No. 14-1397

In The

Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Petitioner,

v.

ROBERT F. UTTER AND FAITH IRELAND, IN THE NAME OF THE STATE OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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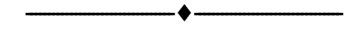
INTEREST OF *AMICUS CURIAE*[1]

Founded in 1991, the Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute has litigated cases challenging laws that burden Americans' ability to peacefully communicate political messages to one another, including directly representing the plaintiffs in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. ___, 131 S. Ct. 2806 (2011). The Institute has also filed *amicus curiae* briefs in numerous campaign finance cases, including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Davenport v. Washington Education Association*, 551 U.S. 177 (2007). The Institute is deeply concerned about the effect that the decision below will have on the ability of multi-purpose organizations to participate in the political process.



[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amicus curiae*'s intention to file this brief.

SUMMARY OF THE ARGUMENT

Thirty-nine years ago in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), this Court applied the doctrine of constitutional avoidance to rewrite the Federal Election Campaign Act (FECA) to limit the definition of "political committee." The Court narrowed the scope of the definition in order to save it from invalidation and protect political speech. However, the Court's rewrite of FECA has sown confusion for years, leaving political speakers to guess as to when and under what circumstances they will be forced to reorganize themselves into the political committee form.

This confusion presents a threat to political speech in this country because of the consequences that come with being labelled a political committee. When the government designates an organization as a political committee, it does not simply require that that organization report its political contributions and expenditures. Instead, becoming a political committee comes with complex, perpetual, and burdensome reporting and organizational requirements. The risk of being classified as a political committee creates a strong incentive for speakers to stop speaking.

Instead of adding words and qualifiers that were never in the statute, the Court in *Buckley* should have simply struck down the definition of political committee and left it to the legislative branch to craft a constitutional one. This case presents an excellent opportunity to rectify that mistake and expressly

require legislatures to define the term "political committee" in a reasonable manner to reach only a limited and clearly defined type of organization.

The current state of affairs – different jurisdictions using varying tests with inconsistent standards – is unsustainable. Most, if not all, of the tests used by the federal and state courts to define political committees are subjective, create incentives for abuse, and chill free speech and association. This case in particular demonstrates the grave consequence of such nebulous standards, as here politically motivated private entities have used Washington's formless definition of "political committee" to persecute their political opponents for seven years about speech made in a long-ago election.

Even if this Court were to adhere to *Buckley*'s definition of "political committee," however, the Washington Supreme Court misapplied it in this case. Like the First, Second, and Ninth Circuits, as well as the Colorado Court of Appeals, the Washington court concluded that the State may impose ongoing, complex, and invasive reporting requirements, along with unnecessary organizational changes, on multipurpose organizations with "a" major purpose of political activity. But that is not the standard this Court created in *Buckley*. The standard set out in *Buckley* was that political committees could only be those "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 (emphasis added). While still ill-defined and

prone to inconsistent application, the *Buckley* formulation is less amorphous than the incomprehensible test adopted by the Washington court and the circuit courts it followed.

This Court should therefore grant the Building Industry Association of Washington's petition and conclude that Washington's definition of "political committee" is unconstitutional and that no saving interpretation should be applied to it. If Washington – or any other governmental entity – wishes to regulate "political committees," it may only do so by first defining what they are in a constitutional manner. At the very least, this Court should grant the petition and establish that the national standard for designating an organization a political committee is the one set forth in *Buckley*, and not the unconstitutional approach used by the Washington court and some federal courts.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO HOLD THAT THE DEFINITION OF "POLITICAL COMMITTEE" IS UNCONSTITUTIONAL.

A. BEING CLASSIFIED AS A POLITICAL COMMITTEE COMES WITH SIGNIFICANT REGULATORY BURDENS.

This case is about when, and under what circumstances, the government may transform a speaker on political issues into a heavily regulated entity.

In *Buckley*, this Court considered the reporting requirements for "political committees" and others under Section 434(a), (b), and (e) of the Federal Election Campaign Act of 1971 (FECA). In this case, the Washington Supreme Court considered the definition of "political committee" under Washington's Fair Campaign Practices Act (FCPA). The definition of "political committee" in both FECA and FCPA are objectively clear, if terribly overbroad. Under both statutes, a political committee is any organization having the expectation, or actually receives, contributions or makes expenditures in support of or in opposition to any political campaign. *See* 2 U.S.C. § 431(4)(A) ("political committee" means, among other things, "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year"); Wash. Rev. Code § 42.17A.005(37) (a political committee is "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition").

To be sure, there are some slight differences – the Washington statute mandates that the contributions or expenditures must be for political activity, even if such contributions or expenditures total $0.01, while the federal statute turns any organization that accepts contributions or makes expenditures in excess

of $1,000, for whatever reason, into a political committee.

At both the federal and state level, moreover, the consequences of having the government designate a preexisting, multi-purpose organization as a political committee are severe and disruptive. Status as a political committee is accompanied by a "full panoply of regulations" that significantly burdens political speech and association. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255, 262 (1986). *See also id.* at 266 (O'Connor, J., concurring); *accord Citizens United*, 558 U.S. at 337 (political committees are "expensive to administer and subject to extensive regulations"). Federal political committees must, upon formation, file a statement of organization with the Federal Election Commission and appoint a treasurer who in turn must ensure that the committee complies with federal campaign laws. 2 U.S.C. §§ 432, 433. A political committee has a continuous obligation to report to the FEC. *Id.* at § 434(a). The committee must file these reports on a monthly, quarterly, or semiannual basis. *Id.* at § 434(a)(4). These reports must itemize all receipts and disbursements of the committee exceeding $200. *Id.* at § 434(b)(3). These reports must list the name, address, and employer of each contributor and the amount of his or her contribution. *Id.* at § 434(h)(i)(1) and § 431(13)(A). Finally, the committee must include a disclaimer with the name of the committee and its address, telephone number, or website address on all

public communications. *Id.* at § 441d(a); 11 C.F.R. § 110.11(a)-(c).

The law addressed by the Washington Supreme Court in this case imposes similarly complex, ongoing requirements on political committees in the Evergreen State. In Washington, political committees must file a statement of organization with the Washington Public Disclosure Commission (PDC) within two weeks of having its expectation to, or actually receiving or making, contributions or expenditures and list its name and address, its affiliated organizations, the names and addresses of its officers, the name and address of its bank, and it must identify what political effort it supports. Wash. Rev. Code § 42.17A.205.[2] It must appoint a treasurer, *id.* at § 42.17A.210, and choose a bank. *Id.* at § 42.17A.215. The committee must file monthly reports with the PDC until it dissolves. *Id.* at § 42.17A.225. This report must contain a list of all contributions received and expenditures made in the month, as well as pledges, loans, promissory notes, transferred funds, any debts, and what it does with surplus funds. *Id.* at §§ 42.17A.235, .240. During election years, it must report its bank deposits weekly. *Id.* at § 42.17A.235.

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[2] The PDC is the government agency primarily charged with enforcing Washington's campaign finance laws. It declined to prosecute the Building Industry Association of Washington (BIAW). App. 4-5. Instead, politically interested private parties pursued BIAW under Washington's private enforcement provision. App. 103.

Thus, being designated as a political committee, in both Washington and at the federal level, is not simply a matter of "transparency" or "disclosure" – it is the government-mandated transformation of an organization into a heavily regulated entity subject to extensive, ongoing requirements. These requirements are unusually complex. The FEC's instruction pamphlet for just starting an independent expenditure committee is three, three-column, single-spaced pages long. *See* Federal Election Commission, *Instructions for Statement of Organization (FEC FORM 1)*, *available at*, http://www.fec.gov/pdf/forms/fecfrm1i.pdf. Not to be outdone, the PDC's instruction book for political committees is *90 pages long*. *See* Washington Public Disclosure Commission, *Political Committees: Campaign Disclosure Instructions* (June 2014), *available at*, http://www.pdc.wa.gov/archive/filerassistance/manuals/pdf/2014/Political.Committee.Manual.2014.pdf. *See also* App. 130 (dissenting judge of the Washington Court of Appeals classifying Washington's political committee requirements as "detailed," "burdensome," and "largely irrelevant").

B. *BUCKLEY* ERRONEOUSLY APPLIED THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE TO REWRITE THE SCOPE AND MEANING OF FECA'S DEFINITION OF "POLITICAL COMMITTEE."

As noted above, the definitions of "political committee" under both federal and Washington law are objectively clear. Both are incredibly broad,

however, and the consequences for being designated a political committee are severe. Thus, simply applying the statutes as written would turn large numbers of organizations into political committees if they engaged in minimal participation in politics. It is therefore not surprising that the Court in *Buckley* recognized that the federal definition could not be applied as written. Rather than strike the law down and leave it to Congress to attempt to draft a constitutional definition, however, the *Buckley* Court rewrote the statute to insert limits uncontemplated by Congress and untested by the legislative process.

In particular, the *Buckley* Court found that the definition of "political committee" in FECA "raise[d] serious problems of vagueness" and that "fear of incurring [FECA's civil and criminal sanctions] may deter those who seek to exercise protected First Amendment rights." *Buckley*, 424 U.S. at 76-77.[3] The Court noted that "[d]ue process requires that a criminal statute provide adequate notice" and that "[w]here First Amendment rights are involved, an even greater degree of specificity is required." *Id.* at 77 (quotation marks and citations omitted). In order to "avoid the shoals of vagueness," *id.* at 78, the Court

[3] Although the Court phrased its concern in terms of vagueness, it is apparent that the Court believed that the statute as written was overly broad and would sweep in a vast array of organizations with only a tenuous connection to political activity. The "major purpose" interpretation thus better tailored the statute; it did not clarify it. *See Buckley*, 424 U.S. at 79.

interpreted the statute to "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 adopted this interpretation from two lower court decisions construing the term "political committee" to not apply to organizations that do not have as their central organizational goal the election of candidates. *Id.* at 79 n.106 (citing *U.S. v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972), and *Am. Civil Liberties Union, Inc. v. Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973) (three-judge panel), *vacated as moot, Staats v. Am. Civil Liberties Union, Inc.*, 422 U.S. 1030 (1975)). In those cases, the courts defined "political committee" to apply only to those groups "organized or at least authorized by a particular candidate and whose principal focus is a specific campaign" in order to comply with Congress's primary concern in passing the law and to avoid "serious constitutional issues" that could result in a "dampening effect on first amendment rights and the potential for arbitrary administrative action." *Nat'l Comm. for Impeachment*, 469 F.2d at 1140-42.

Given the similarities among definitions of "political committee" in states across the country, other federal and state courts applied limiting interpretations to the definition. *See Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576, 596 (8th Cir. 2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011); *Minn. Citizens*

Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 871 (8th Cir. 2012); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) ("*NCRTL*"); *Indep. Inst. v. Coffman*, 209 P.3d 1130, 1139 (Colo. App. 2008). So far as *amicus curiae* has been able to determine, no court has applied a definition of political committee similar to that found in FECA as it is written.

Unfortunately, no court at any level has ever paused to consider whether the varying definitions of "political committee" are appropriate subjects to which to apply the doctrine of constitutional avoidance.[4] While this Court has long applied limiting constructions to federal statutes "reasonably susceptible of two interpretations" in order to avoid vagueness concerns, *U.S. ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909), it has done so only when such a construction is "fairly possible." *Skilling v. U.S.*, 561 U.S. 358, 405-06 (2010). *See also U.S. v. Rumely*, 345 U.S. 41, 45 (1953) (noting that constitutional avoidance is appropriate when there is "the choice of fair alternatives").

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[4] This is assuming that the doctrine itself is legitimate – the Constitution does not require it and it is at the very least questionable whether the judicial role includes rewriting unconstitutional statutes so that the government may win. *See* Clark M. Neily III, *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government* 80 (2013).

The definition of "political committee" in FECA was not a choice between two reasonable interpretations, however. It was a choice between an interpretation that recognized the statute's constitutional problems versus completely rewriting it to lessen its scope, all without the benefit of legislative testimony, deliberation, or negotiation.

In other words, what the Court did in *Buckley* was "make a new law, not . . . enforce an old one." *Skilling*, 561 U.S. at 425 (Scalia, J., concurring) (quoting *U.S. v. Reese*, 92 U.S. 214, 221 (1876)). This case presents the opportunity to reverse that mistake. If there is a definition of "political committee" that justifies the burden on political speech that accompanies that designation, it is the responsibility of the legislature to discover it. Under no circumstances, however, should speakers in American politics be forced to determine whether they are to become political committees based on vague criteria that does not appear in the statute and whose boundaries are impossible to ascertain. *Cf. Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day").

C. THE COURT'S MISAPPLICATION OF THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE HAS RESULTED IN CONFLICTING AND UNEVEN APPLICATIONS ACROSS THE CIRCUITS AND IN THE STATES.

The end result of the Court's misapplication of the doctrine of constitutional avoidance in *Buckley* has been many years of confusion and inconsistency. Courts have struggled with whether *Buckley*'s interpretation sets a floor on which organizations may be considered political committees, whether there are other criteria that the courts may (or should) consider, and whether statutes that depart from the *Buckley* formulation are constitutional.

The courts are even divided on whether *Buckley*'s formulation was just an interpretation of a statute or a constitutional demand. For instance, the courts that have permitted states to regulate entities that have "a" major purpose have concluded that the Court's limiting construction in *Buckley* was not a constitutional mandate, but simply a matter of statutory interpretation. *See Ctr. for Individual Freedom*, 697 F.3d at 487; *Nat'l Org. for Marriage v. McKee*, 649 F.3d at 59; and *Human Life of Wash.*, 624 F.3d at 1009-10. The Washington Supreme Court did not go so far – it held instead that a narrow reading of the definition of "political committee" required "some stringent purpose requirement" in order "to satisfy First Amendment concerns," but that the "more stringent 'the' primary purpose test . . . would likely

contravene the intent of the [Washington] voters to extend the reach of this state's filing and disclosure requirements as much as possible and is not necessary to satisfy the First Amendment." App. 37. The Fourth Circuit, on the other hand, concluded "that the Court in *Buckley* did indeed mean exactly what it said when it held that an entity must have '*the* major purpose' of supporting or opposing a candidate to be designated a political committee." *NCRTL*, 525 F.3d at 288.

In other words, the courts cannot agree on what the nature of the test for a political committee is, what standards are encompassed in the test, whether there are other factors that may or should be considered, or even what the precedential status of *Buckley* is. Given that the consequences of being designated a political committee are so severe, the standards for becoming one should be clearly set out in the statute, not gleaned from judicial decisions that vary from state to state and circuit to circuit. In the area of political speech, such ambiguity is unacceptable and damaging to our political process. This Court should therefore grant the Petition, strike down Washington's unconstitutionally broad definition of "political committee," and leave it to the Washington Legislature or the people of the state to fashion regulations on political committees that are narrowly defined and objectively clear.

II. EXTENDING POLITICAL COMMITTEE STATUS TO ORGANIZATIONS THAT HAVE POLITICAL ACTIVITY AS "A" MAJOR PURPOSE IS INCONSISTENT WITH *BUCKLEY* AND CREATES SIGNIFICANT VAGUENESS PROBLEMS.

As the Fourth Circuit noted in *NCRTL, Buckley* says that political committee status may only be extended to those organizations that have "the" major purpose of supporting or opposing a candidate. *NCRTL*, 525 F.3d at 288. Even if this Court were to adhere to the *Buckley* formulation, the Washington Supreme Court here, and the circuit courts it relied upon, misapplied it. The Washington Supreme Court's rewriting of *Buckley* (which was, as noted above, already a rewriting of FECA) creates an amorphous standard subject to abuse. And as the events of this case show, it is a standard that is impossible to apply with any consistency.

In that regard, the final tally in this case is that five PDC commissioners, PDC staff, and one trial court judge found that BIAW does not have as one of its primary purposes electoral activities. Eight state supreme court justices and two courts of appeals' judges believe that there is a question of fact whether it does. One court of appeals judge has come to both conclusions. One state supreme court justice has concluded that BIAW does not have political activities as one of its major purposes. The parties – sophisticated participants in Washington politics – do not

agree on the answer or on what evidence should be examined to arrive at it.

Specifically, after an investigation, the PDC concluded that BIAW did not have as one of its primary purposes electoral activity. The trial court concluded likewise. On appeal, two courts of appeals' judges concluded that there was an issue of material fact whether BIAW had as one of its primary purposes electoral activities because of "evidence from which it may be inferred that supporting Rossi's campaign was a top priority for BIAW leading up to the 2008 election and that BIAW made significant efforts toward that end." App. 125. This evidence was statements from BIAW personnel about the importance of the governor's race for BIAW. The court did not measure BIAW's electoral activities against all its other activities or examine whether BIAW did all – or any – of the things mentioned in the statements. App. 125-28. Judge Grosse dissented, arguing that there was "insufficient evidence in this record to support such a finding or findings." *Id.* at 130 (Grosse, J., dissenting). On rehearing, however, Judge Grosse joined his colleagues to conclude that there was an issue of fact as to whether BIAW did have a primary purpose of electoral activities. App. 105.

The Washington Supreme Court determined that there was a question of fact of whether BIAW had political activities as one of its major purposes based not on what BIAW actually did, but on statements made by BIAW personnel. App. 38-39. Chief Justice Madsen looked at the same evidence and concluded

that BIAW did not have political activity as one of its major purposes. App. 55-62 (Madsen, C.J., concurring and dissenting).

This is not a standard – it is a lack of a standard. The fact that, after years of court proceedings, no one can objectively say whether BIAW had electoral activity as "a" major purpose demonstrates that the "a" major purpose standard is unacceptably and irredeemably indeterminate. As the Fourth Circuit recognized, the "a" major purpose test is essentially formless. *NCRTL*, 525 F.3d at 290. Just trying to determine the contours of the test shows how inherently subjective it is. For instance, how many purposes can an organization have before one of its major purposes is electoral activity? What percentage of activity makes an activity "major"? To what time period should a speaker or the government look to determine whether political activity is a major purpose of the organization? Do the statements of an organization's personnel weigh more than the organization's actual activities, as the Washington Supreme Court seems to suggest?

Who knows? The Washington Supreme Court's standard – such as it is – is "'incapable of workable application'" and forces BIAW and all other Washington multi-purpose organizations to engage in "'costly, fact-dependent litigation'" in order to figure out their status under the law. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007). This is precisely the kind of standard this Court has said is

unacceptable because of the obvious chilling effects on free speech and free association. *Id.*

This kind of ambiguity based on unannounced criteria creates the "risk of partisan or ideological abuse." *NCRTL*, 525 F.3d at 290. That is certainly what happened in this case. The fact that a similar standard prevails in the states within the First, Seventh, and Ninth Circuits, and in the state of Colorado, no doubt chills speech and association in those places as well. If nothing else, this Court should accept review and clearly indicate that this vague standard creates an intolerable barrier to political participation.

CONCLUSION

For the reasons stated above and in BIAW's petition for a writ of certiorari, this Court should grant the petition and hold Washington's definition of "political committee" to be unconstitutional.

Respectfully submitted,

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