The Honorable JOHN C. COUGHENOUR

United States District Court
Western District of Washington
Seattle Division

Human Life of Washington, Inc., ***Plaintiff***, ***v.*** **Chair Bill Brumsickle, et al.**, ***Defendants***.	**No. 08-CV-00590-JCC** **Plaintiff's Summary Judgment Motion & Memorandum** ORAL ARGUMENT REQUESTED

Human Life of Washington ("HLW") moves for summary judgment on its Verified Complaint (Dkt. 1) ("VC") challenging the definitions of **(a)** "political committee" ("PAC"), RCW 42.17.020(39); **(b)** "independent expenditure," RCW 42.17.100; **(c)** "political advertising," RCW 42.17.020(37); and **(d)** "rating, evaluation, endorsement or recommendation," WAC 390-16-206. There are no material facts in dispute and HLW is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

Facts

The relevant facts are set out in the Verified Complaint and restated in *HLW's Statement of Undisputed Material Facts*. Essentially, HLW wants to do "issue advocacy" about the public-policy issue of physician-assisted suicide. "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) (Roberts, C.J., joined by Alito, J.) (stating holding, *see Marks v. United States*, 430 U.S. 188, 193 (1977)) ("*WRTL II*"). Such "issue advo-

cacy" on public policy issues is "pure political speech," entitled to the highest First Amendment protection. *Id.* 2673-74. HLW does not plan to do, or solicit funds to do, "express advocacy" of the passage or defeat of Washington Initiative Measure No. 1000 ("I-1000"), i.e., "independent expenditures" as the proper scope of that term is recognized in the ballot-measure context. *See California Pro-Life Council v. Getman*, 328 F.3d 1088, 1096-00 (9th Cir. 2003) ("*CPLC I*") (refusing to find "independent expenditure" definition vague and overbroad because it had been given express-advocacy construction). But the Public Disclosure Commission ("PDC") interprets the communications that HLW proposes as not issue advocacy, but express advocacy. *Compare* VC *with* Answer (Dkt. 1, 35) at ¶¶ 27, 28, 29, 30, 35, 36, 37. HLW considers the challenged provisions unconstitutional and will neither assume their burdens nor risk intended activities absent requested relief.

Argument

I. The "Political Committee" Definition Is Unconstitutional.

"'Political 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 definition and Washington's two tests implementing it, i.e., Washington's (**a**) "*a* primary purpose" test, *see*, PDC Interpretation 07-02, *"Primary Purpose Test" Guidelines* (May 2, 2007); *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**) "receiver of contributions" test. *See Evergreen*, *id.* at 904; 1973 Wash. Att'y Gen. Op. 114; PDC, *"Primary Purpose Test" Guidelines* at 3.

A. PAC Status Imposes Substantial Burdens.

PAC status imposes substantial organizational and conduct burdens, including registering as a PAC, appointing a treasurer, using a designated account, keeping detailed records, reporting contributions and expenditures at prescribed intervals, disclosing information about persons making contributions over $100, keeping account books current and available for public inspection,

and being subject to random PDC audits. *Compare* VC *with* Answer (Dkt. 1, 35) at ¶¶ 44. These burdens are substantial. The PDC's manual entitled "Political Committees" ("*PAC Manual*") (available at www.pdc.wa.gov) contains 69 pages (after introductory material) explaining the numerous requirements. This *PAC Manual* 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.

The Supreme Court has recognized that similar federal PAC requirements impose substantial organizational and conduct burdens. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), a four-Justice plurality traced similar burdens, *id.* 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.

Id. at 254-55 (footnote omitted). The fact that MCFL had a PAC did not change the analysis because it was the ideological corporation itself, not the PAC, seeking relief, and "other organizations comparable to MCFL may not find it feasible to establish such a committee and may therefore decide to forgo engaging in independent political speech." *Id.* at 255 n.8. "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 four, noting that the problem was not with "disclosure of a group's independent campaign expenditures" per se, but 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). As a *separate* burden, the five Justices noted the source and amount limits on contributions to federal PACs. *WRTL II* reaffirms that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." 127 S. Ct. at 2671 n.9.

The distinction that the Court made in *MCFL* between (a) one-time reporting of independent expenditures (the "less restrictive" means) and (b) the "full panoply of regulations that accom-

pany status as a political committee" is central to the present case. 479 U.S. at 262 (Court opinion). Just because Washington may require one-time reporting of true independent expenditures, does not justify the more burdensome, intrusive PAC-style reporting.

Another serious burden of compelled disclosure is the fact that it burdens the people's First Amendment rights to engage in core political speech and to retain their privacy, as well as the First Amendment right (where groups are involved) to associate to amplify speech. These are fundamental rights in our system of constitutional government where the people are sovereign. And where the speech being regulated is about public policy issues, the need and right to speak are most urgent and require bright-line, rigorous protection. These burdens are not unique to PAC-style disclosure, but apply to all forms of compelled disclosure in the campaign-finance area. The privacy burden was expressly recognized in *Buckley v. Valeo*: "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. 1, 64 (1976). Compelled disclosure imposes "significant encroachments on First Amendment rights." *Id.* "[P]ublic disclosure of contributions . . . will deter some . . . who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights . . . ." *Id.* at 68. *Buckley* considered these privacy, contribution-deterrence, and potential-harassment burdens as cognizable burdens to be considered *whenever* the constitutionality of disclosure schemes is considered. *Id.* at 68. The Court also recognized that, in severe cases involving disfavored groups, these burdens could become so severe that no disclosure could be required. *Id.* at 68-74. Such a level of potential harm is not asserted here, but these burdens must yet be considered whenever government compels disclosure of information otherwise protected by First Amendment privacy.

The Court has recognized the inherent burdens imposed by compelled disclosure in the referendum context. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court dealt with a provision requiring on-communication disclosure of the author. The Court recognized that a person may wish to avoid disclosure for "fear of economic or official retaliation, concern about

social ostracism, or merely . . . a desire to preserve . . . privacy . . . ." *Id.* at 341-42.

These inherent constitutional concerns must be considered whenever government seeks to compel disclosure. *Davis v. FEC*, 127 S. Ct. 2759 (2008), affirmed that there is a *per se* First Amendment privacy burden that must be included in the constitutional analysis whenever there is compelled disclosure, even though that case involved a candidate disclosing campaign finances: "'[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Id.* at 2774-75 (*quoting Buckley,* 424 U.S. at 64). Significantly, *Davis* cited *Buckley* as authority for the disclosure burden and degree of scrutiny, *id.*, not *McConnell v. FEC*, 124 S. Ct. 619 (2003), eliminating any possibility that *McConnell* changed *Buckley*'s standards.

Since the present case involves burdens on what *WRTL II* called "issue advocacy," proper weight must also be given to *WRTL II*'s reaffirmation of *Buckley*'s special solicitude for "issue advocacy" and the bright-line tests protecting it. *See* 127 S. Ct. at 2659, 2667, 2673-74. The fact that *WRTL II* dealt with a prohibition on "electioneering communications" may not properly be used to distinguish the *Buckley* analysis, which *WRTL II* reaffirmed and which governs this case.

B. Imposed PAC Status and Burdens Require Strict Scrutiny.

Because PAC status seriously burdens core political speech, the Supreme Court has consistently required strict scrutiny when PAC status is imposed. *See MCFL*, 479 U.S. at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest."); *id.* at 262 (less-restrictive-means test); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990) ("The Act imposes requirements similar to those in the federal statute involved in MCFL . . . . Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. [citations omitted] Thus, they must be justified by a compelling state interest."). Under *MCFL* and *Austin*, strict scrutiny applies to PAC-status imposition as a matter of law.

The words these cases use state the rule more broadly than just being about PAC status,

which is relevant to the other counts in this case. *MCFL* required strict scrutiny "[w]hen a statutory provision burdens First Amendment rights," *supra*, and *Austin* did so where "requirements . . . burden expressive activity." *Supra*. This broader approach was reaffirmed in *WRTL II*: "Because BCRA § 203 burdens political speech, it is subject to strict scrutiny. Under strict scrutiny, the *Government* must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest." 127 S. Ct. at 2664 (emphasis in original; citations omitted). *WRTL II* equated the referenced "political speech" with "issue advocacy," which must be protected from the regulation that may be permissibly imposed on what *WRTL II* called "campaign speech," i.e., "express advocacy." *Id.* at 2659. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), Justice Thomas's concurrence examined the Court's use of strict scrutiny, noting that "[w]hen [an] election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny." *Id.* at 206. Where core political speech is involved, the Court has "ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech," *id.* at 207, probably, he added, because "it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a 'severe burden.'" *Id.* at 208 (citation omitted). *WRTL II* did just what Justice Thomas described by requiring strict scrutiny without asking whether the burden was severe because any burden on core political speech is severe. 127 S. Ct. at 2664.

CPLC I followed these precedents and specifically held that strict scrutiny is required where a provision would impose PAC status on a "multi-purpose organization" engaging in express advocacy of the passage or defeat of a ballot measure:

> [t]he [*MCFL*]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. 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." (citations omitted).

CPLC I, 328 F.3d at 1088. This holding applies *a fortiori* to a group that eschews the *express*

advocacy that CPLC did, but wants to do *non-express* advocacy of a public policy issue.

Nothing in *McConnell* could have altered the requirement of strict scrutiny where PAC-style burdens are imposed because *McConnell* never addressed the question. It addressed non-PAC disclosure of "electioneering communications," 540 U.S. at 196, which is like the one-time, independent-expenditures reports that *MCFL* said were the less-restrictive means of meeting the government's informational interest than imposing the panoply of PAC-style burdens. *See supra.*

While *McConnell* did say "disclosure requirements are constitutional because they d[o] not prevent anyone from speaking, *id.* at 201 (quotation marks and citations omitted), that was dictum because (a) the Court was not deciding the level of scrutiny to apply to disclosure requirements and (b) the statement could not be a test since such a test would find *all* disclosure requirements constitutional and there would have been no need for strict scrutiny of imposed PAC status in *MCFL* and *Austin*. *See supra.* If that were the rule, the holding in *California Pro-Life Council v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) ("*CPLC II*"), that PAC status may not be imposed on "multi-purpose organizations" was erroneous because the imposition would have been constitutional. *CPLC II* was not wrong. The Ninth Circuit's decision to employ strict scrutiny to imposed PAC-status was correct as a matter of Supreme Court precedent, not just the law of the case. Moreover, if this Court were to decide not to apply strict scrutiny to Washington's "political committee" definition and hold that PAC status may be imposed on "multi-purpose organizations," that holding would be inconsistent with *CPLC II*'s holding. Ultimately, courts are "bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001).

The strict scrutiny that must be employed here must be truly strict, as in *MCFL*, *Austin*, and *CPLC I & II*, not the apparently lesser variety of *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006) ("*ARTL*"). First, however, it should be noted that *ARTL* does not control this case. *CPLC I* and *CPLC II* control because they involve PAC status in the ballot-initiative context. So whatever may be the law in the *candidate*-election context (*ARTL*), *CPLC II* holds that PAC status may not be imposed on "multi-purpose organizations" in the *ballot-initiative*

context. 507 F.3d at 1190. *CPLC II* also supersedes *ARTL* chronologically, so *CPLC II* controls any conflicts of applicable analysis. *ARTL* relied on three governmental interests to justify imposing PAC status, 441 F.3d at 791-92, but those interests were set out in *Buckley* in the *candidate*-election context. 424 U.S. at 66-68. *CPLC I* held that the two interests targeted at quid pro quo corruption were inapplicable because such corruption doesn't exist absent candidates, so only a general informational interest applies here. 328 F.3d at 1105 n.23. *ARTL* upheld a broad and vague definition of "electioneering communication" that it said was modeled on the contextual express-advocacy test in *FEC v. Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987). 441 F.3d at 783. But both *McConnell*, 540 U.S. at 193, and *WRTL II*, 127 S. Ct. at 2669 n.7 (also unanimously[1]), affirmed that "express advocacy" requires the so-called "magic words," such as "vote for," and *CPLC I* recognized the necessity of the "magic words" and narrowed *Furgatch* accordingly. *See* 328 F.3d at 1098 (" But a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." (emphasis in original)). So the *Furgatch* approach to which *ARTL* pointed is untenable. The vague and overbroad "electioneering communication" definition at issue in *ARTL* was not limited as it now must be by *WRTL II*'s appeal-to-vote test. 127 S. Ct. at 2667. One more key difference between the provisions upheld in *ARTL* and this case is that Alaska's law expressly excluded an "issues communication" from regulation, *see ARTL*, 441 F.3d at 785; Washington does not. So *ARTL* is inapplicable here and is of questionable vitality.

As to *ARTL*'s "degree of scrutiny" analysis, 441 F.3d at 787, it first correctly noted that *Austin* required strict scrutiny. *Id.* (*citing Austin*, 494 U.S. at 657). But then it said that *McConnell* "appeared to have relaxed the degree of scrutiny," *id.*, pointing to *McConnell*'s "important state interests" statement about non-PAC disclosure. *Id.* at 788. As already discussed, *McConnell* was

[1]In *WRTL II* the other justices joined Chief Justice Roberts and Justice Alito in agreeing that express advocacy requires "magic words." *See id.* at 2681 (Scalia, J., joined by Kennedy & Thomas, JJ.) (concurring in part and concurring in judgment) ("to avoid . . . 'constitutional deficiencies,' [*Buckley*] was compelled to narrow the statutory language . . . to cover only . . . magic words"); 2692 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) (*Buckley*'s "prohibition applied 'only to . . . communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office,'" i.e., "'magic words'").

not discussing the degree of scrutiny for *PAC* burdens, so it could not have "relaxed" the holdings of *MCFL* and *Austin*. However, this view that *McConnell* had somehow weakened First Amendment protections for core political speech seems to have affected the court's application of "strict scrutiny." *See infra.* To the extent that *McConnell* may have created this impression, *WRTL II* erased it by reasserting strong protection for "issue advocacy" under a generally-applicable analysis faithful to *Buckley* (*see infra*) and by limiting *McConnell*'s facial upholding of the electioneering communication prohibition by restricting regulation to ads "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. This test relies on the principle that all campaign-finance regulations must employ bright lines to protect issue advocacy by assuring that regulations are unambiguously related to an election campaign. *See Buckley*, 424 U.S. at 80-81. The net result of *WRTL II*'s test, its analysis, and the rules it provided for adjudicating issue-advocacy cases, such as the present one, is a strong reaffirmation of the principles of *Buckley* and an elimination of any possible interpretation that *McConnell* permitted states to do what they will with issue advocacy.

ARTL noted that the Ninth Circuit had employed strict scrutiny in *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), and said it would "assume without deciding that strict scrutiny applies to all of the challenged disclosure requirements." 441 F.3d at 788. However, *ARTL* then held that PAC-style burdens could be imposed on the very sort of nonprofit, nonstock, ideological corporation (an "*MCFL*-corporation") that *MCFL* held could not be subjected to PAC status. *Id.* at 786-94; *MCFL*, 479 U.S. at 263. *ARTL* treated PAC-style requirements (e.g., required registration and periodic reporting) as if they were the same as the one-time reports approved in *MCFL*, *id.* at 262, relying on the fact that Alaska law did not restrict PAC fundraising to "members," as federal PAC law did. 441 F.3d at 788-94. But that ignores *MCFL*'s lengthy discussion of the organizational and conduct burdens of PAC status (in addition to the fundraising limitation) that *MCFL* clearly indicated were unjustified, in and of themselves. *See* 479 U.S. at 253-55 (four-Justice plurality), 264-65 (O'Connor, J., concurring in part and concurring in the

judgment). In any event, *CPLC II* moots the point in this ballot-initiative context—where the absence of a corruption interests precludes contribution and source limits—because *CPLC II* held that California could not impose PAC regulations like Washington's on groups like CPLC. 507 F.3d at 1190.

C. Under *CPLC II*, PAC Burdens Are Not Narrowly Tailored in This Context.

CPLC II struck down PAC-style requirements "on a group like CPLC, a multi-purpose organization," in the ballot-initiative context because they were not "narrowly tailored to . . . [an] informational interest." 507 F.3d at 1187. *CPLC II* noted that California's arguments applied only in the candidate-election context. *Id.* at 1187-89. The Ninth Circuit held that the less-restrictive means for the state to get all the information it was permitted to obtain as to the *express advocacy* involved were the one-time reports approved in *MCFL*, *CPLC II*, 507 F.3d at 1189 (*citing MCFL*, 479 U.S. at 262). HLW is a "group like CPLC," which the Ninth Circuit described "as a group 'whose *major purpose* is not campaign advocacy, but who occasionally make[s] independent expenditures.'" *Id.* at 1177 (emphasis added; citation omitted). If California could not impose PAC status on CPLC for doing *express* advocacy, then *a fortiori* Washington may not impose PAC status on HLW for doing *non-express* issue advocacy.

The "major purpose" to which *CPLC II* referred derives from the major-purpose test for PAC status that was first approved in *Buckley*, 424 U.S. 1: "To fulfill the purposes of the Act ["political committee"] 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." *Id.* at 79 (emphasis added). The Court anchored this major-purpose test in the unambiguously-campaign-related requirement: "Expenditures 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.* (emphasis added). *MCFL* restated the major-purpose test, as noted by *CPLC I*, 328 F.3d at 1101 n.16 (citations omitted). *See also id.* at 1104 n.21. In sum, binding precedents forbid Washington from imposing PAC status on HLW, whose major purpose is issue advocacy.

The foregoing precedents suffice to determine that Washington's imposition of PAC burdens on groups like HLW in the ballot-initiative context is unconstitutionally overbroad because such groups are "multi-purpose organizations" that lack the major purpose of passing or defeating ballot initiatives. However, should the Court decide that these precedents are insufficient to rule in HLW's favor on this point, HLW also challenges Washington's (a) "*a* primary purpose" test and (b) "receiver of contributions" test for establishing PAC status, the citations to which in Washington law are set out above. *Supra* at 2. A fuller analysis of Washington's flawed major-purpose tests is set out in HLW's preliminary injunction memorandum, Dkt. 8 at 16-18, but space limitations preclude repeating that here. For present, the recent analysis of the Fourth Circuit in *North Carolina Right to Life v. Leake*, 525 F.3d 274 (2008), provides a sufficient and succinct statement of what the U.S. Supreme Court's major-purpose test (for imposing PAC status) requires, and the Court is respectfully cited to that opinion for the propositions that: (1) PAC status is governed by the unambiguously-campaign-related requirement, *id.* at 287; (2) the U.S. Supreme Court requires that PAC status be determined on "*the* major purpose," not "*a* major purpose," *id.* at 288-89; and (3) "*Buckley*'s articulation of the permissible scope of political committee regulation is best understood as an empirical judgment as to whether an organization primarily engages in regulable, election-related speech." *Id.* at 287. Under these constitutionally-mandated criteria, Washington's methods of determining PAC status are plainly unconstitutional, as is its "political committee" definition.

D. The "Political Committee" Definition Is Unconstitutionally Vague and Overbroad.

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(38). As noted above, this definition fails narrow tailoring because it lacks a proper major-purpose test component. But it also fails for having terms that are unconstitutionally vague and overbroad.

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.[2] "'Because First Amendment freedoms need breathing space to 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 applied as the unambiguously-campaign-related requirement, 424 U.S. at 79-81, from which the Court derived two tests that govern this case: (1) the major-purpose test, which determines which groups may be treated as "political committees," *id.* at 79 ("organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate"), and (2) the express-advocacy test, which determines when independent expenditures for communications may be subjected to non-PAC disclosure requirements, *id.* at 80 ("[W]e construe 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*." (footnote omitted; emphasis added)). *Buckley*'s unambiguously-campaign-related requirement asks whether "the *relation* of the information sought to the purpose of the Act [regulating elections] *may be too remote*," and, therefore, "*impermissibly broad*." *Id.* (emphasis added). The Court required government to limit campaign laws to reach only activities "*unambiguously related* to the campaign of a particular federal candidate," *id.* (emphasis added), in short, "*unambiguously campaign related*." *Id.* at 81 (emphasis added). *See Leake*, 525 F.3d at 281, 287 (recognizing that express-advocacy and major-purpose tests derive from unambiguously-campaign-related requirement).

[2]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).

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":

> [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 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 emphasized the need for a bright line between (1) "discussion, laudation, [and] general advocacy" and (2) "solicitation" to protect issue advocacy:

> (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). 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 it was to employ the "express words of advocacy" construction. *Id.* at 44 n.52. The Court was employing 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 scrutiny).

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, then all equivalent or less-specific language is vague. *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 (upholding 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.[3] *Buckley*'s rejected formulation required advo

[3]In *Voters Education Committee v. Washington PDC*, 116 P.3d 1174 ("*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

cacy 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 explicit 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(38). "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*-*WRTL II* rejection of intent-and-effect tests, on which "support" and "oppose" rely, is clear and controlling.

But the Supreme Court has also rejected such language directly. The Court did so in loyalty oath cases involving "supporting" and "opposing." In *Cole v. Richardson*, 405 U.S. 676 (1972), the Court treated required oaths to support one's country and "oppose" its enemies as harmless "amenities" merely requiring compliance with other laws, but explained that "oppose" would be vague in other contexts. *Id.* at 678-85. One of those contexts, *id.*, was *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1971), which held "support" unconstitutionally vague. *Id.* at 279. Washington's "support/oppose" test is no "amenity" requiring compliance with other laws but is a law with serious penalties. It is vague and overbroad.

Federal circuit courts have implemented the Supreme Court's rejection of any support/op-

"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.

pose test in the vital political speech area. In 2006, the Fifth Circuit considered a law requiring reporting and disclosure of payments "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person." *CFIF*, 449 F.3d at 662-63. The court imposed the express-advocacy construction: "To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle . . . and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 665. Since the Fifth Circuit construed the whole phrase as requiring express advocacy, it clearly found "supporting," "opposing," and "otherwise influencing" vague and overbroad, even though it had the advantage over Washington's PAC definition of limiting the context to "nomination or election."

The Fourth Circuit struck down as vague North Carolina's "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." *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) (citation omitted). The court did not impose the express-advocacy construction because the statute was not readily susceptible to such a construction and because doing so was against legislative intent. *Id.* at 712-13. *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).

The Sixth Circuit recently employed a saving construction because of the constitutional difficulties of a for/against test, which is similar to support/oppose, in order to protect issue advocacy. The test at issue in *Anderson* was in an "electioneering" definition, which targeted "solicitation of votes for or against any candidate or question on the ballot in any manner." *Anderson*, 356 F.3d at 663. The Sixth Circuit noted that *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the

legislature has established a significant governmental interest." *Id.* at 664-65. The court imposed the express-advocacy construction: "we apply a narrowing construction to the term 'electioneering,' and find that it may permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure." *Id.* at 665.

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* RCW 42.17.562 (Legislature declared authority to regulate issue advocacy); 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) (http://www.pdc.wa.gov/home/laws/guide/declare.aspx). 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, particularly for sweeping in constitutionally-protected issue advocacy. It fails both the express-advocacy test and the unambiguously-campaign-related requirement.

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 Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894, 904 (Wash. App. 2002) ("*WEA*") (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 . . . ear-

marked for the purpose of furthering independent expenditures.")

II. The "Independent Expenditure" Definition 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 (Dkt. 1, 35) at ¶¶ 53.

As to the degree of scrutiny required, this provision does not deal with imposing PAC-style disclosure, so the automatic strict-scrutiny required whenever PAC burdens are imposed is not applicable. *See supra.* The same is true of the following provisions in the following two counts. For non-PAC disclosure of "expenditures," *Buckley* required "exacting scrutiny." 424 U.S. at 64. HLW argues that "exacting scrutiny" is strict scrutiny. *See* Dkt. 8 at 11; Dkt. 55 at 7-8. However, that question need not be resolved because, in any event, *Buckley* required that all expenditures subject to regulation must first be narrowly-construed to meet the unambiguously-campaign-related requirement. *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, just as *Buckley* did twice. *Id.* at 44-45, 80-81. The Supreme Court has only recognized two types of communications that meet this requirement: (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. The provisions in this case fail this requirement. Moreover, the provisions are challenged because they contain language that is itself vague and overbroad, which is readily apparent when they are 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 whatever "exacting scrutiny" means in the disclosure context, 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 provisions fail at the strict vagueness-and-overbreadth phase.

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). These 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. *See supra* at 2. 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" and the Legislature's stated intent to regulate issue advocacy, RCW 42.17.562, it is clear that Washington does not mean "expressly advocate" here. So the support/oppose test is not readily susceptible to 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 definition. 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.*

III. The "Political Advertising" Definition 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 (Dkt. 1, 35) at ¶¶ 59. This definition employs the support/oppose test, which is unconstitutionally vague and overbroad (*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.

IV. "Rating, Evaluation, Endorsement or Recommendation" Is Unconstitutional.

Washington's reporting requirement, at WAC 390-16-206, for communications containing "a rating, evaluation, endorsement, or recommendation for or against a candidate or ballot measure" is unconstitutionally vague and overbroad. The provision 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.*

This requirement relies on a vague for/against test, not Washington's support/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" re-

quires) 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), 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). And RCW 42.17.562 authorized the PDC to regulate issue advocacy, which it is doing.

V. The Relief Should Be Both As-Applied to HLW (and Similar Groups) and Facial.

The relief should be facial in addition to being as applied to HLW (and groups like HLW) in the ballot measure context and to HLW's intended activity. 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 vague, not narrowly tailored, and overinclusive, 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 doctrines"). *Cf. City of Chicago v. Morales*, 527 U.S. 41, 60 (1999).

Conclusion

For the foregoing reasons, summary judgment should be granted to HLW on all counts, and the declaratory and injunctive relief prayed for in the *Verified Complaint* should be granted.

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Respectfully submitted,

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