political Committee Is Vague And Raises “Serious Constitutional Issues”

In 1976, the U.S. Supreme Court set out a standard for when the government may regulate organizations as political committees. The Court’s test, which has been adopted by the FEC and a number of federal

³ The PDC’s instruction book for political committees is 90 pages long. See Washington Public Disclosure Commission, *Political Committees: Campaign Disclosure Instructions* (March 2014), available at, <http://www.pdc.wa.gov/archive/filerassistance/manuals/pdf/2014/Political.Committee.Manual.2014.pdf> (hereinafter, “*Political Committee Handbook*”).

appellate courts, establishes an objective standard that permits political speakers, their opponents, and the government to determine when an organization is a political committee. Other courts, including the Washington courts, have adopted a much more subjective test for making that determination. The assumptions underlying this alternative test are almost entirely incorrect. Moreover, as this case demonstrates, that test is incapable of being applied in a predictable manner.

1. The U.S. Supreme Court, The FEC, And Federal Appellate Courts Use A Clear Standard To Determine When An Organization Is A Political Committee

In *Buckley v. Valeo*, 424 U.S. 1, 79, 96 S. Ct. 612, 46 L. Ed.2d 659 (1976), the U.S. Supreme Court considered the reporting requirements for “political committees” and others under Section 434(a), (b), and (e) of the Federal Election Campaign Act of 1971 (FECA). Section 434(a) imposed reporting requirements identical to those required for political committees on “[e]very person (other than a political committee or candidate) who makes contributions or expenditures ... in an aggregate amount in excess of \$100 in a calendar year.” See *Buckley*, 424 U.S. at 160 (laying out FECA’s reporting requirements). These requirements were similar to those imposed on political committees under Washington law. Compare *id.* at 154-159 (political committees must regularly report expenditures,

cash on hand, sum of contributions, transfers, loans, etc.), *with* RCW 42.17A.205-240 (similar requirements).

The Supreme Court found this provision “raise[d] serious problems of vagueness” and that “fear of incurring [FECA’s civil and criminal sanctions] may deter those who seek to exercise protected First Amendment rights.” *Buckley*, 424 U.S. at 76-77. The Court viewed the problem with this provision entirely in constitutional terms, noting that “[d]ue process requires that a criminal statute provide adequate notice” and that “[w]here First Amendment rights are involved, an even greater degree of specificity is required.” *Id.* at 77 (quotation marks and citations omitted). In order to “avoid the shoals of vagueness,” *id.* at 78, the Court interpreted the statute 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.* at 79 (emphasis added). The Court adopted this interpretation from two lower court decisions construing the term “political committee” to not apply to organizations that do not have as their central organizational goal the election of candidates. *Id.* at 79 n. 106 (citing *U.S. v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972) and *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973) (three-judge panel), *vacated as moot*, *Staats v. Am. Civil Liberties Union*, 422 U.S. 1030, 95 S. Ct. 2646, 45 L. Ed. 686

(1975)). In those cases, the courts defined “political committee” to apply only to those groups “organized or at least authorized by a particular candidate and whose principal focus is a specific campaign” in order to comply with Congress’s primary concern in passing the law and to avoid “serious constitutional issues” that could result in a “dampening effect on first amendment rights and the potential for arbitrary administrative action.” *Nat’l Comm. for Impeachment*, 469 F.2d at 1140-42.

The U.S. Supreme Court has continued to use the *Buckley* formulation. *See Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262, 107 S. Ct. 616, 93 L. Ed.2d 539 (1986) (*MCFL*) (“[S]hould MCFL’s independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee”); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 170 n. 64, 124 S. Ct. 619, 157 L. Ed.2d 491 (2003) (citing *Buckley*). Similarly, the Federal Election Commission has recognized that the Supreme Court adopted the major purpose test because the test allowed the Court to avoid constitutional problems with vagueness and overbreadth. *See Political Committee Status, Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (In *Buckley*, “the Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness

concerns; only organizations whose ‘major purpose’ is the nomination or election of a Federal candidate can be considered ‘political committees’ under the Act. The court deemed this necessary to avoid the regulation of activity ‘encompassing both issue discussion and advocacy of a political result.’”) (quoting *Buckley*, 424 U.S. at 79)).

When the Fourth Circuit addressed a state statute that diluted the *Buckley* standard for political committees, it struck the statute down as vague and overly broad. In *North Carolina Right To Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (“*NCRTL*”), the court examined a state statute that extended political committee status to any two or more individuals who have “a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.” *NCRTL*, 525 F.3d at 286. The court held that extending political committee regulation to a group that had more than one major purpose of supporting or opposing the nomination of a clearly defined candidate violated the Court’s decision in *Buckley*. The Fourth Circuit concluded that the term “political committee” must be defined in a narrow way to avoid overbreadth and vagueness problems. The court noted that, unless *Buckley*’s holding is strictly adhered to, it would be impossible for organizations to know when one of their purposes was sufficiently “major” to bring them within the reach of the statute and that such an

amorphous law would leave such groups subject to partisan or ideological abuse. *Id.* at 290. This reasoning applies with even greater force to Washington’s law because of the existence of the “citizen’s suit” provision, which gives interested parties the ability to bring lawsuits against their political opponents only after the Attorney General—a public official—refuses to bring an action.

The Tenth Circuit has adopted the Fourth Circuit’s approach. *See N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) (determining organizations did not qualify as political committees under the major purpose test and noting that, in order to be regulated as a political committee, the statute at issue “would need to satisfy the ‘major purpose’ test, because this test sets the lower bounds for when regulation as a political committee is constitutionally permissible”). Other courts have added even greater protections for political speakers. In *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 871 (8th Cir. 2012), the court examined a Minnesota statute that forced corporations that spent \$100 on an election to establish a political fund with requirements similar to those that apply to political committees in Washington, such as appointing a treasurer, segregating funds, maintaining detailed records, and registering and filing ongoing reports with the state. It held that the plaintiffs were likely to succeed on their

argument that the state’s on-going reporting requirement, which—like Washington’s—only terminated when the fund or committee is dissolved, forced organizations “to decide whether exercising its constitutional right is worth the time and expense of entering a long-term morass of regulatory red tape.” *Id.* at 873. The court concluded that “[f]aced with these regulatory burdens—or even just the daunting task of deciphering what is required under the law, ... the [plaintiffs] reasonably could decide the exercise is simply not worth the trouble.” *Id.* at 873-74. *See also Iowa Right To Life Comm. v. Tooker*, 717 F.3d 576, 596 (8th Cir. 2013) (striking down Iowa’s similar law because it discouraged organizations from engaging in political speech).

The Petitioners may argue that, while Washington’s law also requires a political committee to file monthly reports until it dissolves itself, this obligation only applies “whenever expenditures are made totaling \$200 or more since” the committee filed the last monthly report. *Political Committee Handbook* at 75; RCW 42.17A.235(1). There is no requirement that the triggering expenditure be for political purposes, however. Thus, for multi-purpose organizations that expend just \$200 a month, the law will always require monthly reports.

In short, Washington’s law raises the same concerns—lack of “the major purpose” language and a never-ending responsibility to adhere to

complex and burdensome reporting requirements—that led the Fourth, Eighth, and Tenth Circuits to strike down similar requirements in other states. Washington can avoid similar constitutional concerns by adopting *Buckley*'s “major purpose” formulation. As discussed next, this would require this Court to revisit one of its earliest campaign finance decisions.

2. Some Courts, Including This One, Have Not Applied *Buckley*'s Holding And Have Created The Vagueness Problem The U.S. Supreme Court Sought To Avoid

Despite the U.S. Supreme Court's decision in *Buckley* that only organizations whose primary focus is unambiguously campaign related may be constitutionally regulated as political committees, numerous courts, including this one, have permitted the government to extend political committee requirements to organizations with only “a” major purpose of electoral activity. As this case demonstrates, this creates precisely the problem the Court in *Buckley* sought to avoid.

In *State v. The (1972) Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976), this Court interpreted the definition of “political committee” (then located at RCW 42.17.020(22)) in order to avoid “unnecessary and unreasonable duplication and extension of the act's detailed and somewhat lengthy reporting requirements.” This Court concluded that “[w]here the surrounding facts and circumstances indicate that *the primary or one of the primary* purposes of the person making the

contribution is to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions, then that person becomes a ‘political committee’ and is subject to the act’s disclosure requirements.” *Evans*, 86 Wn.2d at 509. Even though *Evans* post-dated *Buckley*, this Court did not cite to *Buckley* here. Instead, it cited to an opinion of the Washington Attorney General. *Id.* (citing 14 Op. Att’y Gen. 25 (1973)). However, that AGO interprets “political committee” in the same manner as *Buckley* and concludes that the “overall statutory scheme” of the FCPA was “only meant to affect those organizations whose primary purpose is to attempt to influence elections.” 14 Op. Att’y Gen. at 25.

Evans does not say why this Court departed from the Attorney General’s interpretation, even while citing to it, and does not mention *Buckley* at all. When the Washington Court of Appeals addressed the issue, it followed *Evans* and also divided the political committee inquiry into two separate prongs: “a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.” *State ex rel. Evergreen Freedom Found. v.*

Wash. Educ. Ass'n, 111 Wn. App. 586, 598, 49 P.3d 894 (2002).⁴ The court concluded that “*Evans* controls interpretations of the ‘maker of expenditures’ prong,” *id.* at 599, and therefore appended the requirement that an organization making expenditures becomes a political committee when “*one of the* primary purposes” is electoral activity. *Id.* (quotations omitted). The court provided a “nonexclusive” list of factors to determine an organization’s primary purposes: the stated goals of the organization, whether the organization’s actions further those goals, whether those goals would be achieved by a favorable outcome in the election, and whether the organization uses other means to achieve its goals. *Id.* at 600. In other words, the court rejected *Buckley* and created its own list of “nonexclusive” factors that speakers, the government, and private litigants must weigh when determining whether an organization has electoral efforts as one of its primary purposes.

While neither Washington case contains an explanation of why it departs from the *Buckley* “major purpose” test, other appellate courts have

⁴ The court of appeals applied the “one of the primary purposes” consideration only to expenditures. Thus, if an organization receives a contribution of even one cent to further electoral goals, it becomes a political committee, regardless of its other activities. The “contribution” prong thus has even greater overbreadth and vagueness problems than the “expenditure” prong. Under *Buckley*, the question of whether, or to what extent, an organization may be regulated as a political committee should not even arise unless that organization has as its central purpose election-related activities. In other words, having “the major purpose” is a necessary precondition for political committee status and an organization that does not have as its central organizing principle campaign-related activities cannot be regulated as a political committee.

attempted to explain their reasoning for refusing to follow the U.S. Supreme Court’s rationale. See *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011); and *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010). These decisions rely on a series of assumptions, most of them wrong.

First, they claim that “the major purpose” test in *Buckley* is simply a matter of statutory interpretation. *Ctr. for Individual Freedom*, 697 F.3d at 487; *Nat’l Org. for Marriage*, 649 F.3d at 59; *Human Life*, 624 F.3d at 1009-10. It is true that the *Buckley* test derived from statutory interpretation. But that interpretation was necessitated by the fact that FECA was unconstitutionally vague and overly broad without it. See *Buckley*, 424 U.S. at 76-79. Indeed, the *Buckley* discussion—like those used by the federal courts of appeals to which *Buckley* referred—entirely revolved around interpreting the law to avoid finding it unconstitutional.

Next, these cases claim that “the major purpose” test would have perverse results, leading to political committee status for a small group whose major purpose is campaign related while a large group who spends more money would not be a political committee. *Ctr. for Individual Freedom*, 697 F.3d at 489; *Nat’l Org. for Marriage*, 649 F.3d at 59. But that is exactly the point of *Buckley*’s “major purpose” test. Organizations

that are devoted primarily to political activities may be treated as political committees—“[t]hey are, by definition, campaign related.” *Buckley*, 424 U.S. at 79. In contrast, organizations who are not organized primarily to conduct campaigns are not political committees.

This does not mean that the government cannot demand some form of disclosure from them, however. What the government cannot do is force organizations that do not have electoral purposes as their central organizing mission to reorganize themselves into the political committee model and file comprehensive reports in perpetuity. Political committees “are burdensome alternatives.” *Citizens United v. FEC*, 558 U.S. at 337. As the Supreme Court put it, “[f]aced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, [and] to file periodic detailed reports, ... it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.” *MCFL*, 479 U.S. at 255 (plurality opinion). This is particularly true of small multi-purpose organizations, as “[t]he application of overbroad and onerous disclosure requirements single-handedly prevents grassroots groups from participating vigorously in national and local debate.” Benjamin Barr & Stephen R. Klein, *Publius Was Not A PAC: Reconciling Anonymous Political Speech, The First*

Amendment, And Campaign Finance Disclosure, 14 Wyoming L. Rev. 253, 271 (2014).

In cases concerning disclosure, the government must demonstrate that the law bears a substantial relationship to a sufficiently important interest. *Doe v. Reed*, 561 U.S. 186, 195-96, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). The courts have concluded that some disclosure of political spending meets this constitutional test. *See Family PAC v. McKenna*, 685 F.3d 800, 810-12 (9th Cir. 2012) (upholding reporting requirements for ballot measure committees). This does not mean, however, that the government may force an entity that reaches some unknown (and unknowable) percentage of political activity to fundamentally alter itself into an organizational form ill-suited and counter-productive to the majority of its activities.

These cases assume that the test their test provides political speakers with sufficiently definitive rules to follow. But neither the federal nor the Washington courts state what weight multi-purpose organizations are to give each factor, nor do they explain how to determine when an organization has too many factors weighing against it, or how long these factors must be in place, before an organization is transformed into a political committee. All of these cases ignore the fact that speakers must be able to determine in advance whether they are a

political committee. Otherwise, it is likely their opponents will force the courts to make that determination in response to a lawsuit.

If BIAW's six-year saga demonstrates anything it is that there is no objective or predictable means of deciding whether a group is a political committee under Washington law before an enforcement action may be taken against it. In Washington, then, the question of whether one of a group's purposes is "major" is a matter of opinion while the question of whether a group's primary organizing principle is campaigning is not. Fortunately, this Court can take this opportunity to interpret Washington's law and rectify this situation, and in doing so provide speakers, the government, and private parties with a clear rule with regard to when an organization becomes a political committee.

V. CONCLUSION

This Court should clarify that an organization is a political committee under the FCPA when it has the major purpose of electoral activity.

RESPECTFULLY SUBMITTED THIS 25th day of April, 2014.

INSTITUTE FOR JUSTICE
Washington Chapter

By: /s/ William R. Maurer
William R. Maurer WSBA #25451
Attorneys for Amicus Curiae
Institute for Justice

CERTIFICATE OF SERVICE

RECEIVED BY E-MAIL

I certify under the penalty of perjury under the laws of the State of Washington that on April 25, 2014, I caused a true and correct copy of this MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and BRIEF OF THE INSTITUTE FOR JUSTIE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT to be served in the above captioned matter upon the parties herein via UPS Next Day Air, pursuant to RAP 18.5 and CR 5(b)(2):

Harry J. F. Korrell
Robert J. Maguire
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

Attorneys for Respondent Building Industry Association of Washington

Knoll Lowney
SMITH & LONEY, PLLC
2317 East John Street
Seattle, WA 98112

Michael E. Withey
LAW OFFICES OF MICHAEL W. WITHEY
601 Union Street, Suite 4200
Seattle, WA 98101

Attorneys for Petitioners

Katherine George
HARRISON-BENIS LLP
2101 4th Ave
Seattle, WA 98121

Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009

Howard M. Goodfriend
SMITH GOODFRIEND, P.S.
1619 8th Avenue North
Seattle, WA 98109

Dmitri Iglitzin
James D. Oswald
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT, LLP
18 W. Mercer St., Suite 400
Seattle, WA 98119

Attorneys for Amicus Curiae

/s/ William R. Maurer
WILLIAM R. MAURER

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, April 25, 2014 1:52 PM
To: 'Bill Maurer'
Cc: Howard Goodfriend; mike@withey.com; snelson@citizen.org; knoll@igc.org; HarryKorrell@dwt.com; RobMaguire@dwt.com; kgeorge@hbslegal.com; Hodges-Howell, John (jhodgeshowell@dwt.com); 'oswald@workerlaw.com'; 'iglitzin@workerlaw.com'
Subject: RE: Utter v. Building Industry Association of Washington, Cause No. 89462-1

Rec'd 4-25-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Bill Maurer [mailto:wmaurer@ij.org]
Sent: Friday, April 25, 2014 12:31 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Howard Goodfriend; mike@withey.com; snelson@citizen.org; knoll@igc.org; HarryKorrell@dwt.com; RobMaguire@dwt.com; kgeorge@hbslegal.com; Hodges-Howell, John (jhodgeshowell@dwt.com); 'oswald@workerlaw.com'; 'iglitzin@workerlaw.com'
Subject: Utter v. Building Industry Association of Washington, Cause No. 89462-1

Clerk of Court,

Attached to this email are three documents for submission in *Utter, et al v. Building Industry Association of Washington* (No. 89462-1): Motion for Leave to File Amicus Curiae Brief, Brief of the Institute for Justice as Amicus Curiae in Support of Respondent, and Certificate of Service. My WSBA number is 25451.

Thank you,

William R. Maurer

William R. Maurer

Executive Director and Attorney at Law
Institute for Justice Washington Chapter
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004
Phone: (425) 646-9300
Fax: (425) 990-6500
Email: wmaurer@ij.org