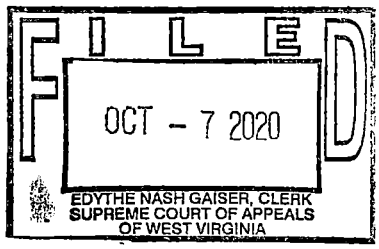

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

REPLY BRIEF OF PETITIONER SHALE ENERGY ALLIANCE

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October 7, 2020

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I. SUMMARY OF ARGUMENT

The circuit court's ruling in this matter is centered on a premise that is simply untrue. Specifically, Respondent convinced the circuit court that Petitioner was a "political action committee" because it "consistently devoted more than half of its election-year expenditures to expressly advocating for and against candidates in West Virginia elections." (J.A. 0000010.) However, that underlying premise was flatly wrong. As Petitioner demonstrated in its opening brief, Petitioner has never devoted more than half of its expenditures to express advocacy, not even in election years.

As a result, Respondent now shifts his focus. Respondent argues — for the first time — that the most important factor in determining whether an entity is a "political action committee" is how the entity is "organized." According to Respondent, the plain meaning of the word "organized" in the West Virginia Code's definition of "political action committee" mandates that the State evaluate an entity's organizational structure and staffing to determine whether it is a political action committee. (Resp. Br. at 14, 25-26.) Under the Respondent's new theory, the level of political spending by an entity is now all but irrelevant to the analysis. *See, e.g., id.* at 29.

Respondent's new focus on an organization's structure and staffing is more than just inconsistent with Respondent's past position. It significantly raises the constitutional stakes in this matter. It allows for regulatory overreach that has wide-ranging consequences for all types of organizations that have engaged in political speech in West Virginia, no matter how de minimis. For instance, the proposed framework may theoretically open hundreds of groups who already engaged in political activity in West Virginia between 2015 and 2018 up to the potential regulatory action like the kind faced by Petitioner in this matter. *See* W.Va. Code § 3-8-5d (setting forth a five-year statute of limitations for a criminal prosecution or civil action for a violation of this

article).[1] Moreover, the impact of this proposed framework is not restricted to groups who already engaged in activity pursuant to the 2018 statute; indeed, those groups engaging in political activity under the ***current*** version of the statute will also be affected. If the circuit court ruling stands and Respondent's interpretation of the meaning of the term "organized" in the statute prevails, the circuit court's constitutionally defective analytical framework may apply to future evaluations of activity conducted pursuant to the 2019 statute.

This uncertainty leaves open the issue of whether 501(c)(4) organizations are now required to register as a "political action committee" even if they minimally participate in the political process as a corollary and in conjunction to their main, stated purpose of social welfare and issue advocacy. Such groups will be forced to choose between subjecting themselves to inappropriately broad registration and reporting obligations or risking that the State will deem them to be a "political action committee" as a result of a minimal amount of political activity. Faced with such a choice, many groups may simply decide to avoid the issue altogether by refraining from engaging in political speech. Such an interpretation has serious and continuing constitutional implications.

Accordingly, as set forth below and in its opening brief, Petitioner requests that the Court reject Respondent's arguments and reverse the circuit court's *Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.*

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner hereby incorporates by reference its "Statement Regarding Oral Argument and Decision" section from its *Petitioner's Brief* in this action, as if fully restated herein.

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[1] 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)**.

III. ARGUMENT

A. The Circuit Court Interpreted the Definition of "Political Action Committee" In W.Va. Code § 3-8-1a(21) (2018) Incorrectly

Here, the circuit court's Order compels Petitioner to register and report with the Secretary of State as a "political action committee" based on an analysis so fundamentally flawed that this Court should allow no part of the Order to survive its review. In reaching its conclusions, the circuit court: (1) misinterpreted the language in W.Va. Code § 3-8-1a(21)(2018) defining "political action committee" in several critical ways; (2) mischaracterized the scope and import of Petitioner's political activity; (3) failed to clearly explain the reasoning for its conclusion that Petitioner is a political action committee; and (4) neglected to articulate a standard other organizations should use to determine if their own activity falls within the expansive regulatory reach it created with its statutory interpretation.

In West Virginia, a "political action committee" is a committee "organized . . . for the purpose of supporting or opposing . . . candidates." W. Va. Code § 3-8-1a(21) (2018). The circuit court made two crucial mistakes interpreting this statute. First, it determined that the term "the purpose" as used in the statute meant "a purpose." (J.A. 000010.) Second, rather than acknowledge the apparent ambiguities in the meaning of the word "organized" contained in the statute, it determined that it must give the word "organized" an "ordinary and plain meaning." (J.A. 000008.) In doing so, the circuit court ignored typical canons of statutory construction and illogically twisted the meaning of the statute to achieve its desired end, i.e. to conclude that entities can be organized for multiple purposes and still fall within the definition of "political action committee." (J.A. 000010.) Respondents attempt to fill in the gaps left by the circuit court's superficial analysis, but the arguments set forth in its Response are unavailing.

1. The Circuit Court Ignored the Plain Meaning of the Phrase "The Purpose" in the Text of the 2018 Statute and Improperly Substituted Its Own Interpretation.

The first canon of statutory interpretation states that when the words of a statute are unambiguous, "judicial inquiry is complete." *Rubin v. U.S.*, 449 U.S. 424, 430, 101 S.Ct. 698, 701 (1981); see also *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989); 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."). Here, it is apparent that the phrase "the purpose" in West Virginia's definition of "political action committee" is an unambiguous definite article referring to a singular purpose. However, the circuit court ignored the unambiguous meaning and instead substituted its own words ("a purpose") into the statute. (See J.A. 000009 (stating that "the Legislature did not conceive of 'organization... for *[a]* purpose' as mutually exclusive with organization for an additional, even wholly non-political, purpose") *(emphasis added)*).

In support of the circuit court's Order, Respondent argues that none of the words in the statute "suggest that the label of 'political action committee' is limited to groups organized for the *sole* purpose of influencing elections." (Resp. Br. at 15.) Petitioner agrees that such a limitation is not *suggested* by the language of the statute. Rather, this limitation is *mandated* by the language of the statute. Indeed, the statute states that an entity is a political action committee only if it 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) (*emphasis added*). The presence of the definite article makes the language clear and unambiguous. The circuit court was wrong not to apply that plain meaning.

The Respondent mistakenly justifies the serious implications of the circuit court's circumvention of the plain statutory language by arguing that the Legislature would have included the word "sole" in the statute if it "had intended the Election Code to capture only political action committees organized for the 'sole purpose' of supporting or opposing candidates." (Resp. Br. at 16; *see also* J.A. 000010.) This argument is unpersuasive. When interpreting a statute, courts must presume that a legislature says in a statute what it means and means in a statute what it says. *See Ron Pair Enters., Inc.*, 489 U.S. at 241-42, 109 S.Ct. at 1030-31; *U.S.* v. *Goldenberg,* 168 U. S. 95, 102-103, 18 S.Ct. 3, 4 (1897). Although the Legislature could have added the word "sole" into the statute, it simply would have had the *same* meaning as it was written. Stated another way, the fact that the Legislature could have added the word "sole" does nothing to change the plain and unambiguous meaning of the word "the" that it used.

The Court should also disregard Respondent's citation to a rather unhelpful dictionary definition of the word "the." (Resp. Br. at 15.) Simply put, where a word's meaning is clear and unambiguous within the statutory text, a court need not consult dictionary definitions. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-99, 123 S.Ct. 2148, 2153 (2003) (demonstrating that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning); *Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. at 145, 107 S.E.2d at 358 ("[T]he general rule is that no intent may be imputed to the legislature other than that supported by the face of the statute itself."). However, even if this Court were to ignore this well-settled principle of statutory interpretation and conclude that dictionary consultation is either necessary or advisable, the most relevant definitions of the word "the" confirm that it acts as a definite modifier of the word which follows (in this case, the word "purpose"). *See The, Random House Webster's Unabridged Dictionary* (2nd Ed. 1987) (defining "the" as "used, especially

before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article *a* or *an*"); *The, Merriam-Webster Collegiate Dictionary* (11th Ed. 2003) (*defining "the"* in the second as "used as a function word to indicate that a following noun or noun equivalent is a unique or a particular member of its class").

Tellingly, the plain meaning of "the" is supported by the case law examining the language of the 2018 statute. As discussed in Petitioner's opening brief, the United States District Court for the Southern District of West Virginia, in *Center for Individual Freedom, Inc. v. Ireland,* specifically found that the statutory language in the 2018 statute limits the definition of "political action committee" to a ***singular-purpose organization***. 613 F. Supp.2d 777, 795 (S.D. W.Va. 2009). The *Ireland* Court explained that no statutory interpretation was required to arrive at this conclusion because the plain meaning of 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 candidate." *Id.* at 795. It also 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.* As in *Ireland*, this Court should apply the statute here as written and reverse the circuit court's attempt to rewrite and distort the clear and unambiguous language of the statute.

Respondent hopes to brush aside the significant constitutional issues that arise from the circuit court's significantly overbroad interpretation of the definition of "political action committee" by arguing that Petitioner waived any constitutional argument here and before the circuit court. (Resp. Br. at 20.) This argument is a distraction and has no merit. As an initial matter, even if the constitutional issue had been waived to this point, which it has not, it may still be considered on appeal now: "constitutional issue that was not properly preserved at the trial court

level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. Pt. 2, *Louk v. Cormier, M.D.,* 218 W.Va. 81, 622 S.E.2d 788 (2005); *In re: Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 223 W.Va. 14, 20, 672 S.E.2d 150, 156 (2008) ("[W]e nevertheless may consider it for the first time on appeal to this Court insofar as it raises an issue of constitutionality that is central to our disposition of this case.") Indeed, Respondent concedes that this Court may take up a constitutional issue raised for the first time on appeal. (Resp. Br. at 21.) Respondent argues that it is inappropriate here because the constitutionality of the 2018 definition of political action committee is not likely to recur in the future. (*Id.*)

Contrary to Respondent's assertion, the issue *is* likely to come up again. As noted above, activity regulated by the 2018 statute may remain subject to regulatory and criminal action by the State for five years, as the old provision may not fully sunset until 2024. W.Va. Code § 3-8-5d(b) (2018). Further, as discussed in detail below, a portion of the constitutional questions at issue in this appeal arise from the circuit court's interpretation of the meaning of "organized," which term remains in the revised and current version of the statute

Petitioner's opening brief before this Court discusses a number of federal cases, including *Ireland*, that explain the constitutional necessity that a statute defining "political action committee" be restricted in a manner that does not permit the inclusion of organizations whose goal of supporting and opposing candidates is merely one of multiple purposes. (Pet. Br. at 16.) *See Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612 (1976). To avoid repetition, Petitioner refers this Court back to those discussions and underscores that if organizations were regulable merely for having the support or opposition of a candidate as "*a* major purpose," political action committee reporting burdens could fall on organizations primarily engaged in speech on political issues

unrelated to a particular candidate. This scenario exposes the core constitutional issues contained within the circuit court's Order.

2. The Circuit Court Incorrectly Assigned a "Plain Meaning" to the Ambiguous Term "Organized" Contained Within the 2018 Statute.

Ironically, in contrast to the extensive interpretative approach it took above to determine the meaning of the unambiguous word "the," the circuit court determined that the meaning of the ambiguous term "organized" in the 2018 statute was quite plain and could be discerned simply by consulting the dictionary definition. (J.A. 000009.) After doing so, the circuit court concluded that "organized" means "having a formal organization to coordinate and carry out activities," though it does not provide much explanation regarding the significance or application of this meaning in its analysis and conclusions. Rather, the findings of fact and legal conclusions in the circuit court's Order appear to be based almost exclusively on an evaluation of Petitioner's political spending. (J.A. 000004-6, 10.)

Despite this, Respondent places great significance on the meaning assigned to the term "organized" by the Circuit Court, arguing that the meaning assigned by the Court "require[es] an analysis of how SEA's organizational components were structured, and what goals those structures predominately pursued." (Resp. Br. at 14.) But Respondent's focus on Petitioner's organizational structure is illogical, not supported by any specific authority (including the circuit court's Order), defies a number of canons of statutory interpretation, and establishes overly broad criteria for a political action committee determination that raises significant constitutional concerns.

Unsurprisingly, Respondent points to no history or authority supporting this application of the circuit court Order. Indeed, the circuit court Order relies on the asserted magnitude of the Petitioner's advocacy for candidates, and not on the structural organization/staffing of Petitioner's organization. In direct response to Respondent's argument on appeal that the Court should focus

on Petitioner's organizational structure, Petitioner notes that the State's own witness established that the State evaluates an entity's activities, mission, and goals, and ***not*** the entity's organizational structure, in order to make a determination on whether an entity is a political action committee. *See* Kersey Dep. Tr. pp. 21-24. (2nd Supp. App. 2)[2]

Further, Respondent's interpretation necessarily requires that the word "organized" be read in isolation rather than in context with the other words and other provisions of the Election Code. *See W.Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996) (demonstrating that the meaning of a word cannot be determined in isolation but must be drawn from the context in which it is used). When read in context as required, the more appropriate meaning of "organized" in this context is "to establish, form, or create." And, other statutes enacted by the West Virginia Legislature appear to use the term "organized" to mean "formed" as well. For example, the State defines a "voluntary association" as "any association *organized for* the purpose of conducting business in this state, but does not include an *organization formed* as an unincorporated nonprofit association under the provisions of article eleven, chapter thirty-six of this code." W. Va. Code § 47-9A-3 (*emphasis added*).

Respondent's singular focus on Petitioner's organizational structure to the exclusion of all other factors creates significant constitutional issues. For example, it eliminates any consideration of that non-election year spending or any non-election spending whatsoever because "there is no threshold ratio of political to nonpolitical spending that obviated SEA's status as a political action committee." (Resp. Br. at 29.) If Respondent's argument prevails, the circuit court's Order has

[2]Concurrent with the filing of the Brief, Petitioner also filed its *Motion for Leave to File Supplemental Appendix*, containing the relevant portions of Kersey's deposition.

far-reaching implications not only for Petitioner, but also for those now operating under the 2019 statute as well.

B. The 2018 Statute's Inclusion of Membership Organizations as a Type of Political Action Committee Does Not Support the Argument that Entities Organized for Multiple Purposes Fall Within the Definition of Political Action Committee.

Respondent argues that the definition of "political action committee" in the 2018 statute includes entities organized for more than one purpose because it lists "membership organization" as one type of political action committee. (Resp. Br. at 13; *see also* J.A. 000009.) The statute defines a "membership organization" as a group which "uses a majority of its membership dues for purposes other than political purposes." Taking the definitions together, Respondent concludes that an entity can be organized for non-electoral purposes and also be organized for the purpose of supporting and opposing candidates. (*Id.*) Though this argument may seem compelling on first glance, it does not withstand the scrutiny of a closer examination.[3]

Most significantly, Respondent ignores a contrary legislative rule clarifying the definition of "political action committee" and its three types, including "membership organizations." *See* W.Va. Code R. § 146-1-2.9. Though much of the rule's language mirrors the statute, there is a critical distinction between the two. Specifically, when listing "membership organization" as one of the three types of political action committee, the legislative rule describes it as "a *separate segregated fund* established by a membership organization." W. Va. Code R. § 146-1-2.9; *id.* at

[3] It is worth noting that this argument is inconsistent with Respondent's primary argument that SEA's spending is irrelevant to the determination of whether it is "organized for the purpose of advocating for or against" candidates because this Court must look exclusively at SEA's organizational structure. (Resp. Br. at 29-30.) If Respondent's argument is taken to its logical extension, the fact that membership organizations use the majority of their membership dues for purposes other than political purposes would have no (or at least very little) bearing on the question of their political committee status. Further, the premise of Respondent's argument appears to rely on a false assumption that membership dues are the only source of income for a membership organization. To the contrary, membership organizations typically have a variety of income sources and it is entirely possible for a membership organization to uses the majority of its dues for nonpolitical purposes and still use a majority of its total income to support or oppose candidates.

2.11. Based on this distinction, it is evident that it is not the membership organization itself that is included as a type of "political action committee," but rather a separate segregated fund that would, by definition, be "organized for the [sole] purpose of supporting and opposing candidates."

Respondent dismisses the significance of the rule, asserting only that it is merely "a regulatory definition, not the text of the statute." (Resp. Br. at 13, n. 3.) This cursory response disregards the significance of the rule. In general, regulatory rules are intended to implement, extend, apply, interpret or make specific the law administered by an agency or provide procedural guidance. Here, the rule was a *legislative rule* that required approval by the same Legislature that drafted and adopted the statutory language, understandably carrying a significant amount of weight. In fact, under the State's Administrative Procedure Act, legislative rules carry the force of law, supply a basis of civil or criminal liability, and can grant or deny a specific benefit. W.Va. Code §29A-1-2(e). And even where promulgated by an administrative agency with delegated authority, and not by the Legislature itself, administrative rules are presumed valid. *See U.S. v. Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D. W.Va. 1975) (recognizing a presumption of the validity of the rules duly noticed and promulgated by an administrative agency pursuant to a specific statutory delegation of power, rebuttable only upon a showing that the challenged regulation is an unreasonable exercise of the delegated power); *Princeton Cmty. Hosp. v. State Health Planning and Dev. Agency*, 174 W.Va. 558, 328 S.E.2d 164 (1985) (recognizing that an agency's determination of matters within its area of expertise is entitled to substantial weight). Thus, it is inappropriate for Respondent to dismiss this valid and probative rule.

Ironically, the State Election Commission on which Respondent now sits would have had a significant role in proposing the rule and shepherding it through the rulemaking process, notwithstanding his role in administering it today. It is difficult for this Court to credibly disregard

a statutory interpretation that was formally approved and implemented by the very same Legislature that drafted the statute itself, and instead favor Respondent's newly preferred (and unsupported) interpretation.

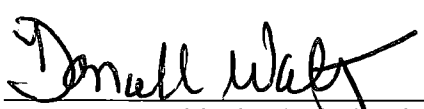
Even if there were no authoritative legislative rule to provide guidance on the proper interpretation of the statute, canons of statutory construction compel this Court to read the definitions of "political action committee" and "membership organization" in context with each other and in light of the Election Code's overall objectives and policy. *See United Savings Ass'n*, 484 U.S. at 371, 108 S.Ct. at 630 (citations omitted) ("Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") Because the definition of "political action committee" makes clear that the support and opposition of candidates must be the sole purpose of the organization, this Court cannot harmonize a definition of "membership organization" that labels a membership organization as a "political action committee" even where its sole purpose (or even major or primary purpose) was not the support or opposition of candidates. *See United Sav. Ass'n v. Timbers of Inland Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 630 (1988) (avoid interpreting a provision in a way inconsistent with the policy of another provision.); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 99-100, 112 S. Ct. 2374, 2384 (1992) (avoid interpreting a provision in a way that is inconsistent with a necessary assumption of another provision). The reasonableness of this conclusion is further bolstered by the Legislature's 2019 amendments revising the language of the statute to clarify that an entity can only be a political committee when

its "primary purpose is to support or oppose the nomination or election of one or more candidates." W. Va. Code § 3-8-1a(28) (2019).

Respondent's argument that entities organized for more than one purpose may fall within the definition of political action committee because "membership organization" is listed as a type of political action committee is superficial, ignores contrary interpretative rules that were approved by the same Legislature that enacted the statute in the first place, and fails to put the relevant statutory provision in the proper context. As a result, Respondent's argument must be rejected.

IV. 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 judgmnt in favor of the Petitioner or for further consideration in accordance with the orders or instructions of this Court.



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2020, true and accurate copies of the foregoing **Petitioner's Reply 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:

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