No. 14-1397

In The

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Petitioner,

v.

ROBERT F. UTTER, ET AL.,

Respondents.

On Petition for Writ of *Certiorari* to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, the Center for Competitive Politics ("CCP") is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. CCP was co-counsel in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and has filed *amicus curiae* briefs in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434 (2014).

All parties to this appeal have agreed that CCP may participate as *amicus curiae,* and all parties have consented to the filing of this brief. Rule 37.2(a).

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[1] Pursuant to Rule 37.6, *Amicus* states that no contributions of money were made to fund the preparation or submission of this brief, which was authored entirely by counsel for *Amicus*.

SUMMARY OF THE ARGUMENT

This Court has long understood that the regulation of campaign speech, including money spent to fund that speech, goes to the heart of American self-government. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*). Consequently, state regulation of such discussions must be drafted to an especially high standard of clarity. *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[W]e cannot assume that…ambiguities will be resolved in favor of adequate protection of First Amendment rights…Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms") (citations omitted); *Buckley*, 424 U.S. at 77 ("Where First Amendment rights are involved, an even greater degree of specificity is required") (citations and quotation marks omitted).

Accordingly, when this Court first reviewed the Federal Election Campaign Act ("FECA"), which could be read to reach groups largely disconnected from electoral politics, it adopted a narrowing construction to "avoid the shoals of vagueness." *Buckley*, 424 U.S. at 78 (citing *United States v. Harriss*, 347 U.S. 612, 618 (1954); *United States v. Rumely*, 345 U.S. 41, 45 (1953)). Accordingly, *Buckley* imposed a rule that only groups with "the major purpose" of making expenditures advocating electoral outcomes could be forced to comply with federal political committee ("PAC") regulations. This

concrete rule prevented governmental actors from abusing vague language to reach overbroad ends.

Rather than straightforwardly applying this portion of the *Buckley* ruling, the Washington Supreme Court created an impossibly vague standard for state political committee status. While this Court has clearly limited PAC status, with its registration and reporting burdens, to groups whose objective and measureable spending shows their overarching purpose to be electoral advocacy, the court below permitted PAC status to turn on, *inter alia*, comments in newsletters and emails.

This error is significant, but increasingly common. This Court has never revisited the major purpose test, but it has limited other portions of the *Buckley* ruling. *McConnell v. FEC*, 540 U.S. 93, 191-192 (2003) (*Buckley*'s limitation of regulated communications to those "expressly advocating" for or against candidates was product of statutory interpretation, not a constitutional requirement); *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434 (2014) ("Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here") (Roberts, C.J., controlling op.).

Given this Court's confusing guidance, lower courts have strayed from the clearly-delineated standard articulated in *Buckley*, and cobbled together a range of vague and unworkable approaches to "the major purpose" requirement. Unless this Court speaks clearly on this subject, standardless and vague PAC status laws will remain in force.

Worse, Washington State has outsourced enforcement of its campaign finance laws to private citizens. Predictably, vague laws, which may otherwise be mitigated by the sound exercise of prosecutorial discretion, instead serve as tempting targets for gamesmanship by partisan actors and ideological opponents.

ARGUMENT

I. Limiting the Burdens of PAC Status to Groups with the "Major Purpose" of Express Advocacy was the Result of a Considered Effort to Preserve Space for Civil Society.

Washington defines a PAC as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, in opposition to, any candidate or any ballot proposition." WASH REV. CODE. ANN. 42.17A.005(37) (LexisNexis 2015). Under a straight reading of the Washington law, any incidental involvement in electoral politics—even the *expectation* of such involvement—converts a group into a PAC. PACs must "file a statement of organization with the [state of Washington]…and make a variety of detailed disclosures." App. at 16. (citing WASH REV. CODE. ANN. 42.17A.205(1); WASH REV. CODE. ANN. 42.17A.235). Such a statute would permit the State to regulate a wide swath of political speech, or even the subjective anticipation of future political speech, and chill a range of vital civil society

groups. *McCutcheon*, 134 S. Ct. at 1441-1442 ("And those who govern should be the *last* people to help decide who *should* govern") (Roberts, C.J., controlling op.) (emphasis in original).

Consequently, the state supreme court properly noted that "to satisfy First Amendment concerns", it was vital to "[r]ead some stringent purpose requirement" into the law. App. at 37. In doing so, the state court had the proper tool at hand: this Court's ruling in *Buckley v. Valeo*. However, the state court failed to directly apply *Buckley*, and instead read the vague "a primary purpose" standard into Washington's PAC law.

A. The *Buckley* Court developed the "major purpose test" to save a substantially similar statute.

For most of the Republic's history, campaign finance was largely unregulated. This abruptly changed in 1971 and 1974 when Congress passed, and subsequently amended, the Federal Election Campaign Act.

FECA regulated comprehensively and vigorously. It was a dramatic intervention by the federal government into the sphere of "campaign[s] for political office", where "the First Amendment has its fullest and most urgent application." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citations and quotation marks omitted, brackets supplied).

FECA created a new regulated category of speaker: federal PACs. These PACs were limited in the amount of funds that they could receive from

individuals and other groups, and were forced to adhere to a rigorous recordkeeping and reporting regime to be administered by the Federal Election Commission ("Commission" or "FEC"). While these requirements, after a generation, may feel routine, the courts which first reviewed these restrictions recognized that they constituted a potentially dangerous limitation of fundamental First Amendment liberties.

This was especially true because FECA's PAC definition was so expansive: "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000." FECA § 431(d); *Buckley*, 424 U.S. at 79 n. 105 (quoting same). Contributions and expenditures were defined by reference to their purpose, and reached money raised or spent "for the purpose of influencing" an election—a startlingly subjective standard that FECA did not itself define. *Buckley*, 424 U.S. at 78; *see id.* at 77 ("It appears to have been adopted without comment from earlier disclosure Acts").

The danger of such a vague statute was obvious. If a § 501(c)(3) group opposed to an ongoing military intervention spent money to promote opposition to the war, during a Presidential election where one candidate supported the war and the other did not, would that nonprofit be converted into a PAC? *Cf. United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d. Cir. 1972) (construing FECA to avoid reaching an organization supporting the impeachment of President Nixon for his conduct of the Vietnam War).

Moreover, even if read narrowly—to reach only groups which spent funds explicitly in support of or opposition to a candidate—FECA declared that a *de minimis* level of spending, $1,000, was enough to turn an unregulated group into a PAC. That rule would have converted many civil society groups, some inadvertently, into organizations that could speak only upon the condition of registering with the federal government and publicly disclosing sensitive data concerning their financial supporters. *Cf.* WASH REV. CODE. ANN. 42.17A.005(37) (PAC "any person…having the expectation of receiving contributions or making contributions in support of, or opposition to, any candidate…").

This was the statue the *Buckley* Court confronted in 1976. To prevent the meritless regulation of organizations principally engaged in the discussion of issues, and not the election of candidates, the Court substantially narrowed FECA's reach. It limited the relevant definition of "expenditure" to reach only communications containing words of "express advocacy", such as "vote for Smith". *Buckley*, 424 U.S. at 80 n. 108. It further ruled that, "[t]o fulfill the purposes of the Act, [PACs] 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." *Buckley*, 424 U.S. at 79. This holding ensured that invasive and burdensome government regulation reached only those groups that were, "by definition, campaign related." *Id.*

In doing so, this Court undoubtedly knew that money would be spent on speech having political consequences, and that unregulated groups would be

permitted to have "a" purpose of conducting express advocacy without registering with the government or disclosing their donor lists. That was expected, a necessary result of an opinion that, by design, shielded a large segment of politically-active civil society from federal regulation. Brief for Respondents at 11, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 437) (listing among plaintiffs, "one chapter of a national civil liberties organization (New York Civil Liberties Union, Inc.), two political action organizations (American Conservative Union and Conservative Victory Fund), and one publication (Human Events, Inc.)").

That some political activity would go unregulated was a foreseeable, and arguably intended, result of imposing a bright and easily-comprehended line (the "major purpose" requirement) between PACs and all other groups.

II. The Washington Supreme Court Failed to Limit the State's PAC Definition to Reach Only Groups with the Major Purpose of Express Advocacy.

The *Buckley* "major purpose" requirement remains good law. Nevertheless, when faced with a vague PAC status law substantially similar to FECA, the Washington Supreme Court failed to apply *Buckley*. Instead, it adopted a narrowing construction containing none of the precision and clarity of "the major purpose" requirement.

A. Washington's "a primary purpose test" for PAC status is unconstitutionally vague.

Washington's courts should have narrowed that state's PAC statute to reach only groups with "the major purpose" of express advocacy. *Buckley*, 424 U.S. at 79 ("Expenditures… of 'political committees' so construed…are, by definition, campaign related"). Instead, the state's supreme court allowed compelled registration and disclosure "[w]here the surrounding facts and circumstances indicate that the primary or one of the primary purposes of" a group is the support or opposition of electoral outcomes. App. at 18-19 (quoting *State v. (1972) Dan J. Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976) (emphasis removed). Moreover, having construed the statute in this fashion, the state court explicitly permitted Washington to regulate groups that "expect" to receive contributions or make expenditures.

This approach bears some superficial similarity to this Court's articulation of the major purpose test. But it differs fundamentally in that it is subjective rather than objective. *Buckley* imposes a straightforward rule: if the major purpose of an organization is to fund speech expressly advocating particular electoral outcomes, it is a PAC. If express advocacy is not the group's major purpose, it is not a PAC. *Buckley*, 424 U.S. at 79-80.

The state court's alternative, by contrast, is likely "'incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation.'" *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) ("*WRTL II*") (citing Brief for

Appellee at 39, *Wisconsin Right to Life, Inc. v. FEC*, 540 U.S. 410 (2006) (No. 04-1581). That is certainly the case here.

Whether "*the* primary purpose of [Petitioner] is to support candidates or initiatives" was never in serious doubt, yet determining if Petitioner had such *a* primary purpose has proved difficult. App. at 34 (emphasis in original). Rather than simply relying upon an analysis of Petitioner's expenditures, the state court examined "e-mails, meeting minutes, agendas, and organizational resolutions"—which had been provided to the Public Disclosure Commission as a result of Respondents' complaint. App. at 23-24. The court also selectively emphasized portions of one article in one of Petitioner's newsletters as dispositive evidence. App. at 38-39. Relying upon such select or obscure bits of evidence to determine whether a primary purpose exists is, by its nature, inherently subjective[2] and susceptible to abuse.[3] It also necessitates an invasive investigation into the private dealings and associations of citizens. *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1138 (9th Cir. 2010) ("[a] political campaign's communications and activities encompass a vastly

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[2] For decades, the Internal Revenue Service, in administering 26 U.S.C. § 501(c)(4), has failed to precisely describe a "primary purpose" of political activity. The nonprofit community is consequently left to the tender mercies of individual IRS employees, more-or-less loosely constrained by prior administrative actions and nonbinding Private Letter Rulings, when operating social welfare organizations.

[3] Treasury Inspector General for Tax Administration, No. 2013-10-053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013).

wider range of sensitive material protected by the First Amendment than would be true in the normal discovery context") (citations and quotation marks omitted).

B. The state supreme court's decision stems from this Court's failure to reaffirm the major purpose test.

The Washington Supreme Court's reluctance to follow *Buckley* is unfortunate, but unsurprising. While this Court has declared that the express advocacy limitation imposed by *Buckley* is a "product of statutory interpretation", it has not done so as to "the major purpose test." *Cf. McConnell*, 540 U.S. at 191-192. However, this Court has held that governments may compel at least some types of donor disclosure from organizations whose major purpose is not the funding of express advocacy. *Citizens United v.* FEC, 558 U.S. 310, 366-371 (2010). Furthermore, while this Court has revisited other questions of campaign finance law, it has not considered the major purpose test as it applies to PAC status in the states. *McCutcheon*, 134 S. Ct. at 1462 (revisiting and overruling aggregate limits, which had been approved by *Buckley*, 424 U.S. at 38).

It has been asked to do so, including in other recently-presented cases. Petition for Writ. of *Certiorari* at i, *Vermont Right to Life Comm., Inc. v. Sorrell*, 135 S. Ct. 949 (2015) (No. 14-380). A few Terms ago, this Court denied *certiorari* in a case involving a state agency that had found "a" primary purpose of advocacy because one of several missions

on the relevant group's website suggested politicking. Petition for Writ of *Certiorari* at i-ii, *Corsi v. Ohio Elections Comm'n.*, 134 S. Ct. 163 (2013) (No. 12-1442). In evaluating this slender evidentiary reed, the Ohio Elections Commission relied upon the definition of the word "primary" from a 1986 New World Dictionary. Petition for Writ of *Certiorari* at 7-8, *Corsi*, 134 S. Ct. 163. It is difficult to see how such *ad hoc* administrative review could be consistent with the First Amendment. *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1055 (D.D.C. 1973) ("Adherence to First Amendment principles requires that standards designed to guide administrative officials must be drawn clearly and precisely. To do otherwise would risk…arbitrary and unwarranted application…"). Nevertheless, this Court permitted that decision to stand. *Corsi*, 134 S. Ct. 163.

Silence on this issue, especially in the face of enforcement actions where the major purpose test has been raised as a defense, encourages doubts concerning *Buckley*'s continuing validity. To the extent that some circuit courts concur with the Washington Supreme Court, and decline to apply the major purpose construction against vague statutes, that is an argument in favor of granting the Petition. App. at 34-37. The federal and state courts have, over time, dropped their guard as to the First Amendment dangers imposed by vague and overbroad campaign finance statutes. This Court ought to step in and reaffirm that laws regulating core First Amendment activity must do so with care. And it should act to enforce its own pronouncement, made decades ago in a seminal case, that only

organizations that exist for electoral advocacy, and not for other reasons, can be regulated as PACs. *Buckley*, 424 U.S. at 79-81.

III. The State Court's Failure to Apply *Buckley* Risks Turning Washington State's "Citizen Suit" Provision into a Mechanism for Partisan and Ideological Mischief.

Washington State has emulated the federal government by creating an independent commission regulating campaign finance. WASH REV. CODE. ANN. 42.17A.105. This model is not without its dangers, as administrative overreach is particularly troubling in the context of activity protected by the First Amendment.

In building the FEC, however, Congress took great care to minimize the risk of an out-of-control agency. No single party is permitted to hold more than half of the seats on the FEC, and commissioners must undergo Senate confirmation. 52 U.S.C. § 30106(a)(1) (2015). Washington State has similar protections, although it permits a single party to control the Commission. WASH REV. CODE. ANN. § 42.17A.100(1) ("The commission shall be composed of five members appointed by the governor, with the consent of the senate…No more than three members shall have an identification with the same political party").

The State also takes inspiration from another element of the federal scheme—a citizen suit provision, whereby a complainant may go to court to challenge the dismissal of a complaint filed with the Commission. WASH REV. CODE. ANN. § 42.17A.765(4);

52 U.S.C. § 30109(a)(8)(A) ("Any party aggrieved by an order of the Commission dismissing a complaint filed by such party…may file a petition with the United States District Court for the District of Columbia…[where] the court may declare that the dismissal of the complaint…is contrary to law..."). In providing third-party standing to citizens, Washington is joined by a number of other states. *E.g.* CAL. GOV'T CODE §§ 91004, 91007, 91008, 91008.5, 91009 (2015); COLO. CONST. art. XXVIII, § 9(2)(a); 10 ILL. COMP. STAT. 5/9-22 (2015); MASS. ANN. LAWS ch. 55, § 33(a) (LexisNexis 2015).[4]

These statutes are, as the Washington Supreme Court observed, "obviously based on the notion that the government *may be wrong*, and then it is up to the citizens to expose the violation." App. at 13-14 (emphasis in original). But these laws are also based on another notion: that the law may be easily applied by both the agency involved and state judges, so that political groups are not haled into court by ideological opponents over administrative "judgment calls" necessitated by vague statutes. *See Colorado Ethics Watch v. Clear the Bench Colorado*, 277 P.3d 931, 937 (Colo. Ct. App. 2012) (despite receiving guidance from Elections Division staff to

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[4] In Maryland, that state's highest court has indicated that there may well be an implicit private right of action under that state's law. *Cabrera v. Penate*, 439 Md. 99, 109-110 (Md. 2014). A case brought on this legal theory in 2014 was withdrawn by the complainant, a candidate for office, after the organization he complained against voluntarily filed a campaign finance report. H. Mark Stichel and Joshua Greenfeld, *Private Cause of Action for Injunctive Relief Under Maryland's Campaign Finance Laws*, Maryland Bar Journal, Mar./Apr. 2015 at 8-10.

register as an "issue committee" instead of a "political committee," a third-party petitioner successfully sued that group in state court for taking the wrong organizational form). Such circumstances "offer no security for free discussion, and would compel…speaker[s] to hedge and trim." *WRTL II*, 551 U.S. at 495 (citations omitted, punctuation altered).

Vague laws subject to third-party enforcement pose unique opportunities for gamesmanship, especially by defeated candidates for office, ideological opponents, or other political actors. *See Am. Fed'n of Labor-Congress of Indus. Organizations v. FEC*, 333 F.3d 168, 172, 178 (D.D.C. 2003) ("…the Commission's policy creates an incentive for political groups to file complaints against their opponents in order to gain access to their strategic plans, as well as to chill the opponents' activities…where, as here, the Commission compels public disclosure of an association's confidential internal materials" it violates the First Amendment).

After all, the outsourcing of enforcement, by design, eliminates checks which otherwise hedge against partisan misuse of the process, including bipartisan commissions, agency expertise, administrative discretion, and the availability of advisory opinions. *See* WASH REV. CODE. ANN. § 42.17A.100(1) ("The public disclosure commission is established…All appointees shall be persons of the highest integrity and qualifications"). Campaign finance laws that impose clear, bright-line rules mitigate the danger inherent in dispensing with so many of the accused's protections.

Denial of this petition will set in motion a remand below, where Petitioner will be unable to simply demonstrate that its major purpose is not express advocacy and obtain a dismissal. Instead, Petitioner will likely undergo a lengthy, and ultimately subjective, review of its internal communications and public documents to ascertain whether it may have had a primary purpose of expecting to make expenditures at some point in 2007-2008. This is a standard "incapable of workable application." *WRTL II*, 551 U.S. at 468 (citation omitted). Accordingly, this Court ought to grant the writ, and reaffirm the importance of *Buckley*'s readily understood and applied "major purpose" test for political committees.

CONCLUSION

Therefore, this Court ought to grant the Petition and issue a writ of *certiorari* to the Supreme Court of Washington.

Respectfully submitted,

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