No. 09-35128

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMAN LIFE OF WASHINGTON, INC.,

Plaintiff-Appellant,

v.

BILL BRUMSICKLE, *et al*.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON (SEATTLE)

No. 08-CV-00590 · The Honorable John C. Coughenour

BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

J. GERALD HEBERT
PAUL S. RYAN
TARA MALLOY
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW Suite 650
Washington, DC 20036
Tel: (202) 736-2200

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center (CLC) is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of The Campaign Legal Center.

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation. The CLC has provided legal counsel to parties and *amici* in campaign finance cases at both the federal and state court level, including representing intervenors Senators John McCain and Russell Feingold in *McConnell v. Federal Election Commission* (*FEC*), 540 U.S. 93 (2003) and representing intervenors Senator John McCain and Representatives Tammy Baldwin, Christopher Shays and Martin Meehan in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (*WRTL II*).

The present case concerns a challenge brought under the First and Fourteenth Amendments of the U.S. Constitution to the State of Washington's campaign finance disclosure laws. Disclosure of funds raised and spent in the electoral arena is a key issue in campaign finance law and directly impacts the interests and activities of the *amicus curiae*.

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[1] Counsel for Appellant and Appellees have been contacted and all parties, through counsel, have consented to the participation of the Campaign Legal Center as *amicus curiae* and to the filing of this brief.

SUMMARY OF ARGUMENT

Human Life of Washington, Inc. (HLW) challenges on constitutional grounds several components of Washington's political committee disclosure regime, including the State's definitions of "political committee," Wash. Rev. Code ("RCW") § 42.17.020(39), "independent expenditure," RCW § 42.17.100, and "political advertising," RCW § 42.17.020(38). The District Court correctly rejected HLW's challenges to these disclosure provisions, but in doing so, the Court considered itself bound by the Ninth Circuit's application of strict scrutiny to disclosure provisions in two prior decisions—*Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (*CPLC I*) and *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (*CPLC II*). *See HLW v. Brumsickle*, No. C08-0590, 2009 WL 62144, at *10 (W.D. Wash. Jan. 8, 2009).

The Ninth Circuit's decision to apply strict scrutiny to disclosure laws in *CLPC I* and *CPLC II* was based on the Court's reading of the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986). Although the challenged provisions are constitutionally valid even under strict scrutiny, *amicus* respectfully submits that the Ninth Circuit erred in declaring that the *MCFL* Court had "subjected disclosure and reporting provisions of [the Federal Election Campaign Act (FECA)] to strict scrutiny." *CPLC I*, 328 F.3d at 1101 n.16. The *MCFL* Court did not apply strict scrutiny to the disclosure laws;

indeed, the Court did not apply any scrutiny at all to disclosure laws because no disclosure laws were challenged by MCFL. It is for this reason that we respectfully urge this Court to make clear that under the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, campaign finance disclosure requirements are subject to intermediate scrutiny. *See id.* at 64 (there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed" (footnotes omitted)).

Also, notwithstanding HLW's claims to the contrary, the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (*WRTL II*), has no bearing on this case. Like *MCFL*, *WRTL II* entailed a challenge to a federal law prohibition on corporate political spending and did not entail a legal challenge to any disclosure requirements.

Amicus further argues that HLW's "unambiguously campaign related" principle, which HLW argues should govern this Court's analysis of the challenged provisions, is <u>not</u> a constitutional standard used by the Supreme Court but is instead a legal argument merely invented by counsel and should be rejected by this Court.

Finally, *amicus* urges this Court to recognize that disclosure requirements applicable to so-called "issue advocacy" are constitutionally permissible, as evidenced by a long line of court decisions upholding not only election-related

disclosure requirements, but also disclosure requirements applicable to lobbying and other activities completely unrelated to elections.

For these reasons, this Court should affirm the well-reasoned analysis of the District Court and reject HLW's arguments.

ARGUMENT

I. Longstanding Supreme Court Precedent Makes Clear that the Challenged Disclosure Requirements Are Subject to Intermediate Scrutiny, Not Strict Scrutiny.

The District Court found that it was "bound by *CPLC I* and *CPLC II* to apply strict scrutiny" to the challenged "political committee" disclosure provisions. *HLW*, 2009 WL 62144, at *10. Applying strict scrutiny, the District Court below correctly upheld the provisions against HLW's challenges. This Court should likewise uphold the challenged provisions, even if strict scrutiny is applied. However, *amicus* respectfully submits that, under longstanding Supreme Court precedent, intermediate scrutiny is the appropriate degree of scrutiny to be applied to the challenged provisions and urges this Court to correct the error that has led the Ninth Circuit and district courts throughout the Ninth Circuit to apply strict scrutiny to disclosure laws in prior cases.

A. The Ninth Circuit in *CPLC I* Mistakenly Interpreted *MCFL* As Applying Strict Scrutiny to Disclosure Requirements.

For years there has been uncertainty in the Ninth Circuit with respect to the appropriate degree of scrutiny for disclosure provisions like the ones challenged in

this case. The District Court below quoted the Ninth Circuit's pre-*McConnell* opinion in *CPLC I* recognizing that "'the Supreme Court has been less than clear as to the proper level of scrutiny' for PAC-style requirements[.]" *HLW*, 2009 WL 62144, at *10 (quoting *CLPC I*, 328 F.3d at 1101 n.16); *see also Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 787 (9th Cir. 2006) (*ARTLC*) ("degree of scrutiny . . . is somewhat unclear").

However, the Court below went on to conclude that the Ninth Circuit in *CPLC I* "resolved that ambiguity" when it "held that California's PAC-style requirements on ballot-initiative political committees should be subjected to strict scrutiny . . . ." *HLW*, 2009 WL 62144, at *10 (citing *CPLC I*, 328 F.3d at 1101 n.16, 1104).

Despite the District Court's conclusion that it was bound by the Ninth Circuit's decision in *CPLC I* to apply strict scrutiny to the challenged disclosure requirements, the District Court went on to note that, following the Ninth Circuit's *CPLC I* decision, the Ninth Circuit itself evinced continued uncertainty on the matter. In *ARTLC*, the Ninth Circuit explained "that *McConnell* might have relaxed the degree of scrutiny since *CPLC I,* but the Court nonetheless 'assume[d] without deciding that strict scrutiny applie[d].'" *HLW*, 2009 WL 62144, at *10 (quoting *ARTLC*, 441 F.3d at 787-88).

Most recently, when the *Cal. Pro-Life Council* litigation made its way to the Ninth Circuit a second time, the Ninth Circuit stated that it was "bound by the 'law of the case' to apply strict scrutiny." *CPLC II*, 507 F.3d at 1177 n.5. The Ninth Circuit in *CPLC II* further explained: "Because neither the *McConnell* decision nor the Supreme Court's recent decision in [*WRTL II*], called into question the analysis reflected in [*MCFL*], upon which we relied in [*CPLC I*], we are not compelled to abandon the standard adopted in [*CPLC I*]." *CPLC II*, 507 F.3d at 1178 (footnote omitted) (citations omitted).

While it is indeed true that neither *McConnell* nor *WRTL II* called into question the Supreme Court's decision in *MCFL*, *amicus* respectfully submits that the Ninth Circuit's reliance on *MCFL* in *CPLC I* and *CPLC II* was misplaced in the first place. *MCFL* did not entail a legal challenge to political committee disclosure requirements and, consequently, the *MCFL* Court did not opine on the appropriate degree of scrutiny to be applied to political committee disclosure requirements.

MCFL, a nonprofit corporation that did not accept contributions from businesses corporations and, instead, was funded principally by member donations, challenged the federal law prohibiting corporations from using treasury funds to make political expenditures. *See MCFL*, 479 U.S. at 241-42; *see also* 2 U.S.C. § 441b (prohibiting corporations and labor unions from making contributions and expenditures in connection with federal elections). MCFL did <u>not</u> challenge the

federal law definition of "political committee," *see* 2 U.S.C. § 431(4), nor any of the federal law disclosure requirements applicable to political committees. *See* 2 U.S.C. §§ 432-434. Consequently, the *MCFL* Court had no reason to—and in fact did not—articulate the appropriate degree of scrutiny to be applied to political committee disclosure requirements. The *MCFL* Court explained that it was deciding only two legal questions: whether MCFL, "by financing certain activity with its treasury funds, has violated the restriction on independent spending contained in § 441b[, and, if so,] whether application of that section to MCFL's conduct is constitutional." *MCFL*, 479 U.S. at 241.

The Court first analyzed whether MCFL's payment for a "special edition newsletter" constituted an "expenditure" under federal law, in violation of the prohibition on corporate political expenditures. The Court concluded that it did. *MCFL*, 479 U.S. at 251. The Court then turned to the second part of its analysis, explaining: "We must therefore determine whether the <u>prohibition of § 441b</u> burdens political speech, and, if so, whether such a burden is justified by a compelling state interest [*i.e.*, whether the prohibition satisfies strict scrutiny]." *MCFL*, 479 U.S. at 251-52 (emphasis added) (citing *Buckley*, 424 U.S. at 44-45).

Understandably, and importantly for the purposes of the present analysis, the *MCFL* Court cited the portion of the *Buckley* opinion analyzing a federal law <u>spending limit</u> as its basis for subjecting the <u>corporate spending prohibition</u> to strict

scrutiny; the *MCFL* Court did not cite the portion of the *Buckley* opinion analyzing disclosure requirements and subjecting them to intermediate scrutiny—because *MCFL* did not entail a challenge to any disclosure requirements. *See Buckley*, 424 at 64 (there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed" (footnotes omitted)).

Applying strict scrutiny to the corporate spending prohibition, the *MCFL* Court found the prohibition unconstitutional as applied to MCFL because the organization has "three features"[2] that distinguish it from the business corporations that pose the threat of corruption the Court had recognized in prior decisions. *See MCFL*, 479 U.S. at 263; *see also id.* at 257 (citing *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985), *Pipefitters v. U.S.*, 407 U.S. 385, 416 (1972), *U.S. v. Automobile Workers*, 352 U.S. 567, 585 (1957), *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982)).

To be certain, the *MCFL* Court did detail federal law political committee disclosure requirements, but it did so solely in its consideration of a defense

[2] First, MCFL was formed to promote political ideas and cannot engage in business activities. *MCFL*, 479 U.S. at 264. Second, it has no shareholders, which "ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Id*. Third, MCFL was not established by a business corporation and it does not accept corporate contributions, so it will not serve as a conduit for circumvention of the prohibition on corporate expenditures. *Id*.

argument advanced by the FEC—namely, that MCFL's speech wasn't unconstitutionally burdened by the corporate spending ban of 2 U.S.C. § 441b because MCFL could set up a political committee to fund political ads. *See MCFL*, 479 U.S. at 252-56. The Court rejected this argument for several reasons, first and foremost because under federal law a "corporation is *not* free to use its general funds for campaign advocacy" through a connected political committee. *Id.* at 252 (emphasis in original). Instead, federal law permits a corporation to set up a political committee and receive into that political committee limited contributions from a small universe of permissible donors.[3] *See* 2 U.S.C. § 441b(b)(4). This, in the Court's view, was no substitute for allowing corporations to spend their general treasury funds on political advertising. The *MCFL* Court also recognized that the FEC's proffered solution to MCFL's complaint (*i.e.*, that MCFL set up a political committee) would impose greater disclosure burdens on MCFL than would the litigation outcome MCFL sought (*i.e.*, permission to spend corporate general treasury funds on political advertising). But the Court was clearly and appropriately focused on federal law burdens on corporations *vis-à-vis* unincorporated groups, not on the broader issue (not before the Court) of the constitutionality of federal law disclosure burdens on political committees *vis-à-vis*

[3] It is worth noting that Washington law places no funding restrictions on such political committees; instead, Washington law imposes only disclosure requirements on political committees supporting or opposing ballot measures.

non-political committees. After surveying federal disclosure laws, the Court declared "[i]t is evident from this survey that [, because it is incorporated,] MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated." *MCFL*, 479 U.S. at 254 (emphasis added).

Consequently, the Court rejected the FEC's argument that MCFL's ability to form a political committee eliminates any burdens that would otherwise result from the ban on corporate expenditure of treasury funds for political ads, reasoning: "Thus, while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities." *Id.* at 255.

A close reading of the *MCFL* opinion makes clear that, with respect to federal political committee disclosure laws, the Court concluded only that they are more burdensome than the federal law disclosure requirements applicable to non-political committees. The Court did not apply strict scrutiny to the disclosure laws; the Court did not apply intermediate scrutiny to the disclosure laws; the Court did not apply any scrutiny at all to disclosure laws. The *MCFL* Court simply did not analyze the constitutionality of federal political committee disclosure laws—because the disclosure laws were not challenged by MCFL. It is for this reason

that we respectfully submit that the Ninth Circuit erred in *CPLC I* when, "[n]otwithstanding *Buckley*," the Court stated that the Supreme Court in *MCFL* had "subjected disclosure and reporting provisions of FECA to strict scrutiny." *CPLC I*, 328 F.3d at 1101 n.16 (citing *MCFL*, 479 U.S. at 252-53).

B. Supreme Court Decisions in *Buckley* and *McConnell* Make Clear That Political Committee Disclosure Requirements Are Subject to Intermediate Scrutiny, Not Strict Scrutiny.

In *Buckley*, the Court reviewed the comprehensive reporting and record-keeping requirements for political committees under FECA, *see* 424 U.S. at 60-74, as well as its more limited reporting requirements for independent expenditures, *see id*. at 74-82. The standard of review established by the Court was whether there was a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. at 64. This intermediate scrutiny was appropriate because disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id*. at 68 (footnotes omitted).

The majority opinion in *McConnell* adopted *Buckley*'s standard of review to consider a challenge to federal law disclosure provisions related to "electioneering communications."[4] Applying intermediate scrutiny, eight Justices upheld the

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[4] Federal law defines "electioneering communication" to mean (1) any broadcast, cable or satellite communication (2) referring to a clearly identified candidate for federal office, (3) within 30 days of a primary election or party

requirement that payments for electioneering communications be reported to the FEC, as well as the requirement that such communications contain a "paid for by" disclaimer, finding that these requirements were substantially related to important state interests.[5] *See* 540 U.S. at 196 (Stevens, J.) and 321 (Kennedy, J.) (upholding the reporting requirements); 540 U.S. at 230 (Rehnquist, C.J., joined by all Justices except Thomas, J.) (upholding the "paid for by" disclaimer requirements).

Moreover, while three concurring Justices in *McConnell* expressly employed *Buckley*'s "substantial relation" standard to the challenged disclosure requirements, holding that the federal law electioneering communications disclosure requirements "do[] substantially relate" to the governmental interest in providing the electorate with information, *id*. at 321 (Kennedy, J., concurring), these same three Justices applied strict scrutiny to the extension of the 2 U.S.C. § 441b prohibition on corporate-funded ads to include electioneering communications and dissented from the majority's decision upholding the corporate prohibition. *McConnell*, 540 U.S. at 330. Both the majority and concurring opinions in *McConnell* are entirely consistent with the Supreme Court's longstanding

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convention or within 60 days of a general election and (4) targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3)(A).

[5] The three concurring Justices noted one exception, and found unconstitutional the requirement in section 201 of BCRA that speakers provide "advance disclosure" of executory contracts to purchase airtime for electioneering communications to be run in the future. 540 U.S. at 321 (Kennedy, J., concurring).

precedent that disclosure laws are subject to intermediate scrutiny, while limits on expenditures are subject to strict scrutiny.

Undeterred by this precedent, HLW asserts this Court should nonetheless apply strict scrutiny, arguing that "[w]here PAC-style burdens are imposed, strict scrutiny is required." HLW Br. at 29.[6] Further, HLW mischaracterizes the Supreme Court's *Buckley* decision as applying strict scrutiny even to "[n]on-PAC disclosure of 'expenditures.'" HLW Br. at 48. In doing so, HLW argues that "*Buckley* required 'exacting scrutiny,' 424 U.S. at 64, which equates to strict scrutiny . . . ." HLW Br. at 48. However, the *Buckley* passage cited by HLW elaborates on the Court's meaning of "exacting scrutiny" by articulating intermediate scrutiny, not strict scrutiny: there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 at 64 (footnotes omitted).

[6] HLW cites not only *CPLC I* and *CPLC II*, but also the Supreme Court decision in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), where the Court considered a constitutional challenge to a state law prohibition on corporate political expenditures similar to the federal law challenged in *MCFL*. *Id*. at 654. Just as the *MCFL* Court had no occasion to determine the constitutionality of political committee disclosure requirements, the *Austin* Court likewise had no occasion to do so. But unlike the Court in *MCFL*, the Court in *Austin* upheld the state's corporate spending prohibition, explaining that the Chamber of Commerce lacked the distinguishing characteristics of MCFL that led the Court in *MCFL* to exempt the corporation for the similar federal law restrictions. *Id*. at 661-65.

HLW attempts to exploit the inconsistent use of the term "exacting scrutiny" by the Supreme Court in past cases.[7] While it is true that this term has denominated different standards of review, the crucial point is that the actual "substantial relation" test applied in *Buckley* and *McConnell* bears no resemblance to strict scrutiny review. Even a cursory reading of *Buckley* and *McConnell* indicates that the Supreme Court did not consider whether the challenged disclosure requirements served a "compelling state interest," nor whether the requirements were "narrowly tailored" to serve that interest. And it is the substance of the test applied by the Court that is dispositive, not the label given to it.

Moreover, since the *Buckley* Court recognized that disclosure requirements are the "least restrictive" form of campaign finance regulations, 424 U.S. at 68, it would be illogical to subject them to the strictest level of scrutiny reserved for expenditure limits. The Court in *Buckley* and *McConnell* did not do so, and neither should this Court.

[7] *Compare Buckley*, 424 U.S. at 64 (applying "exacting scrutiny" by reviewing the challenged disclosure law for a "relevant correlation" or "substantial relation" to a "substantial" governmental interest") *with McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (applying "exacting scrutiny" to a state ballot measure disclaimer requirement by determining whether the requirement was "narrowly tailored to serve an overriding state interest").

II. *WRTL II* Has No Relevance to This Case.

HLW argues throughout its brief that the Supreme Court's decision in *WRTL II* is relevant to its challenge to the State's political committee disclosure requirements. *See*, *e.g.*, HLW Br. at 13, 15, 16. The law in this Circuit is to the contrary, however, as set forth in *CPLC II*: "The Supreme Court's recent decision in [*WRTL II*] does not affect our treatment of this case. [*WRTL II*] concerned a corporation's 'ability to engage in political speech.' [*WRTL II*] did not undertake an analysis of statutory disclosure requirements." *CPLC II*, 507 F.3d 1172, 1177 n.4 (internal citation omitted).

WRTL II was an as-applied challenge to the federal law prohibition at 2 U.S.C. § 441b on the use of treasury funds by corporations and unions to pay for electioneering communications. Plaintiff WRTL, represented by counsel to HLW here, explicitly did <u>not</u> seek review of the electioneering communications disclosure provisions of the law. In the original complaint filed by WRTL that led to the Supreme Court decision, plaintiff made clear that, "WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements." Complaint at ¶ 36, *WRTL v. FEC*, 2004 WL 3622736 (D.D.C. Aug. 17, 2004) (No. 04-1260), 2004 WL 2057568. The narrow scope of its suit was repeatedly stressed by WRTL in its brief to the Supreme

Court, where in the introductory section of the brief it stated: "WRTL challenged the prohibition, not disclosure, and was prepared to provide the full disclosure required under BCRA." Brief for Appellee at 10, *WRTL II*, 551 U.S. 449 (2006) (No. 06-969), 2007 WL 868545; *see also*, *e.g.*, *id*. at n.18; *id*. at 29 n.39. WRTL stressed to the Court that its challenge to the statute, if successful, would leave a fully "transparent" system:

> Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimer and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular government issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, . . . the people, with full disclosure as to the messenger, can make the ultimate judgment.

Id. at 49.

Given that WRTL did not challenge the constitutionality of the electioneering communications disclosure requirements and the Supreme Court accordingly did not examine these requirements—combined with the fact that spending prohibitions and disclosure requirements impose different burdens, serve different government interests and are subject to different degrees of scrutiny—the *WRTL II* decision has no application to the present challenge.

Just as this Court concluded in *CPLC II* concluded that the *WRTL II* decision has no application to disclosure challenges, so too has the U.S. District Court for

the District of Columbia. *See Citizens United v. FEC*, 530 F. Supp. 2d 274, 281 (D.D.C. 2008) (per curiam) (three-judge court). *Citizens United* has been briefed and argued before the Supreme Court and will be decided this month. *See id.*, *prob. juris. noted*, 129 S.Ct. 594, 77 U.S.L.W. 3101 (U.S. Nov 14, 2008) (No. 08-205). The District Court in *Citizens United* reasoned:

> The only issue in [*WRTL II*] was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in [*WRTL II*], reserving it for decision on an as-applied basis. In contrast, when the *McConnell* Court sustained the disclosure provision of § 201 and the disclaimer provision of § 311, it did so for the "entire range of electioneering communications" set forth in the statute. *McConnell,* 540 U.S. at 196, 124 S.Ct. 619; *see also id.* at 230-31, 124 S.Ct. 619 (discussing § 311).

Citizens United, 530 F. Supp. 2d at 281 (denying plaintiff's motion for preliminary injunction).

The District Court in *Citizens United* continued, rejecting the corporation's argument that "protected speech" can not be subject to disclosure requirements:

> We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.

Id. (citing *MCFL*, 479 U.S. at 259-62 (striking down a prohibition, and noting that the disclosure provisions will apply to the newly permitted speech); *Citizens*

Against Rent Control (*CARC*) *v. City of Berkeley*, 454 U.S. 290, 297-98 (1981) (same); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 791-92 & n.32 (1978) (discussing how disclosure provisions can help offset the coercive aspects of corporate speech)).

This Court should reaffirm the conclusion in *CPLC II* that *WRTL II* has no relevance to campaign finance disclosure cases such as this one and disregard HLW's manufactured and legally incorrect *WRTL II*-based arguments.

III. The Phrase "Unambiguously Campaign Related" Is Not a Constitutional Standard Used by the Supreme Court and Should Not Be Used By This Court.

HLW asserts that the threshold requirement for "all campaign-finance regulation" is that it "reach only unambiguously-campaign-related" activity. HLW Br. at 13. According to HLW, the challenged provisions fail its invented "unambiguously campaign related" test and therefore violate the First Amendment. *See*, *e.g.*, *id.* ("Washington's PAC definition and implementing tests are unconstitutional under the Supreme Court's unambiguously-campaign-related principal . . . ."); *id.* at 13-14 ("Washington's regulation of three types of communications is unconstitutional under the Supreme Court's unambiguously-campaign-related principle . . . .").

The problem with HLW's argument is that it is based on a fiction. The Supreme Court has never employed the phrase "unambiguously campaign related"

as a constitutional standard, much less as the overarching standard that HLW claims here.

Despite HLW's claim that the Supreme Court in "*Buckley* applied the unambiguously-campaign-related principle in four contexts," HLW Br. at 19 n.11, the "unambiguously campaign related" language actually appeared in <u>only one</u> section of the *Buckley* decision and the Court's reference was incidental to the Court's scrutiny of a disclosure provision applicable to expenditures by individuals and groups that, unlike political committees, do not have a major purpose of influencing elections. *See Buckley*, 424 U.S. at 79-80. The *Buckley* Court wrote:

> [W]hen the maker of the expenditure . . . is an individual other than a candidate or a group other than a "political committee" . . . we construe "expenditure" . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is <u>unambiguously related</u> to the campaign of a particular federal candidate.

Id. at 79-80 (emphasis added).

The plain language of this passage from *Buckley*, which gave birth to HLW's "unambiguously campaign related" legal theory, makes clear that the Court used the "unambiguously related" phrase only to explain its decision to narrowly construe the statutory term "expenditure" to include only "express advocacy." And the Court made clear that this construction applied only "when the maker of the expenditure . . . <u>is an individual other than a candidate or a group other than a</u>

'political committee.'" *Id.* at 79 (emphasis added). The Court used the same language only once more in *Buckley*, two paragraphs later, when it described the challenged expenditure disclosure requirements as provisions that "shed the light of publicity on spending that is unambiguously campaign related." *Id.* at 81 (emphasis added). The only constitutional "test" created by the *Buckley* Court in these passages was the "express advocacy" test. The "unambiguously campaign related" language was simply a description of the "express advocacy" standard, not a stand-alone constitutional command. The phrase certainly was not adopted as an independent constitutional test and has never been applied as such in any subsequent Supreme Court case.

Furthermore, the Supreme Court in *McConnell* did not "recognize" the "unambiguously-campaign-related principle" as a "first principle of constitutional law." *See* HLW Br. at 25-26. The majority opinion in *McConnell* makes not a single mention of the phrase. In fact, only one Justice in *McConnell* mentions the phrase. Justice Thomas, writing only for himself,[8] makes plain why HLW here is trying to elevate the phrase "unambiguously campaign related" to a first principal of constitutional law as the Supreme Court never has done. Justice Thomas wrote: "[T]he presence of the 'magic words' *does* differentiate in a meaningful way between categories of speech. Speech containing the 'magic words' is

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8 Justice Scalia joined Parts I, II-A and II-B of Justice Thomas' *McConnell* opinion, but not Part II-C, the portion cited here.

'unambiguously campaign related,' while speech without these words is not." *McConnell*, 540 U.S. at 281 (Thomas, J., dissenting in part, concurring in part) (emphasis in original). Justice Thomas' *McConnell* opinion makes clear that the phrase "unambiguously campaign related" is a synonym for magic words "express advocacy." This being the case, it is no wonder that Plaintiffs would have this Court adopt it as the gatekeeper standard for all campaign finance regulation. But the *McConnell* Court majority concluded that "the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley's* magic-words requirement is functionally meaningless[,]" and "has not aided the legislative effort to combat real or apparent corruption." *Id.* at 193-94 (emphasis added). Thus, HLW's attempt to employ a standard that is synonymous with magic words express advocacy is directly contrary to *McConnell*. Of course, from HLW's perspective, it would be difficult to imagine a better standard to regulate their activities than a "functionally meaningless" one.

Finally, the Supreme Court in *WRTL II* did not "appl[y] the unambiguously-campaign-related principle to eliminate overbreadth in the regulation of electioneering communications." *See* HLW Br. at 27. Indeed, the phrase "unambiguously campaign related" does not appear a single time in the Supreme Court's *WRTL II* opinion. Further and again, *WRTL II* has no bearing on the

constitutionality of political committee disclosure requirements like the ones at issue in this case. *See supra* Section II.

The "unambiguously campaign related" test is simply HLW's attempt to replace the Supreme Court's actual jurisprudence for reviewing speech-related regulation with a test more to its liking. But the Supreme Court applies varying standards of scrutiny to review campaign finance regulations, depending on the nature of the regulation and the weight of First Amendment burdens imposed by such regulation. For instance, expenditure limits, as the most burdensome campaign finance regulations, are subject to strict scrutiny and reviewed for whether they are "narrowly tailored" to "further[] a compelling interest." *WRTL II*, 127 S. Ct. at 2664; *see also Buckley*, 424 U.S. at 44-45. Contribution restrictions such as those challenged in this case, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisfy the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136, (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted)). Disclosure requirements, the "least restrictive" requirements, *Buckley*, 424 U.S at 68, are subject to only an intermediate standard of review, namely that there exist a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *id*. at 64

(internal footnotes omitted). Contrary to HLW's claims, in no instance is the test simply whether the activity is "unambiguously campaign related."

This Court should reject HLW's invented test and adhere to the test established by the Supreme Court for judicial review of political committee disclosure requirements. The State's political committee disclosure requirements are constitutionally permissible because there is a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* at 68.

IV. Disclosure Requirements Applicable to "Issue Advertising" Are Constitutionally Permissible.

Further undercutting HLW's assertion that only "unambiguously campaign related" activities can be subject to disclosure is a line of Supreme Court cases approving disclosure of issue advocacy relating to lobbying. This precedent illustrates that the constitutionality of a disclosure requirement does not turn on whether the speech meets the express advocacy standard or HLW's made-up "unambiguously campaign related" test.

Both federal and state courts have consistently upheld lobbying disclosure statutes. The leading Supreme Court case on lobbying disclosure, *U.S. v. Harriss*, 347 U.S. 612 (1954), considered the federal Lobbying Act of 1946, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to disclose

their clients and their contributions and expenditures. *Id*. at 615 & n.1. After evaluating the Act's burden on First Amendment rights, the Court held that lobbying disclosure was justified by the state's informational interests: "[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate [lobbying] pressures . . . . [Congress] has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Id*. at 625.[9]

That the Lobbying Act was unrelated to elections and instead pertained only to issue speech was not deemed constitutionally significant. The Supreme Court found that lobbying disclosure nonetheless serves the state's informational interest and "maintain[s] the integrity of a basic governmental process." *Id*. at 625; *see also Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33 (D.D.C. 2008) (dismissing First Amendment challenge to current federal lobbying disclosure law).

Further, the Supreme Court has recognized that even "grassroots" or "indirect" lobbying may be constitutionally subject to disclosure. Such

[9] The *Harriss* decision has been followed by lower courts which have uniformly upheld state lobbying statutes on the grounds that the state's informational interest in lobbying disclosure outweighs the associated burdens. *See, e.g., Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996); *Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 512 (8th Cir. 1985); *Comm'n on Indep. Colls. and Univs. v. N.Y. Temp. State Comm'n*, 534 F. Supp. 489, 494 (N.D.N.Y. 1982).

communications generally describe a legislative action favored by the sponsor, and urge the public to lobby the relevant lawmakers regarding this action. The *Harriss* case upheld a grassroots lobbying disclosure provision in the 1946 Lobbying Act that required disclosure of lobbyists' efforts to "artificially stimulate[]" the public to conduct "letter campaign[s]" to influence the acts of Congress. *Harriss*, 347 U.S. at 620-21 & n.10;[10] *see also Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 511 (8th Cir. 1985) (upholding Minnesota disclosure requirement as applied to communications sent from the NRA to its Minnesota members urging them to contact their state legislators about pending legislation). That this type of "classic" issue advocacy can be subject to disclosure fatally undermines HLW's claim that only "unambiguously campaign related" communications can be constitutionally regulated.

In a similar vein, the Supreme Court has expressed approval of statutes requiring the disclosure of expenditures relating to ballot measures. *See*, *e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203 (1999) ("Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot[.]") In

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[10] Over twenty states have laws that require disclosure of expenditures funding grassroots lobbying. GAO REPORT, INFORMATION ON STATES' LOBBYING DISCLOSURE REQUIREMENTS, B-129874 (May 2, 1997), at 2. These statutes have been routinely upheld by the courts. *See, e.g., Fla. League of Prof'l Lobbyists*, 87 F.3d at 460-61; *Minn. State Ethical Practices Bd.*, 761 F.2d at 512.

Bellotti, the Court struck down a prohibition on corporate expenditures to influence ballot measures, but did so in part because "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32. Citing *Buckley* and *Harriss*, the *Bellotti* Court took note of "the prophylactic effect of requiring that the source of communication be disclosed." *Id*.

The Supreme Court again recognized this state "informational interest" in *CARC*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance that limited contributions to ballot measure committees. Although the Court struck down the contribution limit, it based this holding in part on the disclosure that the law required from such committees. *See id*. at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.").

Although HLW argues that only disclosure in connection to express advocacy for or against ballot initiatives is permissible, HLW Br. at 22, nothing in these Supreme Court cases indicates that the disclosure requirements were limited to spending for "express advocacy" for or against the ballot measure.

V. The Challenged Political Committee Disclosure Requirements Constitutionally Advance the State's Compelling Interests in Informing the Electorate and Preventing Fraud.

HLW challenges several aspects of the State's disclosure requirements applicable to organizations—including HLW—that spend money to support or oppose ballot measures. Specifically, HLW challenges statutes defining "political committee," "independent expenditure" and "political advertising" on the basis that the statutes fail HLW's made-up "unambiguously campaign related" test.

The District Court properly upheld these statutes against HLW's challenges and did so under an even greater degree of scrutiny than necessary, *see supra* Section I, concluding that the State's political committee disclosure requirements "impose only relatively minor burdens and focus those burdens on the political committees most able and willing to comply," 2009 WL 62144 at *12, and that the State has "an extremely compelling interest in 'following the money' in ballot initiative elections so that the electorate's decision may be an informed one," *id.* at *13. The Court below found the State's "interest in protecting the *contributors* of funds used to advocate in support of or in opposition to a ballot initiative" from "fraudulent misuse" likewise compelling. *Id*. (emphasis in original).

HLW argues that the challenged political committee disclosure requirements are unconstitutional under this Court's decisions in *CPLC I* and *CPLC II*, *see* HLW Br. at 13-14, but all that was determined in those cases was that the State of

California failed to meet its burden of demonstrating that its political committee disclosure requirements were narrowly tailored to a compelling government interest. (As noted above, the Court in *CPLC I* and *CPLC II* applied an incorrect legal standard.) The District Court below explained:

> [R]ather than develop a factual record to support its regulations, the State of California simply argued that it could impose its requirements on CPLC as a matter of law . . . . On appeal, the Ninth Circuit acknowledged that courts had upheld broad imposition of PAC-style requirements on corporate campaign speech, but noted that each of those cases applied to *candidate elections* and explained that "it is not at all certain that the Supreme Court would apply the same criteria to ballot measure advocacy." [*CPLC II*] at 1187-88. Because this was California's sole argument, the Court found that the state had "not satisfied its burden" of demonstrating that its PAC-style requirements were narrowly tailored to its compelling informational interest. *Id.* at 1187. . . . However, in holding California to its failed burden, the Court never actually analyzed whether the state's compelling interest *could* have justified its PAC-style requirements in the ballot initiative context.

2009 WL 62144 at *10 (emphasis in original).

Here, by contrast, the State has detailed its long-recognized and compelling interests in informing its electorate and preventing fraud in ballot measure elections. *See* State Br. at 2-8, 38-41. On this basis, the District Court correctly held "that these two compelling interests—informing the public about the source of political expenditures and protecting contributors from fraudulent misuse of donations—more than justify the general imposition of PAC-style reporting and

disclosure requirements on organizations engaged in ballot measure advocacy." 2009 WL 62144 at *14.

The District Court went on to analyze and reject HLW's vagueness and overbreadth claims with respect to the challenged political committee disclosure requirements. The Court concluded:

> In sum, the Court finds that Washington's PAC-style disclosure and reporting requirements are narrowly tailored to serve the state's compelling interests. Washington's "political committee" requirements are "not particularly onerous." *ARTLC,* 441 F.3d at 791. When Washington voters are asked to vote on an issue of public concern, they are entitled to know who is lobbying to influence their opinion on that issue. Similarly, when Washington residents contribute funds to an organization claiming to support or oppose a ballot initiative, those contributors are entitled to verify that their funds were used for their intended purpose. . . . The State is justified in extending these disclosure and reporting requirements to organizations that make campaign advocacy "their primary or one of their primary purposes" and to organizations that give their contributors "actual or constructive knowledge" that the donated funds will be used for electoral political activity.

2009 WL 62144 at *23.

Amicus respectfully request this Court to adopt the District Court's well-reasoned analysis and reject HLW's vagueness and overbreadth claims.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be AFFIRMED.

RESPECTFULLY SUBMITTED this 4th day of June, 2009.

THE CAMPAIGN LEGAL CENTER

By /s/ Paul S. Ryan

J. GERALD HEBERT, DC Bar No. 447676
PAUL S. RYAN, CA Bar No. 218212
TARA MALLOY, NY Bar No. 4251005
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave. NW,
Suite 650
Washington, DC 20036
Tel: 202-736-2200

Attorneys for *Amicus Curiae*
THE CAMPAIGN LEGAL CENTER

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d), Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached brief *amicus curiae* is proportionally spaced, has a typeface of 14 points and contains 6,972 words.

DATED this 4th Day of June, 2009.

Respectfully submitted,

/s/ Paul S. Ryan
PAUL S. RYAN

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* for the Campaign Legal Center with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 4, 2009.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing Brief *Amicus Curiae* for the Campaign Legal Center by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

Clayton J. Callen
Bopp, Coleson & Bostrom
One South Sixth Street
Terre Haute, IN 47807-3510

/s/ Paul S. Ryan
PAUL S. RYAN