Docket No. 09-35128

In the

United States Court of Appeals

For the

Ninth Circuit

HUMAN LIFE OF WASHINGTON, INC.,

Plaintiff-Appellant,

v.

BILL BRUMSICKLE (Chair), KEN SCHELLBERG (Vice Chair), DAVE SEABROOK (Secretary), JANE NOLAND, JIM CLEMENTS, in Their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission, ROB McKENNA, in His Official Capacity as Washington Attorney General,

Defendants-Appellees.

Appeal from a decision of the United States District Court for the Western District of Washington, (Seattle) · No. 08-CV-00590 · Honorable John C. Coughenour

BRIEF OF APPELLANT

JOHN J. WHITE, JR., ESQ.
LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, Washington 98033-6160
(425) 822-9281 Telephone
(425) 828-0908 Facsimile

Counsel for Appellant, Human Life of Washington, Inc.

JAMES BOPP, JR., ESQ.
RICHARD E. COLESON, ESQ.
JEFFREY P. GALLANT, ESQ.
CLAYTON J. CALLEN, ESQ.
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
(812) 232-2434 Telephone
(812) 235-3685 Facsimile

Lead Counsel for Appellant, Human Life of Washington, Inc.

Corporate Disclosure Statement

Human Life of Washington, Inc. ("**HLW**") is a nonprofit, non-stock corporation without parent corporation or publicly held company owning any of its stock.

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes and Regulations

Other Authorities

Jurisdiction

The district court had jurisdiction over this civil action arising under 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States Constitution and challenging laws, regulations, and enforcement policies established and maintained under color of law of the State of Washington. 28 U.S.C. §§ 1331 and 1343(a)(3). The challenged provisions and complaint established an "actual controversy" within the meaning of 28 U.S.C. § 2201, entitling HLW to a declaratory judgment and supplemental relief under 28 U.S.C. § 2202. This Court has jurisdiction of the appeal of the final Judgment, Excerpts of Record–1-2 ("**ER**") (Dkt.–85), which resolved all issues. Fed. R. Civ. P. 54(b); 28 U.S.C. § 1291. Judgment was filed January 23, 2009. ER–2. HLW filed timely notice of appeal on February 13, 2009, ER–3 (Dkt.–86). Fed. R. App. P. 4(a)(1)(A).

Issues

This case follows *California Pro-Life Council v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) ("***CPLC-II***"), in which this Court answered the question remanded by *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003) ("***CPLC-I***"): whether California could constitutionally impose "political committee" ("**PAC**") status and burdens on "organizations like CPLC" in the ballot-initiative context. *Id.* at 1101. *CPLC-II* held that PAC-style burdens could not be im-

posed, 507 F.3d at 1189-90, on "groups like CPLC . . . . 'whose *major purpose* is not campaign advocacy, but who occasionally make independent expenditures.'" *Id.* at 1177 (citation omitted) (emphasis added). So a central issue is whether Washington *may* do what this Court said California may *not* do in the ballot-initiative context, i.e., impose PAC-style burdens on organizations lacking the major purpose of passing or defeating ballot initiatives. This central issue is addressed first.

1. Whether Washington's "political committee" definition, Wash. Rev. Code ("**RCW**") § 42.17.020(39), and its implementing "*a* primary purpose" and "receiver of contributions" tests, are unconstitutional under the First and Fourteenth Amendments facially and as applied to HLW and its activities.

2. Whether Washington's "independent expenditure" definition, RCW § 42.17.100, is unconstitutional under the First and Fourteenth Amendments facially and as applied to HLW's activities.

3. Whether Washington's "political advertising" definition, RCW § 42.17.020(38), is unconstitutional under the First and Fourteenth Amendments facially and as applied to HLW's activities.

4. Whether Washington's reporting requirement for communications containing "a rating, evaluation, endorsement, or recommendation for or against a candi-

date or ballot measure," Wash. Admin. Code ("**WAC**") § 390-16-206, is unconstitutional under the First and Fourteenth Amendments facially and as applied to HLW's activities.

Case

On April 16, 2008, HLW filed its *Verified Complaint* against Washington campaign-finance provisions and policies in the ballot-measure context alleging violation of First and Fourteenth Amendment rights. ER–69-93. In particular, HLW wished to engage in constitutionally protected issue advocacy concerning physician-assisted suicide ("**PAS**") while public interest in the issue was at its highest, i.e., during efforts to qualify and pass Washington Initiative Measure No. 1000 ("**I-1000**"). On April 16, HLW moved for a preliminary injunction (Dkt.–8), which was denied July 9 (Dkt.–59). On August 7, HLW moved for summary judgment (Dkt.–66). Briefing[1] was completed August 29 (Dkt.–78), and the court did not hold the requested hearing. On November 4, Washington voters enacted I-1000 without HLW ever having been able to do its PAS issue advocacy because it was chilled. On January 8, 2009, summary judgment was denied (Dkt.–82). ER–4. Defendants had not cross-moved for summary judgment, so on January 16, HLW

[1] The court denied parties' request for more pages for summary judgment briefing, confining memoranda to an inadequate twenty-four pages (twelve for reply) and threatening to disregard extensive footnotes. *See* Dkt. 61 at 7, Dkt. 65.

moved for judgment to allow this appeal (Dkt.–83). On January 23, judgment for Defendants was entered disposing of all issues and dismissing the action with prejudice (Dkt.–85). ER–1. On February 13, HLW noticed appeal (Dkt.–86). ER–3.

Facts

The following facts are taken primarily from the *Verified Complaint* ("**VC**"), ER–69-93, and are left in its prospective language, providing the key facts before the district court when relief was requested.

HLW wants to engage in constitutionally-protected "issue advocacy" on the subject of PAS, as it has in the past. ER–69, VC–¶ 1. "Issue advocacy 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." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("***WRTL-II***").[2] ER–69, VC–¶ 2.

"Issue advocacy" is distinguishable from "campaign speech, or 'express advocacy,'" or "electioneering," because it is "speech about public issues more generally." *Id.* at 2659. This protected "issue advocacy" is also known as "political

[2] Since this controlling opinion by Roberts, C.J., joined by Alito, J., states the holding, *see Marks v. United States*, 430 U.S. 188, 193 (1977) (holding is position on narrowest grounds), it will simply be referenced as *WRTL-II*.

speech." *Id.* at 2659-60, 2664-67, 2669 n.7, 2671, 2673. ER–69-70, VC–¶ 3.

Because an effort is under way in 2008 to qualify and pass I-1000, which would legalize PAS, HLW must either endure unconstitutional burdens under Washington law or be chilled from its protected issue advocacy. ER–70, VC–¶ 4.

HLW intends to solicit funds for issue-advocacy radio advertisements that it intends to broadcast concerning PAS. These "genuine issue ads," *WRTL-II*, 127 S. Ct. at 2659, 2662, 2668-70 & n.8, 2673, will not be "unambiguously campaign related," *Buckley v. Valeo*, 424 U.S. 1, 81 (1976), because they will not expressly advocate for or against I-1000, but they will be about PAS. However, as set out below, Washington's vague and overbroad laws burden HLW's planned issue advocacy and put it at risk of being deemed a political committee. Becoming a "required filer" would expose HLW to random "audits and field investigations" under RCW § 42.17.365 and various costs, fees, and penalties, including, but not limited to: a civil penalty of up to $10,000 per violation, RCW § 42.17.390(3) (with treble damages for a contribution limit violation); a civil penalty of $10 per day for failure to file required reports, RCW § 42.17.390(4); a civil penalty equivalent to the amount not reported, where reporting was required, RCW § 42.17.390(5); the states's costs of investigation and trial, including attorney's fees, RCW § 42.17.400(5); and judgment, including the state's costs and fees, that may be trebled as punitive damages where there is a civil action and the violation

is found intentional. RCW § 42.17.400(5). HLW believes that the burdens imposed by Washington's statutes and regulations are unconstitutional and so does not intend to comply with them, but HLW is chilled from doing its planned activity because it reasonably fears enforcement by Defendants. ER–71, VC–¶ 10.

HLW is a nonstock, ideological, Washington corporation, recognized by the IRS as a nonprofit organization under 26 U.S.C. § 501(c)(4). As stated in HLW's Mission Statement, its "mission is to reestablish throughout our culture, the recognition that all beings of human origin are persons endowed with intrinsic dignity and the inalienable right to life from conception to natural death. To accomplish this restoration, [HLW] use[s] peaceful and lawful means of educating and motivating the human heart." HLW is fully independent of any candidate, political party, or political committee. ER–4, VC–¶ 13.[3]

[3] The district court mentioned that HLW has a connected PAC, "HLPAC," apparently thinking the fact legally significant. ER–8. HLPAC's activities are not legally relevant because HLW and HLPAC are separate legal entities and the activities of one are not attributable to the other. *See California Medical Association v. FEC*, 453 U.S. 182, 196 (1981) ("[The] claim that [a PAC] is merely the mouthpiece of [the sponsoring organization] is untenable. [The PAC] instead is a separate legal entity that receives funds from multiple sources and that engages in independent political advocacy."). If the actions of a PAC were attributable to a connected organization, then the connected organization would be in violation of all laws limiting campaign-related activity to PACs and there would be no point to PACs. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 n.8 (1986) ("***MCFL***") (plurality opinion) ("The fact that MCFL established a political committee in 1980 does not change" the burden of imposed PAC-status on MCFL itself); *WRTL-II*, 127 S. Ct. at 2671 n.9 ("'PAC alternative' [does not] give[] corporations a constitutionally sufficient outlet to speak" because "PACs impose

Defendant officers and commissioners of the Washington State Public Disclosure Commission ("**PDC**") have enforcement authority over violations of Washington's election law scheme. RCW § 42.17.395. ER, 73, VC–¶ 14.

Defendant Rob McKenna is the Washington Attorney General, who has enforcement authority over violations of Washington's election law scheme. RCW § 42.17.400. ER–73, VC–¶ 15.

PAS is a long-time issue for HLW, which has over the years expended considerable time and resources to educate the public on the issue. HLW intends to continue its public education in 2008. ER–73, VC–¶ 17.

PAS was especially in public awareness and debate in 1991, when the people considered and defeated a ballot initiative to enact a state constitutional amendment legalizing PAS. HLW made special efforts to educate the public regarding PAS in 1991, while people were unusually focused on, and attentive to arguments about, this perennial public issue. ER–73-74, VC–¶ 18.[4]

---

well-documented and onerous burdens, particularly on small nonprofits."); *CPLC-II*, 507 F.3d at 1188 (PAC option "discounted" by *MCFL*).

[4] The district court mentioned HLPAC activities opposing a 1991 PAS ballot initiative and I-1000, apparently thinking them legally relevant. ER–8. HLPAC's activities are irrelevant for the reasons stated in n.3. HLW's own opposition to the 1991 ballot initiative, ER–8, is relevant to the concreteness of this case, but not to interpreting any of HLW's proposed communications. No other activity of HLW may be employed to interpret the particular communications at issue here because *WRTL-II* reaffirmed *Buckley*'s rejection of any intent-and-effect test for interpreting communications. 127 S. Ct. at 2665 ("[T]his Court in *Buckley* had already

The year 2008 is an especially vital time for HLW to address the PAS issue because people again will be unusually attentive as it swirls to the forefront of public attention. The PAS issue is in people's focus because proposed I-1000 was filed with the Secretary of State on January 9, 2008, and it will appear on the November 4, 2008 ballot. The high-profile nature of PAS also helps to give greater visibility to the broad range of prolife issues that HLW advances by speaking about the ethic of life in general, which includes the issues of abortion, infanticide, and euthanasia. ER–74, VC–¶ 19.

By being unable to speak on assisted suicide, HLW is affected not just by the loss of its ability to speak on that issue but also by the loss of ability to speak effectively on other non-ballot issues that are part of the ethic of life that recognizes, and seeks protection for, the inherent value of all human life from fertilization to natural death. ER–74, VC–¶ 19.

Because PAS is now especially in the public awareness and debate, people will be particularly receptive to arguments about PAS, making 2008 an important time for HLW to advocate concerning prolife issues. Therefore, HLW intends to solicit

---

rejected an intent-and-effect test for distinguishing between discussions of issues and candidates."). *WRTL-II* made clear that the fact that WRTL and its PAC opposed a Senator's reelection went "to WRTL's subjective intent in running the ads, and . . . [so wa]s irrelevant. . . . WRTL d[id] not forfeit its right to speak on issues simply because in other aspects of its work it also oppose[d] candidates . . . involved with those issues." *Id.* at 2668.

funds as soon as possible for issue-advocacy radio advertisements that it intends to broadcast as soon as possible concerning the PAS issue. ER–75, VC–¶ 21.

HLW intends to mail, email, and post on its website as soon as possible an issue-advocacy fundraising letter ("Letter") in an effort to solicit a large number of donors who support HLW's message. The Letter contains no express advocacy, i.e., it does not expressly advocate the passage or defeat of a clearly identified ballot initiative. HLW intends to mail more than 1,000 copies (a statutory trigger) of the Letter (identical except for addressee changes) in 2008. HLW intends to spend in excess of $100 (a statutory trigger) for the 2008 distribution of its Letter. ER–75-76, 90, VC–¶¶ 22, 27, VC–Exhibit 2.

HLW intends to have a vendor employ a telephone fundraising script ("Phone Script") in an effort to solicit a large number of donors who support HLW's issue advocacy. The Phone Script contains no express advocacy, i.e., it does not expressly advocate the passage or defeat of a clearly identified ballot initiative. HLW intends to have its telephone fundraising company make numerous phone calls in an effort to raise funds for its issue advocacy. HLW intends to spend in excess of $100 (a statutory trigger) for the 2008 distribution of its Phone Script by paid phone callers. ER–75-76, 92, VC–¶¶ 23, 28, VC–Exhibit 3.

HLW intends to broadcast issue-advocacy radio ads ("Ads") as soon as possible. The Ads contain no express advocacy, i.e., they do not expressly advocate the

passage or defeat of a clearly identified ballot initiative.[5] HLW intends to run these Ads in 2008, including within 21 days of the November 2008 election, and to run the Ads and materially similar ads repeatedly in 2008 as funds allow. HLW intends to spend in excess of $1000 (a statutory trigger) to broadcast the Ads in 2008. ER–75-76, 93, VC–¶¶ 24, 29, VC–Exhibit 4.

HLW intends to do these and substantially-similar fundraising and public communications in support of its PAS issue advocacy in 2008. ER–75-76, VC–¶ 25.

The expenditures for publicly distributing HLW's issue-advocacy Letter, Phone Script, and Ads will not be "contributions" by reason of coordination as defined by RCW § 42.17.020(15)(a) and WAC § 390-05-210. ER–77, VC–¶ 32.

HLW's expenditures for 2007 total about $180,000, and HLW expects to have a similar level of expenditures in 2008. HLW's expenditures for distributing its Letter, Phone Script, and Ads will not exceed (nor even be close to) 50% of its expenditures so expenditures for these activities will not be the major purpose of HLW. In fact, HLW anticipates spending less than 20% of its annual budget for these Ads. ER–77, VC–¶ 31.

[5] HLW does not plan to do, or solicit funds to do, "express advocacy" of the passage or defeat of I-1000, i.e., "independent expenditures" as the proper scope of that term is recognized in the ballot-initiative context. *See CPLC-I*, 328 F.3d at 1096-00 (refusing to find "independent expenditure" definition vague and overbroad because it had been given express-advocacy construction). But the PDC interprets HLW's proposed communications as not issue advocacy, but express advocacy. *Compare* VC (ER–69) *with* Answer (ER–51) at ¶¶ 27-29, 30, 35-37.

HLW intends to do materially similar fundraising and issue advocacy in future years as issues of concern to HLW become subjects of public debate, which HLW believes is reasonably likely to recur at many points in the future, just as it has in HLW's past experience. ER–77, VC–¶ 33.

HLW reasonably fears that it will be considered a "political committee" by Defendants—although passing or defeating ballot measures is not its major purpose—so that HLW will suffer a burdensome investigation, enforcement, and penalties for not complying with Washington's requirements for political committees. ER–77, VC–¶ 34.

HLW reasonably fears that its Letter, Phone Script, and Ads will be considered "independent expenditures" by Defendants—despite the lack of express advocacy—so that HLW will suffer an investigation, enforcement, and penalties for not complying with Washington's burdensome requirements for groups engaging in independent expenditures. ER–77, VC–¶ 35.

HLW reasonably fears that its Letter, Phone Script, and Ads will be considered "political advertising" by Defendants—despite the lack of express advocacy—so that HLW will suffer an investigation, enforcement, and penalties for not complying with Washington's burdensome requirements for groups engaging in political advertising. ER–77, VC–¶ 36.

HLW reasonably fears that its Letter, Phone Script, and Ads will be considered

as "a rating, evaluation, endorsement, or recommendation for or against . . . a ballot measure" by Defendants—despite the lack of express advocacy—so that HLW will suffer an investigation, enforcement, and penalties for not complying with Washington's burdensome requirements for groups engaging in such communications. ER–78, VC–¶ 37.

HLW believes that the challenged provisions herein impose unconstitutional burdens on constitutional rights and so will not comply with them, but because HLW fears investigation, enforcement, and penalties for noncompliance with Washington law, HLW is chilled from doing its intended First Amendment activities and will not do them unless it receives the declaratory and injunctive relief prayed for herein. ER–78, VC–¶ 38.

The PDC cannot issue easily obtained *binding* "advisory opinions" of the sort issued by the Federal Election Commission. *See* 11 C.F.R. §§ 112.1-112.6. ER–78, VC–¶ 39; Rippie Decl. ¶ 22 (Dkt. 47).[6]

HLW's chilled speech, the loss of opportunity to advocate concerning the PAS

[6] The district court suggested that HLW could have obtained a pre-enforcement interpretation from the PDC through an informal advisory opinion, formal declaratory order, interpretative statement, or petition for formal rulemaking. Informal advisory opinions and interpretative statements are "advisory only." RCW § 34.05.230(1). The PDC is not obliged to respond to a request for a formal declaratory order, and may issue nonbinding orders. WAC § 390-12-250(5). A formal declaratory order is "not a substitute for a compliance action and is intended to be prospective in effect." WAC § 390-12-250(8).

issue, and the loss of the opportunity to effectively advocate the full range of issues included in the life ethic because of the inability to advocate against PAS are irreparable harms for which HLW has no remedy at law. ER–78, VC–¶ 40.

Argument Summary

WRTL-II is relevant to this case because, inter alia, it dealt with the same problem of an issue-advocacy group having to choose between assuming the "onerous" burdens of PAC status or forgoing its issue advocacy. More importantly, it reaffirmed that the First Amendment provides special protection to issue advocacy and issue-advocacy groups, as first set out in *Buckley*. *Buckley* required as a threshold test that all campaign-finance regulation reach only unambiguously-campaign-related First Amendment activity and implemented this principle with bright-line tests, including the express-advocacy test for communications that may be regulated and the major-purpose test for organizations that may be subjected to PAC status and burdens. *See* Part I.

Washington's PAC definition and implementing tests are unconstitutional under the Supreme Court's unambiguously-campaign-related principle, its major-purpose test, and *CPLC-I* and *CPLC-II* and because they employ overbroad and vague language. *See* Part II.

Washington's regulation of three types of communications is unconstitutional

under the Supreme Court's unambiguously-campaign-related principle, its express-advocacy test, and *CPLC-I* and because the provisions contain unconstitutionally overbroad and vague language. *See* Parts III-V.

The challenged provisions should be declared unconstitutional facially in addition to being struck as applied to groups like HLW. *See* Part VI.

Argument

While the district court conceded that *WRTL-II* "suggests a renewed concern for the chilling effect of campaign finance laws on the discussion of public issues," it then ignored *WRTL-II* based on the distinction that it addressed a "*prohibition*," not "*disclosure*." ER–30. The district court did not understand that PAC status is no *mere* disclosure provision because "PACs impose well-documented and onerous burdens, particularly on small nonprofits," *WRTL-II*, 127 S. Ct. at 2671 n.9. It also did not understand that the controlling California Pro-Life Council cases about PAC-style regulations in the ballot-initiative context expressly relied on *MCFL*, which involved the *same prohibition* (2 U.S.C. § 441b). They did so in establishing the level of scrutiny, *CPLC-I*, 328 F.3d at 1101 n.16, the major-purpose test analysis, *id.*, and the less-restrictive-means analysis on which the case was finally decided, *CPLC-II*, 507 F.3d at 1189 (*quoting MCFL*, 479 U.S. at 262; *citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978)) (also a

prohibition case in the ballot-initiative context)).

And the court misunderstood two key things about *WRTL-II*. First, WRTL had to choose (just as MCFL had to do) between using (or being) a PAC or being prohibited from its issue advocacy,[7] and it eventually vindicated its constitutional right to do issue advocacy without having to assume PAC status or employ a PAC. HLW had the same choice between PAC status and burdens or being prohibited from its issue advocacy. As WRTL had done, HLW refused to accept PAC status and burdens, believing them unconstitutional, and consequently was in fact prohibited from doing its issue advocacy by serious penalties for violating the law. So *WRTL-II* is directly on point about Washington's *prohibition* on *issue advocacy* absent *PAC* compliance.[8] And *WRTL-II* expressly rejected the argument that the

---

[7] It was argued in the *WRTL-II* litigation that the prohibition on corporate electioneering communications should not be called a "prohibition" because WRTL could do issue advocacy through its PAC. *See*, *e.g.*, FEC's Opp'n to Pl.'s Mot. Prelim. Inj. at 36, *WRTL v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2004) (No. 04-1260). *WRTL-II* rejected that argument. *See* 127 S. Ct. at 2661 ("prohibition"). Whatever its PAC might do, WRTL *itself* could not do the activity.

[8] The prohibition at issue in *WRTL-II* was based on corporate-form "corruption," *see*, *e.g.*, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), and applied only to corporations and unions, which is not at issue in the present case, but *WRTL-II* held that *no* form of corruption justified banning *issue* advocacy that was neither express advocacy nor it functional equivalent, 127 S. Ct. at 2672-73. So *WRTL-II* may not be distinguished on that basis because a corruption interest "has no application to issue advocacy of the sort engaged in by WRTL." *Id.* at 2673. Both cases deal with issue advocacy, which is the central analytical key.

PAC-option adequately protected WRTL's rights to do issue advocacy:

> [T]he dissent overstates its case when it asserts that the "PAC alternative" gives corporations a constitutionally sufficient outlet to speak. PACs impose well-documented and *onerous* burdens, *particularly on small nonprofits*. *McConnell* [*v. FEC*, 540 U.S. 93 (2003),] did conclude that segregated funds "provid[e] corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy" and its functional equivalent, but that holding did not extend beyond functional equivalents—and if it did, the PAC option would justify regulation of all corporate speech, a proposition we have rejected.

Id. at 2671 n.9 (citations omitted) (emphasis added).

Second, *WRTL-II* is the Supreme Court's latest instruction on the *analysis* that must be applied to protect issue advocacy. *WRTL-II* reaffirmed the protective analysis of *Buckley*, 424 U.S. 1, which has broad application well beyond the prohibition context. And *WRTL-II* limited the broad language, analysis, and purported reach of *McConnell*, 540 U.S. 93, once viewed by some as giving carte blanche to speech and association regulations in the campaign-finance context.[9] *WRTL-II* reaffirmed *Buckley*'s insistence on high protection for issue advocacy, which the district court conceded but did not apply.

This analysis extends to *any* regulation of issue advocacy, requiring far stricter scrutiny on all counts than the court employed (and different results). Because

---

[9] This reaffirmation of *Buckley*'s analysis and limitation on *McConnell* limits the precedential effect of decisions reading *McConnell* as permitting greater regulation of issue advocacy, such as *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006) ("***ARTLC***"), on which the district court relied. *See infra*.

WRTL-II was reaffirming the analysis of the leading cases on campaign-finance constitutional law, such as *Buckley* and *MCFL*, the reaffirmed analysis of those cases is applicable *wherever* it applies (in lieu of any analysis in *McConnell* that arguably differs), even if a new case is arguably distinguishable from *WRTL-II* on its facts. That controlling applicable analysis is set out next.

I. The Constitution Specially Protects Groups Doing Issue Advocacy.

The Supreme Court's constitutional analysis of the First Amendment protection for issue advocacy and issue-advocacy groups is straightforward. Proper application of these first principles readily resolves this case in HLW's favor.

First, "'speech concerning public affairs is more than self-expression; it is the essence of self-government.' And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'" *Bellotti*, 435 U.S. at 777 n.11 (citations omitted).

Second, constitutional analysis of campaign-finance laws must begin with the mandate that "[government] shall make no law . . . abridging the freedom of speech." *WRTL-II*, 127 S. Ct. at 2674 (*quoting* U.S. Const. amend. I). This "'guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 15 (citation omitted).

Third, government may regulate First Amendment activity that is *unambigu-*

ously related to election campaigns because of its authority to regulate elections. *Id.* at 13 ("The constitutional power of Congress to regulate federal elections is well established . . . ."). This authority does not extend beyond speech and association clearly related to elections. Central to *Buckley*'s analysis in the expenditure-disclosure context is its question of whether "the *relation* of the information sought to the purpose of the Act [regulating elections] may be too *remote*," and, therefore, "*impermissibly broad*," *id.* at 80 (emphasis added). So the Court requires that government may only regulate First Amendment activity where the activity is "*unambiguously related* to the *campaign* of a particular federal candidate," *id.* at 80 (emphasis added), i.e., "*unambiguously campaign related*," *id.* at 81 (emphasis added).[10] (After this first-principle threshold is met, regulations must

---

[10] The Fourth Circuit also identified this need to "cabin" campaign-finance regulations with the unambiguously-campaign-related principle:

> *Buckley* . . . recognized that legislatures have . . . power to regulate elections . . . and . . . may establish standards that govern the financing of political campaigns. In particular, the Court identified "limit[ing] the actuality and appearance of corruption as an important governmental interest served by campaign finance regulation. . . . The Court simultaneously noted, however, that campaign finance restrictions "operate in an area of the most fundamental First Amendment activities" and thus threaten to limit ordinary "political expression." . . . *Buckley* . . . recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by demarcating a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley,* campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular . . . candidate." . . . This is because only unambiguously campaign related com-

still survive "exacting scrutiny." *See infra*.) This principle will be called the unambiguously-campaign-related principle, using *Buckley*'s own terminology. In the ballot-initiative context, this principle would permit government to regulate only First Amendment activity that is *unambiguously* related to a ballot-initiative *campaign* itself, not expressive association about issues related to the campaign.[11]

Fourth, the unambiguously-campaign-related principle is implemented by bright-line tests (*see infra*) that are necessary to protect issue advocacy because of the dissolving-distinction problem that *Buckley* identified between "*discussion of issues and candidates*" and "*advocacy of election or defeat of candidates*":

> [T]he *distinction* between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often *dissolve* in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates

---

> munications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable.

North Carolina Right to Life v. Leake, 525 F.3d 274, 281 (4th Cir. 2008). *See also National Right to Work Legal Defense and Ed. Found'n, Inc. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008) (recognizing unambiguously-campaign-related principle as threshold requirement in the ballot-initiative context); *Broward Coalition of Condominiums, Homeowners Ass'ns and Community Orgs, Inc. v. Browning*, No. 4:08-cv-445, 2008 WL 4791004, at *6 (N.D. Fla. Oct. 29, 2008) (recognizing principle as threshold requirement).

[11] *Buckley* applied the unambiguously-campaign-related principle in four contexts: (a) "expenditure" limitations, 424 U.S. at 42-44; (b) PAC status and disclosure, *id.* at 79; (c) non-PAC disclosure of "contributions" and independent "expenditures," *id.* at 79-81; and (d) "contributions," *id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.").

> campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42 (emphasis added). The Court elaborated on the necessity of a bright line between (a) "*discussion, laudation, general advocacy*" and (b) "*solicitation*":

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between *discussion, laudation, general advocacy*, and *solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (emphasis added). In *MCFL*, the Court reaffirmed the need for a bright line "to distinguish *discussion of issues and candidates* from more pointed *exhortations to vote* for particular persons," 479 U.S. at 249 (emphasis added).[12] As applied in the ballot-initiative context, the dissolving-distinction problem requires a bright line test to distinguish between *discussion of issues and ballot measures* and *exhortations to vote* for or against a ballot initiative in order to protect the former from regulation.[13]

---

[12] *WRTL II* reiterated the need for bright-line speech protection based on this dissolving-distinction problem. *See* 127 S. Ct. at 2659, 2669.

[13] The district court argued that "[t]he Supreme Court has protected 'issue advocacy' from the federal campaign finance laws not because that speech is sacred, but simply because the rationales proffered for those laws have not justified im-

Fifth, the Court-approved, bright-line test to protect issue advocacy in the "expenditure" context is the express-advocacy test. *Buckley* and *MCFL* employed this test as the tool for fixing the dissolving-distinction problem. *Buckley* did so as to (1) a limit on "expenditure[s] . . . relative to a clearly identified candidate," 424 U.S. at 39-44, and (2) disclosure of expenditures "for the purpose of influencing" elections, *id.* at 79-80. The Court noted the need for a bright-line test because both "relative to" and "for the purpose of influencing" "share[d] the same potential for

---

posing broad burdens on public discourse." ER–31. This statement and the accompanying assertion that "'[i]n the ballot initiative context, . . . there is little, if any, meaningful distinction between issue and express advocacy," *id.*, demonstrate a misunderstanding of the precedent.

Of course, both express advocacy and issue advocacy are equally protected by the First Amendment, but the special protection for issue advocacy in the precedents results from the lack of constitutional justifications for regulating it. *WRTL-II* rejected an argument similar to the one the district court makes:

> At the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and "the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy." *McConnell*, [540 U.S.] at 205. This greater-includes-the-lesser approach is not how strict scrutiny works. A corporate ad expressing support for the local football team could not be regulated on the ground that such speech is less "core" than corporate speech about an election, which we have held may be restricted.

127 S. Ct. at 2671. The controlling cases have shown a special solicitude for issue advocacy, and *WRTL-II* reaffirmed this, as shown in text *supra*.

The district court's argument that express advocacy cannot be meaningfully distinguished from issue advocacy in the ballot-initiative context is both wrong (one calls for voting, one does not) and inconsistent with *CPLC-I*'s recognition of the express-advocacy test for expenditures in connection with ballot initiatives. *See* 328 F.3d at 1096-00.

encompassing both *issue discussion* and *advocacy of a political result*," *id.* at 79 (emphasis added). *MCFL* imposed the express-advocacy test on a prohibition on corporate and union expenditures "in connection with any election," citing the dissolving-distinction problem and the need for a bright line between issue discussions and exhortations to vote. 479 U.S. at 248-49. In the ballot-initiative context, this would permit requiring disclosure only as to expenditures that expressly advocate a vote for or against a ballot initiative, and *CPLC-I* held California's "independent expenditure" definition was not vague and overbroad in this context because it had been given an express-advocacy construction by California courts. 328 F.3d at1096-00. More vague and overbroad formulations are not permitted, and this has not changed in the wake of *McConnell*. *See infra*.[14]

---

[14] The only other Court-approved, bright-line test for communications is the "appeal to vote" test for communications that *also* meet the federal "electioneering communication" definition. *WRTL-II*, 127 S. Ct. at 2667. No "electioneering communication" definition is at issue here. In *Leake*, 525 F.3d at 282-83, the Fourth Circuit held that only two types of communications meet the unambiguously-campaign-related principle:

> Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that uses specific election-related words. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Sixth, the Court-approved, bright-line test to protect issue-advocacy *groups* from the dissolving-distinction problem is the major-purpose test, which determines which groups may be subjected to PAC status and burdens. *Buckley* created the test in the expenditure-disclosure context discussed above, noting that the unambiguously-campaign-related principle was implemented for PAC-style burdens by this test:

> To fulfill the purposes of the Act [i.e., regulating elections] they need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. *They are, by definition, campaign related*.

Id. at 79 (emphasis added).

MCFL recited *Buckley*'s major-purpose test, *MCFL*, 249 U.S. at 252 n.6, but said that MCFL didn't fit the definition (so as to be a PAC) because "[i]ts central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates," *id.* Because it was a corporation, *MCFL* noted, MCFL would have to form a "separate segregated fund," i.e., a "political committee," so that "all MCFL independent expenditure activity [i.e., express-advocacy] is, as a result, regulated as though the organization's *major purpose* is to further the election of candidates." *Id.* at 253 (emphasis added). *MCFL* restated the major-purpose test when it said 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." *Id.* at 262.[15]

The Federal Election Commission recognizes that this major-purpose test is constitutionally mandated and governs whether any group that otherwise meets the statutory "political committee" definition may actually be subjected to PAC status and burdens. FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (stating that *Buckley* and *MCFL* "deemed this [test] necessary to avoid the regulation of activity 'encompassing both issue discussion and advocacy of a political result'").[16] And the FEC agrees that the test is to determine "*the* major pur-

[15] Note that *MCFL* not only reaffirmed *Buckley*'s major-purpose test as to which organizations may be treated as PACs, but it *also* created an exception from the prohibition on corporate "independent expenditures" (express-advocacy communications) for groups like MCFL that pose none of the dangers giving rise to the so-called corporate-corruption interest. The *MCFL*-corporation exemption is distinct from the major-purpose test, although the district court confused them. ER–34-35. The major-purpose test establishes which groups *may be treated as PACs*, while the *MCFL*-corporation exemption (reaffirmed in *McConnell*, 540 U.S. at 209-11) establishes which corporations *may be prohibited from making independent expenditures*.

[16] The FEC also recognizes, quoting *Buckley*, that the term "expenditure" in the "political committee" definition "includes only 'expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate . . . .'" *Id.* Moreover, "neither BCRA, *McConnell*, nor any other legislative, regulatory, or judicial action has eliminated (1) The Supreme Court's express advocacy requirement for expenditures on communications made independently of a candidate or (2) the Court's major purpose test." *Id.* In fact, says the FEC, *McConnell* "implicitly endorsed the major purpose framework." *Id.*

pose," not *a* major purpose of an organization. *Id.* at 5601 (after meeting the statutory definition, an organization must "additionally have *the* major purpose of engaging in Federal campaign activity" (emphasis added)).

In *Leake*, the Fourth Circuit noted: "Our analysis of . . . [the] political committee definition begins. . . with *Buckley[]*'s mandate that campaign finance laws . . . be 'unambiguously related to the campaign of a particular . . . candidate.' . . . [T]his . . . ensures that the . . . regulation of . . . the financing of campaigns . . . does not sweep so broadly as to become an unconstitutional infringement . . . ." 525 F.3d at 287. *Leake* correctly held that the test must examine "*the* major purpose," not "*a* major purpose," and that major purpose was determined as "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech." *Id.* at 287.

In the present case, it is clear that Washington does not employ the required major-purpose test for imposing PAC status. *See infra*. And the district court expressly rejected the required major-purpose test. ER–22 n.3, 33-37.

Seventh, the unambiguously-campaign-related principle was not abrogated by *McConnell*. *McConnell* declared "the express advocacy restriction . . . an endpoint of statutory interpretation, not a first principle of constitutional law." 540 U.S. at 190. But the express-advocacy construction was created to *implement* the unambiguously-campaign-related principle for "expenditures," and that principle *is*

itself a first principle of constitutional law. *McConnell* recognized this principle by quoting *Buckley*'s explanation that the express-advocacy construction was done "'[t]o insure that the reach' of the disclosure requirement was 'not *impermissibly broad*.'" 540 U.S. at 191 (emphasis added) (*quoting Buckley*, 424 U.S. at 80). *McConnell* also recognized the principle in stating that "[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and *overbreadth*, we nowhere suggested that a statute that was neither vague nor *overbroad* would be required to toe the same express advocacy line." *Id.* at 192 (emphasis added). So where a restriction on First Amendment liberties *is* vague or overbroad (e.g., for regulating activity not unambiguously campaign related), it must toe the express-advocacy line,[17] or its functional equivalent in the electioneering-communication context as established by *WRTL II*'s appeal-to-vote test. 127 S. Ct. at 2667 (*see infra*). *McConnell*'s facial upholding of the electioneering-communication prohibition only "to the extent that [an ad is] the functional equivalent of express advocacy," 540 U.S. at 206, also reaffirms the unambiguously-campaign-related principle because it recognizes that only *true* equivalents to strictly-defined ex-

[17] Post-*McConnell* courts have embraced the express-advocacy construction as an indispensable tool in dealing with vague or overbroad provisions. *See Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004); *ACLU of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 664-65 (5th Cir. 2006).

press advocacy may be regulated.[18] *McConnell* also expressly recognized the existence of "issue advocacy," which it described as "'discussion of political policy generally or advocacy of the passage or defeat of legislation,'" *id.* at 205 (*quoting Buckley,* 424 U.S. at 48), and of "genuine issue ads" that likely lay beyond Congress' ability to regulate. *Id.* at 206 n.88.

Eighth, *WRTL II* applied the unambiguously-campaign-related principle to eliminate overbreadth in the regulation of electioneering communications when it stated its test for functional equivalence: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. This appeal-to-vote test is the application of the unambiguously-campaign-related principle to electioneering communications because the test mandates (a) no ambiguity (an ad must be "susceptible of no reasonable interpretation other than," *id.*, and "in a debatable case, the tie is resolved in favor of protecting speech," *id.* at 2669 n.7), and (b) a candidate-campaign-related message ("as an appeal to vote for or against a specific candidate," *id.* at 2667).[19] *Leake* expressly recognized that

---

[18] *McConnell* unequivocally recognized that express advocacy itself requires "magic words." *See id.* at 217 (requiring political parties to choose between coordinated expenditures and express-advocacy independent expenditures "forced [them] to forgo only . . . magic words").

[19] That the appeal-to-vote test is the implementation of the unambiguously-campaign-related principle is also clear from *WRTL II*'s reaffirmation that the

WRTL-II's appeal-to-vote test is the implementation of the unambiguously-campaign-related principle in the "electioneering communication" context. 525 F.3d at 282-83. And it also rightly recognized that only two types of communications are recognized as meeting this first principle: (1) express advocacy and (2) federally-defined "electioneering communications" as limited by the appeal-to-vote test. *Id.* Only these two carefully-defined categories "struck [the proper] balance" and "ensured that potential speakers would have clear notice as to what communications could be regulated, ensuring that political expression would not be chilled." *Id.* at 284. In the present case, Washington does not limit its regulations of communications to these two particular types, instead employing vague and overbroad terminology that is unconstitutional. *See infra*.

II. Washington's "Political Committee" Scheme Is Unconstitutional.

In Washington, "'[p]olitical committee' means any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any . . . ballot proposition." RCW § 42.17.020(39). HLW challenges this PAC definition and Washington's two tests implementing it: (**a**) Washington's

---

dissolving-distinction problem, *see supra*, requires speech protection, not restriction, 127 S. Ct. at 2659, 2669. *WRTL II* similarly reaffirmed that "'[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" *Id.* at 2670 (citation omitted). Doing otherwise "'turns the First Amendment upside down.'" *Id.* (citation omitted).

"*a* primary purpose" test, *see*, PDC Interpretation 07-02, *"Primary Purpose Test" Guidelines* (May 2, 2007) (available at http://www.pdc.wa.gov); *State v. Dan Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976) (en banc); and *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894, 903 (Wash. App. 2002); and (**b**) Washington's "receiver of contributions" test. *See Evergreen*, *id.* at 904; 1973 Wash. Att'y Gen. Op. 114 (available at http://www.atg.wa.gov); PDC, *"Primary Purpose Test" Guidelines* at 3. Burdens triggered by PAC status are set out in the *Verified Complaint*. *Compare* VC *with* Answer at ¶¶ 44, ER–63, 79. *See also infra* at n.21 (additional burdens).

A. Review Is De Novo and Scrutiny Is Strict.

This issue was raised in HLW's complaint (ER–71, 78-81) and summary judgment memorandum (Dkt.–67 at 2-19) and ruled on in the district court's Order. ER–18-41. The district court denied HLW's summary judgment motion, ER–45, agreed that no genuine factual disputes remain, and dismissed the case with prejudice. ER–1. Denial of summary judgment is reviewable de novo, *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004), as is dismissal on the merits, *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Where PAC-style burdens are imposed, strict scrutiny is required. *See Austin*, 494 U.S. at 658; *CPLC-I*, 328 F.3d at 1101 n.16 (similar PAC-style burdens re-

quire strict scrutiny); *CPLC-II*, 507 F.3d at 1187 (neither *McConnell* nor *WRTL-II* called into question the *MCFL* analysis mandating strict scrutiny). The district court agreed that strict scrutiny governs PAC-style burdens, ER–19, but its scrutiny was not truly strict because it immediately undercut that standard of review by erroneously deciding that Washington's PAC-style burdens were "not particularly onerous," as discussed next.

B. Washington's PAC Burdens Are "Onerous" and Comparable to Those Rejected in *CPLC-II*, So They Must Be Rejected Here.

In giving "great weight" to the premise "that PAC-style burdens are 'not particularly onerous,'" ER–21 (*quoting ARTLC*, 441 F.3d at 791), the district court erred. First, although the court acknowledged that "*ARTLC* applied to candidate elections . . . where the state has somewhat different interests," its insistence that "the *burden* of PAC-style requirements are the same," ER–21, does not make that candidate-election case applicable. *CPLC-I*, the controlling case in the *ballot-initiative* context, expressly *rejected* similar PAC-style requirements on groups like HLW in this context and expressly rejected reliance on candidate-election cases in this context. 507 F.3 1187-89.[20]

---

[20] *CPLC-II* expressly rejected the notion that since PAC-style burdens were upheld in the candidate context they should be upheld in the ballot-initiative context, *id.* at 1188-89:

> California also argues that the "reporting, registration, record-keeping and notice requirements . . . imposed on CPLC or groups like CPLC are necessary

Second, since the strictness of scrutiny under the applicable "exacting scrutiny" standard, *Buckley*, 424 U.S. at 64, depends on the severity of the burden, *CPLC-I*, 328 F.3d at 1101 n.16, and since *CPLC-I* expressly decided that California's similar PAC-style requirements were a severe burden requiring strict scrutiny in the ballot-initiative context, *id.*,[21] the burden of Washington's similar PAC-style burdens is "severe," and therefore "onerous," as a matter of law.

Third, *WRTL-II* recently reiterated that "PACs impose well-documented and *onerous* burdens, *particularly on small nonprofits*." 127 S. Ct. at 2671 n.9 (*citing MCFL*, 479 U.S. at 253-255 (plurality opinion)). *WRTL-II* relied on the portion of *MCFL*, in which a four-Justice plurality traced burdens similar to Washington's, *MCFL*, 479 U.S. at 253, concluding that:

> These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage.

> and reasonable[,]" because the " 'burdens' enumerated [by] CPLC[ ] . . . have all been upheld by the Supreme Court and could constitutionally be imposed on CPLC by California." However, this argument is again unpersuasive because *McConnell* dealt solely with disclosures in the *candidate context*. *See* 540 U.S. at 194.

[21] This Court said: "Given that the *MCFL* Court considered FECA's disclosure requirements to be a severe burden on political speech for multi-purpose organizations, we must analyze the California statute under strict scrutiny." *Id.*

Id. at 254-55 (footnote omitted). These stated burdens parallel Washington's and California's PAC-style burdens. The plurality continued: "The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [2 U.S.C.] § 441b as an infringement on First Amendment activities." *Id.* at 255. Justice O'Connor agreed with the plurality, noting that "the *significant* burden . . . [came] from the additional *organizational* restraints imposed . . . ." *Id.* at 264-65 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). As a *separate* burden, the five noted the source and amount limits on contributions to federal PACs. *Id.* at 255, 266. But the organizational burdens alone were a "disincentive" and "significant burden" warranting strict scrutiny. And *CPLC-I* said that simply having to file "detailed reports" and "disclose for public scrutiny the source and amount of political expenditures and contributions" was a sufficient burden on core political speech to warrant strict scrutiny. 328 F.3d at 1101. So *ARTLC*'s statement that the lack of a source-and-amount limit in Alaska's candidate-context restrictions makes the burdens "not particularly onerous," 441 F.3d at 791, is constitutionally inaccurate, and if the Court views *ARTLC* as precedential in this context, it should be overruled on this point.

Fourth, the district court said that "[t]he only notable difference between the Washington and Alaska provisions is that Washington also requires . . . a treasurer . . . and . . . an in-state bank account." ER–22. The appointment of a treasurer was

precisely one of the burdens cited by *MCFL* as part of what *WRTL-II* called an "onerous" burden, *supra*. The PDC's manual entitled "Political Committees" ("*PAC Manual*") (available at http://www.pdc.wa.gov) declares that "[t]reasurers for most political committee campaigns using full reporting will have to devote many hours to keeping exact records and filing accurate, detailed reports of receipts and expenditures." *Id.* at 1. So *ARTLC* is not applicable because treasurer duties are onerous. California's PAC-style regulations, which may not be imposed on groups like CPLC, require a treasurer, Cal. Gov. Code § 84100, just as Washington's does.[22]

In sum, Washington's PAC-style burdens are as a matter of law and in fact "onerous," undercutting a central premise of the district court's analysis, and they may no more be imposed on groups like HLW in Washington than California could impose similar burdens on groups like CPLC.

---

[22] An unmentioned and onerous burden is the problem of escaping PAC status once imposed. If HLW became a PAC, it would be stuck with ongoing PAC burdens until it disposed of its assets, ceased operation, dissolved, and reported doing so in a final report. *See PAC Manual* at 60. Distribution of "surplus" funds is restricted. RCW § 42.17.095. Another burden is reporting the name and address of anyone contributing $25 or more (a very low threshold for disclosure), RCW § 42.17.080(3). Another burden is filing C3 reports (identifying all deposits and reporting names/addresses of contributors of more than $25 and names/addresses/employers of contributors of more than $100), which are due on the first Monday *after each deposit is made* within the 5 months leading up to general elections or 4 months leading up to special elections, and are otherwise due when C4 reports are due (according to a PDC schedule). RCW § 42.17.080.

C. Washington's PAC-Status Scheme Is Unconstitutional.

Washington's scheme of imposing PAC status and burdens is unconstitutional because (1) it is not the less restrictive means for fulfilling a disclosure interest that *CPLC-II* required,[23] (2) it is not based on *the* major purpose of an organization determined on the basis of regulable campaign-related speech, *see supra* at 23-25, (3) and it contains vague and overbroad language.

First, it is not the less restrictive means that *CPLC-II* required of California as to its similar PAC-style regulations for groups like CPLC in the ballot-initiative context. 507 F.3d at 1189. There, this Court concluded its constitutional analysis of California's PAC-style burdens with a quote from *MCFL* about how "'[t]he state interest in disclosure . . . can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee . . . .'" *Id.* (*quoting MCFL*, 479 U.S. at 262). The less-restrictive means was the one-time reporting of contributions earmarked for a regulable purpose and "'inde-

[23] The district court noted that this Court found an informational interest compelling in the ballot-initiative context, ER–24, but proceeded to find a compelling interest in protecting contributors from fraudulent misuse of donations, ER–25. This interest has nowhere else been found compelling in the campaign-finance context—let alone in justifying PAC status—and must be rejected as, inter alia, not unambiguously campaign related and beyond permissible consideration. To avoid having the asserted interest be fatally "underinclusive," *cf. Bellotti*, 435 U.S. at 792-95, PAC status would have to be imposed on *every* group receiving donations. And if this interest were cognizable, there are less-restrictive means than imposing PAC status to further it.

pendent expenditures,'" which one-time reports would "'provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions.'" *Id.* (*quoting MCFL*, 479 U.S. at 262). This was *MCFL*'s answer to the FEC's arguments about "massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending . . . ," 479 U.S. at 262. By quoting the Supreme Court's less restrictive means of dealing with the concern at the conclusion of *CPLC-II*'s analysis, this Court adopted the response as its own response to California's same arguments. It is the answer to Washington's same arguments here. There may be required "disclosure" as to true "independent expenditures" and earmarked "contributions" by groups like CPLC and HLW, but it must be in the nature of the one-time reports approved in *MCFL*, not the PAC-style regulations rejected for this purpose in *MCFL* and *CPLC-II*.

Second, Washington's scheme is not based on *Buckley*'s and *MCFL*'s major-purpose test for imposing PAC status and burdens. *See infra*. Issue-advocacy groups such as HLW are protected from regulation as PACs in the ballot-initiative process unless *the* major purpose of the association is passing or defeating ballot initiatives. *See supra* at 23-25. Since major purpose is determined as an empirical judgment of whether the group primarily engages in regulable, campaign-related speech, the only activities to be considered in determining major purpose are expenditures for express advocacy and contributions specifically to pass or defeat

ballot initiatives. *See supra* at 23-25. Under this analysis, PAC status could not be imposed on HLW, but Washington does not follow this mandated model.

In *CPLC-I*, this Court's analysis expressly invoked the major-purpose test in deciding that strict scrutiny applies because "burdensome" PAC-style burdens were imposed, meaning that the major-purpose test was applicable to CPLC:

> [W]e follow . . . *MCFL* . . . . [which] subjected disclosure and reporting provisions . . . to strict scrutiny because th[ey] . . . applied to "organizations whose *major purpose is not campaign advocacy*, but who occasionally make independent expenditures on behalf of candidates." 479 U.S. at 252-53. The Court recognized that reporting and disclosure requirements are more *burdensome* for multi-purpose organizations (such as CPLC) than for political action committees whose sole purpose is political advocacy. *See id.* at 255-56. Given that the *MCFL* Court considered FECA's disclosure requirements to be a severe burden on political speech for multi-purpose organizations, we must analyze the California statute under strict scrutiny. Post-*Buckley,* the Court has repeatedly held that any regulation *severely burdening* political speech must be narrowly tailored to advance a compelling state interest.

328 F.3d at 1101 n.16 (emphasis added). This Court remanded the case for "the district court [to] . . . determine whether California's informational interest is sufficiently compelling to justify its regulation of *groups like CPLC* and, if so, whether the PRA regulations are closely tailored to advance this interest." *Id.* at 1101 (emphasis added). By "*groups like CPLC*," this Court meant "'organizations whose *major purpose is not campaign advocacy*, but who occasionally make independent expenditures on behalf of candidates,'" *id.* at 1101 n.16 (emphasis added) (citation omitted). *See also* 1104 n.21 ("groups such as CPLC 'whose major pur-

pose is not campaign advocacy, but who occasionally make independent expenditures'" (citation omitted)). And after the remand, *CPLC-II* took express notice of the major-purpose test in reiterating the remand instructions:

> The district court was bound by the *Getman* panel's instructions: "On remand, the district court should determine whether California's informational interest is sufficiently compelling to justify its regulation of groups like CPLC and, if so, whether the PRA regulations are closely tailored to advance this interest." *Getman,* 328 F.3d at 1101. The *Getman* panel described CPLC as a group "whose major purpose is not campaign advocacy, but who occasionally make[s] independent expenditures." *Id.* at 1101 n. 21 (citation omitted).

507 F.3d at 1177. CPLC had dismissed its major-purpose count,[24] which *CPLC-II* noted, *id.* at 1180 n.11,[25] but the major-purpose analysis was inherent in the applicable constitutional analysis and the remand issue, and *CPLC-II* was decided by

---

[24] Dismissal of this particular claim was consistent with a desire to limit the burdensome, intrusive discovery that flows from flawed understandings of major-purpose doctrine, both as to whether it is based on *the* major purpose or *a* major purpose and as to whether major purpose is "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287, or a determination based on ambiguous and forbidden intent-and-effect factors. *WRTL-II* took special note of the burdensome discovery imposed on that issue-advocacy group attempting to vindicate its right to issue advocacy and declared that such burdensome discovery must be forbidden in such cases. 127 S. Ct. at 2666 & n.5.

[25] *CPLC-II* did say that "irrespective of the major purpose of an organization, disclosure requirements may be imposed." *Id.* Disclosure may, of course, be imposed in keeping with constitutional requirements even on groups like *MCFL*, as the Supreme Court recognized, *supra*, but PAC-style requirements may not be imposed on groups lacking the requisite major purpose of (in this context) passing or defeating ballot initiatives. Otherwise, states may impose only the one-time reports that *MCFL* and *CPLC-II* recognized as the least restrictive means of meeting the need for disclosure. *See supra*.

rejecting PAC-style disclosure in favor of the one-time reports as the less restrictive means that *MCFL* approved. This analysis implicitly embraced *MCFL*'s major-purpose test because *MCFL* found one-time reports the less-restrictive alternative to PAC-style reports for groups lacking the major purpose of nominating or electing candidates. By embracing *MCFL*'s less-restrictive-means analysis, *CPLC-II* necessarily embraced its major-purpose-test analysis.

Third, Washington's PAC definition employs vague and overbroad language that is inconsistent with *Buckley*'s narrowing of similar terminology to comply with the unambiguously-campaign-related principle. *See supra* at 17-22. It is not necessary to reach this basis for deciding this issue because the issue may be decided on the prior two bases, but Washington's PAC-status scheme is unconstitutional on this additional basis.

Washington's PAC definition 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). Federal law requires that PAC status only be imposed after a group both fits the "political committee" definition *and* has *the* major purpose of nominating or electing candidates. *See infra* at 23-25. The federal definition has a trigger of $1,000 of "contributions" received or "expenditures" made (which helps eliminate overbreadth and which Washington's definition lacks). Employing the unambiguously-campaign-related

principle, *Buckley* narrowly construed both "contribution," 424 U.S. at 23 n.24, 78, and "expenditure," *id.* at 44 & n.52, 80. For "expenditure," *Buckley* imposed the express-advocacy construction, *id.*, so that a group cannot even be *considered* a PAC (regardless of its major purpose) unless it first spends $1,000 for express-advocacy communications or receives the same in true "contributions." *See* FEC, "Political Committee Status," 72 Fed. Reg. at 5597 ("Supreme Court held . . . 'expenditure' includes only 'expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate"). Since Washington rejects *Buckley*'s constructions of "expenditure" and "contribution," it's PAC definition and regulatory scheme are unconstitutional as a matter of law.

In addition to *not* employing these approved terms of art as construed by *Buckley*, Washington uses *other* vague and overbroad language. The seminal *Buckley* decision established the precision required: "Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." 424 U.S. at 40-41.[26] "'Because First Amendment freedoms need breathing space to

[26] Washington law does not impose criminal penalties, but it has severe civil penalties, *see* RCW § 42.17.390, and imposes liability for the State's costs of investigation and trial and attorney's fees. RCW § 42.17.400. Moreover, any judgment (which includes costs for this purpose) "may be trebled as punitive damages." RCW § 42.17.400(5). Precision is required not only where such severe penalties are involved, but where First Amendment rights are involved, as here. *See text supra*.

survive, government may regulate in the area only with narrow specificity.'" *Id.* at 41, n.48 (citation omitted). "The test is whether the language . . . 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).

Buckley recognized that there was an important overbreadth concern that often accompanied vague terms, which it discussed, *id.* at 42-43 (the dissolving-distinction problem, *see infra*), and addressed with the unambiguously-campaign-related requirement, 424 U.S. at 79-81, which is implemented through the major-purpose test, the express-advocacy test, and *WRTL-II*'s appeal-to-vote test. *See supra* at 17-28.

Buckley's standard for avoiding vagueness and overbreadth is formidable. *Buckley* considered a provision that limited to $1,000 per year a person's "'expenditure . . . relative to a clearly identified candidate." 424 U.S. at 39. Finding the "relative to" language unconstitutionally vague, *id.* at 41, the Court attempted to save the provision by reading another part of the provision into the "relative to" language so that the construed phrase referenced an expenditure "*advocating the election or defeat of a candidate.*" *Id.* at 42 (emphasis added). While this went far to alleviate the vagueness of "relative to," it did not relieve the overarching vagueness and overbreadth inherent in the dissolving-distinction problem that requires bright, speech-protective lines between (1) "discussion of issues and candidates"

and (2) "advocacy of election or defeat of candidates." *Id.* at 42. *See supra* at 19-20. Because of this dissolving-distinction problem, *Buckley* held that even its new construction of "relative to," i.e., "*advocating the election or defeat of a candidate*," remained unconstitutionally vague and overbroad, *id.* at 44, in part for restricting "discussion of issues." *Id.* at 42. The only way to save this relatively-clear phrase was to employ the "express words of advocacy" construction. *Id.* at 44 & n.52.[27]

Buckley's rejected phrase—"*advocating the election or defeat of a candidate*," *id.* at 44—is the proper benchmark for analyzing Washington's laws. If that benchmark is vague and overbroad, then all equivalent or less-specific language is, too. *Buckley* held that the only way to save that benchmark phrase was with the express-advocacy construction. *Id.* at 44. The express-advocacy construction should also be applied to vague and overbroad laws in ballot-initiative cases where a provision is readily susceptible to it. *See CPLC-I*, 328 F.3d at 1096-00 (uphold-

[27] The Court used the express-advocacy test to cure the dissolving-distinction problem, employing a requirement that it returned to in a second express-advocacy construction for another "expenditure" definition where it identified its analysis as assuring that the provision would reach only First Amendment activities that are "*unambiguously related* to the campaign of a particular federal candidate." *Id.* at 80 (emphasis added). As to *Buckley*'s first express-advocacy construction, *id.* at 44, even after construing the italicized phrase, *supra*, to meet the unambiguously-campaign-related requirement, *Buckley* found the provision unconstitutional under strict scrutiny. So the unambiguously-campaign-related requirement is a threshold test to be applied even before strict scrutiny. *See also id.* 80-81 (narrowly construing, then applying strict scrutiny).

ing vague and overbroad "expenditure" definition because it had received express-advocacy construction). If possible, the construction must be applied to the vague and overbroad laws at issue here. *See Heller*, 378 F.3d at 985. The current state of the law is that, under the unambiguously-campaign-related requirement, government may regulate only (a) true express-advocacy communications and (b) federally-defined "electioneering communications" subject to *WRTL-II*'s appeal-to-vote test. *See Leake*, 525 F.3d at 282-83. Attempts to regulate communications under any other definitions upset the "balance" that the Supreme Court has struck "between the legislature's authority to regulate elections and the public's fundamental First Amendment right to engage in political speech." *Id.* at 284.

Measuring "support" and "oppose" against the benchmark of *Buckley*'s rejected phrase demonstrates the vagueness of a support/oppose test.[28] *Buckley*'s rejected formulation required advocacy of *election or defeat* of the candidate, i.e., there had to be an *appeal to vote* for or against the candidate. But *Buckley* said that "advocating the election or defeat of a candidate" was still too vague absent ex-

[28] In *Voters Education Committee v. Washington PDC*, 116 P.3d 1174 (2007) ("*VEC*"), the Washington Supreme Court said that the "support . . . or oppos[e]" language in Washington's definition of "political committee " was "significantly more precise than the phrase "'*relative to a clearly identified candidate*'" found to be vague in *Buckley*. *Id*. at 1184 (citation omitted; emphasis added). But that was a straw man because *Buckley* construed "relative to" to mean "advocating the election or defeat of," *Buckley*, 424 U.S. at 42, and then held that even the latter required the express-advocacy construction. *Id.* at 42-44.

plicit words of express advocacy, lest the definition reach issue advocacy. Washington requires only "support of, or opposition to, any candidate or any ballot proposition." RCW § 42.17.020(39). "Support of, or opposition to," is much vaguer than "advocate the election or defeat of," which *Buckley* rejected as vague and overbroad. And Washington's support/oppose test is not restricted to words appealing for a vote, as existed in the language that *Buckley* rejected. So Washington's language is more vague and overbroad than the language that *Buckley* rejected. It is vague and overbroad as a matter of law.

Buckley discussed in detail the problem with any test short of the express-advocacy test, i.e., less-protective tests collide with the dissolving-distinction problem, *see supra*, and require assessing the intent and effect of speech, which *Buckley* forbade. 424 U.S. at 43. *WRTL-II* affirmed that tests attempting to examine intent and effect impermissibly burden speech. 127 S. Ct. at 2665 ("[T]his Court in *Buckley* . . . rejected an intent-and-effect test for distinguishing between discussions of issues and candidates."). The *Buckley* and *WRTL-II* rejection of intent-and-effect tests, on which "support" and "oppose" rely, is clear and controlling.[29,30]

---

[29] That Washington's support/oppose test is a forbidden "intent" test is clear from Defendants' deposition of HLW's Executive Director in which they belabored questions as to the "intent" of HLW's issue advocacy. ER–48-50.

[30] Courts have also rejected such language. *See*, *e.g.*, *Cole v. Richardson*, 405

Washington's PAC support/oppose test is unconstitutional without a saving construction, but Washington's Supreme Court has already authoritatively construed the PAC definition as *not* limited to express advocacy. *VEC*, 166 P.3d at 1186. *See also* PDC Decl. Rul. No. 1 at 3-4 (Nov. 15, 1977) ("promoting or opposing a ballot proposition," *id.* at 3, is to be determined under broad contextual test not requiring express advocacy, *id.* at 4) (available at http://www.pdc.wa.gov). Therefore, this Court may not impose a saving construction, but must consider the statute as construed. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 411-12 (1992) (White, J., concurring). Because a saving construction is impossible, the support/oppose test in the PAC definition is unconstitutionally vague and overbroad,

---

U.S. 676, 678-85 (1972) (treating oath to support one's country and "oppose" its enemies as harmless "amenities" merely requiring compliance with other laws, but explaining that "oppose" would be vague in other contexts); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 279 (1971) ("support" unconstitutionally vague). *See also Leake*, 525 F.3d at 280-286 (holding regulation of communications that "support[] or oppose[] the nomination or election of one or more clearly identified candidates" unconstitutional because it regulated issue advocacy); *Anderson*, 356 F.3d at 663 (construing similar for/against test with express-advocacy construction). *See also Carmouche*, 449 F.3d at 662-63 (imposing express-advocacy construction on "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person," focusing especially on problem with "otherwise influencing"); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) (striking for vagueness "political committee" definition with the operative phrase "support or oppose any candidate or political party or to influence or attempt to influence the result of any election"). *McConnell* did find support/oppose language not vague, but not in the context of imposing PAC status and only in the context of political parties and candidates. 540 U.S. at 170 n.64, 184.

particularly for sweeping in constitutionally-protected issue advocacy. It fails both the unambiguously-campaign-related principle and the express-advocacy test.

Washington's PAC definition is also unconstitutional because "expectation" is vague and overbroad in providing a PAC-status trigger. Is it a hope?—promise?—understanding?— agreement?—contract? "Expectation" is "[t]he act of looking forward; anticipation." *Black's Law Dictionary* 598 (9th ed. 1999). In property, an "expectancy" is "[t]hat which is hoped for," but "[a]t most it is a mere hope or expectation . . . ." *Black's Law Dictionary* 517 (5th ed. 1979). By contrast, the federal "political committee" definition has a $1,000 trigger of actual "contributions" or "expenditures," 2 U.S.C. § 431(4), so it is clear when an organization becomes a PAC (if it also meets the major-purpose test). The absence of a clear trigger exacerbates the vagueness and overbreadth. Even *McConnell*'s approval of disclosure of "executory contracts" for electioneering communications required that there be a contract. *See McConnell*, 540 U.S. at 199-02.

The term "expenditures" is vague and overbroad, failing to follow the Supreme Court's express-advocacy construction in *Buckley*, *id.* at 44, 80, and *MCFL*, 479 U.S. at 249. "Contributions" is also vague and overbroad, and does not follow the U.S. Supreme Court's construction in *Buckley*. 424 U.S. at 23 n.24. Under federal law, a "contribution" is "anything of value made by any person for the purpose of influencing any election for Federal office . . . ." 2 U.S.C. § 431(8). Faced with the

ambiguity of "for the purpose of influencing" and applying the unambiguously-campaign-related requirement, *Buckley* approved the following scope for "contributions": "Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. 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. Washington's "contribution" definition has no intent requirement, being just a transfer of "anything of value . . . ." RCW § 42.17.020(15)(a)(i). The donor intent requirement is supplied by the PAC definition, i.e., "contributions . . . in support of, or opposition to, any . . . ballot proposition," which is vague and overbroad as already shown.

Washington also unconstitutionally presumes a purpose to influence elections with its unconstitutionally vague "receiver of contributions" test, which examines whether the members of a membership organization might have "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition," in which member dues or donations are deemed "contributions" and the organization is deemed a "political committee." *Evergreen*, 49 P.3d at 904 (*citing* 1973 Wash. Att'y Gen. Op. 114). This is contrary to *Buckley*'s restriction of "contributions" to those donations given to political entities, which would at least require that an entity *be* a "political committee"

(based on the major-purpose test) before donations to it are deemed "contributions" or that the donations be expressly earmarked for such political purposes as express advocacy. *Cf. MCFL*, 479 U.S. at 252-53 (plurality opinion) (non-PAC entity need only identify those "who contribute . . . to influence elections" or "make contributions . . . earmarked for the purpose of furthering independent expenditures.")

III. "Independent Expenditure" Is Unconstitutional.

The second of Washington's two definitions of "independent expenditure," RCW § 42.17.100, is unconstitutional for vagueness and overbreadth. In relevant part, it is as follows (emphasis added): "For the purposes of this section and RCW § 42.17.550 the term "independent expenditure" means any expenditure that is made *in support of or in opposition to* any candidate or *ballot proposition* and is not otherwise required to be reported pursuant to RCW § 42.17.060, 42.17.080, or 42.17.090." The applications and burdens triggered by the definition are in the *Verified Complaint*. *Compare* VC *with* Answer at ¶¶ 53, ER–65, 81

A. Review Is De Novo and Scrutiny Is Exacting.

This issue was raised in HLW's complaint (ER–81-82) and summary judgment memorandum (Dkt.–67 at 19-21), and was ruled on in the district court's Order. ER–41-42. Denial of summary judgment and dismissal require de novo review.

See supra at Part II.A.

For non-PAC disclosure of "expenditures," *Buckley* required "exacting scrutiny," 424 U.S. at 64, which equates to strict scrutiny because "any regulation severely burdening political speech must be narrowly tailored to advance a compelling state interest." *CPLC-I*, 328 F.3d at 1101 n.16. But the unambiguously-campaign-related principle controls as a threshold. *See infra*.

B. "Independent Expenditure" Is Overbroad & Vague.

HLW wants to do constitutionally-protected issue advocacy. *Buckley*, 424 U.S. at 42 (express-advocacy test protects "discussion of issues"); *WRTL-II*, 127 S. Ct. at 2667 (appeal-to-vote test protects "issue advocacy"). HLW reasonably fears that its Letter, Phone Script, and Ads, *see* VC ¶¶ 22-24, 27-29, 32, and Exs. 2-4, will be deemed by enforcement officials to be "independent expenditures." *See* VC ¶¶ 52-55 (statute, burdens, and constitutional flaws).

Buckley required that "expenditures" be construed to meet the unambiguously-campaign-related principle. *See Buckley*, 424 U.S. at 80. This is a threshold requirement to avoid unconstitutional vagueness and overbreadth that must be met *before* "exacting" scrutiny is applied. *See id.* at 44-45, 80-81. The Court has only recognized two types of communications that meet this requirement: (1) "independent expenditures" limited by *Buckley*'s express-advocacy test and (2) "election-

eering communications" limited by *WRTL-II*'s appeal-to-vote test. *See Leake*, 525 F.3d at 282-83. Since this definition fits neither, it is unconstitutional. *See supra* at 28 (only these two types of communications strike the right balance for regulation).

Moreover, the provision contains vague and overbroad language as measured against *Buckley*'s rejected benchmark phrase, "advocating the election or defeat of a candidate." 424 U.S. at 42. *Buckley*'s strict standards for vague and overbroad language in the First Amendment area, *id.* at 40-41, are applicable here and are entirely apart from whatever "exacting" scrutiny might mean with respect to non-vague, non-overbroad provisions regulating disclosure. For example, requiring a one-time report for an express-advocacy independent expenditure would be subject to "exacting scrutiny," but requiring a one-time report for a communication that "supports or opposes" runs into the exceptionally strict scrutiny required to eliminate vagueness and overbreadth, *id.* at 40-41, long before it gets to the "exacting scrutiny" of its ends and means. The challenged provision fails at the strict vagueness-and-overbreadth phase.

HLW's expenditures would never be *federal* "independent expenditures" (if federal law allowed ballot initiatives) because the definition, 2 U.S.C. § 431(17), requires express advocacy. But Washington substitutes its support/oppose test for the express-advocacy test, reaching "any expenditure that is made in support of or

in opposition to any . . . ballot proposition." RCW § 42.17.100. There are clear burdens here that HLW wishes to avoid and will not assume because it deems them unconstitutional. *See* VC ¶ 53. Absent the requirement that the definition be triggered only by express advocacy of the passage or defeat of I-1000, it is highly likely that HLW's communications, which oppose physician-assisted suicide but do not expressly call for a vote against I-1000, would be deemed "independent expenditures." In fact, the PDC's Answer insists that HLW's communications are express advocacy, not issue advocacy. *Compare* VC (ER–69) *with* Answer (ER–51) at ¶¶ 27-29, 30, 35-37. In light of the holding in *VEC*, 116 P.3d at 1186, that the PAC definition's support/oppose test does not mean "expressly advocate," it is clear that Washington does not mean "expressly advocate" here. So the support/oppose test is not readily susceptible of a saving construction. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

Washington's use of the support/oppose test to define "independent expenditure" sweeps within that definition a vast amount of speech that is not unambiguously-campaign-related because it does not expressly advocate a vote for or against a clearly identified ballot proposition. A substantial number of expenditures that do not "expressly advocate" may be deemed to "support or oppose." Thus, although HLW's communications contain no express advocacy, they nonetheless likely qualify as "independent expenditures" under Washington's defini-

tion. Washington's regulation of expenditures that "support . . . or oppos[e]" a ballot proposition is "*too remote*" to its interest in regulating elections and is "*impermissibly broad*." *Buckley*, 424 U.S. at 80 (emphasis added). Given *Buckley*'s holding that "advocating the election or defeat of a candidate," *Buckley*, 424 U.S. at 42, is unconstitutionally vague and overbroad, *id.* at 44, especially for capturing "discussion of issues," *id.* at 42, there is no possibility that "support" and "oppose" are constitutional here. *See supra*.

Finally, this definition of "independent expenditure" is inconsistent with *CPLC-I*, which upheld California's definition of "independent expenditure" in the ballot-initiative context because it had been given the express-advocacy construction by California courts, thus eliminating constitutional concerns. 328 F.3d at 1096-00. This inconsistency alone dooms Washington's definition.

IV. "Political Advertising" Is Unconstitutional.

Washington's definition of "political advertising," RCW § 42.17.020(38), is unconstitutionally vague and overbroad. "'Political advertising' includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used *for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign*. *Id.* (emphasis

added). The burdens triggered by this definition are set out in the *Verified Complaint*. *Compare* VC *with* Answer at ¶¶ 59, ER–66, 83.

A. Review Is De Novo and Scrutiny Is Exacting.

This issue was raised in HLW's complaint (ER–82-83) and summary judgment memorandum (Dkt.–67 at 21-22), and was ruled on in the district court's Order. ER–42-44. Denial of summary judgment and dismissal require de novo review. *See supra* at Part II.A. As set out above, *supra* at Part III.A, "exacting" scrutiny applies.

B. "Political Advertising" Is Overbroad & Vague.

This definition is unconstitutional because the Supreme Court has only recognized two types of communications that meet the unambiguously-campaign-related principle: (1) "independent expenditures" limited by *Buckley*'s express-advocacy test and (2) "electioneering communications" limited by *WRTL-II*'s appeal-to-vote test. *See Leake*, 525 F.3d at 282-83. Since this definition fits neither, it is unconstitutional.

This definition is also unconstitutionally overbroad and vague because it employs the support/oppose test (*see supra*), and introduces three subsets of the vague phrase "supporting or opposing," i.e., (a) direct or indirect appeals "for votes"; (b) direct or indirect appeals for "financial . . . support or opposition"; and

(c) direct or indirect appeals for "other support or opposition." "Directly or indirectly" is unconstitutionally vague and overbroad (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements), as is "appealing" in this context and "other support or opposition" (which, whatever it means, does not mean appeals for votes or contributions). "Mass communication" is undefined, so it is impossible to determine, e.g., whether 5, 50, 500, or 5,000 letters meet the definition.

Because this definition employs the same support/oppose test that the Washington Supreme Court held not to be restricted to express advocacy and because of the Legislature's declared intent to regulate issue advocacy, *see supra*, it is not readily susceptible to the saving, express-advocacy construction. Measured against the language that *Buckley* rejected, i.e., "advocating the election or defeat of a candidate," the "political advertising" definition is unconstitutionally vague and overbroad. It is unconstitutional because of its reliance on the support/oppose test instead of the express-advocacy test and because it contains other vague and overbroad terms.

V. "Rating, Evaluation, Endorsement . . ." Is Unconstitutional.

Washington's reporting requirement at WAC § 390-16-206 requires that "[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 (other than news, feature, or editorial comment in a regularly scheduled issue of a printed periodical or broadcast media program) shall report such expenditure including all costs of preparation and distribution in accordance with [RCW] § 42.17.030 through 42.17.100." *Id.*

A. Review Is De Novo and Scrutiny Is Exacting.

This issue was raised in HLW's complaint (ER–83-84) and summary judgment memorandum (Dkt.–67 at 22-23), and was ruled on in the district court's Order. ER–44-45. Denial of summary judgment and dismissal require de novo review. *Supra* at Part II.A. As set out above, *supra* at Part III.A, "exacting" scrutiny applies.

B. "Rating, Evaluation, Endorsement . . ." Is Overbroad & Vague.

This definition is unconstitutional because the Supreme Court has only recognized two types of communications that meet the unambiguously-campaign-related principle: (1) "independent expenditures" limited by *Buckley*'s express-advocacy test and (2) "electioneering communications" limited by *WRTL-II*'s appeal-to-vote test. *See Leake*, 525 F.3d at 282-83. Since this definition fits neither, it is unconstitutional.

This requirement also relies on a vague for/against test, not Washington's sup-

port/oppose test. It cannot be determined whether the PDC intends its for/against test to reach more broadly or more narrowly than Washington's statutory support/oppose test, but the tests cannot be the same because the PDC consciously chose different, non-statutory terms and because otherwise some communications captured here by the for/against test would be redundant of communications captured by the "political advertising" definition. *See supra*. However, given the absence of any requirement that the communication be a "mass communication" (as "political advertising" requires) and the choice of the exceedingly vague, overbroad, and undefined terms "rating," "evaluation," "endorsement," and "recommendation," it is apparent that PDC is regulating a vast swath of protected issue advocacy. And such ratings, evaluations, endorsements, and recommendations would be subject to compelled disclosure at the "measurable expenditure" level of a single letter to a friend discussing a public official who happens to be a candidate.

This provision is unconstitutionally vague and overbroad because of its reliance on the for/against test instead of the express-advocacy test and because it contains other vague and overbroad (i.e., they fail the unambiguously-campaign-related and narrow-tailoring requirements) terms, all in violation of the First and Fourteenth Amendments to the U.S. Constitution. The Sixth Circuit imposed a saving express-advocacy construction on the for/against test in *Anderson*. 356

F.3d at 66. But the PDC's regulation is not readily susceptible to the express-advocacy construction because the PDC clearly knows how to articulate the express-advocacy test when it intends to do so, *see*, *e.g.*, PDC Int. 00-04 ("Use of 'Soft Money' for Issue Advocacy") (available at http://www.pdc.wa.gov), but chose not to do so here. This interpretive principle was clearly stated by the Ninth Circuit in the controlling *Heller* opinion. 378 F.3d at 986 (use of "advocacy" language elsewhere precludes imposing that meaning where it is lacking).

VI. Relief Should Be As-Applied and Facial.

The relief should be facial in addition to being as applied to HLW (and groups like HLW) and to HLW's intended activity in the ballot-initiative context. For the reasons set out above, the political committee definition cannot be applied to any group like HLW that lacks the requisite major purpose of advocating the passage or defeat of ballot initiatives. And because all of the challenged provisions contain language that is overbroad, vague, and not narrowly tailored, they should be struck both facially and as applied. The challenged provisions "reach[] 'a substantial amount of constitutionally protected conduct,'" so they should also be struck under the First Amendment overbreadth doctrine. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (*quoting Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982)) ("vagueness and overbreadth [are] logically related and similar doc-

trines"). *Cf. City of Chicago v. Morales*, 527 U.S. 41, 60 (1999).

Conclusion

For the foregoing reasons, HLW prays this Court to reverse the district court on all counts and remand this case for entry of judgment for HLW.

Dated: April 14, 2009

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr.
Richard E. Coleson
Jeffrey P. Gallant
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807-3510
812/232-2434
812/235-3685 facsimile
Lead Counsel for HLW

John J. White Jr.
LIVENGOOD, FITZGERALD
& ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
425/822-9281
425/828-0908 facsimile
Counsel for HLW

Certificate of Compliance

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,890 words.

Dated: April 14, 2009

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr.
Richard E. Coleson
Jeffrey P. Gallant
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807-3510
812/232-2434
812/235-3685 facsimile
Lead Counsel for HLW

John J. White Jr.
LIVENGOOD, FITZGERALD
& ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
425/822-9281
425/828-0908 facsimile
Counsel for HLW

Statement of Related Cases

CPLC-I, 328 F.3d 1088 (No. 02-15378) and *CPLC-II*, 507 F.3d 1172 (No. 05-15507) concern a central issue in this case, i.e., whether PAC status and burdens may be imposed on groups lacking the major purpose of passing or defeating ballot-initiatives or whether the less-restrictive means of one-time reporting must be employed for regulable First Amendment activity. *CPLC-I* also governs the use of the express-advocacy construction for regulating communications in the ballot initiative context, which is at issue herein.

ADDENDUM

RCW § 42.17.020(38)

(38) "Political advertising" includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.

RCW § 42.17.020(39)

(39) "Political committee" means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

RCW § 42.17.100(1)

(1) For the purposes of this section and RCW 42.17.550 the term "independent expenditure" means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17.060, 42.17.080, or 42.17.090. "Independent expenditure" does not include: An internal political communication primarily limited to the contributors to a political party organization or political action committee, or the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person.

WAC § 390-16-206(1)

(1) Any person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition (other than news, feature, or editorial comment in a regularly scheduled issue of a printed periodical or broadcast media program) shall report such expenditure including all costs of preparation and distribution in accordance with Wash. Rev. Code § 42.17.030 through 42.17.100.

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore