IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0270

SHALE ENERGY ALLIANCE,
A Delaware Corporation,
Petitioner,

Appeal from the Circuit Court of Wood County, (case no. 18-C-162)

v.

MAC WARNER,
Secretary of State of the State of West Virginia
Respondent.

BRIEF FOR RESPONDENT

PATRICK MORRISEY
ATTORNEY GENERAL

Lindsay S. See (WV Bar No. 13360)
Solicitor General
Curtis R.A. Capehart (WV Bar No. 9876)
Deputy Attorney General
Thomas T. Lampman (WV Bar No. 13353)
Assistant Solicitor General

State Capitol Complex
Building 1, E-26
Charleston, WV 25301
Telephone: (304) 558-2021
Email: thomas.t.lampman@wvago.gov
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rules

Other Authorities

ASSIGNMENTS OF ERROR

Petitioner's brief sets forth six assignments of error, which are reproduced below.

A. The Circuit Court erred in ruling that SEA is a "political action committee" as defined in W.Va. Code § 3-8-la(21) (2018).

B. The Circuit Court erred in ruling that SEA was "organized for the purpose of supporting or opposing one or more candidates" under W.Va. Code § 3-8- 1a(21) (2018).

C. The Circuit Court erred by looking only at two select calendar years of SEA spending, rather than looking at the lifetime spending of the organization in determining "the purpose."

D. The Circuit Court erred by finding that SEA has consistently devoted more than half of its expenditures to expressly advocating for and against candidates in West Virginia elections.

E. The Circuit Court erred by including the commission of four public opinion polls by SEA in its calculation of SEA's express advocacy expenditures for 2018's "political" calculation.

F. The Circuit Court erred by failing to independently examine each of SEA's expenses.

Pet'r's Br. 1.

STATEMENT OF THE CASE

Elections are won and lost through the public discourse, and West Virginia—like every State—brings transparency and integrity to the public discourse by informing its citizens about the money spent shaping it. To that end, the State requires public disclosure of political advertising and its attendant expenditures. Similarly, the State requires that the major players in this public discourse—candidates, political parties, and political action committees—register with the

Secretary of State ("the Secretary") to effectuate these disclosures. These requirements are contained in Chapter 3 of the West Virginia Code ("Election Code").

Petitioner, Shale Energy Alliance, Inc. ("SEA"), financed an extensive campaign of television, mail, print, and internet advertising that expressly advocated for and against nine different candidates across the 2018 primary and general elections. *See, e.g.*, JA 60-83. The direct cost of these advertisements was over $156,000, JA 173-191, yet SEA did not initially report its expenditures to the Secretary, register as a political action committee, or file the detailed financial statements required of political action committees under the Election Code. During the pendency of this litigation, the parties resolved many of these disclosure issues through a settlement agreement. However, SEA maintains that it is not required to register as a political action committee, and consequently it has not registered as such nor filed complete versions of the transaction reports that are required of such groups.

I. West Virginia's System Of Campaign Finance Regulations.

An informed electorate is an effective electorate, and the Election Code informs West Virginia's electorate by requiring public disclosures of money in politics. This system ensures citizens have information about each political advertisement they are exposed to, about the organizations making those advertisements, and about how these advertisements and organizations are funded.

At the heart of the Election Code is the requirement that "political committees"—organizations with an inherent political mission—file a "statement of organization" with the Secretary. W. Va. Code § 3-8-4(a),(b) (2018).[1] This requirement applies to candidates' campaign

[1] As this action was initiated in response to advertisements made in the 2018 election, the 2018 version of the Election Code is used throughout this brief. Many of the relevant provisions were amended in 2019. *See* SB 622, 2019 Reg. Sess., *enrolled at* 2019 W. Va. Acts ch. 102.

committees, political party committees, and political action committees. *Id.* Campaign committees and political party committees are, as the name suggests, "established" directly by a candidate's campaign or by a political party. W. Va. Code § 3-8-1a(5), (24) (2018). Political action committees, however, operate independently of candidates and political parties. As such, these groups are identified by how they are structured rather than simply why they were created. Under the 2018 definition, a "political action committee" is any group that is "organized for the purpose of supporting or opposing the nomination or election of one or more candidates." W. Va. Code § 3-8-1a(21) (2018).

Once registered, all committees must periodically file a "detailed financial statement" disclosing all transactions over $500 and all transactions made shortly before each election. W. Va. Code § 3-8-5(a), (b) (2018). The "financial transactions" subject to disclosure encompass "all repayments of loans or expenditures made to promote the candidacy of any person," as well as "all contributions or loans received." W. Va. Code § 3-8-5(d) (2018). "Contributions" are similarly defined as transfers of monies or other things of value "made for the purpose of influencing the nomination or, election, or defeat of a candidate." W. Va. Code § 3-8-1a(7) (2018).

At a more granular level, the Election Code contains disclosure requirements that apply to two overlapping categories of political advertisements. These requirements apply to all qualifying advertisements, irrespective of who makes them.

First, the Election Code regulates "independent expenditures." This term encompasses all expenditures for advertisements that "[e]xpressly advocate[e] the election or defeat of a clearly identified candidate" and "[are] not made in concert or cooperation with or at the suggestion of such candidate." W. Va. Code § 3-8-1a(16) (2018). An advertisement "expressly advocates" for a candidate if it uses phrases such as "vote for," "vote against," "support," "reject," or is otherwise

"susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." W. Va. Code § 3-8-1a(13) (2018). Independent expenditures that are "in an aggregate amount or value of $1,000 during a calendar year" must be disclosed and reported to the Secretary. W. Va. Code § 3-8-2(b)(1) (2018).

Second, the Election Code regulates "electioneering communications." This term encompasses "paid communications made by broadcast, cable or satellite signal, mass mailing, telephone bank, billboard advertisement or published in any newspaper" that (1) "[r]efer[] to a clearly identified candidate," (2) are "targeted to the relevant electorate," and (3) are "publicly disseminated" within thirty days of a primary election or sixty days of a general or special election. W. Va. Code § 3-8-1a(12)(A)(i)-(iii) (2018). Many communications are also excluded from this category, such as media reports and candidate debates. W. Va. Code § 3-8-1a(12)(B)(i),(iii). However, "independent expenditures . . . are not exempt from the reporting requirements of this section." W. Va. Code § 3-8-1a(B)(ii) (2018). Anyone making electioneering communications must disclose and report them to the Secretary if the total costs of "purchasing, producing, or disseminating" those communications is in excess of $5,000 within a calendar year, or $1,000 within fifteen days of an election. W. Va. Code § 3-8-2b(a) (2018). The Election Code calls for similar disclosures related to independent expenditures and electioneering communications, capturing (i) the amount in question, (ii) the candidate or candidates targeted, and (iii) any contributions that were used to pay for the specific expenditure or communication. W. Va. Code §§ 3-8-2(b)(1)(A)-(F) (2018), 3-8-2b(a)(1)-(5) (2018).

There is obvious overlap in this system, not the least of which being that the typical independent expenditure made shortly before an election will—by virtue of "expressly advocating" for or against a candidate—also meet the definition of an electioneering

communication. To avoid redundant reporting, when a person or group makes over $1,000 of independent expenditures within fifteen days of an election, the expenditures are required to be reported only as electioneering communications. W. Va. Code § 3-8-2(c)(1) (2018). Similarly, the reporting requirements for electioneering communications exempt any transactions that meet the threshold for disclosure on a group's periodic transaction report. W. Va. Code § 3-8-1a(12)(B)(ii) (2018). However, this exemption does *not* apply to independent expenditures. *Id.* Thus, an entity that files detailed financial reports under Section 3-8-5 must both disclose all independent expenditures over $1,000 in the fifteen days preceding an election *and* disclose those expenditures as transactions on their detailed financial statement.

The net result is a system that requires slightly more disclosure from committees—including political action committees—than from others. Everyone reports and discloses all money spent directly in public discourse, whether as independent expenditures or electioneering communications, as well as all money given specifically to support those expenditures. A group that incidentally makes independent expenditures will not have to make separate and redundant disclosures when those expenditures also qualify as "electioneering communications," nor will such a group have to file detailed financial statements. Conversely, a group that is organized for the purpose of expressly advocating for candidates—*e.g.*, a political action committee—will disclose each of its expenditures both individually and also as transactions on its periodic financial report. And unlike persons or groups that incidentally make independent expenditures, political action committees must ultimately disclose all contributions they receive for political purposes during the reporting periods, not merely those that are tied to a specific expenditure or communication.

II. SEA Was Formed In 2015 And Almost Immediately Began Making Expenditures To Influence The Outcome Of West Virginia Elections.

SEA was first incorporated in the State of Delaware in September of 2015, and registered to do business in West Virginia in November of that year. JA 158. Since its inception, SEA has described its "mission or most significant activities" as twofold: (1) to conduct "public education campaigns" related to a range of "public policy issues" including "oil and natural gas development" and "taxation and labor issues;" and (2) to "[a]dvocate for candidates seeking public office whose views align with the organization's priorities." JA 93.

SEA's executive leadership is divided between two officers, who each take responsibility for different aspects of SEA's mission. JA 322-23. Each officer operates largely independently of the other, overseeing activities within their own areas of expertise—one focusing on educational and outreach events, another focusing on communications and advertising. JA 333-35, 338-39. These officers oversee SEA's "operating structure," JA 322, which encompasses "government relations support" from other groups, JA 322, "ongoing relationships" with "advocacy" consultants, JA 323-25, administrative staff provided by outside groups, JA 361, and vendors who assist with both crafting and executing SEA's advertising campaigns, JA 354-55, 362-63. From its inception, SEA has retained Stephanie Ming at "Comerica Bank PAC services" as its records custodian. JA 94. Comerica Bank PAC Services provides services including "[f]ederal and state regulatory reporting" services, receipt and expenditure services, and "solicitation assistance" to "corporation[s], union[s], and associating political action group[s]." JA 96.

Although SEA takes an interest in several States, almost as soon as SEA was registered to do business in West Virginia it devoted a significant portion of its time and resources to influencing the outcome of West Virginia elections. SEA disclosed thirteen distinct expenditures, totaling more than $24,000, advocating "for" nine different candidates in the 2016 primary election. JA

102-09. Moreover, SEA's disclosures indicate that it was given $13,000 specifically for the purpose of making the expenditures in question. JA 106, 109. SEA's IRS-990 form for 2016 reveals a further $50,000 in contributions from SEA to two other groups. JA 100. Each of these groups reported SEA's contribution consistent with contributions given to fund communications that expressly advocated for or against candidates. JA 111-19.

All together, the more than $74,000 SEA spent or contributed to expressly advocate for or against candidates in West Virginia's 2016 election cycle was more than 54% of SEA's total expenditures in its first full year of operation, and nearly 45% of its expenditures across 2015 and 2016 combined. JA 93, 99 (indicating a total of $32,510 in expenses in 2015 and $136,302 in expenses in 2016).

III. SEA Effectively Ceased Doing Business In West Virginia In 2017, But Resumed Making Expenditures To Influence West Virginia Elections In 2018.

SEA's authorization to conduct business in West Virginia lapsed in late 2016. JA 281. Nonetheless, SEA's leadership decided to "ramp[] up" their political activities in West Virginia during the 2018 election cycle. JA 214. In the weeks leading up to the 2018 primary election, SEA began a full-court press of political advertising. SEA commissioned a $20,000 video expressly advocating against the election of a specific candidate, and aired this ad in 468 distinct "spots" in the two weeks preceding the primary. JA 73-78, 174, 544. SEA made eighteen distinct expenditures for mailing campaigns, some expressly advocating against a candidate and others expressly advocating for a different candidate. JA 174-190. While some of SEA's appeals to voters focused on SEA's avowed interest areas—natural gas, oil, and taxes—others touted candidates' stances on unrelated issues as diverse as the "Second Amendment" and "fight[ing] the opioid crisis." JA 64-65. Lastly, SEA purchased an ad in a local newspaper expressly advocating "[v]ote to keep [a candidate] in office," again touting the candidate's "Second Amendment"

record. JA 71. SEA's disclosures indicate that its primary election advocacy campaign cost $77,178.22 in total. JA 174-190.[2]

The Secretary's office received a complaint about SEA, and determined that SEA had neither registered as a political action committee nor disclosed any of its expenditures. JA 121-23. The Secretary's office informed SEA of its violations and assisted SEA with coming into partial compliance. JA 121-23. SEA then filed disclosure forms for its 2018 primary-cycle independent expenditures. JA 125-140. However, SEA did not agree that it was required to register as a political action committee, did not agree that it was required to file the detailed transaction reports required from political action committees, and did not pay the penalties associated with its delinquent filings. Accordingly, the Secretary filed this suit in June of 2018.

Although SEA participated in settlement negotiations with the Secretary's office, it did not maintain even its partial compliance with the Election Code. Indeed, as the general election drew near, SEA deployed even more sophisticated tactics to expressly advocate on behalf of candidates. Like in the primary election, SEA's advocacy was largely concentrated in direct mail campaigns; SEA spent nearly $79,000 on direct mail during the general election, advocating on behalf of seven distinct candidates. JA 192-99. Unlike in the primary, SEA did not bolster its mailings with television and print ads. Rather, SEA spent a further $10,500 to commission four public opinion polls of voters in the districts it targeted. JA 85-91. While not themselves a form of express advocacy, SEA admits it conducts polls to facilitate its political activity. JA 164. Accordingly, SEA calibrated its advertising to speak to the concerns these polls identified as important to voters—even where these concerns were unrelated to SEA's avowed policy interests. For

[2] SEA's financial transaction reports reflect a different total for the primary reporting period. JA 167-170. Although these reports omit any reference to the $6,100 expenditure to the Parkersburg News and Sentinel, the omitted expenditure is larger than the discrepancy.

example, SEA's poll of voters in Senate District 13 showed that—by a wide margin—the two issues most important to voters were "healthcare" and "jobs." JA 87-88. SEA's mailer on behalf of a District 13 candidate—sent shortly after this poll was completed—touted this candidate's record on "Jobs" and "Healthcare." JA 83. In another departure from the primary, where SEA's advertising provided links to candidates' web pages, SEA's general election mailers provided links to SEA's own websites dedicated to specific candidates. JA 82.

Once again, SEA did not disclose these expenditures to the Secretary until it received a cease and desist letter. JA 142. SEA's eventual disclosures reflect that SEA's general election mailing campaign cost $78,983.03. JA 144-153, 172. Altogether, the grand total for SEA's advertising, mailing, and polling related to the 2018 election cycle was $166,661.25. JA 174-191 (reporting $77,178.22 total spending in the primary, *see* n.2, *supra* p. 8), 170, 172. These expenditures accounted for more than half of its total spending for the entire year. JA 155 (reflecting total expenditures of $332,108 in 2018).

The parties reached a partial settlement in August of 2019, by which time the Legislature had changed the definition of "political action committee" as part of a comprehensive overhaul of the State's campaign finance regulations. *See* S.B. 622, enrolled at 2019 W. Va. Acts vol. I, ch. 102. SEA filed "electioneering communication" disclosures for its previously disclosed independent expenditures, following the procedure set forth in Section 3-8-1a(12)(B)(ii) (2018), JA 174-199, and further agreed to make partial disclosures of its financial transactions in order to toll the accrual of timeliness penalties. SEA's transaction reports reflect the expenditures that it has disclosed, but represent that it has not received any contributions for political purposes. JA 167-172.

However, the parties were unable to reach an agreement as to whether SEA met the 2018 definition of "political action committee." Thus, each party sought summary judgment on that question from the Circuit Court—although notably, SEA did not raise any constitutional arguments relating to the scope of the 2018 definition of political action committee. *See* JA 272.

The Circuit Court concluded that SEA was "organized for the purpose of advocating for or against" candidates—and thus was a political action committee under the 2018 definition—because it is "staffed, directed, and supported by a network of communications professionals, pollsters, and government affairs consultants." JA 8. SEA's appeal followed.

SUMMARY OF ARGUMENT

SEA's organizational structure contains a network of political and communications professionals, who design and execute prolonged and sophisticated campaigns to influence the outcome of elections. Therefore, the Circuit Court correctly held that SEA is "organized for the purpose of supporting or opposing one or more candidates," and therefore is a political action committee under the terms of the 2018 statute. JA 10 (quoting W. Va. Code § 3-8-1a(21) (2018)).

This brief responds to SEA's six assignments of error in two parts. *First*, in response to SEA's first assignment of error, this brief sets forth the plain-text meaning of the relevant statutory language: "organized for the purpose of supporting or opposing one or more candidates." W. Va. Code § 3-8-1a(21) (2018). SEA's arguments in support of this assigned error alternate between attempts to add qualifying language to the statute, or to manufacture ambiguity by ignoring clarifying language. None of these arguments justify a judicial modification of the statute, and all were either rightly rejected by the court below or affirmatively waived by SEA.

Second, this brief collectively responds to SEA's five assignments of error that attack the substance of the Circuit Court's conclusion that SEA is "organized for the purpose of advocating for or against" candidates. Consistent with the plain text of the 2018 definition, the Circuit Court

rightly concluded that SEA is "organized" for this purpose because it is "staffed, directed, and supported by a network of communications professionals, pollsters, and government affairs consultants" that "work[] together to organize multifaceted multimedia campaigns advocating for and against candidates every election year." JA 8.

SEA objects to the Circuit Court's analysis of the facts before it, but at most these objections nibble around the edges of the analysis's core premise. None of SEA's critiques contest that SEA was "staffed, directed, and supported by a network of communications professionals, pollsters, and government affairs consultants" that "work[] together to organize multifaceted multimedia campaigns advocating for and against candidates every election year." JA 8. Rather, some of these arguments attempt to reframe the issue by raising irrelevant distinctions—for example, the notion that SEA honing its express advocacy through public opinion polling should not bear on whether it is "organized for the purpose of advocating for or against candidates" simply because *the polls themselves* are not express advocacy. *See* Pet'r's Br. 20-21. Other arguments attempt to manufacture factual disputes well after SEA declined the opportunity to contest the facts before the Circuit Court. Each of these arguments fail, and taken together none warrant reversal of the Circuit Court's order.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this case is not necessary, as the issues presented for review are adequately presented in the briefs. W. Va. R. App. P. 18(a)(4). Moreover, this case involves interpretation of a statute that is no longer in effect. Thus, insofar as argument is granted it involves only a "narrow issue of law," and thus is suitable for resolution under West Virginia Rule of Appellate Procedure 19(a).

STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

ARGUMENT

I. The Circuit Court Correctly Interpreted The 2018 Definition Of "Political Action Committee."

This case centers on one sentence in the 2018 Election Code: "'Political action committee' means a committee organized by one or more persons for the purpose of supporting or opposing the nomination or election of one or more candidates." W. Va. Code § 3-8-1a(21) (2018). The Circuit Court correctly held that this sentence means what it says—nothing more and nothing less.

SEA argues that this sentence means less than what it says, and that "political action committee" only encompasses groups that are "organized . . . for the [sole, or primary, or major] purpose of supporting or opposing" candidates. W. Va. Code § 3-8-1a(21) (2018). But these narrower readings are not supported by the text of the 2018 statute, are contradicted by SEA's own arguments below and by intervening legislative developments, and draw no support from the constitutional theories that SEA offers for the first time on appeal.

A. The Circuit Court's Order is grounded in the plain meaning of "organized for the purpose" of influencing elections.

A political action committee is distinct from other groups that influence the election or defeat of candidates based on one feature: whether it is "organized" for that purpose. W. Va. Code § 3-8-1a(21) (2018). Thus, if a community organization, issue awareness group, or social media page is not "organized" for the purpose of supporting candidates, it does not become a political action committee merely by engaging in express advocacy. But at the same time, a group does not need to be "created" for the purpose of influencing elections—or pursue that goal exclusively—in order to qualify under the 2018 definition.

The Election Code does not define what it means to be "organized," so courts must give this term its ordinary and plain meaning. *See* Syl. pt. 1, *Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee–Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982) ("In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used."). Merriam-Webster's Collegiate Dictionary defines "organized" as "having a formal organization to coordinate and carry out activities." JA 9 (quoting *Organized, Merriam-Webster Collegiate Dictionary* (11th Ed. 2003)). Similarly, the Oxford English Dictionary defines "organized" as "[f]ormed into a whole with interdependent parts; co-ordinated so as to form a system or orderly structure; systematically arranged." *Organized, Oxford English Dictionary* (2nd Ed. 1989). *See also Meadows v. Wal-Mart Stores, Inc.,* 207 W.Va. 203, 215, 530 S.E.2d 676, 688 (1999) (utilizing dictionaries to "give the term its familiar and ordinary meaning.").

What is clear from the 2018 definition is that being "organized for the purpose" of influencing elections does not preclude being organized for other purposes as well. The Election Code expressly contemplates the possibility that an entity organized for non-electoral purposes can *also* be organized for the purpose of influencing elections. The 2018 statutory definition included "membership organizations" as a type of political action committee.[3] W. Va. Code § 3-8-1a(21)(B) (2018). Membership organizations "use[] a majority of [their] membership dues for purposes other than political purposes," W. Va. Code § 3-8-1a(18) (2018). Such groups no doubt devote much of their time and organization to non-political purposes, yet the Election Code

[3] SEA's brief, at pp. 13-14 n. 14, proffers that this definition does not extend to the membership organization itself. But this relies on a regulatory definition, not the text of the relevant statute.

recognizes they are *also* "organized . . . for the purpose" of advocating for and against candidates. W. Va. Code § 3-8-1a(21) (2018).

Thus, the Circuit Court was correct to read the 2018 definition as requiring an analysis of how SEA's organizational components were structured, and what goals those structures predominately pursued. JA 8-9. So too was it correct to conclude that, taken together, the provisions of the 2018 definition indicated that the Legislature did not conceive of "organization . . . for [a] purpose" as mutually exclusive with organization for an additional, even wholly non-political, purpose. *Id.*; *see also W. Va. Health Care Cost Rev. Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996) ("It is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used."); Syl. pt. 7, *Miller v. Wood*, 229 W. Va. 545, 729 S.E.2d 867 (2012) ("[S]tatutes which have a common purpose will be regarded in *para materia* to assure recognition and implementation of the legislative intent." (quoting Syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975)).

B. SEA's attempts to modify the text of the 2018 definition of "political action committee" unavailing.

SEA's disagrees with the Circuit Court's approach to the plain language of the statute, arguing that it cannot be a political action committee under the 2018 definition because advocating for and against candidates is not its "only, primary, or even major purpose." Pet'r's Br. 14. But this is not what the 2018 definition says or means. None the qualifying terms SEA attempts to shield itself with appear in the statute, and it is a well-established canon of judicial interpretation that courts should not add to the text of the statute through interpretation. *See* Syl. pt. 11, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21 (2013) ("It is not for [courts] arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation

words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted."); Syl. pt. 1, *Consumer Advocate Division v. Pub. Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650 (1989) ("A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.").

Whatever else SEA may or may not be—whatever other purpose it may or may not *also* be organized for—is irrelevant to whether it is a political action committee "organized for the purpose of advocating for or against" candidates. W. Va. Code § 3-8-1a(21) (2018). The Circuit Court correctly rejected SEA's proffered amendment of the 2018 definition to include the "sole purpose" limitation, concluding "[i]f the legislature had intended the Election Code to capture only political action committees organized for the 'sole purpose' of supporting or opposing candidates, then it would have included the word 'sole' as it did in other statutes." JA 10 (citation omitted). And indeed, each of SEA's proffered additions to the statute are flawed.

1. The 2018 definition does not implicitly limit itself to groups organized for the "sole purpose" or "only purpose" of advocating for or against candidates.

None of the words in the phrase "organized for the purpose of advocating for or against" candidates suggest that the label of "political action committee" is limited to groups organized for the *sole* purpose of influencing elections. "The" simply indicates to the reader that "purpose" is the trait used to judge which organizations satisfy the definition of "political action committee." *See The*, *Concise Oxford English Dictionary* (11th Ed. 2009) (defining "the" in the second as "used to point forward to a following qualifying or defining clause or phrase"). And "purpose" alone does not include any limiting factor in its definition. Merriam-Webster's Collegiate Dictionary defines "purpose" as "something set up as an object or end to be attained." *Purpose*, *Merriam-Webster Collegiate Dictionary* (11th Ed. 2003). Without a modifying word such as "sole," or "only," the phrase "organized for the purpose" is not inherently exclusive of all other purposes.

Cf. McComas v. Bd. Of Educ. of Fayette Cty., 197 W. Va. 188, 205, 475 S.E.2d 280, 297 (1996) ("[W]hen interpreting statutes we give credence to the normal usage of the word."). For example, saying "the judiciary is organized for the purpose of adjudicating disputes" does not imply, by exclusion, that the judiciary is not *also* "organized for the purpose of regulating the practice of law." Similarly, the organization chart of a group like SEA can contain an "operating structure" that reports to an educational event planner, and as well as another "operating structure" that reports to a political advertising director. JA 323, 333-35, 338-39. The normal usage of the terms would be to say that such a group is organized the purpose of planning educational events, and also organized for the purpose of political advertising, as both statements are true.

Thus, here, the Court should not add the word "sole" as a modifier to "purpose." If the Legislature had intended the Election Code to capture only political action committees organized for the "sole purpose" of supporting or opposing candidates, then it would have included the word "sole" as it did in other statutes. *See, e.g.*, W. Va. Code § 60-8-2 (defining a "private wine bed and breakfast" as "any business with the *sole purpose* of providing" lodging, meals, etc. and defining a "private wine spa" similarly) (emphasis added). "Atextual judicial supplementation is particularly inappropriate when, as here, [the Legislature] has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019).

SEA relies on one case—from a federal district court—to dispute the Circuit Court's conclusion, but the analysis it relies on is incomplete and inapposite to the question in this case. The case, *Center for Individual Freedom, Inc., v. Ireland*, examined the definition of "political action committee" that was in effect in 2018. 613 F. Supp. 2d 777, 795 (S.D.W. Va. 2009). And that case did conclude that the phrase "for the purpose" in the definition of "political action committee" inherently "indicates that there is but one and only one purpose" behind the group. *Id.*

Notwithstanding the fact that not even "[t]he Fourth Circuit's interpretation of a West Virginia statute is [] binding on [state courts]," *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 510 n.4, 583 S.E.2d 800, 807 n.4 (2002), SEA holds up the *Ireland* decision as "determin[ing] . . . the statute means that supporting or opposing candidates must be the entity's sole purpose" for it to qualify as a political action committee. Pet'r's Br. 13 (emphasis in original).

This Court is not bound by the federal district court's holding in *Ireland*, and should not rely on it for even persuasive authority for two reasons. *First*, the holding is flatly contradicted by the text of the statute. The *Ireland* court concluded that the 2018 definition "limit[s] its application to singular-purpose organizations." 613 F. Supp. 2d at 795. In reaching this conclusion, the *Ireland* court did not acknowledge or grapple with the concept of "membership organizations." As the Circuit Court pointed out below, by including membership organizations as political action committees the Election Code "expressly contemplates the possibility that an entity organized for non-electoral purposes can *also* be organized for the purpose of influencing elections." JA 9 (citing W. Va. Code § 3-8-1a(21)(B) (2018) (regulating as political action committees membership organizations that "use[] a majority of [their] membership dues for purposes other than political purposes")).

Second, no part of the *Ireland* holding analyzed the key statutory term at issue here: "Organized." And this is not surprising, because the textual analysis in *Ireland* was drawn from a case addressing a statute that did not use the term "organized." 613 F. Supp. 2d at 794-95 (citing *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-89 (4th Cir. 2008)). Relying on that case's application of *Buckley v. Valeo*, the *Ireland* court compared the language of West Virginia's definition of "political action committee" to that set forth in the Federal Election Campaign Act ("FECA"), which defined "political committees" as entities that have "the major purpose" of

influencing elections. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*)). In the *Ireland* court's view, "by omitting 'major,' West Virginia's definition of a [political action committee] more precisely identifies the scope of regulated organizations than the language found to be constitutional in *Buckley*." *Id.* at 795. The *Ireland* court believed that absent some narrowing qualifier—implicit or explicit—the term "for the purpose of supporting or opposing" candidates would give "political action committee" an unconstitutionally overbroad scope. *Id.* at 794-95. [4] But here, it is not the omission of "major" in service of an implied "sole" qualifier that makes West Virginia's statute more precise—as the *Ireland* court held, 613 F. Supp. 2d at 795—but the inclusion of "organized for." A group is not "organized for" the purpose of advocating for or against candidates simply by *having* that purpose. To be "organized for" a purpose, a group's "formal organization" must reflect that purpose, evincing a "system or orderly structure[,] systematically arranged" with "interdependent parts" that work together to accomplish that purpose. *Organized, Merriam-Webster Collegiate Dictionary* (11th Ed. 2003); *Organized, Oxford English Dictionary* (2nd Ed. 1989).

Thus, even accepting the constitutional premise of the *Ireland* holding says nothing about how to interpret the actual text of the 2018 definition of "political action committee." That classification is narrower than the alternative presented in *Ireland*—extending only to groups that both have the purpose of advocating for candidates and that are organized for that purpose—but is not so narrow as to exclude groups that "spend a majority" of certain funds "for purposes other

[4] The Fourth Circuit had indeed held that a definition of "political action committee" can be unconstitutional if it includes every organization that "[h]as as a major purpose" "support[ting] or oppos[ing] . . . clearly identified candidates." *N. Carolina Right to Life*, 525 F.3d at 286 (citation omitted). The shortcomings with this constitutional analysis are examined in Part I.B.3, *infra* pp. , but as explained in that section SEA has not preserved this constitutional argument for appeal.

than political purposes." W. Va. Code § 3-8-1a(21)(B) (2018). SEA's proffered "sole purpose" limitation therefore cannot be harmonized with the statute's text.

2. The 2018 definition does not implicitly limit itself to groups organized for the "primary purpose" of advocating for or against candidates, and SEA conceded as much below.

SEA suggests that the limitation "organized for the [primary]" purpose should be read into the 2018 definition. Pet'r's Br. 14. Yet in opposing the Secretary's motion for summary judgment, SEA itself argued that the 2018 definition of political action committee "*did not encompass*" groups "whose *primary purpose* was to support or oppose the election of candidates." JA 224 (emphasis added).

Indeed, this exact "primary purpose" language was added to the definition of "political action committee" by the 2019 Legislature. *See* S.B. 622, enrolled at 2019 W. Va. Acts vol. I, ch. 102 at 863 (enacting the current definition of "political action committee," W. Va. Code § 3-8-1a(28) (2020)). If anything, the Legislature's proactive insertion of SEA's proffered narrowing language undermines SEA's claim that this language always existed within the statute by implication—after all, why would the Legislature add language that it already believed to be part of the existing text? *See Yeager v. Farmers Mut. Ins. Co.*, 192 W. Va. 556, 560, 453 S.E.2d 390, 394 (1994) (ascribing meaning to a change in statutory language, because "if the legislature did not intend to [change the law], the relevant amendments would have no purpose"). *See also State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc.*, 147 W. Va. 645, 653, 129 S.E.2d 921, 926 (1963) ("[I]t is always presumed that the legislature designed a statute to take effect, and not to be a nullity." (citation omitted)).

To be sure, there are instances in which the Legislature clarifies its previous intent, amending a statute's language without intending to change the result of applying that language.

But again the plain language of the Legislature's enactment here disclaims such an intent. *See, e.g.*, *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 569–70, 396 S.E.2d 737, 750–51 (1990) ("[M]ore explicit language in subsequent amendment to statute was merely a clarification of legislature's original intent, not an indicator of a change in the law." (citation omitted)). The operative word in these circumstances is "clarifying." When the Legislature amended the Election Code in 2019, it described the bill as "*modifying* and adding definitions." S.B. 622, enrolled at 2019 W. Va. Acts vol. I, ch. 102 at 852 (emphasis added). In contrast, other provisions of the same bill were intended to "clarify[]" the application of the Election Code, but these provisions were described as such. *Id.* at 852-53. ("[*C*]*larifying* that a political committee must file a statement of organization before engaging in any activity[.]" (emphasis added)).

3. *The 2018 definition is not unconstitutionally overbroad without a "major purpose" qualifier, and in any event SEA has not preserved this argument for review.*

SEA asserts at various points throughout its brief—but never directly in an assignment of error—that any interpretation of the 2018 definition other than its proffered narrow interpretation is "unconstitutionally overbroad." Pet'r's Br. 9. This indirect approach to the constitutional argument is likely due to the fact that SEA went out of its way to avoid preserving this issue for appeal. Thus, this Court should not consider it now. But this argument is also incorrect, and out of step with the majority of federal appellate courts to consider it.

a. SEA waived any constitutional argument here and before the Circuit Court.

SEA raises its constitutional arguments obliquely, rather than through a direct assignment of error, and for good reason. Not only did the Circuit Court never reach the question of the 2018 definition's constitutionality, SEA affirmatively disclaimed that it was making any such argument in its motion for summary judgment, noting only that it "may assert this defense at oral argument and at trial." JA 272. SEA did not raise the issue at oral argument, JA 12-23, and it is unclear

how or why SEA would omit a dispositive legal argument from a summary judgment motion in order to raise it at trial—indeed, the premise of a motion for summary judgment is belief that a trial is not necessary. This Court "declines to address" such "non-assignment of error" where the circuit court "did not reach the merits of" those arguments. *Thorton v. Ward*, 242 W. Va. 104, 829 S.E.2d 592, 602 n.23 (2019) (quoting, in part, *Skaggs v. E. Associated Coal Corp.*, 212 W. Va. 248, 256 n.3, 569 S.E.2d 769, 777 n.3 (2002)).

Moreover, "[t]his Court's general rule is that nonjurisdictional questions not raised at the circuit court level will not be considered for the first time on appeal." *State v. Jessie*, 225 W.Va. 21, 27, 689 S.E.2d 21, 27 (2009); *see also Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009) (finding issue waived when "[t]he appellants clearly did not raise this issue in their cross motion for summary judgment below"). There is a narrow exception to this rule, but it does not apply to SEA's claim. This Court will sometimes take up a "constitutional issue raised for the first time on appeal" if the "issue is one . . . that may recur in the future." *Whitlow v. Bd. of Educ. of Kanawha Cty.*, 190 W. Va. 223, 227, 438 S.E.2d 15, 19 (1993). This doctrine has not been applied to salvage a claim that, rather than being missed below, was *affirmatively disclaimed* by the party that later seeks to raise it. But more to the point, the constitutionality of the 2018 definition of political action committee is not likely to recur in the future. The statute was amended before the current election began, *see* S.B. 622, enrolled at 2019 W. Va. Acts vol. I, ch. 102 at 863, and no other litigation is pending under the 2018 definition.

SEA made a deliberate and calculated decision to not raise constitutional arguments on summary judgment. This Court should hold it to that decision, and apply its strong presumption against allowing petitioners to raise new issues on appeal.

b. The 2018 definition is not unconstitutionally overbroad.

Notwithstanding its silence on the issue below, SEA now argues that classifying groups with more than one purpose as political action committees "is constitutionally unsound as it risks including groups primarily engaged in issue advocacy." Pet'r's Br. 14. This argument is flawed for at least two reasons.

First, SEA's argument over-reads *Buckley* to create a rule of constitutional necessity out of statutory interpretation. In *Buckley*, the Court was faced with a federal campaign finance statute aimed at regulating the election of candidates. 424 U.S. at 79 (citation omitted). Under the terms of that statute, the meaning of "political committee" was "defined only in terms of amount of annual 'contributions' and 'expenditures.'" *Id.* The Court thus concluded that "expenditure" and "contribution" would need to be construed as applying only in the context of advocacy for or against candidates, otherwise groups not related to candidates' campaigns—and thus, not related to the goals of the statute—would be considered "political committees" and subject to regulation. *Id.* at 79-80.

Thus, while *Buckley* read a narrowing term into the federal law at issue, it did not announce the broader rule SEA cites it for: That "campaign finance laws must be unambiguously related to the campaign of a particular candidate and not aimed at issue advocacy." Pet'r's Br. 14. Indeed, the United States Supreme Court made clear in *Citizens United v. Federal Elections Commission* that the First Amendment allows regulation of speech that does not qualify as "express advocacy." 558 U.S. 310, 369 (2010) ("[W]e reject [the] contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.") And indeed, the majority of federal courts to address the issue have construed *Buckley*'s discussion on this topic as statutory

dicta, rather than a constitutional rule.[5] Cases that have not, such as *Ireland* and the Fourth Circuit case on which it relied, were decided before *Citizens United* clarified this point. *See Ireland*, 613 F. Supp. 2d at 794-95 (citing *N. Carolina Right to Life*, 525 F.3d at 287 (decided in 2008)).

Second, SEA's constitutional argument ignores the importance of the term "organized for" as a narrowing term. SEA invokes the plight of "issue advocacy groups" that incidentally—perhaps even unavoidably—"attempt to advance their cause by linking it to candidates and elections" and find themselves "caught in the regulatory net of registration" as a political action committee. Pet'r's Br. 15-16. Yet SEA does not and could not demonstrate that the 2018 definition of "political action committee" could somehow encompass a group whose "central organizational purpose is issue advocacy [and] occasionally engages in activities on behalf of political candidates." Pet'r's Br. 23 (quoting *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986)). To qualify as a political action committee under the 2018 definition, a group would need to display "a formal organization to coordinate and carry out" "advocating for or against" candidates. *Organized*, *Merriam-Webster Collegiate Dictionary* (11th ed. 2003); W. Va. Code § 3-8-1a(21) (2018). Such a structure is inconsistent with the image SEA presents of groups "primarily engaged in issue advocacy" and only incidentally involved in express advocacy.

Thus, issue advocacy groups—as described by SEA—would by definition not be "organized for the purpose of advocating for or against" candidates. W. Va. Code § 3-8-1a(21)

---

[5] *See, e.g., Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 488-490 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) ("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." (citations omitted)); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014) ("When the *Buckley* Court construed the relevant federal statute to reach only groups having 'the major purpose' of electing a candidate, it was drawing a statutory line." (citations omitted))

(2018). Indeed, SEA itself exemplifies the contrast between such groups and political action committees, as a group "primarily involved in issue advocacy" would not exemplify the factors that demonstrate SEA is "organized for the purpose of advocating for or against" candidates. For instance, a group "primarily engaged in issue advocacy"—and that only refers to candidates as a way of drawing attention to its issue of choice—would not hire pollsters to craft express advocacy that is *wholly unrelated to the issues the group advocates for* as SEA did in 2018. Nor would such a group would not boast expenditures for express advocacy on par with expenditures on *all other functions including issue advocacy*—as SEA did in 2018.

SEA has not shown why applying the plain text of the Election Code would offend the First Amendment, and its oblique reference to *Buckley* does not fill in this gap. Thus, its argument that only a narrowed definition of "political action committee" is "constitutionally valid" fails. Indeed, none of SEA's arguments for narrowing the 2018 definition can bear the weight SEA places on them—and none warrant reversing the Circuit Court's order.

II. The Circuit Court Correctly Held That SEA Is A Political Action Committee Under The 2018 Definition.

The Circuit Court relied on the undisputed facts before it and correctly concluded that SEA is "organized for the purpose of advocating for or against" candidates because it is "staffed, directed, and supported by a network of communications professionals, pollsters, and government affairs consultants." JA 8 (citation omitted). SEA's objections to this conclusion largely re-litigate its narrowed interpretation of the 2018 definition, but each such dispute also displays unique substantive flaws.

A. The Circuit Court's conclusion is correctly drawn from facts showing that SEA was "organized for the purpose of advocating for or against" candidates.

SEA has "a formal organization to coordinate and carry out" advocacy for and against candidates for office. *Organized, Merriam-Webster Collegiate Dictionary* (11th Ed. 2003).

Indeed, since the year it was formed SEA has described "advocat[ing] for candidates seeking public office" as one of its "most significant activities." JA 93. In each election cycle since its creation, SEA's largest category of expenditures has been advocating for and against candidates in West Virginia. Between 2015 and 2016, SEA disclosed more than $24,000 of spending "for" ten different candidates in the 2016 election. JA 102-09. Indeed, SEA received over $14,000 in contributions specifically to facilitate these expenditures. JA 106, 109. And SEA's IRS-990 form for 2016 reveals a further $50,000 in contributions to two other groups, JA 100, which were subsequently reported as having been given to fund communications that expressly advocated for and against candidates. JA 111-19. Taken together, that over $74,000 accounted for more than 44% of SEA's total expenditures across both years, and more than 54% of its total spending for the first full year of SEA's existence. JA 93, 99 (indicating a total of $32,510 in expenses in 2015 and $136,302 in expenses in 2016). Similarly, SEA spent more than $166,661 to expressly advocate for or against candidates in the 2018 election cycle. JA 85, 174-191 (reporting $77,178.22 total spending in the primary, *see* n.2, *supra* p. 8), 170, 172. Again, this was no offhand or incidental expense, but accounted for over half of SEA's total expenses in 2018. JA 155 (indicating a total of $332,108 in expenses for 2018).

It is implausible at best that an organization could expend nearly a quarter of a million dollars on advocacy—spanning dozens of mail campaigns, hundreds of paid TV spots, print media, robocalls, and websites—without a "formal organization to coordinate and carry out" that purpose. And indeed, the interdependent parts that comprise SEA were structured to enable these activities. Since 2016, a communications specialist has served as a director and nominal president of SEA, with oversight and editorial control over its messaging campaigns. JA 303, 355, 375. And far from acting alone, SEA's president coordinates the actions of fellow decision-makers, advisors,

supporters, volunteers, and vendors. At the highest level, SEA "makes the decision to support or oppose a particular politician" in "strategy sessions," involving both leadership and "government affairs support resources." JA 357-58, 390. Once the decision is made, a more detailed strategy to execute that decision is developed and implemented. Depending on the "specific instance," that strategy may be crafted by SEA's leadership and/or its contractors. JA 353-56. In some cases, SEA conducts polling to learn how to make these messages more effective. JA 164. In others, SEA's president leverages his communications background to draft messaging. JA 303, 355.

Ultimately, once SEA's president has "approve[d]" the "general approach" SEA will take in its advocacy, the execution is handled by others at "a level of detail that [the president] would not be engaged in." JA 394. Mail is printed and physically sent by a mail house, television spots are produced and placed by a media studio. JA 353-54, 374. Once SEA receives the resulting bills, its support network processes them, routes them to leadership for approval, and cuts the check to pay them. JA 331, 375. And when paying that bill constitutes an independent expenditure that must be disclosed, that disclosure is sometimes completed by an SEA officer and other times other times completed by Comerica Bank PAC Services on SEA's behalf. JA 376; *see also* JA 102-03 (2016 independent expenditure report prepared by Comerica Bank PAC Services).

SEA's operational system is comprehensive and reliable, to the point that SEA's president trusts it enough to approve submitted bills without having reviewed the specific ad associated with it. JA 374-76. The many components of SEA's advertising process interlock and interface with each other to accomplish the organization's overall goal of "advocate[ing] for candidates seeking public office whose views align with the organization's priorities." JA 93. Thus, SEA is "co-ordinated to form a system" of "interdependent parts," *Organized*, *Oxford English Dictionary* (2nd Ed. 1989), a system which then operates to "support[] or oppos[e] the nomination or election of"

candidates for office in West Virginia elections, W. Va. Code § 3-8-1a(21) (2018). That is to say, SEA is a political action committee.

B. SEA's remaining disputes with the Circuit Court's factual analysis are irrelevant, distracting, and irrational.

SEA's remaining assignments of error take issue with how the Circuit Court evaluated the facts before it. Each of these factual objections are irrelevant, as none detract from the core premise of the Circuit Court's holding—that SEA is "organized for the purpose of advocating for or against" candidates. Moreover, the framing of these objections subtly reframes the discussion around purely financial information rather than SEA's organizational structure, which if taken to its logical conclusion would produce absurd results.

1. SEA's non-election-year spending, or indeed any non-election spending, is not relevant.

SEA's third assignment of error argues that "[t]he Circuit Court erred by looking only at two select calendar years of SEA spending, rather than looking at the lifetime spending of the organization in determining 'the purpose.'" Pet'r's Br. 1. SEA's spending in non-election years, for whatever purposes, is simply not relevant to the question of whether SEA was "organized for the purpose of advocating for or against" candidates—unless SEA's proffered "sole purpose" limitation is inserted into the 2018 definition. *See* Part I.B.1, *supra* pp. 15-18. Since a group can be "organized" for more purposes in addition to influencing elections under the 2018 definition of "political action committee," SEA gains nothing by insisting on the fact that it is *also* organized for *other* purposes.

More than simple irrelevancy, SEA's attempts to re-characterize and reframe its expenditures distort the bounds of the inquiry here and quickly lead to absurd results. SEA downplays the nature of its advocacy by discussing "the safeguards designed to prevent issue-focused groups from being caught in the regulatory net . . . as a political action committee." Pet'r's

Br. 15. It may be true that "policy groups often attempt to advance their cause by linking it to candidates and elections simply because that is when lawmakers and the public are focused on public policy issues," Pet'r's Br. 16, but such activities are very far afield from SEA's involvement in the 2018 election. Indeed, in addition to being cut-and-dried examples of express advocacy on behalf of a candidate, many of SEA's advertisements were tied to issues *unrelated to their stated public policy goals*. *See, e.g.*, JA 64-65 (advocating "vote" for a candidate based on his stance on West Virginia University and the Second Amendment); JA 71 (advocating "vote . . . to keep" a candidate based on his stance on "fiscal" and "Second Amendment" issues); JA 80-83 (advocating "vote for" a candidate based on his stance on healthcare issues). Rather than earnest policy advocacy that happens to allude to candidates, SEA in fact worked *backwards* from its desire to support *candidates* when deciding which *policy issues* to discuss in its advertising. *See* JA 164 (SEA conducted polling to make its advertising more effective); JA 83, 88 (SEA tailored its advertising to healthcare issues after opinion polling identified that as an issue that voters believed was important).

SEA has presented itself as a group that influences "public policy," in contrast to influencing "elections," Pet'r's Br. 11, but this is a false dichotomy. *Every* group that influences elections does so to influence public policy. An overarching policy-driven motivation is not a Russian nesting doll that subsumes express, targeted, and prolonged electioneering campaigns like those operated by SEA. If it were, every political action committee could make the same claim and cease to be a political action committee. Not every policy-influencing group influences elections, but the two goals are far from mutually exclusive. And while SEA may also be organized to influence public policy through non-election avenues, such as "social events" and legislative receptions, Pet'r's Br. 11, this aspect of its organization does not wash out the elements

of SEA that are "organized for the purpose of advocating for or against" candidates—indeed, the portions of SEA's "operating structure" that organize these events operate largely independently of its advertising directors, consultants, and vendors. JA 322-25, 333-35, 338-39.

2. There is no threshold ratio of political to non-political spending that obviates SEA's status as a political action committee.

SEA's fourth assignment of error argues that the Circuit Court "erred by finding that SEA has consistently devoted more than half of its expenditures to expressly advocating for and against candidates in West Virginia elections," Pet'r's Br. 1, which it supports in large part by arguing that the Circuit Court's "[a]ttributions of 2015 [a]ctivity" were "[m]istaken," Pet'r's Br. 19-20. This assignment of error misstates the Circuit Court's conclusion, raises an irrelevant distinction, and once again attempts to distract from the relevant inquiry into whether SEA was "organized for the purpose of advocating for or against" candidates. W. Va. Code § 3-8-1a(21) (2018).

As a threshold matter, the Circuit Court did not in fact "find[] that SEA has consistently devoted more than half of its expenditures to expressly advocating for and against candidates in West Virginia elections," as SEA claims. Pet'r's Br. 1. Rather, the Circuit Court held that "SEA has consistently devoted more than half of its *election-year* expenditures to expressly advocating for or against candidates." JA 10. SEA's premise is once again that non-election-year activities somehow cure it of its other organizational purpose—advocating for and against candidates. As explained above, Part II.B.1, *supra* pp. 27-29, this premise is simply wrong.

SEA's remaining arguments on this point amount to the fact that its political spending in particular election years did not exceed 50% of its total expenditures. Pet'r's Br. 23. SEA's attribution of costs to reach this figure is also flawed,[6] but minutiae of this dispute are irrelevant.

[6] *See* Parts II.B.3-II.B.4, *infra* pp. 31-34.

SEA's extensive argument on the point that it devoted 47%—rather than 50%—of its 2018 budget to influencing elections, Pet'r's Br. 20-24, does not rebut the Circuit Court's conclusions about SEA's *organizational structure*. And the Circuit Court based its holding on SEA's organizational structure. JA 8 (holding that SEA was "organized for the purpose of advocating for or against" candidates because it is "staffed, directed, and supported by a network of communications professionals, pollsters, and government affairs consultants"). The Circuit Court did not hold that there is a 50% threshold for political expenditures beyond which a group becomes a political action committee, so whether or not SEA can bring itself slightly below that threshold does not address the actual substance of this case.

On its face this point is not especially helpful to SEA. SEA's triumphant declaration that its political spending in 2018 amounted to 47% of its annual expenditures[7] is certainly difficult to reconcile with casting itself as a group that "may engage in occasional political speech from time to time." Pet'r's Br. 11, 23. But as with SEA's other factual arguments, this argument shifts the scope of the inquiry away from how SEA was *organized* and onto how SEA *spent its money*. SEA's relative expenditures may be illustrative of its organizational structure, but it is *organizational structure* that is dispositive of whether SEA is a political action committee under the 2018 definition. W. Va. Code § 3-8-1a(21) (2018). The critical factor in the Circuit Court's analysis was that SEA was "staffed, directed, and supported by a network of communications professionals, pollsters, and government affairs consultants." JA 8. And the "network of communications professionals . . . and government affairs consultants" that "staffed, directed, and

[7] This figure is based on the premise that the public opinion polling used to craft SEA's advocacy messages does not suggest that it is "organized for the purpose of advocating for or against" candidates. W. Va. Code § 3-8-1a(21) (2018). This premise is incorrect, *see* Part II.B.3, *infra* pp. 31-33, so even this unhelpful figure is an understatement.

supported" SEA *were not paid by SEA*. *See, e.g.*, JA 318 (SEA's president and directors were not paid by SEA); JA 321-23 (SEA's government affairs advisors are not employed or contracted by SEA). Thus, by drawing attention to its expenditures, SEA draws focus away from the relevant facts that show it was indeed "organized for the purpose of advocating for or against" candidates. W. Va. Code § 3-8-1a(21) (2018).

Taken at face value, SEA's argument suggests that a team of communications and government affairs professionals could come together under an organization's banner to design, target, and deliver express advocacy on behalf of candidates, but would not be considered "organized" for that purpose if they are not compensated directly by the organization. Apart from being facially absurd, this result is wholly disconnected from the relevant inquiry.

3. The scope, purpose, and magnitude of SEA's public opinion polling is relevant to analyzing its organizational structure and purpose.

As an extension of its theory that status as a political action committee turns entirely on percentages of expenditures attributable to political activity, SEA's fifth assignment of error argues that the amount it spent on public opinion polling should not be considered in this analysis because polls do not themselves expressly advocate for or against a candidate. Pet'r's Br. 1, 20-21. As explained above, *see* Part II.B.2, *supra* pp. 29-31, this argument begins from a flawed premise that a group's ratio of political to non-political expenditures is dispositive of its status as a political action committee. The fact that SEA maintains an apparatus to conduct public opinion polling—particularly on issues unrelated to its mission—and then calibrates its express advocacy around the results of that polling helps illustrate the purposes for which it is organized.

But accepting that the ratio of political to non-political spending is illustrative, there is no reason for this illustration to have a myopic focus on solely expenditures for express advocacy. There is no dispute that public opinion polls—whether SEA's or in general—do not expressly

advocate for or against candidates for office. Pet'r's Br. 20. But there is also so dispute that SEA commissioned at least $10,500 worth of public opinion polls in 2018, and that it commissions polls *in order to "make [its] political advertisements more effective*." JA 161-62, 164 (emphasis added). Against this backdrop, SEA offers nothing by way of argument to show that these polls were not a relevant example of SEA's "network of communications professionals, *pollsters*, and government affairs consultants." JA 8 (emphasis added). Rather, SEA offers only the oblique suggestion that "the underlying issue here" is "limiting the reach of the definition or [sic] express advocacy." Pet'r's Br. 21 n.22. But yet again, it must be repeated that the "underlying issue" here is whether SEA is "*organized for the purpose of* advocating for or against" candidates, not defining what "advocating for or against" candidates is or is not. W. Va. Code § 3-8-1a(21) (2018) (emphasis added).

Moreover, SEA's approach of treating only direct express-advocacy expenditures as illustrative of a group's organizational structure is inconsistent with the Election Code and with common sense. [8] If a group were to spend $300,000 on extensive and sophisticated polling refining its message and targeting its audience with enough precision that it need only spend $10,000 on the eventual advocacy itself, then under SEA's view that group would not be a political action committee because the initial $300,000 was not related to the subsequent advocacy. But it is clearly a significant indicator that a group is "organized for the purpose of advocating for or against" candidates, W. Va. Code § 3-8-1a(21) (2018), if it maintained such a robust polling

[8] Although SEA's brief does not call attention to this fact, narrowing is focus to only direct acts of advocacy also allows SEA to omit $50,000 of its contributions to other political action committees from its 2016 spending totals. *See* Pet'r's Br. 23 (listing $34,343 in spending in 2016); *see also* JA 112-19 (reporting $50,000 total contributions from SEA "made for the purpose of furthering [an] [independent] expenditure"). But here too, SEA engaged in repeated and significant activities that advanced—if indirectly—advocacy on behalf of candidates. Like polling, these activities illustrate SEA's organizational purpose and thus should be included here.

apparatus in service of express advocacy—even if that apparatus itself does not expressly advocate.

Moreover, the Election Code recognizes and accounts for the obvious connections between express advocacy and its attendant support services. It is true that portions of the Election Code only require disclosures of transactions involving *specific* independent expenditures or electioneering communications. W. Va. Code §§ 3-8-2(b)(1)(A)-(F) (2018), 3-8-2b(b)(1)-(5) (2018). But the "financial transactions" subject to disclosure on a political committee's annual reports encompass "all . . . expenditures *made to promote the candidacy of any person*," as well as "all contributions or loans received." W. Va. Code § 3-8-5(d) (2018) (emphasis added). "Contributions" are similarly defined as a transfer of monies or other things of value "made for the purpose of influencing the nomination or, election, or defeat of a candidate." W. Va. Code § 3-8-1a(7) (2018).

This broader scope recognizes that operating a political action committee—which is "organized for the purpose of advocating for or against" candidates, W. Va. Code § 3-8-1a(21) (2018)—will necessarily entail making expenditures and receiving contributions "made for the purpose of influencing the nomination or, election, or defeat of a candidate" but not necessarily tied to an express advertising plan. W. Va. Code § 3-8-1a(7) (2018). For example, a contribution made to finance polling services that enhance the power of later advocacy could be done "for the purpose of influencing" an election, but not with a specific independent expenditure in mind. And conversely, a group that both engages in express advocacy and spends money on support services to enhance that advocacy looks more like it is "organized for the purpose of advocating for or against" candidates. W. Va. Code § 3-8-1a(21) (2018). Thus, the Circuit Court properly considered all of SEA's expenditures when determining whether it is a political action committee.

4. *If SEA disputed the specific content of advertisements before the Circuit Court, it had the burden of producing them.*

SEA's *per se* objection to considering polling expenditures is not the only way it attempts to downplay the magnitude of its political spending. In its sixth and final assignment of error, SEA criticizes the Circuit Court for "failing to independently examine each of SEA's expenses" to "confirm the nature of the activity." Pet'r's Br. 1, 22. SEA acknowledges that this information "was not in the record," Pet'r's Br. 9, and that is because SEA declined to provide it in discovery. The Secretary asked SEA to identify all instances of political and non-political advertising it engaged in during the years in question. Supp. App. 7-10. SEA objected, claiming that this information was "not relevant" to "the sole remaining issue in this matter, which is whether or not SEA was required to register as a [political action committee]." *Id.* And later, when the Secretary—relying on the advertisements available to it and on SEA's own disclosures—characterized the advertisements at issue as "express advocacy," SEA did not claim that this material fact was in dispute. JA 35-36, 223.

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, *the burden of production shifts to the nonmoving party who must either . . . produce additional evidence showing the existence of a genuine issue for trial, or [] submit an affidavit explaining why further discovery is necessary* as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. pt. 3, *Gibson v. Little Gen. Stores, Inc.*, 221 W. Va. 360, 655 S.E.2d 106 (2007) (quoting Syl. pt. 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995)) (emphasis added).

Faced with the Secretary's evidence and assertions, SEA had the burden of demonstrating that a dispute existed. It did not, and cannot now benefit from claiming that its inaction led to uncertainty. Like each of SEA's other assertions of fact-driven error, this assignment of error fails.

CONCLUSION

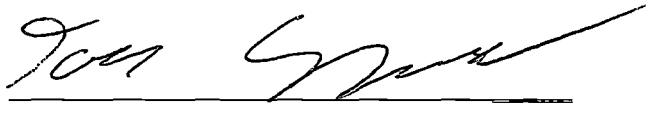
For the foregoing reasons, the order below granting summary judgment should be affirmed.

Respectfully submitted,

MAC WARNER, Secretary of State of
the State of West Virginia,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



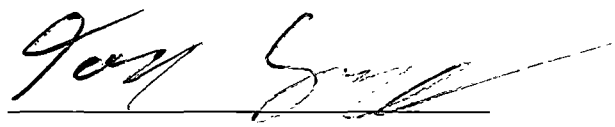
Lindsay S. See (WV Bar No. 13360)
Solicitor General
Curtis R.A. Capehart (WV Bar No. 9876)
Deputy Attorney General
Thomas T. Lampman (WV Bar No. 13353)
Assistant Solicitor General

State Capitol Complex
Building 1, E-26
Charleston, WV 25301
Telephone: (304) 558-2021
Email: thomas.t.lampman@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Thomas T. Lampman, Assistant Solicitor General and counsel for the Respondent, hereby verify that I have served a true copy of the foregoing brief upon counsel for the Petitioner by email, and by depositing a copy in the United States mail, with first-class postage prepaid, on this 17th day of September, 2020, addressed as follows:

Danielle M. Waltz (WV Bar # 10271)
Counsel of Record
JACKSON KELLY PLLC
500 Lee Street East, Suite 1600
P.O. Box 553
Charleston, WV 25322
dwaltz@jacksonkelly.com
(304)340-1000
Counsel for Petitioner, Shale Energy Alliance



Thomas T. Lampman