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

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Petition for Writ of Certiorari

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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 it 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.

Parties to the Proceeding

Petitioner in this Court (Plaintiff-Appellant below) is Human Life of Washington, Inc.

Respondents in this Court (Defendants-Appellees below) are Chair Bill Brumsickle, Vice-Chair Ken Schellberg; Secretary Dave Seabrook; Jane Noland; Jim Clements, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission, and Rob McKenna, in His Official Capacity as Attorney General.

Corporate Disclosure Statement

Human Life of Washington, Inc. is a nonstock corporation with no parent company and no publicly held company owning 10% or more of its stock. Rule 29.6.

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Petition

Human Life of Washington ("HLW") seeks a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit to review its judgment herein.

Opinions Below

The appellate opinion is reprinted in the Appendix ("App.") at 1a and available at __ F.3d __, 2010 WL 3987316 (9th Cir. Oct. 12, 2010). The district court opinion, App. 65a, is unreported but available at 2009 WL 62144 (W.D. Wash. Jan. 8, 2009).

Jurisdiction

Appellate judgment was entered October 12, 2010. This Court has jurisdiction. 28 U.S.C. 1254(1).

Constitutions, Statutes, and Regulations Involved

Appended are: First Amendment (App. 121a); Fourteenth Amendment, Section 1 (App. 121a); RCW 42.17.020(39), App. 122a; RCW 42.17.100(1), App. 122a; RCW 42.17.020(38), App. 121a; Wash. Administrative Code ("WAC") 390-16-206, App. 122a.

Statement of the Case[1]

As a result of this Court's decision in *Citizens United v. FEC*, 130 S.Ct. 876 (2010) ("*Citizens*"), citizens groups, whether incorporated or a labor union, are no longer prohibited from engaging in the full range of independent political advocacy of candidates. While this is a profound change in federal election law,

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[1] The district court had jurisdiction over this case brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments. 28 U.S.C. §§ 1331, 1343(a)(3), 2201, 2202. The Ninth Circuit had jurisdiction. 28 U.S.C.1291.

its practical implications are still unclear because there remain substantial legal impediments to citizen groups' free speech.

The State of Washington has adopted many of these impediments, targeting independent speech by both groups and individuals for regulation and prohibition. By these vague and overbroad laws, Washington has chilled issue advocacy by groups, by threatening them with PAC-status and punishing them if they fail to register and comply with complex organization-wide disclosure and administrative burdens. And by using vague terms, Washington does not give them fair notice of when PAC-status is triggered.

Of course, before *Citizens*, some groups were already exempt from the corporate and labor union political speech ban, such as *MCFL*-type corporations and unincorporated associations, and some political speech regarding candidates could not be regulated, such as issue-advocacy and grass roots lobbying. So since 1974, Congress and many states have tried to reign in these group's political speech by regulating them as PACs. But this Court has carefully cabined these efforts, in order to protect issue advocacy organizations and to ensure that campaign laws are unambiguously campaign related. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court limited PAC-status to those groups with the major purpose of nominating or electing candidates to public office[2] and, to ensure that

[2] PAC-status may only be imposed on "organizations . . . *the* major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79 (emphasis added). If PAC-status may be applied in this context, the major-purpose test would only permit it to be imposed on groups with *the* major purpose of *passing or defeating ballot*

groups knew when they were engaged in political activity that might trigger PAC-status, held that only contributions to candidates and express-advocacy communication could be counted. These standards have been consistently reaffirmed by this Court. *See FEC v. Massachusetts Citizens For Life,* 479 U.S. 238, 262 (1986) ("*MCFL*"); *McConnell v FEC*, 540 U.S. 93, 170 (2003); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 488 n.3 (2007) ("*WRTL-II*")

However, these carefully crafted standards for determining PAC-status have been under persistent assault, leading to numerous decisions of the federal courts dealing with this issue. Most recently, the complex federal regulatory scheme for determining PAC-status reached this Court in *Real Truth About Obama v. FEC*, 575 F.3d 342 (4th Cir. 2009) ("*RTAO*"), where Plaintiff claimed that the FEC, through both regulations and their enforcement policy, had subverted this Court's major purpose test and PAC-status triggers, but which the Fourth Circuit had upheld. This Court, however, had just decided *Citizens*, which held that PAC burdens were "onerous" and did not resolve First Amendment concerns about undue regulation of political speech, and which condemned complex and vague multi-factor tests. *Citizens* 130 S.Ct. at 895-96. As a result, this Court vacated and remanded *RTAO* for reconsideration in light of *Citizens*. 130 S.Ct. 2371 (2010).

The court below here, however, thought that *Citizens* cast no negative light on PAC-status, rather that *Citizens* endorsed imposition of PAC-status because it upheld a one-time, event-driven report. So

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initiatives.

despite this Court's vacation and remand of *RTAO*, the Ninth Circuit has taken a different tack, undermining this Court's carefully crafted standards in *Buckley* and inviting wholesale disregard of this Court's important precedent.

Therefore, even if HLW escapes PAC-status, its independent political speech is potentially subject to penalty for failing to comply with certain event-driven reports, which are defined so vaguely that HLW cannot be certain of when they are triggered. They are also overbroad, regulating issue advocacy that is not campaign related.

These are important issues for this Court to decide. The Ninth Circuit's decision conflicts with this Court's precedents and the decisions of other Circuits. Unless reversed, it threatens to deprive groups of the very political speech that this Court sought to protect in *Buckley* through *Citizens*. The petition should granted.

A. Facts[3]

Plaintiff HLW is a nonprofit, pro-life advocacy group that wanted to continue its long-time issue advocacy against physician-assisted suicide ("PAS"), while public interest in it peaked during efforts to qualify and pass Initiative 1000, legalizing PAS in the State of Washington during 2008.[4] Defendants ("Washington") are the members of the Public Disclosure Commission ("PDC") and the Attorney General.

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[3] Facts are verified in the Complaint. App. 124-36a, ¶¶ 1-10, 13-40.

[4] This case is not moot: HLW intends similar future activity and such challenges are capable of repetition yet evade review. *WRTL-II*, 551 U.S. at 462.

HLW wanted to solicit funds for issue-advocacy PAS advertisements. A planned fundraising "Letter" referenced a failed PAS ballot initiative *in 1991* and a failed PAS bill in 2006, but it made *no mention* of I-1000, referring instead to the PAS *issue*:

> [N]ow in 2008 the assisted suicide *issue* is again *on the minds of the people* of Washington. Now, *while their minds are focused* on the *issue*, is the *opportune time to educate* them on the dangers of assisted suicide—and on the value of every life. . . . The public needs to receive this sort of information as assisted suicide advocates once again offer biased, inaccurate, and rosy depictions of this grisly practice. The public needs to know that the answer is love and care at the end of life, not eliminating patients. And people need to be reminded of the importance of patients always being able to trust that physicians will be care givers, not life takers.

App. 148-50a (emphasis added).

A planned fundraising "Phone Script" mentioned efforts "to get an initiative on the ballot this fall that would legalize [PAS]," but it did not expressly advocate for or against any initiative or say it would do so with funds it received, focusing rather on "plan[s] to broadcast . . . advertisements bringing awareness to this issue." App. 151-52a.

Of HLW's four intended ads, only *Settled* mentioned a "ballot measure," but that was a *1991* initiative. *Settled* said "[a]ssisted suicide is back in the news," asked "[d]idn't we settle that issue?," and recited problems with Oregon's PAS experience as "reasons *not* to reconsider the *issue*." *Id.* (second emphasis added). *Slippery* discussed the slippery slope of the Dutch PAS

experience. *Id. Tolerance* discussed why disability groups oppose PAS and the need for "[t]he Hemlock Society's founder" to "be more tolerant—of persons with disabilities." *Id. Trust* recalled the Hippocratic Oath breakthrough—whereby patients could trust doctors—and the danger of turning doctors into killers. *Id.*

So only the Phone Script even mentioned an effort to put a current initiative on the ballot, and no communication expressly advocated for or against it.[5] These communications are "issue advocacy," which "conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *WRTL-II*, 551 U.S. at 470. HLW did not plan to, or solicit funds for doing "express advocacy" of the ballot measure. *See California Pro-Life Council v. Getman*, 328 F.3d 1088, 1096-00 (9th Cir. 2003) ("*CPLC-I*") (upholding "independent expenditure" definition in the ballot-initiative context because it was construed to apply to only express advocacy communications). Washington "den[ied HLW]'s characterization of [its communications as issue advocacy], saying that it "lack[ed] sufficient information . . . to form a belief regarding [HLW]'s *intentions*." *See* Answer ¶¶ 27-29 (emphasis added).[6]

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[5] Washington has asserted no interest in regulating broadcast communications simply referencing initiatives near elections because it has not passed legislation similar to the federal "electioneering communications" provisions. *See* 2 U.S.C. 434(f)(3) (definition).

[6] Washington's forbidden reliance on *intent* to determine

Disbursements for HLW's issue-advocacy communications (even if they are cognizable for the major-purpose analysis) could not have been HLW's major purpose, because they were under 20% of HLW's $180,000 annual budget.

HLW feared Washington would deem it a PAC and penalize it for not complying with PAC requirements. Compl., Count 1.

HLW feared Washington would deem its communications "independent expenditures"—despite no express advocacy—and penalize it for not complying with requirements for making independent expenditures. Compl., Count 2.

HLW feared Washington would deem its communications "political advertising" and penalize it for not complying with requirements for doing political advertising. Compl., Count 3.

HLW feared Washington would deem its communications "a rating, evaluation, endorsement, or recommendation for or against . . . a ballot measure" and penalize it for not complying with requirements for making such communications. Compl., Count 4.

HLW considered Washington's speech burdens unconstitutional and did not intend to comply with them but was chilled from its speech for fear of investigation, enforcement, and penalties.

B. Counts

1. Count 1—"Political Committee"

HLW challenged Washington's PAC-status scheme,

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communications' meaning violates this Court's repudiation of intent-and-effect tests for interpreting communications. *See Buckley*, 424 U.S. at 43.

involving the PAC definition and Washington's (1) "*a* primary purpose" test, *see State v. Dan Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976); *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894, 903 (Wash. App. 2002), and (2) "receiver of contributions" test. *See Evergreen Freedom Found.*, 49 P.3d at 904; 1973 Wash. Att'y Gen. Op. 114 ("'Political committee' means any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition. RCW 42.17.020(39).")

PAC burdens are onerous. PACs must file a prompt "Statement of Organization" appointing a treasurer, providing detailed information about the organization's officers, and stating the ballot proposition or candidate supported or opposed. RCW 42.17.040. PACs file regular reports—some monthly and some weekly—of all of its contributions and expenditures, even those unrelated to any political activity. RCW 42.17.080; RCW 42.17.060. PAC reports must contain the names and addresses of those contributing $25 or more, RCW 42.17.080(3), and also their occupation and employer for contributions over $100. WAC 390-16-034. Contributions received must be deposited into a designated account. RCW 42.17.040. PACs may not accept anonymous contributions over $300. RCW 42.17.060. PACs must keep account books current within five days of any contribution or expenditure and books are available for public inspection. RCW 42.17.080(5). For eight days preceding elections, books must be current within one day and available for viewing by the public from 8:00 a.m. to 8:00 p.m. *Id.* PACs are subject to random "in-depth" audits following elections. PDC, "Political Committees: 2010 Campaign Disclosure Instructions"

("*PAC Manual*") at 10.[7] PACs are stuck with PAC burdens until they dispose of all their assets, cease operation, dissolve, and report doing so in a final report. *Id.* at 58. PAC burdens are substantial: "Treasurers . . . devote many hours to keeping exact records and filing accurate, detailed reports of receipts and expenditures." *Id.* at 1.

HLW challenged Washington's PAC definition as unconstitutional because (1) "expectation" of receiving contributions or making expenditures for political purposes is undefined, vague, and overbroad[8] in

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[7] Available at http://www.pdc.wa.gov/ archive/filerassistance/manuals/pdf/2010/2010.Man.Comm.pdf (materially parallels 2008 manual).

[8] "Overbroad" herein refers to both inadequate tailoring and failure to comply with "*Buckley*-overbreadth," which limits government disclosure to activity that is "unambiguously campaign related." *Buckley*, 424 U.S. at 81. *Buckley*-overbreadth examines whether speech regulated is clearly and closely related to Congress's authority to regulate elections, the authority under which government may regulate First Amendment activities to begin with, *Id.* at 13 and n.6 (*citing* U.S. Const. art. I, § 4). *Buckley* employed it as a threshold test before other scrutiny was applied. *Id.* at 39-51, 76-82. It differs from the First Amendment substantial-overbreadth doctrine of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which strikes facially provisions sweeping in a substantial amount of protected speech. Courts recognizing the unambiguously-campaign-related requirement as this Court's means of cabining governmental speech regulation in the election context include the Fourth Circuit, *North Carolina Right to Life v. Leake*, 525 F.3d 274, 281-83 (4th Cir. 2008) ("*Leake*"), and the Tenth Circuit, *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676-77 (10th Cir. 2010) ("*NMYO*")

providing a trigger for when PAC burdens are imposed; (2) there is no monetary contribution or expenditure trigger, *cf.* 2 U.S.C. 431(4) ($1,000 trigger), which lack enhances vagueness and overbreadth; (3) "contributions" is vague and overbroad, not following this Court's construction, *Buckley*, 424 U.S. at 23 n.24; (4) "expenditures" is vague and overbroad, not following this Court's construction, *id.* at 44, 80; *MCFL*, 479 U.S. at 249; (5) "in support of, or opposition to" is vague and overbroad; and (6) the definition lacks the necessary "the major purpose" requirement to be a PAC. *Buckley*, 424 U.S. at 79.

HLW also challenged Washington's "*a* primary purpose" test for imposing PAC-status, *see*, *e.g.*, PDC Interpretation 07-02 ("'Primary Purpose' Guidelines") (available at http://www.pdc.wa.gov/archive/guide/pdf/Interp0702.pdf), as vague and overbroad for not following this Court's "the major purpose" test.

In addition, HLW challenged Washington's "receiver of contributions" test for imposing PAC-status as vague and overbroad because it also does not follow this Court's "the major purpose" test.

2. Counts 2-4

HLW also challenged three additional provisions as unconstitutionally vague and overbroad: first, the definition of "independent expenditure" as "any expenditure . . . made *in support of or in opposition to* any candidate or *ballot proposition* and is not otherwise required to be reported," RCW 42.17.100 (emphasis added); second, the definition of "political advertising," as "any advertising . . . mass communication, used *for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign*," RCW 42.17.020(37) (emphasis

added); and third, the regulation of "[a]ny person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition . . . ." WAC 390-16-206.

C. Litigation

On April 16, 2008, HLW filed its Verified Complaint and moved for preliminary injunction, which was denied. On August 7, HLW moved for summary judgment. Briefing was completed August 29, but the court did not hold the requested expedited hearing. On November 4, Washington voters enacted I-1000, without HLW ever being able to do its issue advocacy. On January 8, 2009, summary judgment was denied. Defendants had not cross-moved for summary judgment, so on January 16 HLW moved for judgment to allow it to appeal. On January 23, judgment for Defendants was entered disposing of all issues and dismissing the action with prejudice.

On October 12, 2010, the Ninth Circuit affirmed the district court. Regarding the PAC definition, it held that after *Citizens*, PAC-style burdens are mere "disclosure" subject to "exacting scrutiny," that this Court's "*the* major purpose" test for PAC-status is satisfied by "*a* major purpose," and that the definition survives exacting scrutiny. App. 20a. Of the several vagueness and overbreadth challenges to terms used in the PAC definition, it only addressed "expectation," ignoring challenges to "expenditure," "contribution," and the statutory support/oppose test. App. 56-58a.

Regarding challenges to "independent expenditure," "political advertising," "a rating, evaluation, endorsement, or recommendation," it again ignored vagueness and overbreadth challenges—except for "mass commu-

nication" in the "political advertising" definition—treating the sole issue as whether issue advocacy ("physician-assisted suicide is bad policy") without any express advocacy ("vote against Initiative 1000") could be subject to disclosure. App. 44-45a. It held that the two were essentially the same in the ballot-initiative context, App. 46-48a, and that since *Citizens* permitted disclosure as to issue advocacy under the "electioneering communication" definition, 130 S.Ct. at 915, Washington could require it under its tests. App. 48-49a.

Reasons to Grant the Petition

The petition should be granted because the decision below conflicts with decisions of this Court and other federal appellate courts on four important questions of federal constitutional law. Rule 10. These four questions ask (I & II) on what groups and under what standards may PAC-status be imposed, (III) what disclosure burdens may be imposed to meet the government's informational interest, and (IV) what clarity standards govern definitions regulating core political speech?

These questions are vitally important because this Court's recent campaign-finance decisions are being viewed as carte blanche for heavy burdens on free speech in the name of "mere disclosure," ignoring important holdings of this Court limiting the application of these burdens, and because this Court's prior speech-protective standards are being ignored. Consequently, free speech and association are being chilled. That HLW was chilled, when an issue central to its mission was in public debate, is a prime example.

Current Campaign Finance Jurisprudence Is Not Working.

Two previous Ninth Circuit decisions on which this Court denied review are being cited as authority for lowered protection of issue advocacy and issue-advocacy groups. If this case is also denied review, free speech and association will be further chilled.

In *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987), the Ninth Circuit decided that this Court's magic-words express-advocacy test—established to narrow "expenditure" for disclosure, prohibition, and PAC-status-trigger purposes, *Buckley*, 424 U.S. at 44 & n.52, 80; *MCFL*, 479 U.S. at 249—could be replaced by a vague multi-factor test. States and the FEC have since recited *Furgatch* as authority for tests regulating speech that are neither brightline nor speech-protective—such as the "independent expenditure" test at issue here, and the FEC's "express advocacy" definition at 2 U.S.C. 100.22(b), which was brought to this Court. *RTAO,* 575 F.3d 342, *cert. granted, judgment vacated, and case remanded for reconsideration in light of Citizens,* 130 S.Ct. 2371 (2010).

In *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006) ("*ARTLC*"), *cert. denied*, 549 U.S. 886, the Ninth Circuit decided that PAC-style burdens are not onerous (even when applied to an *MCFL*-corporation that should be free of PAC status and burdens under *MCFL*, 479 U.S. at 263). *ARTLC* is also being cited, as in the present case, as authority to impose PAC-style burdens to satisfy a mere informational interest that could be satisfied with simple

disclaimers and a one-time, event-driven report.[9]

If a writ of certiorari were denied in the present case, *HLW* would be considered as endorsing the view that *Citizens* is carte blanche for layer-on-layer of organization-wide disclosure and other administrative burdens under a complaisant scrutiny that rejects little, if anything, a state might impose in the name of disclosure.[10] Enough is enough. This Court should accept this case to clarify that the only thing subject to exacting scrutiny in *Citizens* was the simple disclaimers and one-time, event-driven reports *Citizens* left in place for electioneering communications, 130 S.Ct. at 914, not the PAC-style burdens *Citizens* pronounced "onerous" and reviewed under strict scrutiny, *id.* at 895-96. Review should be granted to clarify and standardize the sort of disclosure permitted and other administrative burdens imposed, so that states will not suppress core political speech and association in the name of disclosure.

The Decision Below Involves Four Important Federal Questions.

I. Is PAC-Status Still Determined by *Buckley*'s "*the* Major Purpose" Test?

HLW wanted to oppose PAS in communications to

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[9] This case arises in the ballot-initiative context, where only informational interests, not corruption interests, are involved.

[10] *WRTL-II* rejected "a prophylaxis-upon-prophylaxis approach," 551 U.S. at 479 (principal opinion), and the PAC-style use of ongoing reporting (in the absence of ongoing activity) to satisfy the informational interest should not survive even intermediate scrutiny because one-time reports sufficiently meet the informational interest.

Washington voters that would not constitute its major purpose, even if one counts issue advocacy, as well as express advocacy, in determining PAC-status, without becoming a PAC. Its fear was that Washington would deem it a PAC for its activity, subject to multiple disclosure and administrative burdens. That this fear was reasonable has been borne out in this litigation. Washington recited numerous facts that are not cognizable for determining PAC-status—such as the fact that *in 1991* HLW had expressly advocated against a PAS ballot initiative and the fact that HLW's *PAC* had expressly advocated against I-1000—in arguing that HLW should have been treated as a PAC if it had proceeded with its activities. Br. Appellees 8-11, 49 n.38. The Ninth Circuit likewise recited *1991* HLW activity, activity by HLW's *PAC*, a *single* 2008 HLW *email* expressly advocating against I-1000, and HLW's "planned educational campaign," App. 3-6a, before determining that HLW's "fear . . . is well founded." App. 17a.[11]

This raises the first vital question: May PAC-status only be imposed on groups having *the* major purpose of

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[11] The reliance below on the proximity of planned HLW's issue advocacy to a vote on I-1000 is inconsistent with *WRTL-II*'s refusal to consider proximity to the election to determine the meaning of WRTL's ads, 551 U.S. at 473 (principal opinion) ("a group can certainly choose to run an issue ad to coincide with public interest"), 472 (rejecting contextual factors and timing as means of determining interpretation of issue ads), because interpretation of communications must be based on the content of the ads themselves. *Id.* at 469 ("focusing on the substance of the communication rather than amorphous considerations of intent and effect").

regulable campaign advocacy or also on groups with *a* major purpose of regulable campaign advocacy?[12]

A. The Decision Below Conflicts with this Court.

This Court requires *the* major purpose. In construing what "expenditures" might be subjected to disclosure (under a vague and overbroad definition regulating expenditures "for the purpose of influencing . . . elections"), *Buckley* adopted the lower courts' construction of "political committee" as limited to

> 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.

424 U.S. at 79. As to disclosure of expenditures by non-PAC entities, *Buckley* construed "expenditure" to apply only to express-advocacy communications to avoid the disclosure being "overbroad" by snaring information that is "too remote" because it is not "unambiguously related to the campaign of a particular federal candidate." *Id.* at 79-80.

Ten years later, this Court, in *MCFL* restated the major-purpose test thrice. First, it noted that requiring MCFL to use a separate segregated fund ("PAC") meant that "all MCFL independent expenditure[13]

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[12] What properly may be considered "regulable campaign advocacy" is considered in Part II.

[13] Under federal law, "independent expenditures" are communications "expressly advocating the election or defeat

activity is . . . regulated as though the organization's major purpose is to further the election of candidates." 479 U.S. at 253 (plurality opinion) (emphasis added). Second, in response to FEC concerns that not forcing MCFL's independent expenditures to be done by a PAC "would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending," this Court responded that the regular one-time, event-driven reporting required for those making independent expenditures and receiving contributions for the purpose of making independent expenditures was sufficient to meet the informational interest. *Id.* It concluded that "[t]he state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *Id.* at 262.[14] Then it added: " Furthermore, should 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." *Id.* (emphasis added). Third, it reiterated this test: "As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose *primary objective is to influence political campaigns*." *Id.* (emphasis added).

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of a clearly identified candidate" that are not coordinated with a candidate, so as to be treated as contributions. 2 U.S.C. 431(17).

[14] "[L]ess restrictive means" indicates that strict scrutiny applied to requiring PAC-status, as does the requirement of a "compelling" interest. *Id.* at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.").

In *McConnell*, 540 U.S. 93, the Court again quoted the major-purpose test from *Buckley* and relied on it in its analysis, *id.* at 170 n.64,[15] thereby "implicitly endors[ing] the major purpose framework." FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

This major-purpose test is constitutionally mandated and governs whether any group that otherwise meets the statutory "political committee" definition[16] may actually be subjected to PAC-status and burdens. 72 Fed. Reg. at 5597 (stating that *Buckley* and *MCFL* "deemed this [test] necessary to avoid regulation of activity 'encompassing both issue discussion and advocacy of a political result'"). And the test examines "*the* major purpose," not *a* major purpose, of an organization. *Id.* at 5601 (emphasis added).

This Court's "*the* major purpose" test is important in protecting speech because (a) imposing these "onerous" disclosure and other administrative burdens on groups is constitutionally justified only if the groups are, "by definition . . . campaign related." *Buckley*, 424 U.S. at 79, and (b) it is a brightline test under which it is easily determined which groups may be deemed PACs (when proper standards are used in determining "major purpose") without burdensome, intrusive

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[15] *MCFL* set out two ways for determining major purpose of an entity, *see MCFL*, 479 U.S. at 252 n. 6, 262. Both ways indicate that it is *the*, not *a*, major purpose that is required.

[16] Federal law defines "political committee" as "any . . . group . . . receiv[ing] contributions . . . in excess of $1,000 . . . a . . . year or . . . mak[ing] expenditures . . . in excess of $1,000 . . . a . . . year." 2 U.S.C. 431(4)(A).

investigations of groups simply engaging in constitutionally protected speech and association.[17]

In *Citizens*, this Court surveyed the same sort of PAC-style burdens that are imposed on Washington PACs and declared them "onerous."130 S.Ct. at 898. The *Citizens* "onerous" list included organization-wide disclosure and other administrative burdens, but *excluded* the source-and-amount limitations imposed on PACs under federal law. *Id.* at 897. Thus, the *Citizens* "onerous" list and Washington's is nearly identical. This is significant because the decision below relied at several points on *ARTLC*, which held that Alaska could impose PAC-status because Alaska's PAC burdens were "not particularly onerous" because they lacked the source-and-amount limitation of federal law. 441 F.3d at 791.

B. The Decision Below Creates a Circuit Split.

The Second, Seventh, Tenth, Eleventh, and D.C. Circuits have recognized this Court's "*the* major purpose" test, albeit with varying degrees of precision.[18]

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[17] The decision below insisted that Washington's "*a* primary purpose" test was adequate because it "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" (App. 37a (emphasis added)), ignoring the fact that "priority" and "incidental" are as imprecise as "a major purpose" in imposing onerous burdens in an area where bright lines are required to prevent chilling speech.

[18] *United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972); *FEC v. Survival Educ. Fund,* 65 F.3d 285, 295 (2d Cir. 1995); *Brownsburg Area Patrons Affecting Change v. Baldwin,* 137 F.3d 503,

The Fourth and Ninth Circuits have engaged in the full analysis of distinguishing between "*the* major purpose" and "*a* major purpose," with the Fourth Circuit explaining that major purpose is determined as "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287; *see also North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) ("major purpose" must be "engaging in *express advocacy*" (emphasis in original)), and with the Ninth Circuit previously deciding in *California Pro-Life Counsel v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) ("*CPLC-II*"), that PAC-status could not be imposed on groups like CPLC that lacked the major purpose of qualifying and passing ballot initiatives. 507 F.3d at 1177.

The Ninth Circuit expressly recognized the circuit split it created.[19] So, despite the holdings of this Court and other circuits requiring *the* major purpose of regulable campaign-related speech for imposed PAC-

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505 n.5 (7th Cir. 1998); *Colorado Right to Life Comm. v. Coffman,* 498 F.3d 1137, 1153-54 (10th Cir. 2007) ("*CRLC*"); *NMYO,* 611 F.3d 669, 677 (10th Cir. 2010); *FEC v. Florida for Kennedy Comm.,* 681 F.2d 1281, 1287 (11th Cir. 1982); *Unity08 v. FEC,* 596 F.3d 861, 867 (D.C. Cir. 2010); *FEC v. Machinists Non-partisan Political League*, 655 F.2d 380, 392 (D.C. Cir.1981), *cert. denied*, 454 U.S. 897 (1981); *FEC v. EMILY's List,* 581 F.3d 1, 16 n.15 (D.C. Cir. 2009).

[19] "The Fourth Circuit has adopted [HLW]'s view . . . We disagree . . . ." App. 34a. As to *CPLC-II*, the panel held that it was vitiated by *Citizens*, ignoring *Citizens*'s condemnation of the PAC alternative. App. 41-42a. *ARTLC* is actually the Ninth Circuit holding vitiated by *Citizens*, not *CPLC-II*.

status, the Ninth Circuit upheld Washington's "*a* primary purpose" test for PAC-status. App. 37a. It held that "what is constitutionally significant" is "the word 'primary'—not the words 'a' or 'the,'" though it then declared that "we do not hold that the word 'primary' or its equivalent is constitutionally necessary." App. 37a.[20] Thus, a group might have "several primary purposes," with only one being regulable campaign activity, and yet be deemed a PAC. App. 38a. The decision below argued that, under a test examining *the* major purpose, an organization with a large budget could spend larger amounts for "political advocacy" without PAC burdens than could a small organization. App. 38a. But the Ninth Circuit's analysis ignores the facts that (1) PAC-status is based on the *nature* of the organization (its major purpose makes it, "by definition, campaign related," *Buckley*, 424 U.S. at 79), not the *amount* of its expenditures; (2) disclosure of properly defined contributions and expenditures occurs regardless of PAC-status (because there are required disclaimers and one-time, event-driven reports); and (3) in any event, the sort of issue advocacy at issue here is non-cognizable for determining PAC-status (because it is not "regulable, election-related speech," *Leake*, 525 F.3d at 287).

Whether PAC-status and the attendant onerous disclosure and administrative burdens may only be imposed on groups having *the* major purpose of regulable, election-related speech is a vital question of federal law regarding which there is a conflict in the

[20] Thus, the Ninth Circuit seems to say that a group might even be deemed a PAC for merely having "a purpose" of campaign advocacy, which is far afield from this Court's "the major purpose" test.

Circuits and which has resulted in considerable confusion among the lower courts.[21] This petition should be granted to reaffirm that this Court meant what it said in *Buckley* when it chose the words "the major purpose" in construing which groups could be subject to PAC-style burdens but approving disclosure of expenditures by one-time, event-driven reports. 424 U.S. at 79-80.[22]

II. Is "Major Purpose" Based on "Regulable, Election-Related Speech"?

Washington construes its PAC definition to require at least "a major purpose," but how does it determine "major purpose"? Washington recited facts from *1991* and things HLW's *PAC* did in an attempt to portray HLW as "political," Br. Appellees 8-11, 49 n.38, as did the Ninth Circuit, App. 3-6a, but such facts have nothing to do with HLW's *own* status in *2008*. The Ninth Circuit pointed to a single express-advocacy email from HLW to supporters, App. 3-4a, though Washington does not regulate emails as "expenditures," *see* PDC, "Campaign Activities on the Internet,"

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[21] This confusion has been evident in the last few weeks, as district courts have issued vastly different rulings on the impact of the major-purpose test. *Compare, e.g., Iowa Right to Life v. Smithson*, 2010 WL 4277715, at *14 (S.D. Iowa, Oct. 20, 2010) ("the Court reads no such [major-purpose] "mandate" in *Buckley*) *with National Organization for Marriage, Inc. v. Roberts*, No. 1:10-cv-00192 at 11 (N.D. Fla, Nov. 8, 2010) (recognizing the major-purpose test for political-committee status).

[22] *Buckley*'s creation of the major-purpose test in the context of discussing expenditure *disclosure* indicates that the test is not limited to the *prohibition* context, and its concern about "encompassing both issue discussion and advocacy of a political result" clearly applies here.

PDC Interpretation 07-04 (Oct. 25, 2007), making it non-cognizable for PAC-status, and, in any event, the cost of a single email is de minimus and could not establish even *a* primary purpose.

Washington's PAC definition provides no better guidance in determining "major purpose." It speaks of "contributions" and "expenditures," without the constructions given those terms in *Buckley*.[23] It triggers PAC-status on "having the *expectation* of receiving *contributions* or making *expenditures* in *support* of, or *opposition* to, any candidate or any ballot proposition." RCW 42.17.020(39) (emphasis added). The italicized terms are unconstitutionally vague and overbroad. And it lacks the monetary trigger of *actual* "contributions" or "expenditures," which the federal definition contains, and has been construed to encompass activities decades before, which heightens the vagueness and overbreadth.

This raises the second vital question requiring this Court's decision: Must "major purpose" (PAC-status) be determined only as "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at

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[23] *Buckley* construed "contribution" as "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary . . . . In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act." 424 U.S. at 23 n.24. "[F]or political purposes" clearly meant "for regulable contributions and expenditures," as those terms were construed in *Buckley*. "Expenditure" was construed to require magic-words express advocacy. *Id.* at 44 (prohibition context), 80 (disclosure context).

287—including only "expenditures" and "contributions," during a single year, *Buckley*, 424 U.S. at 39-44, 79-80—or may PAC-status be determined on a vague, overbroad support/oppose test?[24]

A. The Decision Below Conflicts with this Court.

Buckley required that a group's "major purpose" be "nominating or electing candidates" before PAC burdens could be imposed. *Id.* at 79. *Buckley* expressly rejected any vague "intent and . . . effect" approach to regulating core political speech, *id.* at 43, so the regulable activities that could have been considered in determining major purpose would have been narrowly construed "contributions" and "expenditures." *See id.* at 23 n. 24, 44, 80.

In *MCFL*, this Court identified two objective ways of determining "major purpose," as explained by the Tenth Circuit:

> In *MCFL,* the Court suggested two methods to determine an organization's "major purpose": (1) examination of the organization's central organizational purpose; or (2) comparison of the or-

[24] This Court upheld a support/oppose test in *McConnell*, but made the point that it was not vague because it applied to entities that were *already* political committees, whose activities were *presumed* to be campaign related. 540 U.S. at 170 n.64. The same cannot be said of a test to decide *whether* a group is a "political committee," as here, or else presumptions *flowing from* political status are employed to *determine* PAC-status. In determining PAC-status and in construing definitions of "contributions" and "expenditures" by *non*-political committees, this Court has required bright-line tests.

> ganization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates. 479 U.S. at 252 n. 6 (noting that MCFL's "central organizational purpose [wa]s issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates"); *see id.* at 262 (noting that "should 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").

CRLC, 498 F.3d at 1152.[25] The cited "independent spending" at issue in *MCFL* was magic-words express advocacy. *See MCFL*, 479 U.S. at 249.

B. The Decision Below Creates a Circuit Split.

In addition to conflicting with the Tenth Circuit's decision in *CRLC*,[26] the decision below conflicts with decisions of the Fourth Circuit. The Fourth Circuit succinctly held that major purpose "is best understood as an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *Leake*, 525 F.3d at 287 (emphasis added). That approach would examine how much an advocacy group spends on express-advocacy "independent expenditures" and contributions to candidates compared to its

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[25] This formulation was restated in 2010 in *NMYO*, 611 F.3d at 677.

[26] *See also Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964 (Colo. Ct. App. 2007) (recognizing test and remanding for administrative law judge to determine group's major purpose).

total disbursements in a particular year to determine if the group was a "political committee" for that year.[27] If over fifty percent of a group's expenditures were for express advocacy and for properly defined "contributions," then the major purpose of the group would be "nominating or electing candidates," *Buckley*, 424 U.S. at 79, and PAC-status could be imposed. There would be no examination of non-regulable speech or other factors. *See also Bartlett*, 168 F.3d at 712.

The Ninth Circuit, however, declined to recognize that major purpose must be determined "as an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287, instead deciding that the support/oppose test and the PAC definition containing undefined "expectations" and vague terms such as "contribution," and "expenditure" were adequate and citing to non-cognizable activity to determine HLW's major purpose. App. 34-37, 61-62a.

How "major purpose" is determined is a vital question of federal law that this and other courts have resolved differently than the decision below. This petition should be granted to reaffirm that only regulable, election-related speech may be considered in determining "the major purpose" of a group for the purpose of imposing PAC-status and PAC-style burdens.

III. Did *Citizens* Approve "Onerous" PAC-Style Disclosure Under "Exacting Scrutiny"?

The decision below relied on *Citizens*, 130 S.Ct. 876,

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[27] *See also FEC v. GOPAC*, 917 F. Supp. 851, 852 (D.D.C. 1996) (PAC-status determination done by particular year).

as authority for treating PAC-status and PAC-style burdens as "mere disclosure" subject to complaisant "exacting scrutiny," App. 24a, under which it held that the only consideration was "whether the law's requirements are substantially related to a sufficiently important governmental interest." App. 25a. It readily found an informational interest sufficient, App. 25-31a, decided that PAC-style burdens were not particularly onerous under exacting scrutiny, App. 40-44a, and held that the "modest political committee disclosure requirements are substantially related to the government's interest in informing the electorate." App. 44a.

This raises the third vital question requiring this Court's decision: Was *Citizens*, 130 S.Ct. 876, carte blanche for imposing—in the name of "mere disclosure" and under complaisant scrutiny—the PAC-style organization-wide disclosure and other administrative burdens that *Citizens* rejected as "onerous" and which could not be imposed on groups not properly PACs, *id.* at 898, when the informational interest could be met under the a simple federal-style scheme of disclaimers and one-time, event-driven reports that *Citizens* left in place for electioneering communications?

A. The Decision Below Conflicts with this Court.

The answers to four corollary questions demonstrates the conflict between the decisions of this Court and the Ninth Circuit. First, has this Court viewed PAC-style burdens as onerous or modest? Clearly the sort of burdens at issue here have long been considered onerous. *MCFL* considered them onerous. It examined two kinds of burdens (divided into two groups by the word "[f]urthermore," 479 U.S. at 254-55) with the first group being the sort at issue here. That group included

"[d]etailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records." *Id.* at 254. The plurality said that such burdens "impose administrative costs that many small entities may be unable to bear" and "such duties require a far more complex and formalized organization than many small groups could manage." *Id.* at 254-55. Only *after* these PAC-style burdens were thus pronounced onerous did the discussion turn to source limitations. *Id.* at 255. So even *absent* source-and-amount restrictions, PAC-style burdens were found onerous in *MCFL*.[28] Justice O'Connor concurred that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." *Id.* at 266.

Furthermore, the principal opinion in *WRTL-II* agreed that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." 551 U.S. at 477 n.9 (Roberts, C.J., joined by Alito, J.) (*citing MCFL*, 479 U.S. at 253-255 (plurality opinion)). And *Citizens* listed the PAC-style burdens at issue here, with no mention of source-and-amount limitations, and pronounced these precise burdens "onerous." 130 S.Ct. at 898.

So for the Ninth Circuit to pronounce these PAC-style burdens "not particularly onerous" in *ARTLC*, 441 F.3d at 791, and "somewhat modest" in the decision below, App. 44a, conflicts with the decisions of this

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[28] And *MCFL* explicitly said that the fact that MCFL had a *PAC* did not alter the analysis, 479 U.S. at 255 n.8, which vitiates the Ninth Circuit's argument to the contrary with regard to HLW. App. 40a.

Court.[29]

Second, what standard of review has this Court applied to PAC-style burdens? In *MCFL*, this Court applied strict scrutiny to the determination of whether PAC-status could be imposed on an *MCFL*-corporation. This is particularly evident in its holding that the less-restrictive means of simple one-time, event-driven, independent-expenditure reports for groups that were not properly PACs adequately met the government's informational interest. 479 U.S. at 262. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled on other grounds*, *Citizens*, 130 S.Ct. 876, this Court also held that strict scrutiny applied to imposed PAC-style burdens. 494 U.S. at 658 ("Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. Thus, they must be justified by a compelling state interest." (*citing MCFL* plurality and concurring opinions)).

It is not enough to say that *MCFL* and *Citizens* involved a prohibition and the present one does not, as the Ninth Circuit did, App. 21-25a, because both *MCFL* and *Citizens* directly applied strict scrutiny to their analysis of the PAC-style burdens, not just the prohibition. *Citizens* directly addressed the government's argument that there really was *no* prohibition because the PAC-option was available. 130 S.Ct. at

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[29] And the Ninth Circuit's view that Washington's PAC-style scheme is "not unduly onerous," App. 43a, is contradicted by Washington's own *PAC Manual*, which declares that "[t]reasurers for most political committee[s] . . . will have to devote many hours to keeping exact records and filing accurate, detailed reports of receipts and expenditures." App.138a ¶ 44.

897. Consequently, *Citizens* evaluated the PAC-style burdens as if there *were* no prohibition. *Citizens* evaluated them under strict scrutiny to see if the PAC-option adequately protected First Amendment rights, holding that it did not. *Id.* at 897-99. If PAC-style burdens don't protect First Amendment rights as the only option because of a prohibition, then they don't protect the group's rights as the only option because the same "onerous" burdens have been imposed in the name of "mere disclosure." In other words, if a prohibition is eliminated but the same onerous PAC-style burdens remain—or a nearly identical subset—the same scrutiny that originally applied should yet be applied to this effort to circumvent the holding that such burdens unduly undermine First Amendment rights.

Third, even if "exacting scrutiny" applies to PAC-style burdens, as the Ninth Circuit held, App. 24-25a, would it be complaisant or high exacting scrutiny? *Buckley* called "exacting scrutiny" the "strict test" and employed it as a non-complaisant test. 424 U.S. at 66. In *Davis v. FEC*, 128 S.Ct. 2759 (2008), this Court held that, under "exacting scrutiny," "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* at 2775. Here the burdens are serious. So even assuming *arguendo* that *Citizens* imposed "exacting scrutiny" on PAC-style burdens, it would have to be a demanding exacting scrutiny—the functional equivalent of strict scrutiny, which the Ninth Circuit did not apply.

Fourth, what sort of disclosure did *Citizens* leave in place for electioneering communications? *Citizens* upheld federally-defined disclosure reports for communications meeting the federal "electioneering communi-

cation" definition (as opposed to disclosure only for those meeting *WRTL-II*'s appeal-to-vote test, *WRTL-II*, 551 U.S. at 451). Electioneering-communication disclosure requires a simple disclaimer, 2 U.S.C. § 441d, and simple, one-time, event-driven report when the cost of the broadcast ads exceed $10,000 (per calendar year) upon which a *single* statement is filed identifying the payor (and its accounts custodian and principal place of business, if not an individual), anyone else sharing control over the disbursements, itemized disbursements over $200 for electioneering communications, the election and candidate identified, and the names of persons donating $1,000 or more for the purpose of making electioneering communications. 2 U.S.C. 431(f)(1)-(2). This is not organization-wide, *PAC-style* reporting of the sort declared onerous in *Citizens*, and this Court's exacting scrutiny of the simple disclosure scheme is not warrant for complaisant scrutiny of the PAC-style burdens to which this Court has applied strict scrutiny.

The answers to these four corollary questions reveal that *Citizens* is not carte blanche for PAC-style burdens under complaisant exacting scrutiny for groups not properly PACs. PAC-style burdens are inherently onerous because they go beyond satisfying a mere informational interest and treat as PACs groups whose focus is issue advocacy.

B. The Decision Below Creates a Circuit Split.

The decision below creates a circuit split with both the Fourth and the Tenth Circuits on the level of scrutiny to be applied. In *Leake*, the Fourth Circuit applied a "high bar . . . developed in the strict-scrutiny context," to review all provisions, including standards for imposing PAC-status. 525 F.3d at 311 (Michael, J.,

dissenting). The Tenth Circuit in *CRLC*, 498 F.3d at 1146, did likewise.[30]

The decision below also creates an intra-circuit split in the Ninth Circuit since prior decisions have applied strict scrutiny to PAC-style burdens in the ballot-initiative context, *CPLC-I*, 328 F.3d at 1101 n.16, and *CPLC-II*, 507 F.3d at 1177-78, decisions that the court below erroneously asserted were effectively overruled by *Citizens*. App. 41-42a.

Whether *Citizens* was carte blanche for imposing, under complaisant scrutiny, PAC-style burdens that *Citizens* rejected as "onerous" is a vital question of federal law that this and other courts have resolved differently than the decision below. This petition should be granted to reaffirm that PAC-style burdens are reviewed under strict scrutiny and may only be imposed on groups having the major purpose of regulable, election-related speech.

IV. Do this Court's High Standards for Definitions and Tests Regulating Speech Survive?

HLW challenged, as unconstitutionally vague and overbroad, terminology in Washington's PAC definition in Count 1; the definitions of "independent expenditure" (Count 2, challenging "in support of or in opposition to any candidate or ballot proposition") and

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[30] The Tenth Circuit, using exactly scrutiny, recently found Colorado's campaign-disclosure statutes unconstitutional as applied to a ballot-issue committee that raised less than $1,000. *Sampson v. Buescher*, 2010 WL 4456970 (10th Cir. Nov. 9, 2010). Exacting scrutiny was appropriate because the political committee definition was not at issue since the major purpose test was satisfied. The court was evaluating the disclosure burdens.

"political advertising" (Count 3, challenging "for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign" and "mass communication"); and regulation of a "rating, evaluation, [or] endorsement" (Count 4, challenging the stated terms as well as "for or against a candidate or ballot proposition"). The decision below rejected all of the vagueness and overbreadth challenges it considered, App. 55-60a—it did not discuss some—though the challenged language is like terminology this Court has already rejected.

This raises the fourth vital question requiring this Court's decision: Are the high vagueness and overbreadth standards and bright, speech-protective tests of *Buckley*, 424 U.S. 1, and *MCFL*, 479 U.S. 238, now abandoned so that states may regulate speech under vague terminology comparable to that previously rejected by this Court?

A. The Decision Below Is in Conflict Decisions of this Court.

This Court has historically been highly protective of the people's issue advocacy by requiring bright-line tests: "'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" *Buckley*, 424 U.S. at 41 n.48 (citation omitted). "The test is whether the language of [the challenged provision] affords the '(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 41 (citation omitted). This Court has specifically found vague and overbroad the operative phrases "relative to a clearly identified candidate," *id.* at 39-44; "for the purpose of . . . influencing the nomination or election of candidates," *id.* at 23 n.24, 76-81;

"'advocating the election or defeat of' a candidate," *id.* at 42; and "in connection with any election," *MCFL*, 479 U.S. at 248-49; including in *disclosure* contexts. In particular, *Buckley* required that disclosure of "expenditures" be limited to magic-words, express-advocacy communications. 479 U.S. at 80. While *Citizens* approved extending disclosure to all federally defined "electioneering communications,"130 S.Ct. at 913-14, that definition has a very bright line,[31] and so *Citizens* does not serve as justification for regulating issue advocacy under vaguer terminology.

B. The Decision Below Is in Conflict with Other Circuits.

The decision below expressly noted a circuit split with the Fourth Circuit, App. 34a, where the Fourth Circuit had held that the only two regulable communications are federally defined "independent expenditures" and "electioneering communications," because those strike the right "balance" between liberty and governmental authority to regulate elections. *Leake*, 525 F.3d at 284.

Whether this Court's high vagueness and overbreadth standards and bright, speech-protective tests govern speech in this area is a vital question that this and other courts have resolved differently than the decision below. This petition should be granted to reaffirm that speech regulations require bright, speech-protective definitional lines and tests.

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[31] Electioneering communications are essentially broadcast ads clearly identifying candidates in 30- and 60-day periods before primaries and general elections. 2 U.S.C. 431(4)(3).

Conclusion

The decision below upheld PAC-style burdens because it pronounced them "modest." App. 44a, 61a. Yet those "modest" burdens chilled HLW's speech. This Court has recognized the danger of creeping, incremental, free-speech encroachments presented as "modest":

> Our pursuit of other governmental ends . . . may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the *modest* diminution of speech as we are against its sweeping restriction.

MCFL, 479 U.S. at 264-65 (emphasis added). This Court's vigilance is again required. For reasons stated, the petition should be granted.

Respectfully submitted,

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