No. 18-1293

IN THE

Supreme Court of the United States

EVERGREEN FREEDOM FOUNDATION,

PETITIONER,

V.

STATE OF WASHINGTON,

RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE LIBERTY JUSTICE CENTER, 60 PLUS ASSOCIATION, ALLIANCE DEFENDING FREEDOM, AMERICANS FOR TAX REFORM, BEACON CENTER, CENTER FOR WORKER FREEDOM, CENTER OF THE AMERICAN EXPERIMENT, AND WISCONSIN INSTITUTE FOR LAW & LIBERTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Jeffrey M. Schwab
Counsel of Record
Daniel R. Suhr
Brian K. Kelsey
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
jschwab@libertyjusticecenter.org

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QUESTIONS PRESENTED

1. Do Washington campaign finance statutes Wash. Rev. Code §§ 42.17A.255 and 42.17A.005 violate Due Process under the Fifth and Fourteenth Amendments because they are vague as applied to legal services provided to citizens engaged in litigation pertaining to proposed initiative petitions when no campaign or election ever occurred?

2. Does Washington's enforcement action under the Fair Campaign Practices Act, Wash. Rev. Code §§ 42.17A.255 *et seq.* violate the First Amendment to the United States Constitution—made applicable to the States through the Fourteenth Amendment to the United States Constitution—when it is extended to cover legal fees for litigation concerning Washington's local ballot initiative process where no campaign or election ever occurred?

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are public interest and public policy organizations concerned by the selective enforcement of vague campaign finance laws at issue in this case and the potential impact of similar future cases on free speech.

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448 (2018). The Center is particularly interested in this case for two reasons. First, it has a special focus on issues of free speech and the First Amendment in the campaign finance context. *See, e.g.*, *Ill. Liberty PAC v. Madigan*, 904 F.3d 463 (7th Cir. 2018) (representing a political action committee and a legislative candidate). Second, it has provided *pro bono*, public-interest representation to political candidates and committees in the past and may do so again in the future. *See, e.g., id.* (representing a political action committee); *Illinois Liberty Principles PAC v. Madigan*, 904 F.3d 463 (7th Cir. 2018) (representing a political action committee); *Harlan v. Scholz*, 866 F.3d 754 (7th Cir. 2017) (representing a candidate for Congress and a county political party committee).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amici funded its preparation or submission. Counsel timely provided notice to and received consent from all parties to file this brief.

60/Plus Association, Inc. (60 Plus) is a non-stock, tax-exempt research and educational corporation qualified under Internal Revenue Code Section 501(c)(4). 60 Plus was founded as a seniors advocacy group with a free enterprise, less government, less taxes approach to seniors' issues. The interest of 60 Plus in this case stems from its goal of educating seniors and their families about the virtues of a free-market, free-speech future for seniors and their families.

Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. As an alliance-building organization, Alliance Defending Freedom unites attorneys, ministry leaders, pastors, and like-minded organizations in a common purpose: a shared commitment to defending religious liberty, the sanctity of life, and marriage and family. This work frequently involves securing rights by litigating jurisprudentially significant cases before this Court. *See, e.g., National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 Sup. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Town of Greece, New York v. Galloway*, 134 Sup. Ct. 1811 (2014); *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014).

Americans for Tax Reform (ATR) is an advocacy organization that represents the interests of the American taxpayers at the federal, state and local levels. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today.

ATR educates citizens and government officials about sound tax policies to further these goals. ATR is interested in this case because taxpayer dollars are being used to target a particular organization due to its viewpoint in order to help the current administration. ATR is a non-profit, tax-exempt organization under Section 501(c)(4) of the Internal Revenue Code.

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free market policy solutions in Tennessee. The Beacon Center operates as a 501(c)(3) organization and provides *pro bono*, public interest legal services to advance the promotion of individual liberty and constitutional rights. To that end, the Beacon Center litigates First Amendment cases, and has participated in amicus efforts at the Supreme Court level in the past, including in *Minnesota Voters Alliance, et al. v. Mansky*, 138 S. Ct. 1876 (2018) and *Daleiden v. National Abortion Federation, et. al* (No. 17-202).

The Center for Worker Freedom (CWF) is a nonprofit, educational organization dedicated to educating the public about the causes and consequences of unionization. CWF supports freedom of speech and association and believes all workers should have the right to decide for themselves whether or not they belong to a labor organization. CWF is interested in this case because the administration sought sanctions against the Evergreen Freedom Foundation and not the labor unions. CWF is concerned that labor organizations receive special benefits and exemptions that other nonprofit organizations do not. CWF is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

Center of the American Experiment is a nonpartisan educational organization dedicated to the principles of individual sovereignty, private property, and the rule of law. It advocates for creative policies that limit government involvement in individual affairs and promotes competition and consumer choice in a free-market environment. Center of the American Experiment, located in Golden Valley, Minnesota, is a nonprofit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

Wisconsin Institute for Law & Liberty is a public interest law firm dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011, WILL has served as counsel for a litigant or amicus party in a number of campaign finance cases including *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014), *CRG Network v. Barland*, 139 F. Supp. 3d 950 (E.D. Wis. 2015), *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165 (Wis. 2015), and *Young v. Vocke*, No. 13-CV-635 (E.D. Wis. 2014). Its founder, President, and General Counsel, Richard Esenberg, has written on the subject of campaign finance law. *See* Richard M. Esenberg, *If You Speak Up, Must You Stand Down:* Caperton *and its Limits*, 45 WAKE FOREST L. REV. 1287 (2010); Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283 (2010); Richard M. Esenberg, Citizens United *Is No* Dred Scott*,* 16 NEXUS: CHAP. J.L. & POL'Y 99 (2010-11).

SUMMARY OF ARGUMENT AND INTRODUCTION

The decision below exemplifies the First Amendment dangers of broad interpretations of vague campaign finance statutes. As the cert. petition demonstrates, the Washington Supreme Court's vagueness analysis violates the fundamental due-process rights of the Evergreen Freedom Foundation (the "Foundation") and engages in impermissible burden-shifting. In doing so, it reaches a conclusion heretofore alien to campaign finance law, that *pro bono* legal representation on an issue regarding ballot access must be reported as a contribution and an independent expenditure.

Public interest organizations and law firms would also have a difficult time reconciling these new reporting obligations under the campaign finance statutes with their ethical obligations under attorney-client confidentiality codes. Attorney billing data can contain valuable insights into case activity and strategy, information attorneys are ethically bound to protect.

Finally, public interest and public policy organizations worry that this is an arbitrary enforcement action targeting a particular organization in an obviously unequal way. This case is an enforcement action against the Evergreen Freedom Foundation based on its *pro bono* representation of citizens in three Washington state trial court cases. In those cases, unions participated on the other side, but they did not face an enforcement action for making an independent expenditure. By seeking sanctions against the Foundation while letting the unions go scot-free,

the state uses its enforcement authority in a viewpoint-based manner to benefit the administration's political coalition and undermine ideological opposition.

ARGUMENT

I. The decision typifies the dangers of vague and overbroad campaign finance regulation.

As the cert. petition ably demonstrates, the Fair Campaign Practices Act is unconstitutionally vague in this instance. Petition for Certiorari at 21. "Confusing" and "ambiguous" statutory language is not a firm foundation for law, especially in a constitutionally fraught realm such as free speech and ballot access. Petition at 22 (quoting decisions below). The decision below exacerbated this problem by applying an extraordinarily broad construction rather than a narrow construction. Petition at 24. Finally, the Washington Supreme Court engaged in an unprecedented burden-shift which suddenly requires the speaker to demonstrate the correctness of his position rather than the government having to do so. Petition at 24-26.

The preceding paragraph summarizing the Petition leads *amici* to a substantial fear for the First Amendment rights of public interest legal organizations engaged in campaign finance and election administration cases in Washington and other states. Courts often find that the terms used in states' campaign finance statutes are vague, ambiguous, or overbroad. *See, e.g., N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 284 (4th Cir. 2008) ("Neither the regu-

lator nor the regulated can possibly be expected to know when the 'essential nature' of speech is deemed to 'direct voters to take some action to nominate, elect, or defeat a candidate in an election' based on these vague criteria."); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999); *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 U.S. Dist. LEXIS 142122, at *58 (D. Ariz. Sep. 30, 2013) ("[I]t is not clear that even a campaign finance attorney would be able to ascertain how to interpret the definition of 'political committee.'"); *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 792 (S.D. W. Va. 2009); *People v. Weiss*, 479 N.W.2d 30, 33 (Mich. App. 1991); *Williams v. Fahrenholtz*, 990 So. 2d 99, 108 (La. App. 2008).

This is a problem that will persist: "the law of campaign finance is quite complicated and in some flux. Courts, state governments, and those involved in the political process are doing what they can to navigate this difficult terrain…" *Leake*, 525 F.3d at 277. Lower courts, then, will continue to be called on to make these difficult line-drawing determinations on what is in or out. In this case, the Washington Supreme Court has drawn an aggressive line that, for the first time, encompasses *pro bono* legal services within campaign disclosure law. If this precedent stands, it could allow officials in other states with similarly vague laws to pursue claims against public interest legal organizations representing candidates or initiatives that they oppose. Such discrimination would place the burden on those organizations to show why campaign finance laws are too broad, rather than re-

quire the government to justify its broad reading of statutes. Not only does this conflict with this Court's First Amendment precedent, but it could discourage public interest law firms from representing political entities in cases where a rogue attorney general could pursue a claim against them for failure to disclosure their representation as a campaign contribution.

Such a development would have an especially negative impact on non-major parties and their candidates, which often rely on *pro bono* legal services to challenge campaign finance or election administration structures that they believe overly or overtly preference incumbents and the traditional two-party system. *See, e.g., Libertarian Party of Va. v. Judd*, 718 F.3d 308 (4th Cir. 2013); *Libertarian Party of S.D. v. Krebs*, No. CIV-15-4111, 2018 U.S. Dist. LEXIS 169851 (D.S.D. Oct. 2, 2018); *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340 (N.D.Ga. 2006) (representing the Constitution Party as well). It would also harm citizen activists like the initiative proponents in this case, who likely could not afford the same level of legal representation as the Republican National Committee or Democratic National Committee might. And it would limit the ability of many elected officials, those living on their public-service salaries and those who do not wish to be investigated by state ethics regulators, to access top-quality counsel in bringing precedent-setting First Amendment cases, such as *Buckley v. Valeo*, 424 U.S. 1 (1976).

II. The decision below would place *pro bono* attorneys in a conflict between their disclosure obligations and their ethical obligations.

Even if regulators decided not to go after *pro bono* practices at firms and public interest organizations, attorneys providing *pro bono* legal services to political entities would place themselves in a different kind of dilemma by attempting to comply with the disclosure requirements imposed by the court below. The attorneys would be forced to create billing records for *pro bono* services, records that likely would not be made or be provided to the client but for the requirements of Washington law.

Washington's Public Disclosure Commission requires that a campaign file its disclosure reports on a monthly basis, including Schedule B to Form C-4 listing in-kind contributions. Rev. Code of Wash. 42.17A.200-270. Requiring monthly reports of contributed legal services could force attorneys to compromise their ethical obligations to protect privileged information. *See* Wash. Rules of Prof. Conduct 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…").

Invoices from attorneys to clients that provide detail as to the legal services rendered are generally privileged, but bills that reveal only the amount charged are not protected. *In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982). A campaign finance report would normally fall into the second category, disclosing only an attorney's name and the dollar value of the in-kind contribution. However, Washington's un-

usually frequent reporting requirements push the information into the first category because the regularity of reporting provides an unacceptable insight into the legal strategy of a client.

> When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees. This is because, even though the amount of money paid for legal services is generally not privileged, an invoice that shows a sudden uptick in spending might very well reveal much of a government agency's investigative efforts and trial strategy. Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event.

L.A. Cty. Bd. of Supervisors v. Superior Ct., 386 P.3d 773, 781 (Ca. 2016).

> The chronological nature of billing records reveals when, how, and what resources were deployed. With this knowledge, a party in the same proceeding could deduce litigation strategy as to specific or global matters. Aggregate fee summaries also reveal strategic choices. When litigation is pending, the discovery rules impose a duty to amend or supplement discovery throughout litigation. A dramatic increase in mid-litigation spending could imply an upcoming filing or significant research expenditures re-

> lated to elevated concerns over recent litigation events.

In re Nat'l Lloyds Ins. Co., 532 S.W.3d 794, 806 (Tex. 2017).

The frequency of reporting offers just the sort of insight that led the Supreme Courts of California and Texas to hold the attorney-client privilege applies to similar aggregate fee summaries in those states. The Washington Supreme Court's ruling, when placed in the broader context of Washington's campaign finance system, places attorneys in an impossible choice between complying with the disclosure requirements or their duty of confidentiality.

III. Public interest organizations are concerned by the targeted enforcement in this case.

Public interest attorneys and organizations play a unique and vital role in our system of justice. They often take on the most controversial and high-profile cases, from going after the Klu Klux Klan in the South, *see Donald v. United Klans of America*, C.A. 84-0725 (S.D. Ala. Feb. 12, 1987), to defending the First Amendment rights of neo-Nazis to march and protest, *see National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). They take these stands knowing that the legal profession as a whole shares in a tradition that dates to John Adams' defense of the redcoats present at the Boston Massacre. Yet that proud heritage of taking on controversial cases that challenge established power structures inevitably will be chilled if public interest organizations

find themselves selectively targeted for reprisal and retribution by politically motivated regulators.

The Evergreen Freedom Foundation provided *pro bono* legal services to citizens who were seeking to bring initiatives challenging unions' entrenched power in three municipalities by representing them in three lawsuits. Petition Appx. at A37. Attorneys representing unions opposed all three lawsuits. *Id.* *See, e.g.*, James Casey, "Judge rules against Sequim labor lawsuit," Peninsula Daily News (Dec. 4, 2014) (reporting that Teamsters Local 589 joined the city in defending against the initiative supporters' lawsuit). Public-sector unions are a core part of the Attorney General's political coalition and fundraising base. *See* VoteSmart.org, "Bob Ferguson's Campaign Finances," https://votesmart.org/candidate/campaign-finance/95581/bob-ferguson#.XMM-bJNKiu4.

Here only the Evergreen Freedom Foundation was subject to an enforcement action by the Attorney General for the supposed undisclosed independent expenditure. If it was an undisclosed independent expenditure to support the initiative lawsuits, then it was necessarily an undisclosed independent expenditure on the part of the unions to oppose the initiative lawsuits. Yet no enforcement action was brought against the unions simultaneous or subsequent to this action against the Foundation.

Whether motivated by political alliance or some other influence, the fact remains that one side was arbitrarily targeted for enforcement in this instance. Not only is that unfair, but it creates a credible threat that all public-interest legal organizations need to be

wary—cross a partisan regulator at your own risk, for in doing so you too may be subject to fines, fees, and penalties.

CONCLUSION

By law and by tradition, public interest legal organizations must pursue their advocacy to advance the civil and human rights of their clients and our citizenry as a whole. 26 CFR § 1.501(c)(3)-1(d)(2)(iii). Those civil rights include free speech and the right to run for and participate in our political system, and that citizenry numbers among itself candidates and activists. It is a reflection of the best of our legal profession when donors, attorneys, and clients band together to advance human freedom and flourishing. And it is a great service to this Court, which frequently benefits from their zealous and informed advocacy.

Yet that proud tradition is under attack by the court below, which takes advantage of a typically vague campaign finance scheme to convert a decades-long consensus into an illegal act subject to fines and sanctions. This Court should grant cert. and ensure greater respect for the First Amendment.

Respectfully submitted,

Jeffrey M. Schwab
Counsel of Record
Daniel R. Suhr
Brian K. Kelsey
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St.,
Ste. 1500
Chicago, IL 60603
(312) 263-7668
jschwab@libertyjusticecenter.org

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