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 a Writ of Certiorari to the
Supreme Court of Washington

RESPONDENT FAITH IRELAND'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In this case, the Washington Supreme Court held that respondent's citizen's action raised genuine issues of fact as to whether petitioner Building Industry Association of Washington's (BIAW) solicitation and receipt of political contributions and/or its political expenditures made it a political committee. The court held that to establish that BIAW was a political committee by virtue of its expenditures, respondent would have to establish not only that it made expenditures, but also that it had "a primary purpose" of influencing elections. The court remanded for determinations of whether BIAW made contributions or expenditures; if the latter, whether it had a primary purpose of influencing elections; what reporting and disclosure requirements would apply if BIAW were determined to be a political committee; and whether those requirements would unduly burden BIAW's First Amendment rights.

The questions presented are:

1. Whether the Washington Supreme Court's ruling remanding for further proceedings is a final judgment within the meaning of 28 U.S.C. § 1257.

2. Whether a Washington statute imposing as-yet undetermined disclosure obligations with respect to the political fundraising and spending of an organization that engages in electoral expenditures is unconstitutional solely because whether an organization is a political committee depends in part on whether electoral activity is "a primary purpose" of the organization.

PARTIES TO THE PROCEEDING

The petition identifies Robert F. Utter as a respondent in this case and includes him in the caption. Retired Justice Utter died on October 15, 2014. As a result, retired Justice Faith Ireland is the sole respondent in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other:

INTRODUCTION

The Building Industry Association of Washington (BIAW) raised and expended millions of dollars in Washington's 2008 gubernatorial election. Two citizens, retired Supreme Court Justices Robert Utter and Faith Ireland, brought an action under Washington law claiming that BIAW was a political committee in 2008 and was required to report and disclose political contributions and expenditures. The Washington Supreme Court held that Washington law permitted a citizen's action and that there was a genuine issue of fact over whether BIAW was a political committee in 2008. The court remanded for resolution of that fact issue and for determination of what, if any, reporting and disclosure requirements were applicable if BIAW were determined to be a political committee.

Along the way, the court construed Washington law to provide that an organization is a political committee based on its electoral spending only if one of its primary purposes is supporting or opposing candidates or ballot measures. The court did not determine whether BIAW satisfied that criterion, but left the issue for remand. The court likewise did not decide BIAW's claim that political committee requirements would unduly burden its First Amendment rights. The court found that issue unripe because it necessitated determining whether BIAW was a political committee and, if so, what requirements would follow, and then weighing any burden against state interests. Again, the court left those matters for remand.

BIAW asks this Court to decide that the First Amendment limits political committee requirements to organizations whose *only* primary purpose is electoral activity. But this Court lacks jurisdiction under

28 U.S.C. § 1257 because the state court's decision is not final. BIAW's cursory invocation of the fourth finality "exception" under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), fails because federal policy would not be significantly eroded in the absence of immediate review: Rather, federal policy would be *promoted* by avoiding piecemeal adjudication of constitutional issues. The state courts should be allowed to do their job on remand by deciding currently unresolved issues affecting BIAW's constitutional claims before this Court considers whether review is warranted. The fourth *Cox* exception is also inapplicable because deciding whether political committee status depends on "a" primary purpose or "the" primary purpose of an organization would not preclude further litigation if BIAW prevailed on the point. Whatever the answer, BIAW may ultimately be found to be a political committee. Indeed, because BIAW spent approximately $6.4 million on campaigns in 2008—roughly five times its non-campaign spending—it would easily qualify for political committee status under BIAW's "the" primary purpose test.

BIAW's claim does not merit review in any event. This Court held in *Citizens United v. FEC*, 558 U.S. 310 (2010), that powerful public interests support disclosure requirements for those who speak about candidates for political office. Courts since *Citizens United* have rejected the argument that such requirements may be imposed only on organizations with "the" major purpose of influencing elections activity, and this Court has denied certiorari in such cases.

BIAW relies primarily on *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), but neither that decision nor any other creates a conflict

among the lower courts warranting review now. *Leake* predates *Citizens United*'s holding concerning disclosure and reporting. Moreover, *Leake* involved the conditions under which an organization could be defined as a political committee *to which contributions were limited*. Washington law imposes no such limits, but requires reporting and disclosure. Because the extent of those requirements has not been determined—and is to be determined on remand—BIAW's contention that the burdens of political committee status under Washington law require limiting it to organizations with "the" primary purpose of electoral activity is premature. Indeed, it is likely that the obligations that would be imposed on BIAW are comparable to the kinds of reporting requirements that *Leake* agreed may be imposed on *all* organizations engaged in political spending without regard to their major purpose.

This case is also an unsuitable vehicle for resolving the issue BIAW poses. Under Washington law, an organization may become a political committee either by soliciting political contributions or by making political expenditures. BIAW argued below that the expenditure prong was subject to a "the" primary purpose requirement, but the Washington Supreme Court held that this case could proceed under *both* prongs. Thus, the issue BIAW seeks to argue is not outcome-determinative here. Moreover, the many unresolved questions in the case as to whether BIAW will be held to be a political committee, and what disclosure requirements will apply if it is, render BIAW's arguments about vagueness and burdensomeness—which are meritless in any event—premature.

STATEMENT

1. Factual Background

Petitioner has portrayed itself as a trade association that dabbled in an election and was unwittingly caught in the web of the campaign finance laws. This portrait, and BIAW's claim that it only engaged in a "small amount of election-related speech," Pet. 32, is far from true.

For at least a decade before the 2008 election at issue here, BIAW had been one of Washington State's most sophisticated campaign players. It spent millions of its own dollars to influence campaigns through contributions and independent expenditures, and raised and spent millions more through affiliated political committees. CP 288–307.[1] It led statewide ballot measure campaigns in both 2002 and 2003. CP 405. In the 2004 election cycle, BIAW spent almost $2 million,[2] and took credit for the elections of the attorney general and one state Supreme Court justice. BIAW spent almost $1 million that year trying to elect Dino Rossi as governor, but he lost in a close recount.[3]

In 2006, BIAW began strategizing for a 2008 rematch between Dino Rossi and incumbent Governor Christine Gregoire. BIAW claimed this campaign would be its top organizational priority. Its Board President stated that "BIAW is putting forth the larg-

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[1] Cites to record materials not included in the appendix to the petition are to the "clerk's papers," or CP, the part of the record designated for use on appeal in the Washington courts.

[2] http://www.seattletimes.com/nation-world/biaw-rossis-biggest-backer-explains-what-it-wants/.

[3] *Id.*

est political effort in the entire history of the association" and that "all of our efforts for the next two years need to be expended on electing a new Governor in 2008." *Id.* BIAW trumpeted that "*[o]ur primary goal* this year has been to unify BIAW members and local associations behind a coordinated, all out effort to elect Dino Rossi as governor. Pet. App. 38–39 (emphasis in original). BIAW's Board minutes stated, "BIAW's number one priority this campaign season would be to help Rossi get elected." Pet. App. 38.

BIAW internally admitted that it was creating a "campaign war chest" but making every effort to keep it secret. CP 449 ("Bottom line—BIAW needs to build up a war chest and to support the potential campaign for Dino Rossi in 2008. … The intent of BIAW is to accumulate funds without hitting the pocket books too hard."); CP 410 ("[I]t is important that we not advertise that we are pooling our funds in this manner."); CP 424 ("I will pass the word for the gang to keep quiet."). When the organization received over a million-dollar windfall in one of its programs, it set aside 100 percent of the funds for the campaign. Pet. App. 23. It also orchestrated a campaign to get its affiliated organizations to pledge funds directly to BIAW to increase the size of its "war chest." Pet. App. 22–24. Ultimately, eleven BIAW affiliates pledged over $500,000 to BIAW's secret war chest for the 2008 election. As a sophisticated political player, BIAW knew this operation was illegal for several reasons, including that Dino Rossi was not yet a declared candidate, and so it took great pains to keep its efforts secret. *See* Pet. App 23 ("We … need to be extra careful … since Dino is not a declared candidate we can't raise money for him therefore all official references are for a 08 candidate for Governor.").

BIAW organized several political committees during the 2008 election cycle, which were used in an apparent effort to undermine transparency. BIAW made contributions to ChangePAC, which in turn contributed to "Its Time for a Change," which ran the political ads. CP 264, 266, 269. Elliot Swaney, BIAW's political director, operated and submitted PDC filings for both political committees. CP 256, 264, 266.

After spending years amassing its secret war chest, BIAW spent over $6.4 million in the gubernatorial race in the several months leading up to the 2008 election. *See* Pet. App. 76. As the Seattle Times reported at the time, "The Building Industry Association of Washington is a bigger force in this year's election than the state Republican Party. The builders group has spent far more supporting Dino Rossi for governor than the party has spent on all races this year. And with $6.3 million sunk into its political-action committee—$3.8 million just this week—the BIAW has thrown more into the race than any other interest group."[4]

BIAW ultimately reported to Washington's Public Disclosure Commission (PDC) that it spent $6.4 million in the 2008 cycle. However, it reported the totals only in its lobbying disclosures, not as a political committee. In so doing, BIAW deprived the public of critical information. First, BIAW's disclosures were not submitted until after the election, whereas political committee reporting is required before the elec-

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[4] http://www.seattletimes.com/nation-world/biaw-rossis-biggest-backer-explains-what-it-wants/.

tion.[5] Second, BIAW never filed the basic organizational disclosures required of political committees, creating a dearth of information about the election's biggest political player. The lack of reporting even created uncertainly about who was making the expenditures, allowing BIAW to tout its spending in the media and to the PDC,[6] only to later deny that it had made any expenditures.[7]

2. Proceedings Below

In July 2008, former Washington Supreme Court Justices Faith Ireland and Robert Utter complained to Washington's Attorney General that BIAW and an affiliated entity, BIAW Membership Services Corporation (BIAW-MSC), were functioning as political committees without complying with reporting and disclosure requirements under Washington law. The Attorney General referred the complaint to the PDC for investigation. The Attorney General later sued BIAW-

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[5] For example, BIAW reported over $4 million in campaign expenditures made during October 2008 on its lobbyist Elliot Swaney's lobbying report. However, BIAW was not required to submit that report until November 17, 2008, weeks after the election. *See* RCW 42.17A.615(1), (2)(c) (monthly lobbyist report must list political contributions, but is not due until the 15th day of the following month). The Elliot Swaney 2008 lobbying reports with their untimely reporting of election expenditures are at http://www.pdc.wa.gov/qviewreports/.

[6] *See* http://www.seattletimes.com/nation-world/biaw-rossis-biggest-backer-explains-what-it-wants/ (BIAW took credit for contributions in media); CP 253 *et seq*. (BIAW reported under oath that it made the political expenditures in question).

[7] *See* CP 153 (BIAW executive testifying under oath that "BIAW does not contribute to any political candidates or political action committees. Nor does it make any political expenditures.").

MSC, but not BIAW itself, for violating political committee requirements.[8]

Alleging that BIAW itself was responsible for both the solicitation of political contributions and the expenditure of funds in the 2008 gubernatorial race, Ms. Ireland and Mr. Utter brought this action against BIAW in a Washington state trial court. They invoked a statutory provision allowing a citizen to bring an action to enforce campaign finance laws when the citizen has submitted a complaint to the Attorney General and the Attorney General has not "commence[d] an action" against the alleged violator. RCW 42.17A.765(4)(a).

The Superior Court granted summary judgment to BIAW in a brief and unreasoned order holding that the claims presented no genuine issue of fact. Pet. App. 132. Ms. Ireland and Mr. Utter appealed, and the Washington Court of Appeal affirmed on other grounds. The appellate court disagreed with the trial court about the sufficiency of the evidence to survive summary judgment. Extensively canvassing the record, the court concluded that the evidence created a genuine issue of fact as to whether BIAW was responsible for electoral expenditures—which BIAW now

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[8] BIAW-MSC administers a workers' compensation insurance program for BIAW members. When payments into the program exceed actual claims, the excess is refunded to BIAW, and some of that is eventually refunded to BIAW's local associations. In 2007, the refund was much larger than anticipated, and BIAW solicited the local associations to pledge the excess to support its efforts to promote Rossi's candidacy. The Attorney General's lawsuit against BIAW-MSC ultimately resulted in a settlement under which BIAW-MSC was required to register as a political committee and report political contributions and expenditures.

denied making—and as to whether political campaigning was one of BIAW's primary purposes. However, the court concluded that the citizen's action must be dismissed because the Washington Attorney General's preliminary investigation precluded a citizen action.

Mr. Utter and Ms. Ireland successfully sought review by Washington's Supreme Court, which reversed and remanded.[9] The court first held that, under the plain language of the citizen action statute, the Attorney General's investigation did not preclude the action. The court then considered and rejected BIAW's argument that the court of appeal's decision should be affirmed on the alternative ground that there was no genuine issue of fact as to whether BIAW was a political committee under Washington law.

In addressing the latter issue, the court separately analyzed the evidence as to the two alternative theories the plaintiffs had advanced: (1) that BIAW was a political committee under the "contributions prong" because it solicited hundreds of thousands of dollars in campaign contributions for its "war chest"; and (2) that BIAW was a political committee under the "expenditure prong" because it spent approximately $6.4 million in the 2008 election. BIAW's defense on both prongs was that BIAW-MSC, not BIAW, took the actions in question. The court thoroughly examined the record and concluded that there was a triable issue of fact that precluded summary judgment on both prongs because there was evidence that BIAW itself

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[9] As explained in the Parties to the Proceeding statement, *supra* at ii, Mr. Utter died while the case was pending in the state supreme court, making Ms. Utter the sole respondent here.

solicited contributions for electoral purposes and made and directed expenditures.

The court further considered BIAW's argument that, to survive First Amendment scrutiny, Washington law must be construed to provide that an organization is a political committee under the expenditure test only if it has "the" primary purpose of influencing elections—that is, influencing elections is the organization's *only* primary purpose. The court noted that BIAW did not make this argument under the contribution prong, and thus its decision "deal[t] with the controversy over the 'purpose' test [only] under the expenditure prong—the only prong under which BIAW raises it." Pet. App. 21.

Addressing the primary purpose issue, the court held that a primary purpose test should be superimposed on the expenditure-based prong of the political committee definition, but held that it was sufficient that electoral activity be "a" primary purpose of the organization. In so holding, the court conformed its reading of the Washington statute and applicable constitutional requirements with that of the Ninth Circuit in *Human Life of Washington Inc. v. Brumsickle,* 624 F.3d 990 (9th Cir. 2010), as well as with the post-*Citizens United* consensus of the circuits reflected in such cases as *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014), *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 491 (7th Cir. 2012), and *National Organization for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011).

The court characterized its "a" primary purpose standard as a "stringent" one adequate to protect First Amendment rights of affected organizations. Pet. App. 37. Imposing a more restrictive "the" pri-

mary purpose requirement would have "perverse" consequences such as requiring small organizations with unitary purposes to register as political committees while allowing "a mega-group" that spends millions on electoral activities to avoid political-committee reporting and disclosure merely because electoral activity is not its sole major activity. Pet. App. 35 (quoting *McKee*, 649 F.3d at 59). Such limits on disclosure would "contravene the intent of the voters" who adopted Washington's campaign finance laws by initiative. Pet. App. 37.

Applying the "a" primary purpose standard, the court held that there was a genuine issue of fact as to whether electoral activity was a primary purpose of BIAW in 2008. The court pointed to evidence that BIAW officials repeatedly described the campaign for Rossi as "BIAW's number one priority," "the largest political effort in the entire history of the association," the focus of "all of our efforts for the next two years," and *"[o]ur primary goal*." Pet. App. 38 (emphasis in original).

As with the fact issues over whether BIAW satisfied the contribution or expenditure prong, the court did not determine whether BIAW had a primary purpose of influencing elections during the 2008 election cycle. Rather, the court remanded the case for resolution of those issues.

Likewise, the court declined to decide whether imposing political committee requirements on BIAW would, under the circumstances, unduly burden its First Amendment rights. The court observed that that question "involves a strong factual component—it would require a court to address the specific reporting requirements and balance the burden of the disclo-

sure requirements for the specific time period in that particular case against the government's interest in providing the public with campaign finance information." Pet. App. 41. Because the court lacked "a sufficient factual record to determine whether any applicable reporting requirements as applied to BIAW at the relevant time would have been onerous or would have been substantially related to the government's interest," it held that the issue was not yet "ripe for review." Pet. App. 41–42.[10]

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction because the decision below is not final.

A. The decision does not terminate the case.

Under 28 U.S.C. § 1257(a), this Court has certiorari jurisdiction only over "[f]inal judgments or decrees" of state courts.

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a

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[10] In addition to these holdings, the court also resolved *in BIAW's favor* whether BIAW was collaterally estopped from denying ownership of the workers' compensation refunds. The court also ruled *for* BIAW, on First Amendment grounds, on an issue concerning whether a Washington statute attributing contributions to trade associations under certain circumstances was applicable to the determination of political committee status.

> final court." *Market Street R. Co. v. Railroad Comm'n of Cal.,* 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945).

Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997).

The decision below is not an "effective determination of the litigation," but is "merely interlocutory or intermediate." *Id*. The court's decision determined that a citizen's action was proper in the face of state officials' failure to bring an action and remanded for trial of the factual issues over whether BIAW was a political committee and whether its reporting obligations, if any, would impinge upon First Amendment rights. Far from ending the case, the court's decision left unresolved whether BIAW in fact met the definition of a political committee, as well as what reporting and disclosure duties would follow if it did, and whether such duties might pose an undue burden on its First Amendment rights. A decision that leaves so much more to be decided is by no means the "final word of a final court." *Id*.

B. *Cox Broadcasting*'s fourth category is inapplicable.

This Court has exercised jurisdiction over state-court judgments that do not terminate a case in only a "limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza,* 456 U.S. 430 (1982) (*per curiam*). In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, the Court identified "four categories" of such cases. *Florida v.*

Thomas, 532 U.S. 774, 777 (2001). This case does not fall within the *Cox* categories.

BIAW invokes *Cox*'s fourth category but does not accurately describe its scope. *Cox* category four applies only to

> those cases in which "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review" might prevail on nonfederal grounds, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "refusal immediately to review the state-court decision might seriously erode federal policy."

Nike, Inc. v. Kasky, 539 U.S. 654, 658–59 (2003) (opinion concurring in dismissal of writ) (quoting *Cox*, 420 U.S. at 482–83).[11]

Ignoring the requirement that the petitioner establish that deferring review until final judgment would "seriously erode federal policy," BIAW asserts only that this case falls into category four because a

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[11] The first three *Cox* categories are plainly inapplicable: They apply only when: (1) the lower court's decision "preordain[s]" the result on remand, *Cox*, 420 U.S. at 479; (2) the federal issue will survive and require decision regardless of the outcome on remand, *id.* at 480; or (3) later appellate review "cannot be had, whatever the ultimate outcome of the case." *Id*. at 481. This case does not satisfy the first and second categories because the decision below leaves open the possibility that BIAW may prove that it is not a political committee under the "a primary purpose" standard, mooting the federal issue BIAW seeks to raise. And it does not satisfy the third category because BIAW will have further opportunities for appellate review if it loses on remand.

resolution of its constitutional claim in its favor would supposedly preclude further litigation on the cause of action asserted against it. BIAW's attempt to shoehorn the case into category four fails for two reasons: First, BIAW is wrong in asserting that a decision in its favor on its "the" primary purpose argument would definitively end respondent's case against it; and second, BIAW cannot demonstrate that the state court finally decided federal constitutional claims as to which immediate review is required to prevent serious erosion of federal policy.

1. Ruling for BIAW on its claim would not preclude further litigation.

A determination of the issue BIAW presents in BIAW's favor would not terminate the litigation against it, an essential prerequisite to application of *Cox* category four. The premise of BIAW's contrary argument is that under a "the" primary purpose standard there would be no remaining issue as to whether BIAW was a political committee in 2008. That is not so.

The Washington Supreme Court held that BIAW preserved its argument for a "the" primary purpose standard only under the "expenditure prong," Pet. App. 21, but it allowed the case to proceed also on the "contributions prong" based upon the evidence showing that BIAW solicited and received pledges into its 2008 "war chest." Thus, regardless of the resolution of BIAW's "the" primary purpose issue, respondent will still be able to proceed with her claim that BIAW is a political committee because of its solicitation and receipt of contributions. A decision by this Court in BIAW's favor, therefore, would not "be preclusive of

any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482–83.

Even as to the expenditure prong, a decision in BIAW's favor on its "the" primary purpose theory would leave respondent free to argue on remand that BIAW satisfied that standard. Although the Washington Supreme Court observed in passing that "the evidence *does not appear* to raise a question of fact as to whether [electoral activity] was the primary purpose of BIAW," Pet. App. 33 (emphasis added), that question was not before the court, and respondent had not been afforded the opportunity to establish that a "the" primary purpose standard was satisfied. The Court's use of the terms "likely" and "appear" confirmed that it was not actually deciding an issue presented to it, but only speculating about the possible outcome if the issue were litigated. Pet. App. 34. The court's discussion was intended not to resolve the issue, but to indicate why it was sufficiently likely that BIAW's argument mattered to justify addressing it.

Had the issue been before the Washington Supreme Court, it is exceedingly *un*likely that the court would have found that respondent's claims would fail as a matter of law under a "the" primary purpose standard. The court's principal reason for saying that it was "unlikely" that electoral activity was BIAW's sole primary purpose was that the organization existed before 2008 and had other purposes. Pet. App. 33. Neither of those observations, however, is determinative under a "the" primary purpose test. Under a reasonable application of such a test, BIAW would likely be found to have had electoral work as its primary purpose in the 2008 election cycle. This Court has recognized that under federal law, which has been

construed to apply a singular major purpose standard for its political committee definition, an organization can change its original major purpose if it engages in political "spending so extensive that the organization's major purpose may be regarded as campaign activity." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). Federal appellate decisions (including decisions cited by BIAW itself) agree that the amount of political spending an organization engages in is highly relevant to determining its major purpose, and that an organization that spends the majority of its money on elections generally has "the" major purpose of supporting or opposing candidates. *The Real Truth About Abortion v. FEC,* 681 F.3d 544, 557 (4th Cir. 2012); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010); *Leake,* 525 F.3d at 289.

Here, when BIAW systematically amassed a campaign war chest over several years, and then spent $6.4 million to support a single candidate in just a few months, its political spending became "so extensive that the organization's major purpose may be regarded as campaign activities." *MCFL*, 479 U.S. at 262. Indeed, during 2008, BIAW's campaign spending dwarfed its non-campaign spending by an approximately five-to-one ratio. CP 309–11, 316. BIAW spent more on helping its candidate than did the candidate's own political party.

Other evidence confirms that electing this candidate was *the* primary purpose of BIAW, and that respondent could so prove if that were the applicable test in Washington. BIAW repeatedly acknowledged that this campaign was its primary purpose. BIAW trumpeted that "*[o]ur primary goal* this year has been to unify BIAW members and local associations behind

a coordinated, all out effort to elect Dino Rossi as governor." Pet. App. 38–39. BIAW's Board minutes stated "BIAW's number one priority this campaign season would be to help Rossi get elected." Pet. App. 38. Its Board President stated that "BIAW is putting forth the largest political effort in the entire history of the association" on the campaign, and that "all of our efforts for the next two years need to be expended on electing a new Governor in 2008." *Id*. The evidence was more than sufficient to create a genuine factual issue precluding summary judgment even under a "the" primary purpose test.

Thus, even if this Court were to hold that the First Amendment requires the test BIAW advocates, this case would need to be remanded because the evidence creates a triable issue of fact under either test. Whether an organization satisfies a "the" major purpose test is a complex factual inquiry; applying the test is "inherently a comparative task, and in most instances it will require weighing the importance of some of a group's activities against others" and "a very close examination of various activities and statements." *See Real Truth*, 681 F.3d at 556. When BIAW spent millions of dollars on a campaign and pronounced that the campaign was its primary goal, it cannot hope to obtain summary judgment based on the difference between "a" primary purpose and "the" primary purpose."

Because even a ruling in BIAW's favor on the question it presents would not preclude respondent from proceeding with her claim that BIAW was a political committee under Washington law, the threshold requirement of *Cox* category four is not met. Ac-

cordingly, this Court lacks jurisdiction to review the Washington Supreme Court's interlocutory decision.

2. Deferring review would not harm federal policy.

Jurisdiction under *Cox* category four requires not only that a judgment for the petitioner would preclude further litigation, but also that the lower court definitively decided a constitutional claim as to which immediate review is necessary to prevent serious erosion of federal policy. Here, any contention that federal policy would be eroded in the absence of immediate review founders on the fact that this Court has at least four times in recent years denied review of decisions upholding state laws that do not require that electoral activity be a political committee's *exclusive* primary purpose. *See Sorrell*, 758 F.3d 118, *cert. denied*, 135 S. Ct. 949 (2015); *McKee*, 649 F.3d 34, *cert. denied*, 132 S. Ct. 1635 (2012); *Brumsickle*, 624 F.3d 990, *cert. denied*, 562 U.S. 1217 (2011); *Independence Inst. v. Coffman*, 209 P.3d 1130 (Colo. Ct. App.), *cert. denied*, 558 U.S. 1024 (2009).

The Court's considered decision to deny review of those challenges negates any suggestion that failing to provide immediate review here would seriously erode federal policy. Indeed, in *Sorrell*, *McKee*, and *Brumsickle*, the Court denied review in cases coming from federal appellate courts, in which finality of the decision below is not a jurisdictional requirement. *See* 28 U.S.C. § 1254. If the issue did not merit review in cases where the Court clearly had jurisdiction, it would be anomalous to grant review here in the face of the jurisdictional finality requirement of 28 U.S.C. § 1257.

Moreover, the suggestion that imposing reporting and disclosure requirements on BIAW would seriously

damage federal interests runs headlong into the fact that the government has a powerful interest in requiring disclosure of the sources of funding of pre-election statements concerning political candidates, regardless of whether the speaker intended to influence the outcome of an election. *See Citizens United*, 558 U.S. at 369. That interest would be advanced, not eroded, by allowing the case to proceed to a determination of whether BIAW was a political committee under Washington law in the 2008 election cycle, and, if so, what reporting and disclosure obligations that entailed.

That BIAW asserts a First Amendment challenge to the imposition of those requirements does not, in itself, establish that immediate review is required to prevent erosion of federal interests. Although this Court held in *Cox* and a handful of other cases that particular First Amendment claims satisfied the fourth *Cox* exception, the application of state law in those cases directly penalized or even criminalized speech itself. *See Cox*, 420 U.S. at 485–86; *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55–56 (1989). As *Citizens United* emphasized, however, the First Amendment interests in a case about reporting and disclosure are of a decidedly different nature: Such requirements "do not prevent anyone from speaking." 558 U.S. at 366. The mere fact that a First Amendment claim of some nature is being asserted does not suffice to bring a case within the fourth *Cox* exception. *See*, *e.g.*, *Nike*, 539 U.S. at 660.

Indeed, immediate review in this case would actually interfere with an important federal policy: the policy against piecemeal review of federal issues. An essential part of BIAW's First Amendment claim is that the burdens associated with political committee

status justify limiting that status to entities with an exclusively electoral primary purpose. That claim has *not* been finally decided in this case: The nature of the alleged burdens, and whether they are outweighed by relevant state interests in the circumstances here, are issues that were remanded for trial and are yet to be decided in this case. Similarly, BIAW complains about the supposed vagueness of the "a" primary purpose standard, but the standard has not yet been applied to it, and the particular reasons that the Washington courts may find decisive as to how the standard applies to the as-yet undetermined facts concerning BIAW's operations have not yet been articulated. For this reason, if the Court were to grant BIAW's petition and affirm the decision below, BIAW would still likely pursue arguments on remand about the burdensomeness of whatever requirements may be imposed on it and the vagueness of the criteria applied by the courts to its conduct. The result would be "piecemeal review of the Federal First Amendment issues," a factor weighing heavily against reviewability under *Cox*. *Nike*, 539 U.S. at 660.

II. The question presented does not merit review.

A. There is no genuine conflict among the lower courts.

In *Citizens United*, this Court recognized the strong "public … interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369. *Citizens United* held that interest sufficient to justify reporting and disclosure requirements concerning expenditures discussing candidates, as well as the sources of funds used for such expendi-

tures, even as to *non-electoral* messages that discussed candidates in the pre-election period.

Since *Citizens United*, federal courts of appeals have rejected the argument that reporting and disclosure requirements associated with political committee status must be limited to organizations with the sole "major purpose" of influencing elections. *See Sorrell*, 758 F.3d at 135–38; *Madigan*, 697 F.3d at 490 ("[T]he line-drawing concerns that led the [Supreme] Court to adopt the major purpose limitation for contribution and expenditure limits in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] do not control our overbreadth analysis of the disclosure requirements ...."); *McKee*, 649 F.3d at 59 ("We find no reason to believe that this so called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the Court's construction of a federal statute."); *Brumsickle*, 624 F.3d at 1009–11; *see also Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495 (Colo. Ct. App. 2010). As the Court's denial of certiorari in multiple cases raising the issue reflects, there is no post-*Citizens United* conflict requiring this Court's resolution. *See supra* p. 19.[12]

BIAW relies primarily on the Fourth Circuit's decision in *Leake* for its claim that there is a conflict over whether the First Amendment imposes a rigid "the" major purpose requirement on any state attempt to impose political-committee reporting and

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[12] We recognize that the Washington Supreme Court characterized the federal courts of appeals as being in conflict. Of course, the state court's view on that point is not dispositive. As we demonstrate below, the court overlooked numerous distinctions among the cases that obviate any claimed conflict.

disclosure requirements on an organization. As the Second Circuit pointed out in *Sorrell*, however, *Leake* predated *Citizens United*'s powerful endorsement of the strong state interest in promoting disclosure by organizations that engage in speech about candidates. *See* 758 F.3d at 135.

Leake is also readily distinguishable from this case. *Leake* rested largely on what it described as the exceptionally burdensome consequences of political-committee status under North Carolina law. Unlike Washington's disclosure laws, North Carolina law subjected political committees to limits on the amounts of contributions they could receive from any individual or entity in a given election cycle. *See* 525 F.3d at 286. The Washington statutes at issue here, by contrast, impose no such limits on *fundraising* by organizations that are designated political committees. *Leake* did not address a law such as the one at issue here, where reporting and disclosure are the principal consequences of political committee status.

In addition, the court in *Leake* itself acknowledged that, although the regulations imposed by North Carolina law were in its view too burdensome to pass muster for organizations that lacked the major purpose of influencing elections, lesser burdens, such as reporting requirements limited to the organization's electoral activities, would pass muster. *See id*. at 290, 304. Here, the extent of reporting and disclosure that would be required if BIAW were found to have become a political committee by virtue of its intervention in the 2008 elections has yet to be determined, as has the extent of any burden those requirements might entail. It is possible, indeed likely, that the required disclosures may be no greater than the kinds of re-

porting and disclosure requirements that *Leake* indicated would be permissible even absent *any* major purpose requirement.

BIAW's reliance on the Tenth Circuit's decision in *Herrera*, 611 F.3d 669, and that court's pre-*Citizens United* opinion in *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007), is likewise misplaced. Those decisions held that full-blown political committee registration, reporting, and disclosure requirements could not be triggered *solely* by election spending that exceeded minimal thresholds ($500 or $250, respectively) with *no* additional inquiry into the organizations' major purposes. In holding that an organization's major purposes may not be conclusively determined based only on minimal levels of spending, the Tenth Circuit in no way addressed the validity of a regime like Washington's, where an entity may be classified as a political committee based on expenditures only if its spending exceeds a certain threshold *and* an additional determination is made that one of its primary purposes is influencing elections.

Washington's choice of an "a" primary purpose requirement is also consistent with the Eighth Circuit's statement in *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 592 (8th Cir. 2013), that "major purpose" is "an important consideration" in considering whether particular requirements may be imposed on an organization. *Tooker* did not consider the distinction between "a" major purpose and "the" major purpose, but held only that certain requirements (such as "perpetual" reporting, which is not at issue here) could not be applied to organizations without *any* consideration of their major purpose, while others

could be. *See id*. at 592–601. Those highly case-specific holdings do not conflict with the Washington Supreme Court's decision to impose political-committee requirements based on an organization's electoral spending only if it has a primary purpose of influencing elections.[13]

The Seventh Circuit's decision in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), likewise does not conflict with the decision below. As the Second Circuit pointed out in *Sorrell*, *Barland* acknowledges and does not overrule the Seventh Circuit's holding in *Madigan* that the major purpose requirement is not constitutionally mandated. *See Sorrell*, 758 F.3d at 135 n.15; *Barland*, 751 F.3d at 839. *Barland* could not have addressed the distinction between "a" and "the" primary purpose because the Wisconsin law at issue did not include *any* primary purpose limitation. Rather, Wisconsin law, like the laws considered by the Tenth Circuit in *Herrera* and *Coffman*, imposed onerous requirements on organizations based solely on a low threshold of spending ($300) on communications that merely mentioned candidates but did not explicitly advocate their election or defeat. *See id.* at 834. Accordingly, *Barland* focused principally on whether political committee status may be imposed on organizations that do not engage in express advocacy, *see id.* at 835–38, an issue

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[13] BIAW's reliance on *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424 (Minn. 2005), is misplaced because the state court in that case adopted a "the" major purpose test as a matter of statutory construction and did not hold that an "a" primary purpose test would be unconstitutional.

quite distinct from that posed by BIAW's petition and, indeed, not present in this case at all.

Finally, *Barland*, like *Leake*, explicitly acknowledged that "simpler, less burdensome disclosure rule[s]" for "spending by 'nonmajor-purpose groups' would be constitutionally permissible under *Citizens United*," and it specifically included "event-driven disclosure" of political contributions and expenditures for such groups. 751 F.3d at 841. Again, because the disclosure that may be required of BIAW has not yet been determined, and may be limited to the kinds of disclosures that *Barland* approved, it cannot be said that *Barland* would condemn the Washington statute as applied by the Washington courts.

B. BIAW's arguments are meritless.

BIAW's contention that the Constitution permits imposition of political-committee reporting and disclosure requirements only on entities whose sole primary purpose is electoral activity ignores the powerful interest of the public in reporting and disclosure by those who finance messages about political candidates, even in the absence of an electoral motive. *See Citizens United*, 558 U.S. at 366–71. When substantial candidate-related expenditures are combined with a primary organizational purpose to influence elections, the public interest is more powerful still, and is not reduced by the possibility that an organization may have, or claim to have, some other purposes, even significant ones. *See Brumsickle*, 624 F.3d at 1011–12.

Nor is it necessary to replace Washington's "a" primary purpose standard with a "the" primary purpose test to avoid vagueness. Although BIAW contends that a singular major purpose requirement would provide a "bright-line" test that Washington's

standard lacks, the argument that there is a difference of constitutional dimension in the clarity of the two standards is implausible. Federal courts considering the singular major-purpose test under federal campaign-finance laws have emphasized that that test is not a mechanical, "bright-line" test, but involves the consideration of multiple factors in a flexible, "case-by-case analysis," requiring "weighing the importance of some of a group's activities against others." *Real Truth*, 681 F.3d at 586–87. Indeed, determining an organization's several primary purposes may be more straightforward than determining which of them is predominant. Washington's standard may, therefore, be *advantageous* from the standpoint of clarity over the federal statutory major purpose standard.[14]

In any event, BIAW's argument that it was somehow caught in a web of vague law is belied by the facts. When a sophisticated political actor spends two years amassing a secret war chest, and then dumps $6.4 million into a single campaign, it certainly knows that it is acting as a political committee. This organization maintains multiple multi-million dollar political committees, and directs most of its fundraising and political spending through them. CP 256, 264,

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[14] BIAW's amici Institute for Justice and Pillar of Justice inadvertently make the same point by arguing that the "the" major purpose test applied under federal campaign-finance laws is vague and should be substantially reconsidered or revised. Because BIAW does not present that question, it would not be before this Court if it granted review. But that BIAW's own amici criticize the very standard BIAW urges the Court to impose on the states hardly advances BIAW's argument that vagueness concerns necessitate the adoption of its favored rule.

266, 269, 288–307. Yet it took a calculated risk in 2008 when it decided to conduct fundraising and spending directly.

BIAW claims that the supposed bright-line rule of a "the" primary purpose test would have allowed it to avoid political committee status. However, the record reveals that when BIAW knew of existing bright lines under Washington law, it merely took greater efforts to conceal its prohibited political activities. For example, BIAW knew it was illegal to fundraise for a non-declared candidate, so it concealed such activities. Pet. App 23; CP 410; CP 424. Similarly, BIAW was well aware of another bright-line rule that had long existed under Washington law: When a group solicits or receives political contributions, it becomes a political committee. *Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 49 P.3d 894 (Wash. Ct. App. 2002), *review denied*, 66 P.3d 639 (Wash. 2003). Yet, for two years BIAW secretly and systematically solicited pledges for a "campaign war chest." CP 452, 453 ("BIAW is working to raise considerable funds to support a governor candidate, likely Rossi in 2008."); 491 ("So far three-quarters of a million dollars had been raised. Add that to the amount of BIAW's excess and the total combined amount would come to over $2 million."); CP 509 ("you as Senior Officers have now raised over $2 million (before taxes) for the Governor's race in 2008."). When BIAW started soliciting and receiving campaign contributions in 2007, it knowingly walked over Washington's "bright line" and was required to register as a political committee within two weeks.

Moreover, even under its proffered "the" primary purpose test, BIAW voluntarily took on political committee status when it chose to spend $6.4 million in a

single election. BIAW's petition cites *Leake* for the proposition that "if the organization spends the majority of its money on supporting or opposing candidate (or ballot measures), that organization is under fair warning that it may fall within the ambit of *Buckley*'s test." Pet. 30. That was the case with BIAW. Its campaign spending dwarfed its non-campaign spending significantly. In 2006–2008, BIAW's annual expenditures averaged less than $1.25 million. CP 309–11, 316.[15] Thus, BIAW's 2008 campaign spending was about five times greater than its non-campaign spending. BIAW had "fair warning" it would meet whatever primary purpose test applied.

III. This case is not a suitable vehicle for resolving the issue BIAW presents.

A. The primary purpose argument BIAW has advanced applies to only one prong of Washington's political committee definition.

As explained above, the state court determined that BIAW argued below for superimposing its "the" primary purpose test only on the expenditure prong of Washington's political committee definition. But the lower court held that respondent's action also presented a triable question of fact under the contributions prong of the definition.

To the extent BIAW may now seek to argue that an organization that becomes a political committee by

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[15] The $6.4 million of campaign spending even exceeded the total non-campaign combined spending of BIAW and its for-profit affiliate BIAW-MSC. The after-tax spending of the two organizations for 2007 was less than $5.9 million. CP 310, 313.

soliciting or receiving contributions for electoral purposes must also have an exclusive primary purpose of electoral activity, that argument must be deemed waived in light of the lower court's conclusion that BIAW had not presented it. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (state court's actual reliance on a procedural ground for not addressing a federal question is an adequate and independent state-law ground for the court's judgment).[16] Thus, should this Court accept review, any decision it might make would apply only to one of the two possible bases on which BIAW may ultimately be held to be a political committee. The issue posed by BIAW would therefore not be outcome determinative, and would, indeed, be completely superfluous were BIAW ultimately determined to be a political committee based on its solicitation of contributions, rather than its expenditures.

B. The posture of the case is unsuitable for considering BIAW's vagueness arguments.

BIAW's contention that although a "the" primary purpose test is acceptable, an "a" primary purpose standard is unconstitutionally vague is not only meritless, as explained above, but also ill-suited for resolution now. The Washington courts have not yet determined whether BIAW meets the "a" primary purpose standard, nor articulated how that standard applies to the facts here. Absent such determinations, considera-

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[16] Indeed, even absent a state court's explicit statement that a federal issue has not been presented to it, this Court presumes that a petitioner failed to raise a federal issue properly when the state court declines to address it. *Webb v. Webb*, 451 U.S. 493, 495–96 (1981).

tion of BIAW's claim that it had no fair warning that it could be a political committee would proceed in a factual vacuum. Unless and until the state courts hold that the test is satisfied, identify the facts that support that conclusion, and assess their adequacy to do so, any decision by this Court as to the constitutionality of Washington's definition as applied to BIAW would be premature.

C. BIAW's claims rest on as-yet untested and likely erroneous assumptions about the "burdens" of designating it a political committee.

BIAW's argument for its "the" primary purpose standard rests upon a false assumption that the burdens of political committee status under Washington law are identical to those imposed by federal campaign laws and those of any and all other states whose laws employ the concept of political committee reporting and disclosure. Obviously, however, whether requirements are unduly burdensome depends on what those requirements are. This Court's decisions and the appellate decisions on which BIAW relies make clear that some degree of reporting and disclosure may permissibly be imposed on any organization that engages in political spending, regardless of whether it has any primary purpose to influence elections, *see Citizen United*, 558 U.S. at 369, and that further limitations such as primary purpose tests may be required only when the requirements attached to political committee status become unduly onerous. *See Barland*, 751 F.3d at 841; *Leake*, 525 F.3d at 290, 304.

Here, as the Washington Supreme Court observed, the disclosure that would be required has not yet been addressed. Without a determination of that issue, and

the development of a record about whether or to what extent BIAW would be burdened by political committee reporting, the First Amendment inquiry sought by BIAW is premature. The state court thus correctly declined to evaluate BIAW's claim that registration as a political committee would impose an onerous burden, holding that that issue was not ripe for review in the absence of a factual record and in-depth briefing by the parties. Pet. App. 41. This Court should decline review for the same reasons and allow the Washington courts and regulators to determine in the first instance the reporting that would be required if BIAW were found to be a political committee, rather than assuming that BIAW's obligations would be so burdensome as to infringe its First Amendment rights.

The burdens that may ultimately be imposed are likely to be, as the Ninth Circuit concluded in *Brumsickle*, "not unduly onerous" and "quite modest." 624 F.3d at 1013, 1022. BIAW fails to apprise the Court that there is substantial reason to think that even if it were found to meet Washington's political committee definition, BIAW would be allowed to establish a committee whose scope was limited to the organization's electoral activity, and thus BIAW would be required to report only its *political* fundraising and expenditures, not its non-campaign finances. That is what happened to BIAW's affiliate BIAW-MSC. That organization has a multi-million-dollar budget, but when it was deemed a political committee, it was only required to report its campaign contributions and expenditures. The Washington PDC concluded that "[while] the entire BIAW-MSC general fund would not be considered a political committee, the solicitation, receipt, and retention of local association Retro program refunds by BIAW-MSC in the amount of

$584,527.53 qualifies *that discrete portion of BIAW-MSC funds as a political committee*." Pet. App. 70 (emphasis added); *see also* CP 285–86 (setting forth limited disclosures ultimately required from BIAW-MSC). In recent years, Washington has interpreted state law to permit a corporation qualifying as a political committee to bring itself into compliance by establishing a separate political committee and thus disclose only its political fundraising and spending.[17]

By offering a means by which a corporation qualifying as a political committee can limit disclosure to its political fundraising and spending, Washington imposes no undue burden on First Amendment rights. The Court has held that even organizations that cannot be classified as political committees have no First Amendment objection to being required to disclose their identities and the amounts they raise and spend in relation to candidates. *Citizens United*, 448 U.S. at 369. The First Amendment concern that led to *Buckley*'s imposition of the "major purpose" limiting construction of the federal political committee definition was that absent that limitation the information sought by the government might be too remote from the legitimate purpose of the statute (maintaining openness and transparency in elections) to justify the

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[17] *See e.g.,* http://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-files-suit-against-grocery-manufacturers-association (reporting that the Attorney General "alleges the GMA should have formed a separate political committee, registered with the state's Public Disclosure Commission (PDC), and filed reports indicating who contributed, how much they contributed and how the money was spent to oppose I-522") (linking to complaint seeking disclosure only of *political* fundraising and spending).

burdens imposed. *See Buckley*, 424 U.S. at 79–80. By requiring only limited disclosure from corporations qualifying as political committees, Washington fully protects the First Amendment rights of organizations like BIAW while providing critical information to voters in a timely manner.

The limited disclosures required by Washington law illustrate that the arguable burdens of political committee registration under state laws vary from state to state. Whereas *Buckley* involved federal law and therefore could have national impact, this case is based upon the intricacies of Washington's campaign reporting regime. Even if the extent of BIAW's reporting and disclosure arguments had been determined by the courts below, review of the case by this Court would be unlikely to have an impact beyond the State of Washington. Given Washington's method of protecting First Amendment rights—by requiring corporations to report only political contributions and spending—this case does not provide a vehicle for enunciating national First Amendment standards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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