IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Docket No. 20-0270

ON APPEAL FROM THE
CIRCUIT COURT OF WOOD COUNTY

SHALE ENERGY ALLIANCE, a Delaware Corporation
Defendant Below, Petitioner

v.

MAC WARNER, West Virginia Secretary of State
Plaintiff Below, Respondent

PETITIONER SHALE ENERGY ALLIANCE'S BRIEF

Jason B. Torchinsky (Admitted *Pro Hac Vice*)
Kathleen M. Guith (Admitted *Pro Hac Vice*)
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Drive
Suite 100
Warrenton, Virginia 20186
JTorchinsky@hvjt.law

Danielle M. Waltz (WV Bar # 10271)
Counsel of Record
M. Shane Harvey (WV Bar # 6604)
Chelsea A. Creta (WV Bar #13187)
JACKSONKELLY 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

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

Shale Energy Alliance ("Petitioner" or "SEA"), by counsel, respectfully submits its Petitioner's Brief, which challenges the Circuit Court of Wood County's ruling that SEA is a "political action committee" under West Virginia law. See *Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.* (J.A. 000003-000011.)

I. ASSIGNMENTS OF ERROR

A. The Circuit Court erred in ruling that SEA is a "political action committee" as defined in W.Va. Code § 3-8-1a(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.

II. STATEMENT OF THE CASE

Petitioner SEA is a 501(c)(4) non-profit social welfare organization. It focuses on issues relating to the development of oil and natural gas. Like other 501(c)(4) organizations, SEA sometimes expresses support for political candidates. But, as explained below, SEA was not organized for the purpose of supporting political candidates, nor is it even SEA's primary purpose.

In 2018, the State of West Virginia, acting through its Secretary of State ("State"), sued SEA in the Circuit Court of Wood County for failing to register and file disclosures as a "political action committee." Under West Virginia law, a "political action committee" is a "committee organized by one or more persons for the purpose of supporting or opposing the nomination or election of one or more candidates." *See* W.Va. Code § 3-8-1a (21) (2018). SEA denied that it was a "political action committee" on the grounds that it was not "organized . .. for the purpose of supporting or opposing . . . candidates." (J.A. 000240-000263.)

The Circuit Court of Wood County agreed that SEA was a "political action committee" and granted summary judgment to the State. In doing so, the Circuit Court ruled that an organization can be a "political action committee" even if opposing or supporting candidates is not the organization's "sole" or "primary" purpose. Additionally, the Circuit Court ruled that, during certain time periods, opposing or supporting candidates was SEA's primary purpose.

As explained below, the Circuit Court's ruling was inconsistent with both established law and the underlying facts. If the ruling is allowed to stand, other organizations like SEA may be wrongly required to register as "political action committees" even though such organizations only participate in the political process in a minimal fashion.

A. SEA's Formation and Purpose

Petitioner SEA is a Delaware-chartered 501(c)(4) non-profit social welfare organization doing business in West Virginia, as well as in other states in the region. Formed in 2015, SEA focuses on issues related to the energy industry. Specifically, its bylaws explain that it was established for the purpose of "rais[ing] and expend[ing] funds in support or opposition to public policy relating to oil and natural gas development and general business issues." (J.A. 000424 Art. 1, Sec. 1.) As explained by its President and undisputed in this case, SEA's mission includes bringing together companies throughout the shale energy supply chain, educating these companies about issues that are impacting the shale energy industry, advocating on their behalf, and providing them with the tools to advocate themselves. (J.A. 000305: 2-18.)

B. SEA's Activities

SEA is primarily an education and awareness advocacy organization, focusing on issues that impact the shale industry. SEA engages in a variety of activities to further this purpose, including social events, fundraisers, and receptions. (J.A. 000309-000310, 000314-000315.) From its formation in 2015 through 2018, SEA spent over $952,922 on a variety of activities designed to forward its organizational mission. (J.A. 000445-000449.) Those activities included: running advertising that touted the benefits of shale energy; educating the industry about salient political developments; and holding "legislative receptions" designed to get "representatives from natural gas suppliers, delegates, and legislators in the same rooms so they can talk to each other." (J.A. 000309-000310; 000314-000315.) SEA's first tax filing in 2015 illustrates the wide range of its activities, describing its "mission or most significant activities" as follows:

> To raise and expend funds on public education campaigns regarding public policy issues critical to oil and natural gas development in multiple states, including Pennsylvania and West Virginia and future states to be determined. To raise and expend funds on public

> education campaigns regarding public policy issues critical to general business development such as taxation and labor issues in multiple states including Pennsylvania and West Virginia and future states to be determined. Advocate for candidates seeking public office whose views align with the organization's priorities.

(J.A. 000445; *see also* J.A. 000447-000449.)

Consistent with its status as a 501(c)(4) organization, SEA's wide array of activities encompasses some that are political in nature, including limited election-related advocacy.[1] SEA has made political contributions and disseminated communications such as print ads, mailers, and television advertisements about candidates. Such communications are governed, in part, by West Virginia's Election Code, which requires certain disclosures. *See* W.Va. Code § 3-8-1a *et seq.*

For instance, SEA disclosed approximately $11,000 for independent expenditures (i.e., express advocacy) in 2015.[2] (J.A. 000456-000463.) And in 2016, it contributed $25,000 to two different West Virginia political action committees ($50,000 total). (J.A. 448 at Part I-C.) Also in 2016, SEA disclosed spending approximately $34,000 on "electioneering communications." Similarly, in 2018, SEA ran communications featuring state candidates in West Virginia, including: mailers; a single newspaper advertisement; and a single television advertisement. (J.A. 000530-000544.) SEA spent $156,000 on these communications and reported them as independent expenditures. SEA also spent $10,500 on four public opinion polls in 2018. (J.A. 000527.)

These types of activities, however, have been intermittent, and not even every instance described above is necessarily indicative of the status of a "political action committee" as defined by West Virginia law. For instance, not every communication that meets the definition of

[1] Under the Internal Revenue Code, 501(c)(4) organizations may engage in political campaigns on behalf of or in opposition to candidates for public office provided that such intervention does not constitute the organization's primary activity. (Rev. Rul. 81-95, 1981-1 C.B. 332 – because the primary activities of a social welfare organization promote social welfare, its less than primary participation in political campaigns will not adversely affect its exempt status).

[2] The content of the 2015 and 2016 communications, including those reported as "electioneering communications," were not part of the record below.

"electioneering communication" under West Virginia law is necessarily "political campaign activity."[3] For example, an advertisement airing within the electioneering communication window that says "Tell Jane to vote against the bad tax bill" says nothing electoral and is not express advocacy, although it is an "electioneering communication." Further, the expenses for the public opinion polls are not "electioneering communications" or "express advocacy" under the West Virginia Code and were not reported as such.

So while SEA does not dispute that intermittently, during its lifetime as a 501(c)(4) organization, it has engaged in political spending as identified above, SEA's West Virginia political activity is not SEA's sole, primary, or even major purpose.[4] Indeed, when SEA's activities in West Virginia are examined over the lifetime of the organization, only 21.7% (or $206,600) of SEA's $952,922 in expenses from 2015 through 2018 were spent supporting or opposing candidates. In the election years of 2016 and 2018, such expenditures were only 25.2% and 47%, respectively.[5]

C. Procedural History

Nonetheless, on May 29, 2018, SEA received a letter from the West Virginia Secretary of State informing it that the State had received a complaint that SEA had "violated W. Va. Code §§ 3-8-2 and 3-8-4(a) by expressly advocating for the defeat of one or more clearly identified candidates without filing the proper organizational paperwork as a political action committee with the Secretary of State." (J.A. 000442-000443.) In June 2018, the State, upon information from the West Virginia Secretary of State's office, brought suit against SEA, alleging multiple violations of

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[3] Political campaign activities as defined by the IRS includes any activities that favor or oppose one or more candidates for public office. *See* https://www.irs.gov/pub/irs-tege/Avoid%20Political%20Campaign%20Intervention.pdf

[4] *See supra* note 1.

[5] As explained *infra*, because the content of the 2016 electioneering communications was not properly examined by the Circuit Court below, the costs for those communications are excluded from the political activity expenses in these calculations – if those costs were included the 2016 political activity would increase to 35.5%.

the West Virginia Election Code, including that SEA failed to register and report with the State as a political action committee. (J.A. 000280-000287.) SEA and the State settled most of the allegations through a negotiated settlement agreement which required SEA to file disclosures for the election communications expenses from 2018. (J.A. 000274-000279.) The settlement, however, did not resolve whether SEA qualifies as a "political action committee" under W.Va. Code § 3-8-la(21) (2018).[6] Therefore, that specific issue remained before the Circuit Court.

SEA and the State filed cross motions for summary judgment regarding the remaining political committee status issue, and the Circuit Court held a hearing on the motions on March 9, 2020. (J.A. 000012-000023.) The State, in support of its motion, argued that SEA fell squarely within the definition of "political action committee" set forth in the West Virginia Code because the $156,000 that SEA spent in 2018 on express advocacy showed that SEA "is organized for the purpose of expressly advocating for candidates in West Virginia elections." (J.A. 000034.) SEA, in support of its motion, argued that it did not meet the definition of "political action committee" under W. Va. Code § 3-8-1a(21) (2018) and was not organized for the purpose of expressly advocating for or against candidates. (J.A. 000242.)

The Circuit Court granted the State's motion for summary judgment and denied SEA's motion, concluding "that [the State] is entitled to summary judgment as the undisputed material facts demonstrate that Shale Energy Alliance, Inc. is a political action committee." (J.A. 000085.)

[6] The definition of a "political action committee" in the West Virginia Code was updated with a revision that became effective on June 7, 2019. *See* W.Va. Code § 3-8-1a(28) (2019). This case was initiated by a complaint filed on June 14, 2018, before the 2019 revision took place; therefore, the 2018 statutory definition is applicable here. *See e.g.*, W. Va. Code § 2-2-l0(bb) (2018) ("A statute is presumed to be prospective in its operation unless expressly made retrospective"); *Pub. Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 1499 (1994)) (recognizing that a statute is substantive, and thus subject to the presumption against retroactivity, if retroactive application "attaches new legal consequences to events completed before its enactment."). In its Order, the Circuit Court acknowledged that that 2018 statute applies, writing, "[a]s this action was initiated in response to advertisements made in the 2018 election, this Order reflects a decision made under the 2018 version of the Election Code." (J.A. 000008 fn 1.)

In reaching this conclusion, the Circuit Court found that "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." (J.A. 000008 ¶6) The Circuit Court further stated, "[t]he Election Code expressly contemplates the possibility that an entity organized for non-electoral purposes can *also* be organized for the purpose of influencing elections." (J.A. 000009 ¶12.) (*emphasis in original*).) In addition, the Circuit Court stated, "[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 than it would have included the word sole as it did in other statutes." (J.A. 000010 ¶15.) The Circuit Court then concluded that SEA was organized for the purpose of supporting or opposing one or more candidates because it has "consistently devoted more than half of its election-year expenditures to expressly advocating for and against candidates in West Virginia elections." (J.A. 000010 ¶16.) As discussed in more detail below, the Circuit Court erred in making these determinations.

III. SUMMARY OF ARGUMENT

The Circuit Court made errors of law and fact when it ruled that SEA is a "political action committee" under West Virginia law.

First, the Circuit Court misapplied the law. A "political action committee" is a committee "organized . . . for the purpose of supporting or opposing . . . candidates." W. Va. Code § 3-8-1a(21) (2018). As explained below, courts interpreting West Virginia's statute as well as similar statutes have consistently found that advocating the election or defeat of a candidate must be the sole or primary purpose of a "political action committee." Yet, the Circuit Court concluded that an organization may have multiple purposes and must register as a political action committee even if political activity is not the organization's "sole" or "primary" purpose. In each of the calendar

years at issue in this case, SEA's spending supporting or opposing candidates in West Virginia accounted for less than 50% of its spending and, during SEA's lifetime, roughly only 25% of its spending. Nevertheless, the Circuit Court concluded that SEA must register as a "political action committee." Such a ruling threatens all issue-based organizations that participate in the political process, regardless of the amount of the organization's political spending.

Second, the Circuit Court made factual findings that were either unsupported by the record or flatly contradicted by the record. In particular, the Circuit Court erred by finding that SEA consistently devoted more than half of its expenditures to expressly advocating for and against candidates in West Virginia, when SEA in fact did not spend more than 50% on political spending in any of the four years at issue in this case, much less during the liftetime of the organization. While it was difficult to ascertain the data on which the Circuit Court relied,[7] based on information within the Court's Order, it appears that the Circuit Court: (1) miscategorized expenses by year; (2) incorrectly included public opinion polls in the calculations of expenses; and (3) failed to examine the content of SEA expenditures that were not in the record, leading to the possible miscategorization of these expenses. Each of these errors are fatal on their own, and collectively these errors require the reversal of the Circuit Court's decision and a remand for entry of summary judgment in favor of SEA.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because the principle issue in this case — the First Amendment rights implicated by the regulation of political speech — involves an issue of fundamental public

[7] *But see Hapchuck v. Pierson*, 201 W.Va. 216, 218, 495 S.E.2d 854, 856 (1997) ("Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed") (citations omitted).

importance. Of particular import and at issue is whether 501(c)(4) organizations would now be required to register as a "political action committee" even though such organizations only minimally participate in the political process, as a corollary and in conjunction to their main, stated purpose of social welfare and issue advocacy.

V. ARGUMENT

A. The Circuit Court Erred in Ruling that SEA is a "Political Action Committee" as Defined in W. Va. Code § 3-8-1a(21)(2018).

Simply put, SEA does not meet the definition of a "political action committee" under the applicable 2018 statute, W. Va. Code § 3-8-1a(21) (2018), and the Circuit Court erred in ruling otherwise. Because SEA does not meet this definition, the Circuit Court erred in granting Respondent's summary judgment motion and denying Petitioner's motion. Specifically, the Circuit Court's ruling that SEA is a "political action committee" is based on an unconstitutionally broad reading of the plain language of its definition in the West Virginia Code, contrary to persuasive authority.[8] This overly board reading strips away the constitutional safeguards in the West Virginia Election Code designed to prevent issue groups from getting swept up in the registration and reporting requirements for political action committees. In addition to its overbroad statutory interpretation, the Circuit Court compounded its error by focusing on isolated pockets of activity by SEA without placing those activities into the broader context of SEA's other activities over its lifetime as an organization.

This Court reviews a circuit court's entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). It is well-settled that summary judgment is proper if no genuine issue of material fact exists and the movant

[8] *Compare* Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548 Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.").

demonstrates entitlement to judgment as a matter of law. *See* W. Va. R. Civ. P. 56(c); *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995). The Supreme Court of Appeals of West Virginia has long recognized that a motion for summary judgment should be granted "when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 2, *Peavy,* 192 W. Va. 189, 451 S.E.2d 755.

In this matter, the parties agreed that the facts relevant to the cross-summary judgment motions were not in dispute. Based on the undisputed facts and the applicable standard of law, Respondent failed to show, and the Circuit Court incorrectly held, that SEA was a "political action committee" under West Virginia law. *See* W.Va. Code § 3-8-1a(21) (2018). SEA was therefore entitled to judgment as a matter of law and the Circuit Court erred in granting Respondent's motion and denying Petitioner's motion for summary judgment.

1. The Circuit Court Erred in Ruling that SEA was "Organized for the Purpose of Supporting or Opposing One or More Candidates."

The relevant statute defines a "political action committee" as:

> [A] committee organized by one or more persons *for the purpose of supporting or opposing* the nomination or election of one or more candidates. The following are types of political action committees:
>
> (A) A corporate political action committee, as that term is defined by subdivision (8) of this section;
>
> (B) A membership organization, as that term is defined by subdivision (18) of this section;
>
> (C) An unaffiliated political action committee, as that term is defined by subdivision (29) of this section.

W. Va. Code § 3-8-la(21) (2018) (*emphasis added*). Once an organization becomes a "political action committee," it must bear the burden of registering with the State and periodically file a "detailed financial statement" disclosing all transactions made shortly before an election and all

other transactions over $500, including all expenditures made to promote the candidacy of any person, and all contributions or loans received.[9] W.Va. Code §§ 3-8-5(a), (b), (d) (2018). While 501(c)(4) organizations are required to disclose certain "electioneering communications" and "independent expenditures," many of the contribution disclosure requirements under the West Virginia Code are applicable only to political action committees.

To find that SEA is required to register and report as a "political action committee," the Circuit Court concluded that SEA was "'organized for the purpose of supporting or opposing one or more candidates' in West Virginia elections." (J.A. 000010.) The undisputed facts presented to the Circuit Court demonstrate otherwise. SEA was organized for the purpose of influencing public policy, not elections. SEA's bylaws overtly state that it was formed "to raise and expend funds in support or opposition to *public policy* relating to oil and natural gas development and general business issues." (J.A. 000424 Art. 1, Sec. 1 (*emphasis added*).) To further this stated purpose, SEA engages in issue advocacy, promoting the shale industry and the positive impacts that it can have within the State of West Virginia. (J.A. 000314: 8-23.) SEA also carries out a variety of specific activities to further this purpose, including social events, fundraisers, receptions, and other activities designed to gather together representatives from the various supply chain companies in the shale industry, as well as legislators in some cases, so they can discuss the issues facing the shale industry. (J.A. 000305: 2-18.)

The fact that SEA may engage in occasional political speech from time to time in furtherance of its public policy goals does not alter its organizational purpose, but rather simply supports that purpose. Indeed, Respondent concedes that supporting and opposing candidates is not SEA's sole, or major, purpose. (J.A. 000266) Yet, the Circuit Court's Order seemingly ignores

[9] Contributions are a transfer of monies or other things of value "made for the purpose of influencing the nomination, election or defeat of a candidate." W.Va. Code § 3-8-1a(7) (2018).

the State's admission and improperly relies on the premise that SEA can be a political action committee even though its sole or major purpose is not supporting and opposing candidates.[10] The Circuit Court's position is contrary to the plain meaning of the statute and the relevant caselaw.

While the Supreme Court of Appeals of West Virginia has not addressed this issue, the United States District Court for the Southern District of West Virginia provided guidance on the meaning of the phrase "for the purpose of supporting or opposing" in the West Virginia Election Code. *Center for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 795 (S.D.W. Va. 2009), *affirmed in part and reversed in part by, Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270 (4th Cir. 2013). In that case, West Virginians for Life ("WVFL"), a 501(c)(4) social welfare organization like SEA, sought to invalidate several provisions of West Virginia's campaign finance laws as unconstitutionally vague and/or overbroad. WVFL claimed, *inter alia*, that "the definitions of political committee, PAC, and unaffiliated PAC are facially vague and overbroad . . . ."[11] *Id.* at 792.

The *Ireland* Court found that the statutory language limits the definition of "political action committee" to a singular-purpose organization. Specifically, the *Ireland* Court found that the Legislature's use of the words "*the* purpose" in the statute (versus, "*a* purpose" or "*the major* purpose") "indicates that there is but one and only one purpose – namely, to support or oppose a

[10] (J.A. 000266.) ("The Secretary acknowledges that supporting and opposing candidates is not SEA's sole purpose.")

[11] WVFL planned advertising and advocacy efforts and asserted that the uncertainty of whether those efforts would convert it into a political committee, as that term is defined by W. Va. Code § 3-8-1a(22), caused it to refrain from communicating its message for fear that it would run afoul of West Virginia law. Specifically, the organization had planned communications concerning West Virginia Supreme Court of Appeals candidate Margaret Workman. In 1993, then-Chief Justice Workman penned the Supreme Court of Appeals' decision in *Women's Health Ctr. of W Va. v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658 (1993), a prominent abortion-rights case. The organization planned to conduct a mass mailing, radio advertising campaign, and petition drive to highlight Workman's opinion in *Panepinto* but feared that these communications may be construed as "opposing" Workman's candidacy, thereby converting WVFL into a PAC and subjecting it to West Virginia's campaign laws. *Ireland*, 613 F. Supp. 2d at 792-793.

candidate."[12] *Id.* at 795. The Court explained that it "[did] not arrive at this meaning by construction or interpretation. Instead, it is the plain meaning of this statute to limit its application to singular-purpose organizations." *Id.* Accordingly, the Court denied WVFL's request for injunctive relief and rejected its as-applied challenge to the statutory definitions, finding:

> Defendants have not argued in their briefs that WVFL's only or primary purpose is to support or oppose a candidate for state election. Furthermore, Defendant Betty Ireland, West Virginia Secretary of State, conceded at the hearing on October 14, 2008, that WVFL's sole purpose is not supporting or opposing candidates. Because there appears to be no basis to find that WVFL's sole, or even major, purpose is supporting or opposing candidates, the likelihood of success of WVFL's as-applied challenge is easily ascertained. As WVFL will ... not be deemed a PAC under the constitutionally valid definition in W. Va. Code § 3-8-la[13], there is little likelihood that the challenged section will be impermissibly applied to WVFL.

Id. at 797. Thus, as determined in *Ireland*, the phrase "for the purpose of supporting or opposing" in the statute means that supporting or opposing candidates must be the entity's sole purpose.

Here, the Circuit Court erred when it concluded that "[t]he Election Code expressly contemplates the possibility that an entity organized for non-electoral purposes can *also* be organized for the purpose of influencing elections."[14] (J.A. 000009 ¶12) (*emphasis in original*).)

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[12] The *Ireland* Court explained, "Like the Supreme Court in *Buckley,* West Virginia's legislature chose the definite article to limit the word 'purpose.' However, West Virginia differs because it does not qualify the requisite purpose with the word 'major.' This difference does not make West Virginia's statute more vague or more broad; the opposite is true. Stating that an organization has one 'major purpose' implies that it at least could have other, minor purposes." *Ireland* at 795. Following the decision in *Ireland,* the West Virginia Code was revised, effective June 7, 2019, to include a new definition for "political action committee" that includes organizations whose primary purpose is supporting or opposing candidates. *See* W.Va. Code § 3-8-la(28) (2019). The definition of a "political action committee" now reads, in relevant part, as follows: "'Political action committee' means a committee organized by one or more persons, **the primary purpose of which** is to support or oppose the nomination or election of one or more candidates." W. Va. Code § 3-8-la(28) (2019) (emphasis added).

[13] The definition of a "political action committee" examined is identical to the definition at issue in this matter.

[14] To illustrate its point, the Circuit Court notes that "membership organizations" are a type of political action committee identified in the statute, and yet are defined as organizations that "use[ ] a majority of their membership dues or purposes other than political purposes." (J.A. 000009 ¶13). From this the Circuit Court erroneously concludes that any organization that spends a majority of their funds on non-political purposes can also be a "political action committee." However, this argument conflates a membership organization itself with its separate segregated fund. *See* W. Va. Code R. § 146-1-2.9; *id.* at 2.11 (defining "PAC" and listing the three types of PACs including a *separate segregated fund* established by a membership organization). It is not the membership organization itself that is a type

Not only is this multi-purpose interpretation wholly inconsistent with the standard clearly laid out in *Ireland*, but it is also constitutionally unsound as it risks including groups primarily engaged in issue advocacy into the scope of the definition of "political action committee"—exactly the unconstitutional concern raised by WVFL in *Ireland.*

This very issue was addressed in *Buckley v. Valeo*, where the United States Supreme Court held that the definition of "political action committee" in the Federal Election Campaign Act impermissibly swept within its ambit groups engaged primarily in issue advocacy. 424 U.S. 1, 79, 96 S.Ct. 612, 663 (1976). In *Buckley,* the Supreme Court made a clear distinction between issue advocacy and advocacy for the election of a particular candidate, finding that campaign finance laws must be unambiguously related to the campaign of a particular candidate and not aimed at issue advocacy. *See Buckley,* 424 U.S. at 80, 96 S.Ct. at 664. For this reason, the Court narrowly construed the definition of political action committee to reach only groups that have as their "major purpose" the nomination or election of a federal candidate. *Id.* at 79, 663.The Supreme Court reaffirmed the "major purpose" requirement in *FEC v. Mass. Citizens for Life, Inc.,* ("MCFL"), 479 U.S. 238, 262, 107 S.Ct. 616, 630 (1986). Though *Buckley* and *MCFL* address federal law, "many states, including West Virginia, have incorporated this language into their definitions of political committees. . . ." *Ireland,* 613 F.Supp.2d at 794. Thus, the underpinnings of *Buckley* and *MCFL* are equally applicable here.

Despite the instructive rulings in *Ireland* and *Buckley,* neither Respondent nor the Circuit Court have stated that SEA's only, primary, or even major purpose is to support or oppose candidates for election. To the contrary, the record below makes clear that the State "acknowledges

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of "political action committee," but rather its separate segregated fund that is a connected but separate entity purposed exclusively for supporting and opposing candidates.

that supporting and opposing candidates is not SEA's 'sole purpose'" and the Circuit Court's ruling reflects the same. (J.A. 263, J.A. 000003-000004.) There appears to be no basis for finding that SEA's sole, primary, or major purpose is supporting or opposing candidates. As a result, the Circuit Court erred when it deemed SEA a "political action committee" as defined in W.Va. Code § 3-8-1a(21) (2018).

2. The Circuit Court Erred by Looking Only at Two Select Calendar Years of SEA Spending to Determine SEA's Purpose.

In analyzing SEA's activities to determine its purpose, the Circuit Court erred when it primarily considered political spending from two select calendar years that were cherry picked by the Respondent – 2016 and 2018 – and almost entirely disregarded other facts relevant to determining the organization's purpose.[15] In doing so, the Circuit Court ignored the other factors that should be considered when determining if an organization is a political action committee. Instead, it appears that the primary factor supporting the Circuit Court's conclusions was that "SEA has consistently devoted more than half of its election-year expenditures to expressly advocating for and against candidates in West Virginia elections." (J.A. 000010 ¶8.) It is simply impossible, however, to make this determination relying on a handpicked set of spending and without reviewing all relevant information.

Determining an organization's purpose by only examining isolated and narrow snapshots of spending (e.g., one calendar year that happens to be an election year), rather than looking at the organization's lifetime spending history, undercuts the safeguards designed to prevent issue-focused groups from being caught in the regulatory net of registration and reporting as a political action committee. Advocacy groups often intensify their activities on policy issues around the time

[15] As discussed in more detail below, the Circuit Court mistakenly misattributes a portion of expenses from 2015 as having been made in 2016, but otherwise does not consider any 2015 spending in its evaluation.

of elections and 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.[16] Therefore, a more comprehensive approach is not only more reasonable, but necessary in order to prevent unconstitutional overreach. For these reasons, multiple court decisions have embraced an examination of an organization's multi-year or lifetime spending history in determining whether an organization meets the federal major purpose test that originated with *Buckley*. *See, e.g., CREW v. FEC*, 209 F.Supp. 3d. 77, 94 (D.D.C. 2016) (describing a calendar year approach as inflexible and finding lifetime spending examination reasonable where coupled with an examination of other factors); *Akins v. FEC*, 736 F.Supp.2d 9, 20 (D.D.C. 2010) (examining over 40 years of activity). This is consistent with the "case by case" approach set forth in testimony by the Secretary of State's office as well.

Using this approach, the undisputed facts here establish that SEA does not meet the definition of a "political action committee" under a constitutionally valid interpretation of W. Va. Code § 3-8-la(21) (2018). For instance, SEA's organizational documents and corporate structure demonstrate that its purpose is to advance public policy objectives that align with its mission. In this regard, SEA's bylaws state the following:

> [t]he purpose of [SEA] shall be to engage in any lawful act or activity for which a non-profit corporation may be *organized* under [Delaware law] and as permitted under Section 501(c)(4) of the Internal Revenue Code, and to raise and spend funds in support or opposition to public policy relating to oil and natural gas development in general business issues.

[16] *See, e.g., Citizens United v. FEC,* 558 U.S. 310, 334, 130 S.Ct. 876, 895 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence."); Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, it Cannot Be Regulated When It Is Most Valuable,* 50 CATH. U. L. REV. 65, 76 (Fall 2000) ("Unsurprisingly, most citizens begin to focus on and become engaged in political debate once election day approaches.").

(J.A. 000424, Art. 1, Sec. 1) (*emphasis added*).)

As discussed above, SEA is primarily an education and awareness advocacy organization, focusing on issues that impact the shale industry. (J.A. 000308.) SEA engages in a variety of activities to further this purpose, including social events, fundraisers, and receptions. (J.A. 000309: 16-20.) The goal of these events is to gather together representatives from the various supply chain companies in the shale industry, as well as legislators in some cases, into one space so they can discuss the issues facing the shale industry. (J.A. 309) SEA also engages in issue advocacy, promoting the shale industry and the positive impacts that it can have within the State of West Virginia. (J.A. 000314-000316) The fact that SEA may engage in political speech from time to time in furtherance of its public policy-based organizational purpose does not alter its organizational or primary purpose.

Further, SEA is organized under Section 501(c)(4) of the Internal Revenue Code ("IRC"). Though this fact is not dispositive, 501(c)(4) status is wholly inconsistent with a conclusion that an organization was formed for the purpose of supporting or opposing one or more candidates. "In order to qualify for exemption under section 50l(c)(4) of the [Internal Revenue] Code, an organization must be primarily engaged in activities that promote social welfare" within the meaning of section 1.501(c)(4). Rev. Rul. 81-85, 1981-1 C.B. 332. Because a social welfare organization's primary activity promotes social welfare, its less than primary participation in political campaigns will not adversely affect its exempt status. *Id.*; *see also* 26 CFR § 1.501(c)(4)-l(a)(2)(ii) ("The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."). Therefore, under the IRC, organizations may generally make expenditures for political campaign activities if such activities (and other activities not furthering its exempt purposes) do

not constitute the organization's primary activity.[17] Therefore, SEA's tax-exempt status is significant and indicative of a purpose other than political activity.

Though the record included compelling information — including non-political spending and organizational documents, *inter alia* — which showed SEA's public policy-oriented purpose, the Circuit Court erred by instead limiting its examination of SEA's activity to cherry-picked snapshots of time highlighted by Respondents. As discussed in more detail below, a fuller analysis of SEA's activity and lifetime spending demonstrates that its purpose is not the support or opposition of candidates. This fact turns the Circuit Court's findings on their head.

B. The Circuit Court Erred by Finding that SEA Consistently Devoted More Than Half of its Expenditures to Expressly Advocating for and Against Candidates in West Virginia Elections.

The Circuit Court's determination that SEA was "organized for the purpose of supporting or opposing one or more candidates" is based almost exclusively on its finding that SEA has "consistently devoted more than half of its election-year expenditures to *expressly advocating* for and against candidates in West Virginia." (J.A. 00010 ¶16 (*emphasis added*).) *See also* J.A. 000009 ¶11("In each election cycle since its creation, SEA has directed a majority of its annual expenditures toward advocating for and against candidates in West Virginia.") However, the Circuit Court's calculations are wrong — SEA did not spend more than 50% on express advocacy in any year between 2015 and 2018, including the election years of 2016 and 2018. The Circuit Court's error arises from three separate issues: (1) attributing certain activity to the wrong year; (2) including non-express advocacy expenses in the purported express advocacy totals; and (3) including expenses for communications without independently examining the content. Because the Circuit Court's conclusions about the extent of SEA's express advocacy expenses provide the

[17] *See* 26 CFR § 1.501(c)(4)-l(a)(2)(ii) ("The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.").

foundation for its finding on SEA's purpose, the Circuit Court's ruling necessarily collapses as a result of these errors.

1. The Circuit Court's Findings Regarding the Amount of SEA's Express Advocacy Spending in 2016 are Based on Mistaken Attributions of 2015 Activity.

The Circuit Court found that SEA spent $24,000 advocating for ten different candidates[18] in the 2016 primary election and made a total of $50,000 in contributions to two different registered committees ($25,000 each). Based on this information, the Circuit Court calculated that "SEA spent or contributed over $74,000 to expressly advocate for or against candidates in West Virginia's 2016 election which accounted for over 54% of SEA's total expenditures for 2016." (J.A. 000004) Other than the spending amount, the Circuit Court does not specify the figures that it used to arrive at this percentage, nor does it explain its methodology. Presumably, the Circuit Court (and Respondent) used the overall spending amount of $136,302 that SEA reported in its IRS Form 990 for 2016 — $74,000 is 54% of $136,302.[19] (J.A. 000447.)

The Circuit Court's calculation, however, is incorrect. Almost half of the $24,000 in candidate-related expenses included in the 2016 amount actually occurred in November 2015 and, therefore, should not have been included in the 2016 calculations. Specifically, on November 17, 2015, SEA filed an independent expenditure reporting form with the Secretary of State disclosing ten disbursements totaling $11,257 "For" nine different candidates. (J.A. 000456) Removing the erroneously included 2015 amounts from the Court's 2016 calculation yields an express advocacy percentage below 50%. Therefore, the Circuit Court erred in finding that SEA "consistently devoted more than half of its expenditures to expressly advocating for and against candidates in

[18] SEA's disclosure reports show that it was nine individuals rather than ten. (J.A. 000456.)

[19] Respondent used this calculation in its filings, and the Court's Order appears to borrow liberally from them. (J.A. 000031.)

West Virginia elections" in part because it was substantially based on miscalculations of SEA's activity in 2016 (one of the only two years that it considers).

2. The Circuit Court Erred by Including Public Opinion Polls in Its Calculation of Express Advocacy Expenditures for 2018

Similarly, the Circuit Court materially miscalculates SEA's spending on express advocacy in 2018. The Circuit Court found that in 2018, "SEA spent . . . $10,500 to commission four public opinion polls, using the findings therefrom to calibrate the messages in its mailings." (J.A. 000006 ¶22) Although the Circuit Court was not fully transparent with its methodology, it appears that it counted these polling expenses as part of SEA's express advocacy when it calculated SEA's political spending for 2018. After noting that SEA's "directs cost[s]" for express advocacy in 2018 were $156,000, the Circuit Court concluded that "[t]he grand total for SEA's advertising, mailing, and polling, in the 2018 election was $166,661.25." *Id.* The Circuit Court then noted SEA's total expenditures for 2018 at $332,108 and found that "expenditures aimed at influencing West Virginia's elections in 2018 accounted for more than half of that total."[20] (J.A. 000006 ¶27.)

The Circuit Court erred in including the polling costs in the express advocacy amounts because the polls themselves do not contain express advocacy and whether the results may later be used to guide express advocacy communications is not relevant.[21] A communication "expressly advocates" for a candidate if it uses phrases such as "vote for," "vote against," "support," "reject," or is otherwise "susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate." W.Va. Code § 3-8-1a(13) (2018). The four polls here each

[20] $166,661 is 50.2% of $332,108.

[21] A "poll," as defined by one of the leading experts in campaign polling is: "a method of collecting information from people by asking them questions. Most polls involve a standardized questionnaire, and they usually collect the information from a sample of people rather than the entire population. . . . Candidates use polls as an essential part of the intelligence-gathering operation of their campaign. Polls provide a candidate with information about what the voters are thinking and how they are inclined to vote." Michael W. Traugott & Paul Lavrakas, THE VOTER'S GUIDE TO ELECTION POLLS 1 (4th ed. 2008).

asked a series of questions on a variety of topics, including demographics, political ideology, likelihood to vote, opinions on various politicians, and likelihood to vote for a particular candidate based on certain statements about that politician. (J.A. 000522-000526.) Though some of the poll questions use the phrase "vote for," the words are not there to advocate for or against a particular candidate, but rather to ask a question and gather information about whether the respondent will "vote for" a particular candidate.[22]

If the polling costs were not included in the express advocacy amount, the percentage of express advocacy in 2018 would be only 47%. Thus, again, the Circuit Court erred in finding that SEA "consistently devoted more than half of its election-year expenditures to *expressly advocating* for and against candidates in West Virginia" because when the polling expenses are properly excluded from the Circuit Court's calculations, SEA's political spending for 2018 does not exceed half of its election-year expenditures.

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[22] For instance, one of the poll questions is "Now that you know more about Bob Beach, are you going to *vote for* him in the fall?" (J.A. 000525 (*emphasis added*).) While the phrase "vote for" appears in the question, it is not there for the purpose of expressly advocating. "Polls ultimately ask questions, and thus no matter how negative or suggestive, do not as a matter of law expressly advocate election or defeat. This is true even if a poll contains the so-called 'magic words' of express advocacy, as evidenced by the typical testing of whether or not certain information makes a respondent more or less likely to vote for a candidate. Use of such a method does not convert a poll into express advocacy because 'magic words' in the context of a poll are susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate." *See* FEC, *In the Matter of Democratic Congressional Campaign Committee and Brian L. Wolff, in his official capacity as treasurer, Statement of Reasons*, n.44, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjil_r1hvjqAhUOlKwKHZ8KBvoQFjAAegQIBhAB&url=http%3A%2F%2Ffloridacitizen.org%2Ffiles%2Fresources%2Fcivicsconnection%2Fconversations%2Fcommittees%2FIn%2520the%2520matter%2520of%2520the%2520DCCC%2520before%2520the%2520FEC.pdf&usg=AOvVaw1G8Y1IaXaAkCs6Xr2L2g02; *see also FEC v. Wisconsin Right to Life. Inc.* ("WRTL"), 551 U.S. 449, 127 S.Ct. 2652, 2667 (2007). The Supreme Court discussed this issue in the context of defining the functional equivalent of express advocacy and the fundamental underlying issue here is the same, i.e., limiting the reach of the definition or express advocacy so as not to include groups who may be engaging in issue advocacy, but wish to test public policy oriented messaging by measuring messages by the likelihood of voting (as opposed to asking less straightforward questions about whether certain information makes one feel more or less favorable toward an individual or entity).

3. The Circuit Court Erred by Failing to Independently Examine Each of SEA's Expenses.

In categorizing certain expenses as express advocacy, the Circuit Court also failed to independently examine each of the expenses to confirm the nature of the activity. This has a particularly significant legal relevance for certain expenses considered by the Court. For example, for 2016, the Circuit Court includes approximately $14,000 in expenses for electioneering communications in SEA's express advocacy totals. The U.S. Supreme Court has recognized that not all electioneering communications are the functional equivalent of express advocacy, declaring that "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70, 127 S.Ct. at 2667; *see also McConnell v. FEC*, 540 U.S. 93, 206, 124 S.Ct. 619, 696 (2003); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 858-59 (D.D.C. 1996). Therefore, not all electioneering communications should necessarily be counted toward the threshold of political activity required for an organization to be considered a "political action committee," and each communication must be individually examined. *See, e.g., Citizens for Responsibility and Ethics in Washington v. FEC,* 299 F.Supp.3d 83 (D.D.C. 2018) (rejecting the argument that all electioneering communications must automatically be counted as activity indicative of a major purpose to nominate or elect a candidate).

Nevertheless, the Circuit Court failed to independently examine the communications to determine if the content demonstrated a purpose of "supporting or opposing one or more candidates." In fact, these communications are not even included in the record below and therefore, it was inappropriate (and legal error) for the Circuit Court to include these expenses with the express advocacy amounts and to make a legal determination based upon the same.

Taking each of the Circuit Court's errors into account, below is a chart showing SEA's Revenue, Expenditures, Express Advocacy, and percentage of political spending in West Virginia since its inception:

Year	Revenue	Expenses	Express Advocacy	Political Spending %
2015	$158,964	$32,510	$11,257	34.6%
2016	$283,500	$136,302	$34,343	25.2%
2017	$522,143	$452,002	$5,000	1.1%
2018	$367,846	$332,108	$156,000	47%
TOTAL	**$1,322,453**	**$952,922**	**$206,600**	**21.7%**

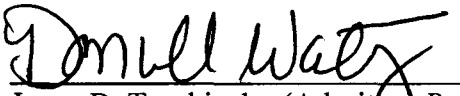
As this chart demonstrates, SEA's spending on activities that show a purpose of supporting or opposing candidates in West Virginia do not reach 50% in any year, including election years, and comprise only 21.7% of its lifetime spending. *See New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 678 (10th Cir. 2010) (comparing campaign spending with overall spending as means to determine a group's major purpose). In fact, this comprehensive and objective evaluation of SEA's activity is wholly inconsistent with a determination that that it is a "political action committee." Under no constitutionally permissible interpretation is such an amount enough to suggest, let alone establish, that SEA's primary purpose was "to support or oppose a candidate for state election." *See Ireland,* 613 F.Supp.2d at 797*; see also MCFL*, 479 U.S. at 252, n.6, 107 S.Ct. at 625, n.6 (holding that a nonprofit corporation's major purpose is not the nomination or election of a federal candidate when its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.").

Thus, the information in the record and in publicly available government documents demonstrates that SEA's purpose is not to support or oppose the nomination or election of candidates, but, rather, to raise and expend funds in support or opposition to public policy relating

to oil and natural gas development, including promoting the shale industry and the positive impacts that it can have within the State of West Virginia. Accordingly, SEA does not meet the definition of a "political action committee" under applicable West Virginia law, W. Va. Code § 3-8-la(21) (2018).

VI. CONCLUSION

The Circuit Court's *Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment* should be reversed, and this matter should be remanded for entry of summary judgment in favor of the Petitioner or for further consideration in accordance with the orders or instructions of this Court.

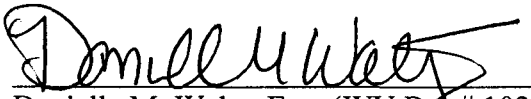


Jason B. Torchinsky (Admitted *Pro Hac Vice*)
Danielle Waltz (WV Bar #10271)
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2020, true and accurate copies of the foregoing **Petitioner Shale Energy Alliance's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Thomas T. Lampman, Esquire, Assistant Solicitor General
Curtis R. A. Capehart, Esquire, Deputy Attorney General
Office of the Attorney General
Room 26-E
State Capitol Building
Charleston, West Virginia 25305
Counsel for Respondent



Danielle M. Waltz, Esq. (WV Bar # 10271)
Counsel of Record for Petitioner