

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

United States District Court
Western District of Washington
Seattle Division

Human Life of Washington, Inc.,
Plaintiff,

v.
Chair Bill Brumsickle, Vice Chair Ken Schellberg, Secretary Dave Seabrook, Jane Noland, and 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, and Dan Satterberg, in His Official Capacity as King County Prosecuting Attorney,
Defendants.

No. C08- 0590

**Preliminary Injunction
Motion & Memorandum**

NOTE ON MOTION
CALENDAR: Friday, May 2, 2008

ORAL ARGUMENT REQUESTED

Motion

Human life of Washington (“HLW”) wants to do constitutionally-protected “issue advocacy,” which “conveys information and educates.” *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) (Roberts, C.J., joined by Alito, J.).¹ HLW moves for a preliminary injunction to prohibit Washington’s enforcement authorities from enforcing Washington’s definitions of (a) “political committee,” Wash. Rev. Code § 42.17.020(39); (b) “independent expenditure,” Wash. Rev. Code § 42.17.100; (c) “political advertising,” Wash. Rev. Code § 42.17.020(37); and (d) “rating, evaluation, endorsement or recommendation,” Wash. Admin. Code § 390-16-206,

¹This opinion, “*WRTL II*,” states the holding. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When . . . no single rationale [commands a majority], ‘the holding . . . [is] that position taken by those . . . concurr[ing] . . . on the narrowest grounds’” (citation omitted)).

1 facially and as applied to HLW and its issue advocacy, as set out in the *Verified Complaint* and
 2 following *Memorandum*.

3 **Memorandum**
 4 **Statement of Facts²**

5 Human Life of Washington (“HLW”) is a nonprofit, ideological, corporation intending to do
 6 issue advocacy concerning physician-assisted suicide, a longstanding issue for HLW. Defendants
 7 enforce the challenged provisions, and the Political Disclosure Commission (“PDC”) promul-
 8 gates regulations and administers them. HLW could freely do its issue advocacy but for Wash-
 9 ington Initiative Measure No. 1000 (“I-1000”), which would legalize physician-assisted suicide.
 10 I-1000 advocates are now seeking signatures for it and hope to pass it in November. I-1000
 11 triggers the impingement of the challenged provisions on HLW’s speech. Because physician-
 12 assisted suicide is now especially in the public awareness and debate, people are particularly
 13 receptive to arguments about the issue. This makes 2008 an especially important time for HLW
 14 to freely advocate its issue.

15 HLW intends to promptly solicit funds for its issue-advocacy radio advertisements with a
 16 fundraising “Letter,” VC ¶ 21, Exh. 2, and “Phone Script,” VC ¶ 22, Exh. 3. HLW will then
 17 broadcast the “Ads,” VC ¶ 23, Exh. 4. The Letter, Phone Script, and Ads do not expressly
 18 advocate for or against I-1000, but HLW reasonably fears that its speech will be captured by the
 19 vague and overbroad challenged provisions. HLW must either endure the burdens imposed by
 20 those provisions or be chilled from its issue advocacy. Since HLW won’t assume the burdens,
 21 which it considers unconstitutional, it will not do its issue advocacy without injunctive relief.

22 **Argument**

23 “Traditional” preliminary injunction criteria are “(1) a strong likelihood of success on the
 24 merits, (2) the possibility of irreparable injury to plaintiff . . . , (3) a balance of hardships favoring
 25

26 ²Fuller facts are set out in the *Verified Complaint* (“VC”) at ¶¶ 1, 4, 10, 13-39, which HLW incorporates by
 reference to avoid burdening the Court with repetition.

1 the plaintiff, and (4) advancement of the public interest (in certain cases).” *Freecycle Network,*
2 *Inc. v. Oey*, 505 F.3d 898, 902 (9th Cir. 2007). “Alternatively, a court may grant the injunction if
3 the plaintiff demonstrates *either* a combination of probable success on the merits and the
4 possibility of irreparable injury or that serious questions are raised and the balance of hardships
5 tips sharply in his favor.” *Id.* “[P]laintiffs [may] show *probable* success on the merits and the
6 *possibility* of irreparable harm.” *Earth Island Inst. v. U.S. Forest Service*, 351 F.3d 1291, 1298
7 (9th Cir. 2003). “[T]he degree of irreparable harm required for a preliminary injunction increases
8 as the probability of success on the merits decreases, and vice versa.” *Id.* at 1300.

9 **I. HLW Has a Strong Likelihood of Success on the Merits.**

10 HLW has a high likelihood of success because, inter alia, (1) HLW seeks to avoid “political
11 committee” (“PAC”) status in the ballot-initiative context, wherein the Ninth Circuit says states
12 may not impose PAC status on groups like HLW, *see infra*, and (2) HLW wants to do *issue*
13 advocacy, for which U.S. Supreme Court recently reaffirmed special constitutional protection
14 that makes Washington’s restrictions unconstitutional. *See infra*. And the preliminary injunction
15 burden of proof tracks that of the merits, so that *Defendants* actually bear the strict-scrutiny
16 burden of proving that Washington’s PAC and issue-advocacy burdens are narrowly-tailored to a
17 compelling state interest, which burden they cannot meet. *See, e.g., California Pro-Life Council*
18 *v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (“*CPLC I*”) (strict scrutiny required).

19 **A. Washington May Not Impose PAC Status in this Context.**

20 *California Pro-Life Council v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (“*CPLC II*”),
21 controls this case. HLW wants to avoid PAC status for doing its issue-advocacy while efforts are
22 underway to pass I-1000. The Ninth Circuit struck down California’s PAC-style requirements in
23 the ballot-initiative context, holding that “California ha[d] not satisfied its burden of demonstrat-
24 ing that the political action committee-like requirements imposed on a group like CPLC [we]re
25 narrowly tailored to . . . [an] informational interest.” *CPLC II*, 507 F.3d at 1187 (capitalization
26 altered). *CPLC II* decided that California could not impose PAC status on CPLC for its express

1 ballot-initiative advocacy because such PAC status was only appropriate in the candidate-
 2 election context. *Id.* at 1187-89. HLW is a “group like CPLC,” *id.* at 1187, which the Ninth
 3 Circuit described “as a group ‘whose *major purpose* is not campaign advocacy, but who
 4 occasionally make[s] independent expenditures.” *Id.* at 1177 (emphasis added; citation
 5 omitted).³ If California could not impose PAC status on CPLC for doing express advocacy,
 6 Washington may not impose PAC status on HLW for doing mere issue advocacy.

7 The “major purpose” to which *CPLC II* referred derives from the major-purpose test for
 8 PAC status that was first approved in *Buckley v. Valeo*, 424 U.S. 1 (1976): “To fulfill the
 9 purposes of the Act [“political committee”] need only encompass organizations that are under the
 10 control of a candidate or *the major purpose* of which is the nomination or election of a candi-
 11 date.” *Id.* at 79 (emphasis added). The Court anchored this major-purpose test in the
 12 unambiguously-campaign-related requirement (*see infra*): “Expenditures of . . . ‘political
 13 committees’ so construed can be assumed to fall within the core area sought to be addressed by
 14 Congress. They are, *by definition, campaign related.*” *Id.* (emphasis added). The major-purpose
 15 test was restated in *MCFL*, as noted by the Ninth Circuit in *CPLC I*, an earlier precedent
 16 involving the “multi-purpose” organization CPLC:

17 [W]e subject California’s disclosure requirements to strict scrutiny. In doing so, we follow
 18 the Court’s post-*Buckley* decision of *MCFL*, 479 U.S. 238. There the Court subjected
 19 disclosure and reporting provisions . . . to strict scrutiny because those provisions applied
 20 to “organizations whose major purpose is not campaign advocacy, but who occasionally
 21 make independent expenditures on behalf of candidates.” 479 U.S. at 252-53. The Court
 22 recognized that reporting and disclosure requirements are more burdensome for
 23 multi-purpose organizations (such as CPLC) than for political action committees whose
 24 sole purpose is political advocacy. *See id.* at 255-56. Given that the *MCFL* Court con-
 25 sidered FECA’s disclosure requirements to be a severe burden on political speech for
 26 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.

CPLC I, 328 F.3d at 1101 n.16 (citations omitted). *See also id.* at 1104 n.21 (“In *MCFL*, the

³ *CPLC II* held that the less-restrictive means for the state to get all the information it was permitted to obtain as
 to *express advocacy* was the reports approved in *FEC v. Massachusetts Citizens for Life* (“*MCFL*”). 507 F.3d at
 1189 (citing *MCFL*, 479 U.S. 238, 262 (1986)).

1 Supreme Court recognized that disclosure laws may not impose overly burdensome administra-
2 tive costs and organizational requirements for groups such as CPLC ‘whose major purpose is not
3 campaign advocacy, but who occasionally make independent expenditures.’ See *MCFL*, 479 U.S.
4 at 251-65.”). In sum, Ninth Circuit and Supreme Court precedents forbid Washington from
5 imposing PAC status on groups like HLW, whose major purpose is issue advocacy.

6 **B. Washington May Not Regulate Issue Advocacy as Express Advocacy.**

7 “Issue advocacy conveys information and educates. An issue ad’s impact on an election, if it
8 exists at all, will come only after the voters hear the information and choose—uninvited by the
9 ad—to factor it into their voting decisions.” *WRTL II*, 127 S. Ct. at 2667. *WRTL II* reaffirmed
10 strong protection for issue advocacy and the speech-protective analysis that it articulated in
11 *Buckley*, 424 U.S. 1. This *Buckley-WRTL II* analysis controls here.

12 The applicable *Buckley* analytic key is its unambiguously-campaign-related requirement, 424
13 U.S. at 79-81, from which the Court derived two tests that govern this case: (1) the major-
14 purpose test, which determines which groups may be treated as “political committees,” *id.* at 79
15 (“organizations that are under the control of a candidate or the major purpose of which is the
16 nomination or election of a candidate”), and (2) the express-advocacy test, which determines
17 when independent expenditures for communications may be subjected to non-PAC disclosure
18 requirements, *id.* at 80 (“[W]e construe ‘expenditure’ . . . to reach only funds used for communi-
19 cations that expressly advocate [footnote omitted] the election or defeat of a clearly identified
20 candidate. This reading is directed precisely to that spending that is *unambiguously related to the*
21 *campaign of a particular federal candidate.*” (emphasis added)).

22 *Buckley*’s unambiguously-campaign-related requirement asks whether “the *relation* of the
23 information sought to the purpose of the Act [regulating elections] *may be too remote*,” and,
24 therefore, “*impermissibly broad.*” *Id.* (emphasis added). The Court required that government
25 restrict its election-related laws to reach only First Amendment activities that are “*unambigu-*
26 *ously related* to the campaign of a particular federal candidate,” *id.* (emphasis added), in short,

1 “unambiguously campaign related.” *Id.* at 81 (emphasis added).⁴

2 The reason for the unambiguously-campaign-related requirement and its derivative express-
3 advocacy and major-purpose tests is twofold. First, since the only authority to regulate core
4 political speech in this context is the authority to regulate elections, *see id.* at 13 (“constitutional
5 power of Congress to regulate . . . elections is well established”), any restriction must be
6 “unambiguously campaign related.” *Id.* at 81. Second, the people’s core political speech, in their
7 sovereign, self-government role, must not be burdened. The Court noted a dissolving-distinction
8 problem as requiring a bright, speech-protective line between (1) “discussion of issues and
9 candidates” and (2) “advocacy of election or defeat of candidates”:

10 [T]he *distinction between discussion of issues and candidates and advocacy of election*
11 *or defeat of candidates may often dissolve* in practical application. Candidates, espe-
12 cially incumbents, are intimately tied to public issues involving legislative proposals
13 and governmental actions. Not only do candidates campaign on the basis of their
14 positions on various public issues, but campaigns themselves generate issues of public
15 interest. [*Id.* at 42 (emphasis added).]

16 The Court elaborated further on the necessity of the bright line—between (1) “discussion,
17 laudation, [and] general advocacy” and (2) “solicitation”—to protect issue advocacy:

18 (W)hether words intended and designed to fall short of invitation would miss that mark
19 is a question both of intent and of effect. No speaker, in such circumstances, safely
20 could assume that anything he might say upon the general subject would not be under-
21 stood by some as an invitation. In short, the supposedly clear-cut distinction between
22 *discussion, laudation, general advocacy, and solicitation* puts the speaker in these
23 circumstances wholly at the mercy of the varied understanding of his hearers and
24 consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such
25 a distinction offers no security for free discussion. In these conditions it blankets with
26 uncertainty whatever may be said. It compels the speaker to hedge and trim. [*Id.* at 43
(emphasis added).]

27 The Supreme Court later reiterated the express-advocacy and major-purpose tests in
28 imposing the express-advocacy construction on the prohibition on corporate and union “inde-

29 ⁴This requirement reaffirms and clarifies an earlier formulation of the unambiguously-campaign-related
30 requirement where the Court established the standard of review as requiring both “exacting scrutiny” (i.e., strict
31 scrutiny) and “also . . . that there be a ‘relevant correlation’ [footnote omitted] or ‘substantial relation’ [footnote
32 omitted] between the governmental interest and the information required to be disclosed.” *Id.* at 64 (emphasis
33 added). This “relevant correlation” or “substantial relation” was applied by the Court to require that regulated
34 activity must be “unambiguously related to the campaign of a particular federal candidate.” *Id.* at 80.

1 pendent expenditures”⁵ at 2 U.S.C. § 441b in *MCFL*. 479 U.S. at 249. *MCFL* reiterated that PAC
 2 status may not be imposed unless an organization’s major purpose is nominating or electing
 3 candidates, *id.* at 253, 262, calculated on the basis of its “independent spending.” *Id.* at 262.

4 Of course, in the ballot initiative context, the express advocacy test would require express
 5 advocacy of the passage or defeat of a clearly-identified ballot measure, not candidate. Protection
 6 for issue advocacy and the lack of any state interest in preventing corruption in the ballot
 7 initiative context were affirmed under strict scrutiny in *First National Bank of Boston v. Bellotti*,
 8 435 U.S. 765 (1978), which held that corporations could not be precluded from making either
 9 contributions or expenditures for or against ballot initiatives because “[r]eferenda are held on
 10 issues, not candidates for public office. The risk of corruption perceived in cases involving
 11 candidate elections simply is not present in a popular vote on a public issue.” *Id.* at 790 (citations
 12 omitted). *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (“*CARC*”), applied
 13 “exacting scrutiny” (strict scrutiny), *id.* at 294, to a limit on contributions to a California ballot
 14 initiative committee, and held it unconstitutional for not “advance[ing] a legitimate governmental
 15 interest significant enough to justify its infringement of First Amendment rights.” *Id.* at 298.

16 The express-advocacy test was well-settled law until *McConnell v. FEC*, 540 U.S. 93 (2003),
 17 raised a question by stating that the test “was the product of statutory interpretation rather than a
 18 constitutional command.” *Id.* at 192. But *McConnell* continued, in language controlling this case:
 19 “In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and
 20 overbreadth, we nowhere suggested that a statute that was *neither vague nor overbroad* would be
 21 required to toe the same express advocacy line.” *Id.* (emphasis added).⁶ Three analytic keys
 22 explain this statement. First, while the express-advocacy test itself was said not to be “a
 23 constitutional command,” the test was an implementation of the unambiguously-campaign-

24
 25 ⁵“Independent expenditures” are now for communications “expressly advocating the election or defeat of a
 clearly identified candidate.” U.S.C. § 431(17).

26 ⁶*McConnell* raised no questions about the major-purpose test, simply reiterating it. *Id.* at 170 n.64. *See also* 72
 Fed. Reg. 5601 (FEC recognizes major-purpose test for PAC status).

1 related requirement, which *is* a constitutional command. Second, the Court did not eliminate the
2 express-advocacy test, which still governs the provisions (and language) at issue in *Buckley* and
3 *MCFL*, e.g., U.S.C. § 431(17) (“independent expenditure” definition), but rather recognized that,
4 in addition to express-advocacy communications, Congress could also regulate “electioneering
5 communications” (which have now been narrowed to include only communications that both
6 meet the statutory definition and are “susceptible of no reasonable interpretation other than as an
7 appeal to vote for or against a specific candidate.” *WRTL II*, 127 S. Ct. at 2667.) Third, the Court
8 made clear that in the context of vague and overbroad statutes the express-advocacy test re-
9 mained viable, which has been recognized by controlling Ninth Circuit precedent in *American*
10 *Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004), following the Sixth
11 Circuit in employing an express-advocacy construction where necessary (and where the provision
12 is reasonably susceptible to it) to cure vague and overbroad statutes and regulations:

13 [A]s stated recently by the Sixth Circuit, *McConnell* “left intact the ability of courts to
14 make distinctions between express advocacy and issue advocacy, where such distinc-
15 tions are necessary to cure vagueness and over-breadth in statutes which regulate more
speech than that for which the legislature has established a significant governmental
interest.” *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

16 *See also Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) (“*CFIF*”);
17 *San Jose Silicon Valley Chamber of Commerce PAC v. San Jose*, No. 06-0425 (N.D. Cal. Sep.
18 20, 2006) (Order Granting Plaintiff’s Motion for Summary Judgment and Denying Defendants’
19 Motion for Summary Judgment). In the present case, the challenged provisions are all vague and
20 overbroad and impinge on issue advocacy. Under *Heller*, these vague and overbroad provisions
21 should be evaluated to see if they are reasonably susceptible to the express-advocacy construc-
22 tion, and if not, they should be declared unconstitutional. *See Heller*, 378 U.S. at 985-87.

23 *McConnell*’s comment about the express-advocacy test was in its “electioneering communi-
24 cations” analysis, so that analysis is inseparable from *WRTL II*’s narrowing of “electioneering
25 communication” to ads that are “susceptible of no reasonable interpretation other than as an
26 appeal to vote for or against a specific candidate.” 127 S. Ct. 2667. In *WRTL II*’s test invokes the

1 unambiguously-campaign-related requirement, with “unambiguously” equating to “no reasonable
2 interpretation other than” (with all doubts resolved in favor of unregulated speech) and the
3 “campaign related” equating to “appeal to vote for or against a specific candidate.” *WRTL I*’s
4 appeal-to-vote test is the application of the unambiguously-campaign-related requirement to
5 electioneering communications, just as the express-advocacy and major-purpose tests are the
6 Court’s unambiguously-campaign-related requirement for independent expenditures and PAC
7 status. This reaffirmation of the unambiguously-campaign-related requirement reaffirms that the
8 derivative express-advocacy test governs the vague and overbroad provisions here.

9 *WRTL II* also expressly reaffirmed the Court’s recognition of the strong First Amendment
10 protection for “issue advocacy,” which “conveys information and educates,” *id.*, also identifying
11 it as “political speech.” *Id.* at 2659 (equating “political speech” with “issue advocacy” in
12 contradistinction to “express campaign speech”). *WRTL II* twice reaffirmed *Buckley*’s dissolving-
13 distinction problem, *see supra*, as the reason why a bright-line, unambiguously-campaign-related
14 requirement is necessary to protect the people’s core political speech. *Id.* at 2659, 2669. *WRTL II*
15 held that vagueness is impermissible and must be resolved by (1) a bright-line, unambiguous test
16 and (2) resolving all doubts about a communication’s meaning in favor of unrestricted speech. *Id.*
17 at 2669 n.7. After *WRTL II*, there is no doubt that *Buckley*’s requirement of bright-line protection
18 for the issue advocacy at issue in the present case is robustly alive and that the express-advocacy
19 test is constitutionally mandated here to resolve the dissolving-distinction problem.

20 Washington once recognized constitutional protection for issue advocacy. *See Washington*
21 *State Republican Party v. PDC*, 4 P.3d 808 (July 27, 2000); PDC Interpretation 00-04 (“Use of
22 ‘Soft Money’ for Issue Advocacy,” available at <http://www.pdc.wa.gov/default.aspx>). But in the
23 PDC’s online list of PDC Interpretations the following annotation follows 00-04: “However, see
24 later statute at RCW 42.17.562(3) as enacted in Chapter 445, Laws of 2005 (effective January 1,
25 2006), and WAC 390-17-060(3) (amended in 2006 to address RCW 42.17.562(3), pursuant to
26 RCW 42.17.562(4)).” The cited statute says it “is intended to . . . [r]eenact . . . the restrictions on

1 the use of soft money, including as applied to electioneering communications, as those
2 . . . restrictions were in effect . . . before *Washington State Republican Party* . . .” Wash. Rev.
3 Code § 42.17.562. The statute says *McConnell* supports “regulation of electioneering communi-
4 cations in political campaigns, including *but not limited to* issue advocacy that is the functional
5 equivalent of express advocacy.” *Id.* (emphasis added). Washington read too much into
6 *McConnell*. *See supra*. It was wrong that *McConnell* allowed it to regulate issue advocacy
7 *beyond* “the functional equivalent of express advocacy.” (Even *McConnell* acknowledged that
8 “the interests that justify the regulation of campaign speech might not apply to the regulation of
9 genuine issue ads.” 540 U.S. at 206 n.88.) Washington’s declared interpretation of its laws and
10 enforcement policy is inconsistent with *WRTL II*, which narrowly limited “the functional
11 equivalent of express advocacy” precisely to protect issue advocacy. *See supra*. But Washington
12 clearly intends to regulate issue advocacy and interprets its laws as doing so.

13 C. The “Political Committee” Definition Is Unconstitutional (Count 1).

14 Washington defines “political committee” as “any person (except a candidate or an
15 individual dealing with his or her own funds or property) having the expectation of receiving
16 contributions or making expenditures in support of, or opposition to, any candidate or any ballot
17 proposition. Wash. Rev. Code § 42.17.020(38). Burdens of PAC status are set out in the *Verified*
18 *Complaint*. VC ¶ 44. Washington’s Supreme Court recently construed this statute, erroneously
19 relegating *WRTL II* to a dismissive footnote in a case where the *Buckley-WRTL II* analysis
20 controlled. *See Voters Education Committee v. PDC*, 166 P.3d 1174, 1183 n.8 (Wash. 2007) (en
21 banc) (“*VEC*”), *petition for cert. filed* (U.S. Mar.12, 2008) (No. 07-1153) (petition available at
22 <http://www.moresoftmoneyhardlaw.com/clientfiles/VEC%20Writ.pdf>). The court authoritatively
23 construed “support” and “opposition” as *not* requiring express advocacy and not protecting issue
24 advocacy. *Id.* at 1186 (“[W]e decline to reach the issue of whether *VEC*’s advertisement
25 constituted express advocacy or issue advocacy.”). This precludes saving the provision from
26 vagueness and overbreadth with the express-advocacy construction. The court held that “support”

1 and “oppose” are “not unconstitutionally vague” and did no overbreadth analysis. *Id.* So Washing-
2 ton’s support/oppose test (presumably in all of its applications) is not an express-advocacy test.

3 *VEC* relied, 166 P.3d at 1184, on *McConnell*’s rejection, in two instances, of a vagueness
4 challenge to “support” and “oppose.” 540 U.S. at 170 n.64, 184. But *McConnell* only found these
5 terms not vague in the limited context of political parties and candidates. *McConnell*
6 expressly noted that the first instance had to do with political parties, all of whose activities are
7 presumed to be unambiguously campaign related. *Id.* at 170 n.64 (*quoting Buckley*, 424 U.S. at
8 79 (major-purpose test)).⁷ *McConnell* did not say that “support” or “oppose” are sufficiently clear
9 standing alone, only that they gave sufficient guidance where (1) the speech was by a political
10 party (with the presumption, *supra*), (2) the speech was about a candidate (likely campaign
11 related where the speaker is a political party), and (3) the speech supported or opposed the
12 identified candidate. That is not the present context. HLW is no political party and seeks to *avoid*
13 PAC status, so there is no presumption that its activities are campaign-related. HLW does not
14 wish to even speak about a candidate, so the implications of a party speaking about its candidate
15 are missing. Also essential to *McConnell*’s analysis was availability of FEC advisory opinions to
16 clarify what is permissible. *Id.* at 170 n.64. The PDC provides no advisory opinions. *McConnell*
17 does not eliminate the requirement to engage in *Buckley*-style strict scrutiny of the challenged
18 provisions here as to vagueness and overbreadth (i.e., sweeping in issue advocacy and failing to
19 meet the unambiguously-campaign-related and narrow-tailoring requirements, along with failure
20 to employ the required express-advocacy and major-purpose tests).

21 Since *McConnell* does not protect “support” and “oppose” from vagueness in this context,
22 the PAC definition requires strict scrutiny. *WRTL II* expressly said that *Buckley*’s express-
23 advocacy analysis, 424 U.S. at 44 (“the exacting scrutiny applicable to limitations on core First
24 Amendment rights of political expression”), was “strict scrutiny.” 127 S. Ct. at 2669 n.7. *See*

25
26 ⁷The second instance had to do with political candidates, where the Court simply pointed to its analysis as to
political parties. *Id.* at 184.

1 also *MCFL*, 479 U.S. at 256 (PAC-style burdens require strict scrutiny); *Austin v. Mich. State*
 2 *Chamber of Commerce*, 494 U.S. 652, 658 (1990)(same). As to vagueness, “[c]lose examination
 3 of the specificity of the statutory limitation is required where, as here, the legislation imposes
 4 criminal penalties in an area permeated by First Amendment interests.” *Buckley*, 424 U.S. at 40-
 5 41.⁸ “Because First Amendment freedoms need breathing space to survive, government may
 6 regulate in the area only with narrow specificity.” *Id.* at 41, n.48 (citation omitted). “The test is
 7 whether the language . . . affords the ‘(p)recision of regulation (that) must be the touchstone in an
 8 area so closely touching our most precious freedoms.” *Id.* at 41 (citation omitted).

9 *Buckley’s* standard for avoiding vagueness and overbreadth is formidable. *Buckley* held that
 10 the phrase “*advocating the election or defeat of a candidate*,” *Buckley*, 424 U.S. at 42 (emphasis
 11 added), was vague and overbroad, *id.* at 44, in part for restricting “discussion of issues.” *Id.* at 42.
 12 *Buckley’s* rejected phrase is a benchmark for analyzing Washington’s laws. If it is vague, then all
 13 equivalent or less-specific language is vague. *Buckley* held that the only way to save that phrase
 14 was by restricting it to “communications that include explicit words of advocacy of election or
 15 defeat of a candidate,” *id.* at 44, i.e., “communications that in express terms advocate the election
 16 or defeat of a clearly identified candidate for federal office.” *Id.*

17 Measuring “support” and “oppose” against *Buckley’s* rejected phrase demonstrates the
 18 vagueness of those terms.⁹ *Buckley’s* rejected formulation required advocacy of *election or defeat*
 19 of the candidate, i.e., there had to be an *appeal to vote* for or against the candidate. But *Buckley*
 20 said that “advocating the election or defeat of a candidate” was still too vague absent explicit

21
 22 ⁸Washington law does not impose criminal penalties, but it has severe civil penalties, *see* Wash. Rev. Code
 23 § 42.17.390, and imposes liability for the State’s costs of investigation and trial and attorney’s fees. Wash. Rev.
 Code § 42.17.400. Moreover, any judgment (which includes costs for this purpose) “may be trebled as punitive
 damages.” Wash. Rev. Code § 42.17.400(5).

24 ⁹In *VEC*, 116 P.3d 1174, the Washington Supreme Court said that the “support . . . or oppos[e]” language in
 25 Washington’s definition of “political committee” was “significantly more precise than the phrase “‘*relative to a*
 26 *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.

1 words of express advocacy, lest the definition reach issue advocacy. Washington requires only
2 “support of, or opposition to, any candidate or any ballot proposition.” Wash. Rev. Code
3 § 42.17.020(38). Washington’s terms “support” and “oppose” are much more vague than the
4 term “advocate,” which *Buckley* rejected as vague and overbroad. And Washington’s sup-
5 port/oppose test is not restricted to words appealing for a vote, as existed in the language that
6 *Buckley* rejected. So Washington’s language is more vague and overbroad than the language that
7 *Buckley* rejected. And it does not come anywhere close to the express-advocacy language that
8 *Buckley* imposed on the phrase it rejected in order to save it. Consequently, Washington’s
9 language is vague and overbroad as a matter of law.

10 *Buckley* discussed in detail the problem with any test short of the express-advocacy test, i.e.,
11 less-protective tests collide with the dissolving-distinction problem, *see supra*, and require
12 assessing the intent and effect of speech, *Buckley*, 424 U.S. at 43, and *WRTL II* said that tests
13 attempting to examine intent and effect impermissibly burden speech. 127 S. Ct. at 2665 (“[T]his
14 Court in *Buckley* . . . rejected an intent-and-effect test for distinguishing between discussions of
15 issues and candidates.”). The *Buckley-WRTL II* rejection of intent-and-effect tests, on which
16 “support” and “oppose” rely, is clear and controlling. But this is not the first time that the
17 Supreme Court has rejected such language. The Court did so in loyalty oath cases involving
18 “supporting” and “opposing.” In *Cole v. Richardson*, 405 U.S. 676 (1972), the Court treated
19 required oaths to support one’s country and “oppose” its enemies as harmless “amenities” merely
20 requiring compliance with other laws, but it explained that “oppose” would be vague in other
21 contexts. *Id.* at 678-85. One of those contexts, *id.*, was *Cramp v. Board of Public Instruction*, 368
22 U.S. 278 (1971), which held “support” unconstitutionally vague. *Id.* at 279. *Cf. Baggett v. Bullitt*,
23 377 U.S. 360, 373 (1964) (since some push vague laws to limits, “[w]ell intentioned prosecutors
24 and judicial safeguards do not neutralize the voice of a vague law”). Of course, Washington’s use
25 of the support/oppose test is no “amenity” requiring compliance with other laws but is a law with
26 serious penalties. So it is vague and overbroad.

1 Federal circuit courts have implemented the Supreme Court's rejection of any support/op-
2 pose test in the vital political speech area. In 2006, the Fifth Circuit considered a law requiring
3 reporting and disclosure of payments "for the purpose of supporting, opposing, or otherwise
4 influencing the nomination or election of a person." *CFIF*, 449 F.3d at 662-63. The court
5 imposed the express-advocacy construction: "To cure that vagueness, and receiving no instruc-
6 tion from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle . . . and conclude
7 that the statute reaches only communications that expressly advocate the election or defeat of a
8 clearly identified candidate." *Id.* at 665. Since the Fifth Circuit construed the whole phrase as
9 requiring express advocacy, it clearly found "supporting," "opposing," and "otherwise influenc-
10 ing" vague and overbroad, even though it had the advantage over Washington's PAC definition
11 of limiting the context to "nomination or election."

12 The Fourth Circuit struck down as vague North Carolina's "political committee" definition
13 with the operative phrase "support or oppose any candidate or political party or to influence or
14 attempt to influence the result of any election." *North Carolina Right to Life v. Bartlett*, 168 F.3d
15 705, 712 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) (citation omitted). The court did not
16 impose the express-advocacy construction because the statute was not readily susceptible to such
17 a construction and because doing so was against legislative intent. *Id.* at 712-13.

18 The Sixth Circuit recently employed a saving construction because of the constitutional
19 difficulties of a for/against test, which is similar to support/oppose, in order to protect issue
20 advocacy. The test at issue in *Anderson* was in an "electioneering" definition, which targeted
21 "solicitation of votes for or against any candidate or question on the ballot in any manner."
22 *Anderson*, 356 F.3d at 663. The Sixth Circuit noted that *McConnell* "left intact the ability of
23 courts to make distinctions between express advocacy and issue advocacy, where such distinc-
24 tions are necessary to cure vagueness and overbreadth in statutes which regulate more speech
25 than that for which the legislature has established a significant governmental interest." *Id.* at 664-
26 65. The court imposed the express-advocacy construction: "we apply a narrowing construction to

1 the term ‘electioneering,’ and find that it may permissibly apply only to speech which expressly
2 advocates the election or defeat of a clearly identified candidate or ballot measure.” *Id.* at 665.

3 Washington’s PAC support/oppose test is unconstitutional without a saving construction, but
4 “[f]ederal courts ‘are “without power to adopt a narrowing construction of a state statute unless
5 such a construction is reasonable and readily apparent.”” *Heller*, 378 F.3d at 986 (*quoting*
6 *Stenberg v. Carhart*, 530 U.S. 914, 944-945 (2000) (*quoting Boos v. Barry*, 485, U.S. 312, 330
7 (1988)). While federal courts “lack jurisdiction authoritatively to construe state legislation,”
8 *Gooding v. Wilson*, 405 US 518, 520 (1972) (*quoting U.S. v. Thirty-seven Photographs*, 402 U.S.
9 363 (1971)), the Washington Supreme Court has authoritatively construed the PAC definition as
10 not limited to express advocacy. *VEC*, 166 P.3d at 1186. *See also* Wash. Rev. Code § 42.17.562
11 (Legislature declared authority to regulate issue advocacy). Therefore, this Court may not impose
12 a saving construction, but must consider the statute as construed:

13 [T]he mere presence of a state court interpretation does not insulate a statute from
14 overbreadth review. We have stricken legislation when the construction supplied by the
15 state court failed to cure the overbreadth problem. *See, e.g., Lewis v. New Orleans*, 415
U.S. 130, 132-133 (1974) But in such cases, we have looked to the statute as construed
in determining whether it contravened the First Amendment.

16 *R.A.V. v. City of St. Paul*, 505 U.S. 377, 411-12 (1992) (White, J., concurring). Because a saving
17 construction is impossible, the support/oppose test in the PAC definition is unconstitutionally
18 vague and overbroad, particularly for sweeping in constitutionally-protected issue advocacy. It
19 fails both the express-advocacy test and the unambiguously-campaign-related requirement.

20 Washington’s PAC definition is also unconstitutional because “expectation” is vague and
21 overbroad in providing a PAC-status trigger. Is it a hope?—promise?—understanding?—
22 agreement?—contract? “Expectation” is “[t]he act of looking forward; anticipation.” *Black’s*
23 *Law Dictionary* 598 (9th ed. 1999). In property, an “expectancy” is “[t]hat which is hoped for,”
24 but “[a]t most it is a mere hope or expectation” *Black’s Law Dictionary* 517 (5th ed. 1979).
25 By contrast, the federal “political committee” definition has a \$1,000 trigger of actual “contribu-
26 tions” or “expenditures,” 2 U.S.C. § 431(4), so it is clear when an organization becomes a PAC

1 (if it also meets the major-purpose test). The absence of a clear trigger exacerbates the vagueness
2 and overbreadth. Even *McConnell*'s approval of disclosure of "executory contracts" for election-
3 eering communications required that there be a contract. *See McConnell*, 540 U.S. at 199-02.

4 The term "contributions" is vague and overbroad, as used here, and does not follow the U.S.
5 Supreme Court's clarifying interpretation of that term in *Buckley*. 424 U.S. at 23 n.24. Under
6 federal law, a "contribution" is essentially "anything of value made by any person for the purpose
7 of influencing any election for Federal office . . ." 2 U.S.C. § 431(8). Faced with the ambiguity
8 of "for the purpose of influencing" and applying the unambiguously-campaign-related require-
9 ment, *Buckley* approved the following scope for "contributions": "Funds provided to a candidate
10 or political party or campaign committee either directly or indirectly through an intermediary
11 constitute a contribution. In addition, dollars given to another person or organization that are
12 earmarked for political purposes are contributions under the Act." 424 U.S. at 23 n.24. Washing-
13 ton's "contribution" definition has no intent requirement, being essentially a transfer of "anything
14 of value . . ." without reference to intent, Wash. Rev. Code § 42.17.020(15(a)(i). The donor
15 intent requirement is supplied by the PAC definition, i.e., "contributions . . . in support of, or
16 opposition to, any . . . ballot proposition," which is vague and overbroad as already shown.

17 Washington also unconstitutionally presumes a purpose to influence elections with its
18 unconstitutionally vague "receiver of contributions" test, which examines whether the members
19 of a membership organization might have "actual or constructive knowledge that the organiza-
20 tion is setting aside funds to support or oppose a candidate or ballot proposition," in which
21 member dues or donations are deemed "contributions" and the organization is deemed a
22 "political committee." *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894, 904
23 (Wash. App. 2002) ("*WEA*") (citing 1973 Wash. Att'y Gen. Op. 114). This is contrary to
24 *Buckley*'s restriction of "contributions" to those donations given to political entities, which
25 would at least require that an entity *be* a "political committee" (based on the major-purpose test)
26 before donations to it are deemed "contributions" or that the donations be expressly earmarked

1 for such political purposes as express advocacy. *Cf. MCFL*, 479 U.S. at 252-53 (plurality
2 opinion) (non-PAC entity need only identify those “who contribute . . . to influence elections” or
3 “make contributions . . . earmarked for the purpose of furthering independent expenditures.”)

4 “Expenditures” is also vague and overbroad, as used here, and does not follow the U.S.
5 Supreme Court’s narrowing constructions of the related uses of “expenditure” in *Buckley*, *id.* at
6 44, 80, and *MCFL*, 479 U.S. at 249, wherein the Court imposed the express-advocacy construc-
7 tion. *See supra* at I.B.

8 The PAC definition is also unconstitutional because it lacks the United States Supreme
9 Court’s required “the major purpose” test. *See supra* at I.A. And it violates the Ninth Circuit’s
10 recent holding that PAC status may not be imposed in this context. *See supra* at I.A. Instead of
11 employing the U.S. Supreme Court’s “the major purpose” test, Washington substitutes its own “a
12 primary purpose” test. *See State v. Dan Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976)
13 (en banc); *WEA*, 49 P.3d at 903. The notion that a primary purpose can define the nature of an
14 organization for imposing PAC status introduces vagueness and overbreadth into the analysis.

15 This is clear from *WEA*’s vague analysis, which sought “[t]o give guidance to the courts,” 49
16 P.3d at 903, by setting out “an appropriate framework” that examined the organization’s “stated
17 goals and mission . . . and whether electoral political activity was a primary means of achieving
18 the stated goals and mission” by using “a nonexclusive list of analytical tools.” *Id.* “But this
19 analysis should not be applied as a formula,” the Court continued, “[t]hese are analytical tools
20 intended to reach all relevant evidence, but they are not exclusive.” *Id.* The court ultimately
21 recited a “totality of the circumstances” test.” *Id.* And in probing all the “relevant evidence” in
22 this “totality of the circumstances” test, the court imposed on *WEA* a “16-day-long bench trial
23 includ[ing] testimony of approximately 50 witnesses and 750 exhibits,” *id.* at 901, from which
24 ordeal the trial court “made extensive findings of fact and conclusions of law.” *Id.*

25 “At trial, *WEA* asserted that the definition of ‘political committee’ was unconstitutional
26 because it chilled its First Amendment right to issue advocacy,” *id.* at 900, but the trial and

1 appellate courts did not address this, instead finding that WEA was not a political committee, *id.*
2 at 904, although the appellate court never really said what was decisive—it merely recited that
3 “[t]he definition of political committee was not meant to indiscriminately include all those who
4 seek to influence government by their support or opposition to candidates or ballot propositions.”
5 *Id.* How would any organization doing issue advocacy in the ballot measure context ever know
6 for certain whether it would be deemed a political committee under such a vague and overbroad
7 we-know-it-when-we-see-it test? Given the U.S. Supreme Court’s unambiguously-campaign-
8 related-requirement, *see supra*, such a vague and overbroad test is unconstitutional.

9 The true analysis was set out in *MCFL*, which reaffirmed that the test examined *the* major
10 purpose, not *a* major purpose, and that the major purpose was to be determined by examining
11 whether MCFL’s “independent spending” (for express-advocacy communications) made it “the
12 organization’s major purpose.” 479 U.S. at 262. This language plainly envisions a simple
13 comparison of the amount spent on express advocacy with the organization’s total annual
14 expenditures to see if a majority of its disbursements were for such “independent spending.” That
15 simple analysis protects the First Amendment rights of issue-advocacy groups by protecting them
16 from 16-day public probes into their private affairs whenever a complaint is made against them.
17 Instead of this required analysis, the PDC incorporated Washington’s flawed “a primary purpose”
18 test into PDC Interpretation 07-02 (“Primary Purpose Test Guidelines”).

19 In sum, Washington’s PAC definition and enforcement policy are unconstitutional for
20 vagueness and overbreadth in failing to follow the express-advocacy and major-purpose test to
21 assure that they do not capture protected issue advocacy.

22 **B. The “Independent Expenditures” Definition Is Unconstitutional (Count 2).**

23 The second of Washington’s two definitions of “independent expenditure,” Wash. Rev.
24 Code § 42.17.100, is unconstitutional for vagueness and overbreadth. It is defined as follows:

25 (1) For the purposes of this section and RCW 42.17.550 the term “independent
26 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

1 pursuant to RCW 42.17.060, 42.17.080, or 42.17.090. "Independent expenditure"
 2 does not include: An internal political communication primarily limited to the
 3 contributors to a political party organization or political action committee, or the
 4 officers, management staff, and stockholders of a corporation or similar
 5 enterprise, or the members of a labor organization or other membership
 6 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. [Wash. Rev. Code § 42.17.100 (emphasis added).]

7 Applications and burdens triggered by the definition are in the *Verified Complaint*. VC ¶ 53.

8 HLW wants to do constitutionally-protected issue advocacy. *Buckley*, 424 U.S. at 42
 9 (express-advocacy test protects "discussion of issues"); *WRTL II*, 127 S. Ct. at 2667 (appeal-to-
 10 vote test protects "issue advocacy"). HLW reasonably fears that its Letter, Phone Script, and Ads,
 11 see VC ¶¶ 22-24, 27-29, 32, and Exs. 2-4, will be deemed by enforcement officials to be
 12 "independent expenditures." See VC ¶¶ 52-55 (statute, burdens, and constitutional flaws). These
 13 would never be *federal* "independent expenditures" (if federal law allowed ballot initiatives)
 14 because the definition, 2 U.S.C. § 431(17), requires express advocacy. But Washington substi-
 15 tutes its support/oppose test for the express-advocacy test, reaching "any expenditure that is made
 16 in support of or in opposition to any . . . ballot proposition." Wash. Rev. Code § 42.17.100. There
 17 are clear burdens here that HLW wishes to avoid and will not assume because it deems them
 18 unconstitutional. See VC ¶ 53. Absent the requirement that the definition be triggered only by
 19 express advocacy of the passage or defeat of I-1000, it is highly likely that HLW's communica-
 20 tions, which oppose physician-assisted suicide but do not expressly call for a vote against I-1000,
 21 would be deemed "independent expenditures." In light of *VEC*'s holding that the PAC defini-
 22 tion's support/oppose test does not mean "expressly advocate" and the Legislature's stated intent
 23 to regulate issue advocacy, Wash. Rev. Code § 42.17.562, it is clear that Washington does not
 24 mean "expressly advocate" here. So the support/oppose test is not readily susceptible to a saving
 25 construction. See *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

26 Washington's use of the support/oppose test to define "independent expenditure" sweeps

1 within that definition a vast amount of speech that is not unambiguously-campaign-related
 2 because it does not expressly advocate a vote for or against a clearly identified ballot proposition.
 3 A universe of expenditures that do not “expressly advocate” may be deemed to “support or
 4 oppose.” Thus, although HLW’s communications are pure issue advocacy, they nonetheless
 5 likely qualify as “independent expenditures” under Washington’s definition. As in *Buckley*,
 6 Washington’s regulation of expenditures that “support . . . or oppos[e]” a ballot proposition is
 7 “too remote” to its interest in regulating elections and is “impermissibly broad.” *Buckley*, 424
 8 U.S. at 80 (emphasis added).¹⁰ Given *Buckley*’s holding that “advocating the election or defeat of
 9 a candidate,” *Buckley*, 424 U.S. at 42, is unconstitutionally vague and overbroad, *id.* at 44,
 10 especially for capturing “discussion of issues,” *id.* at 42, there is no possibility that “support” and
 11 “oppose” are constitutional here. *See supra*.

12 C. The “Political Advertising” Definition Is Unconstitutional (Count 3).

13 Washington’s definition of “political advertising,” Wash. Rev. Code § 42.17.020(37), is
 14 similarly unconstitutionally vague and overbroad. “‘Political advertising’ includes any advertis-
 15 ing displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or
 16 television presentations, or other means of mass communication, used *for the purpose of*
 17 *appealing, directly or indirectly, for votes or for financial or other support or opposition in any*
 18 *election campaign. Id.* (emphasis added). The burdens triggered by this definition are set out in
 19 the *Verified Complaint*. VC ¶ 59. This definition employs the support/oppose test, which is
 20 unconstitutionally vague and overbroad (*see supra*), and introduces three subsets of the vague
 21 phrase “supporting or opposing,” i.e., (a) direct or indirect appeals “for votes”; (b) direct or
 22

23 ¹⁰In *CPLC I*, 328 F.3d 1088, the Ninth Circuit heard a challenge to a California statute defining “independent
 24 expenditures” as those communications that “taken as a whole and in context, unambiguously urge[] a particular
 25 result in an election” *Id.* at 1096. In rejecting a vagueness and overbreadth challenge, the Court pointed to a
 26 state court decision that provided the “narrowing construction” that only communications “that contain express
 language of advocacy with an exhortation to elect or defeat a candidate” qualify as “independent expenditures.” *Id.* at
 1098 (*citing Gov. Gray Davis Comm. v. American Taxpayers Alliance*, 102 Cal. App.4th 449 (2002)). Given this
 narrowing construction,” the Ninth Circuit stated, “we cannot say the . . . definition of “independent expenditure”
 overreaches.” *Id.*

1 indirect appeals for “financial . . . support or opposition”; and (c) direct or indirect appeals for
2 “other support or opposition.” “Directly or indirectly” is unconstitutionally vague and overbroad
3 (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements), as is
4 “appealing” in this context and “other support or opposition” (which, whatever it means, does not
5 mean appeals for votes or contributions). “Mass communication” is undefined, so it is impossible
6 to determine, for example, whether 5, 50, 500, or 5,000 letters would trigger the definition.

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

14 **D. “Rating, Evaluation, Endorsement or Recommendation” Is Unconstitutional (Count 4).**

15 Washington’s reporting requirement, at Wash. Admin. Code § 390-16-206, for communica-
16 tions containing “a rating, evaluation, endorsement, or recommendation for or against a candidate
17 or ballot measure” is unconstitutionally vague and overbroad. The provision requires that “[a]ny
18 person making a measurable expenditure of funds to communicate a rating, evaluation, endorse-
19 ment or recommendation for or against a candidate or ballot proposition (other than news,
20 feature, or editorial comment in a regularly scheduled issue of a printed periodical or broadcast
21 media program) shall report such expenditure including all costs of preparation and distribution
22 in accordance with RCW 42.17.030 through 42.17.100.” *Id.*

23 This requirement relies on a vague for/against test, not Washington’s support/oppose test. It
24 cannot be determined whether the PDC intends its for/against test to reach more broadly or more
25 narrowly than Washington’s statutory support/oppose test, but the tests cannot be the same
26 because the PDC consciously chose different, non-statutory terms and because otherwise some

1 communications captured here by the for/against test would be redundant of communications
2 captured by the “political advertising” definition. *See supra*. However, given the absence of any
3 requirement that the communication be a “mass communication” (as “political advertising”
4 requires) and the choice of the exceedingly vague, overbroad, and undefined terms “rating,”
5 “evaluation,” “endorsement,” and “recommendation,” it is apparent that PDC is regulating a vast
6 swath of protected issue advocacy. And such ratings, evaluations, endorsements, and recommen-
7 dations would be subject to compelled disclosure at the “measurable expenditure” level of a
8 single letter to a friend discussing a public official who happens to be a candidate.

9 This provision is unconstitutionally vague and overbroad because of its reliance on the
10 for/against test instead of the express-advocacy test and because it contains other vague and
11 overbroad (i.e., they fail the unambiguously-campaign-related and narrow-tailoring require-
12 ments) terms, all in violation of the First and Fourteenth Amendments to the U.S. Constitution.
13 The Sixth Circuit imposed a saving express-advocacy construction on the for/against test in
14 *Anderson*. 356 F.3d at 66. But the PDC’s regulation is not readily susceptible to the express-
15 advocacy construction because the PDC clearly knows how to articulate the express-advocacy
16 test when it intends to do so, *see, e.g.*, PDC Interpretation 00-04 (“Use of ‘Soft Money’ for Issue
17 Advocacy), but chose not to do so here. This interpretive principle was clearly stated by the
18 Ninth Circuit in the controlling *Heller* opinion. 378 F.3d at 986 (use of “advocacy” language
19 elsewhere precludes imposing that meaning where it is lacking). And Wash. Rev. Code
20 § 42.17.562 authorized the PDC to regulate issue advocacy, which it is doing.

21 **E. The Challenged Provisions Are Unconstitutional Facially and As Applied.**

22 HLW challenges the provisions at issue facially and as applied to HLW (and groups like
23 HLW) in the ballot measure context and to HLW’s intended activity. For the reasons set out
24 above, the political committee definition cannot be applied to any group like HLW that lacks the
25 requisite major purpose in the ballot measure context. And because all of the challenged
26 provisions contain language that is vague, not narrowly tailored, and overinclusive, they should

1 be struck both facially and as applied. The challenged provisions “reach[] ‘a substantial amount
 2 of constitutionally protected conduct,’” so they should also be struck under the First Amendment
 3 overbreadth doctrine. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Hoffman Estates v.*
 4 *Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982)) (“vagueness and overbreadth [are]
 5 logically related and similar doctrines”). *Cf. City of Chicago v. Morales*, 527 U.S. 41, 60 (1999)
 6 (facially invalidating “loitering” ordinance reaching substantial amount of innocent conduct).

7 **II. HLW Has Irreparable Injury.**

8 Since HLW has established a high likelihood of success on the merits, “the degree of
 9 irreparable harm” required is decreased, *Earth Island Inst.*, 351 F.3d at 1300. But HLW clearly
 10 has irreparable harm as a result of its chilled speech. Self-censorship “[i]s a harm that can be
 11 realized even without actual prosecution.” *American Bookseller’s Ass’n*, 484 U.S. at 393.
 12 “Deprivations of speech rights presumptively constitute irreparable harm for purposes of a
 13 preliminary injunction: ‘The loss of First Amendment freedoms, even for minimal periods of
 14 time, constitute[s] irreparable injury.’” *Sumnum v. Pleasant Grove City*, 483 F.3d 1044 (10th
 15 Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). *See also Chaplaincy of Full*
 16 *Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (“[w]here a plaintiff alleges
 17 injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may
 18 be presumed.”) HLW wants to speak on the physician-assisted suicide issue now, while public
 19 interest is focused on the subject because signatures are being collected for I-1000 and people are
 20 thinking about I-1000 being on the November ballot. And the inability to effectively advocate on
 21 the physician-assisted suicide issue adversely affects HLW’s ability to advocate for the prolife
 22 ethic as a whole, which seeks legal protection for innocent human life from fertilization to
 23 natural death. These opportunities are being lost day by day, and there is no remedy at law

24 **III. Balancing Hardships Favors HLW.**

25 “[A] court may grant the injunction if the plaintiff demonstrates *either* a combination of
 26 probable success on the merits and the possibility of irreparable injury or that serious questions

1 are raised and the balance of hardships tips sharply in his favor.” *Oey*, 505 F.3d at 902. HLW has
 2 demonstrated both probable success on the merits and a clear irreparable injury, so a preliminary
 3 injunction should issue. But the balance of hardships also tips in HLW’s favor. HLW’s hardship
 4 is the irreparable loss of First Amendment rights to engage in core political speech in the form of
 5 highly-protected issue advocacy at the most opportune time in terms of public interest in
 6 physician-assisted suicide. Defendants’ interest in enforcing its statutes is substantially reduced
 7 by the showing of the high probability of success on the merits. Clearly, if the challenged
 8 provisions are unconstitutional, Defendants have *no* cognizable interest in enforcing them.

9 **IV. The Public Interest Favors HLW.**

10 The public interest analysis also follows the high likelihood of success that has been shown
 11 and favors HLW. The public has an interest in its representatives enacting and enforcing
 12 constitutional laws. It has an interest in promoting core political speech. And it has an interest, in
 13 the First Amendment context, in receiving HLW’s speech. An injunction serves these interests.

14 **Conclusion**

15 For the foregoing reasons a preliminary injunction should issue and no security should be
 16 required, or it should be nominal, since Defendants have no monetary stake.

17 Respectfully submitted,

18
 19 /s/ John J. White, Jr.
 John J. White, Jr., WSBA #13682
 LIVENGOOD, FITZGERALD & ALSKOG
 121 Third Avenue
 P.O. Box 908
 Kirkland, WA 98083-0908
 425/822-9281 telephone
 425/828-0908 facsimile
Local Counsel for Plaintiff

/s/ James Bopp, Jr.
 James Bopp, Jr., Lead Counsel*, Bar #2838-84
 Indiana

/s/ Richard E. Coleson
 Richard E. Coleson*, Bar #11527-70 Indiana

/s/ Clayton J. Callen
 Clayton J. Callen*, Bar #59885 Missouri
 BOPP, COLESON & BOSTROM
 1 South Sixth Street
 Terre Haute, IN 47807-3510
 812/232-2434 telephone
 812/234-3685 facsimile
Lead Counsel for Plaintiff
 *Admitted pro hac vice.