SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

STATE OF WASHINGTON, *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Plaintiff, v. VOTERS EDUCATION COMMITTEE, a political committee, Defendant.	The Honorable Richard A. Jones NO. 04-2-33247-8 SEA AMICUS CURIAE BRIEF ON BEHALF OF THE CAMPAIGN LEGAL CENTER
VOTERS EDUCTION COMMITTEE, a Washington nonprofit corporation; BRUCE BORAM, an individual; VALERIE HUNTSBERRY, an individual, Plaintiffs, v. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL CONNELLY, JEANNETTE WOOD, FRANCIS MARTIN, EARL TILLY, and JANE NOLAND, Commissioners of the Washington State Public Disclosure Commission in their individual capacities, VICKI RIPPIE, Executive Director of the Washington State Public Disclosure Commission, in her individual capacity, and CHRISTINE GREGOIRE, Attorney General of the State of Washington in	The Honorable Richard A. Jones NO. 04-2-23551-1 SEA AMICUS CURIAE BRIEF ON BEHALF OF THE CAMPAIGN LEGAL CENTER

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her individual capacity,

Defendants,

and

DEBORAH SENN,

Intervenor.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Campaign Legal Center, *amicus curiae* herein, respectfully submits this brief to provide this Court with an understanding of the historical—but now outdated—distinction between "express advocacy" and "issue advocacy" in the field of campaign finance law. This brief should inform the Court how historical misconceptions regarding the "express advocacy" / "issue advocacy" distinction have been corrected by the Supreme Court through its decision upholding the Bipartisan Campaign Reform Act of 2002 ("BCRA") broadcast advertising provisions in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003) [hereinafter *McConnell*].[1]

Applying the *McConnell* holding to the facts of this case leads to one inescapable conclusion: payments made by the Voters Education Committee ("VEC") for certain broadcast ads were "expenditures" under Washington law. Having made such expenditures, VEC was required—but failed—to comply with the political committee registration requirement of RCW 42.17.040, as well as the reporting and disclosure requirements of RCW 42.17.080 and .090. By failing to comply with these disclosure requirements, VEC also violated RCW 42.17.120, which prohibits contributions and expenditures made in such a way as to conceal the identity of the source of the funds.

The VEC has alleged that its rights under the First Amendment to the United States Constitution are being infringed by the Public Disclosure Commission's ("PDC") enforcement of the state's disclosure statutes (RCW 42.17.040, .080, .090, and .120). Specifically, VEC claims that certain ads it has broadcast are "issue ads" that are not subject to regulation under Chapter

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[1] Although the candidate who is the subject of the Voters Education Committee's ads is not a candidate for federal office, the Voters Education Committee has made the claim that its ads are free speech protected by the First Amendment to the United States Constitution. Thus, many of the same arguments being made by the Voters Education Committee here about how its ads are protected "political speech" and "issue advocacy" have been addressed in court decisions in the federal context, including *McConnell*, and these decisions should guide this Court in resolving this case.

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42.17 RCW; and if such ads are subject to regulation, then the statutes subjecting the ads to regulation violate the United States Constitution's guarantee of freedom of speech.

As explained more fully below, VEC's efforts to cast its ads as "issue advocacy" rather than "express advocacy" are an attempt to have this case decided based on legal doctrine that is now outdated. Moreover, VEC's reliance on *Washington State Republican Party v. State of Washington State Public Disclosure Commission*, 141 Wn.2d 245 (2000) [hereinafter *Washington State Republican Party*], is also misplaced, as that decision was based on the state of the campaign finance law prior to the Supreme Court's landmark *McConnell* decision. Indeed, the principal basis on which the supreme court of Washington decided that case—the distinction between "issue advocacy" and "express advocacy"—has been deemed "functionally meaningless" by the United States Supreme Court. *McConnell,* 124 S. Ct. at 703. The Supreme Court has made clear that political ads need not contain "express advocacy" in order to be regulated. The broadcast ads at issue here may be regulated in the manner prescribed by Washington law without violating VEC's free speech rights under the United States Constitution.[2]

II. SUMMARY OF THE LAW

The VEC has alleged that the PDC violated its constitutional rights by finding that the VEC had violated multiple provisions of Chapter 42.17 RCW. VEC Complaint at ¶ 4.5. Several statutes are at issue in this lawsuit.

Washington campaign finance law defines "political committee" as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation

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[2] *Amicus curiae* takes no position on other claims raised by the VEC in this case.

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of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." RCW 42.17.020(33).

"Expenditure" is defined, in operative part, as:

> a payment . . . in exchange for goods, services, property, facilities, or anything of value for the purpose of assisting, [or] benefiting . . . any public official or candidate, or assisting in furthering or opposing any election campaign.

RCW 42.17.020(19).

State law further provides that:

> Every political committee, within two weeks after its organization or, within two weeks after the date when it first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier, shall file a statement of organization with the commission . . . .

RCW 42.17.040(1). In addition to the statement of organization, political committees must file campaign finance disclosure reports with the Commission at intervals specified by RCW 42.17.080. The reports must contain detailed information regarding the committee's financial activities, including:

> The name and address of each person who has made one or more contributions during the period, together with the money value and date of such contributions and the aggregate value of all contributions received from each such person during the campaign . . . .

RCW 42.17.090(1)(b) and (f).

Finally, Washington campaign finance law prohibits contributions and expenditures made "in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment." RCW 42.17.120.

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III. BACKGROUND AND FACTS

In 1972, immediately following Congress' adoption of the Federal Election Campaign Act of 1971, Washington voters passed Initiative Measure No. 276, which, among other things, established campaign finance disclosure requirements for political committees. *See* RCW 42.17.040, .080, .090 and .120. These disclosure provisions have been amended several times, but the basic provisions have remained the same.

In this lawsuit, VEC, a 527 nonprofit corporation, has brought suit claiming that broadcast advertisements it has sponsored and funded attacking Deborah Senn, a candidate for Attorney General in the State of Washington, are issue ads and not express advocacy. VEC contends its ads are constitutionally protected from regulation because they "are issue oriented and do not expressly advocate the election or defeat of any candidate[.]" VEC Complaint at p. 7 ¶ 1. See also VEC Complaint at ¶s 4.3, and 4.6-4.8. Accordingly, VEC claims its advertisements criticizing Deborah Senn—a candidate for Attorney General on the September 14, 2004 primary election ballot and former Washington State Insurance Commissioner—do not subject the VEC to Washington's campaign finance laws.

According to the State of Washington, VEC's broadcast ads contain the following text:

> Who is Deborah Senn looking out for? As Insurance Commissioner, Senn suspended most of the $700,000 fine against an insurance company in exchange for the company's agreement to pay for four new staff members in Senn's own office. Senn even tried to cover up the deal from state legislators. The Seattle Post Intelligencer said Senn's actions easily could lead to conflict of interest abuses. Log on to learn more.

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State of Washington Complaint at ¶ 3.3.[3] According to the State of Washington, the VEC has spent at least $365,000 on broadcast television advertisements attacking candidate Senn and these ads have run in various media outlets across the State of Washington. *Id.* at ¶ 3.4.

In its complaint, VEC has acknowledged it is a 527 political organization, ¶ 3.1, that it began airing television advertisements on September 1, 2004 criticizing candidate Deborah Senn, *id.*, and alleges that its ads are protected speech under the First Amendment to the Constitution because they constitute "issue advocacy". *Id.* at ¶ 4.3.[4]

IV. ARGUMENT

A. The VEC made payments for the purpose of opposing the election campaign of a state candidate and, as a result, is a political committee under Washington state law.

On September 1, 2004, VEC began airing television advertisements criticizing Deborah Senn, a candidate for Attorney General in the September 14, 2004 primary election. VEC Complaint at ¶ 3.1. Public Disclosure Commission staff determined that, as of September 9, 2004, VEC had made payments totaling at least $365,000 for these advertisements—payments made for the purpose of opposing an election campaign and, therefore, clearly meeting the state law definition of expenditure. RCW 42.17.020(19).

According to these undisputed facts, by early September 2004, VEC was clearly a "person . . . having the expectation of . . . making expenditures in . . . opposition to [a] candidate" and, therefore, had become a political committee by operation of law. RCW 42.17.020(33).

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[3] The State of Washington filed a complaint against the VEC in Superior Court for Thurston County on September 10, 2004. The venue of that complaint has been moved to the Superior Court for King County. Documents filed in both cases are referenced in this brief.

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Washington state law requires VEC, a political committee, to file with the PDC a statement of organization, as well as periodic campaign finance reports. RCW 42.17.040(1) and .080. The VEC has violated these statutes. Furthermore, the VEC's refusal to disclose its campaign finance activities to the PDC constitutes concealment of the sources of VEC's expenditures, in violation of RCW 42.17.120.

The VEC has argued that its constitutional rights "were violated when the PDC found . . . that there were apparent multiple violations of Chapter 42.17 RCW in VEC's political speech . . ." VEC Complaint at ¶ 4.5. The VEC has not anchored its constitutional claim to any specific provision of Washington state law but, instead, has made a general claim that enforcement of any state disclosure requirements would violate the committee's constitutional rights. Nevertheless, the analysis of VEC's constitutional rights in this context necessarily begins with a specific provision of state law: the state's definition of the term "expenditure." The VEC's payments for political "expenditures" triggered state disclosure requirements. Finding that VEC's constitutional rights have been violated would require finding the state's definition of "expenditure" to be unconstitutional.

The VEC has characterized its political speech as "issue advocacy," invoking the historical—but now outdated—distinction between "express advocacy" and "issue advocacy." VEC Complaint at ¶ 4.3. The distinction between "express advocacy" and "issue advocacy" dates back to a 1970s Supreme Court decision regarding the federal law definition of "expenditure," but this distinction was deemed "functionally meaningless" by the Supreme Court in 2003. *McConnell,* 124 S. Ct. at 703.

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[4] Although it alleges its ads are issue ads and not directed for or against a political candidate, VEC admits in their

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B. The historical distinction between "express advocacy" and "issue advocacy" led to widespread circumvention of campaign finance laws.

The distinction between "express advocacy" and "issue advocacy" grew out of the Watergate-era Federal Election Campaign Act ("FECA"). FECA contained two expenditure-related provisions that led to the "express advocacy" / "issue advocacy" distinction. One provision restricted independent expenditures "relative to a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) [hereinafter *Buckley*]. The other required disclosure of expenditures used "for the purpose of . . . influencing" a federal election. *Id.* at 63.

When the constitutionality of these FECA provisions was before the Supreme Court in *Buckley*, the Court found the phrases "relative to" and "for the purpose of . . . influencing" unconstitutionally vague. The Court reinterpreted the statute in a manner that "saved" its constitutionality—interpreting the term "expenditure" to be limited to communications that included explicit words of advocacy of election or defeat of a candidate. *Id.* at 42-44. In a footnote, the Court provided examples of such words of express advocacy, including "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n. 52. These phrases quickly became known in the world of campaign finance law as *Buckley*'s "magic words."[5]

From the 1976 *Buckley* decision until Congress' adoption of BCRA in 2002 (see below), a federal election advertisement was not subject to federal campaign finance laws unless it contained express advocacy using "magic words" or phrases with a clear and unmistakable

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complaint that the ads are "political speech" VEC Complaint ¶3.1 (emphasis added).

[5] Subsequently, in *Massachusetts Citizens for Life, Inc. v. FEC*, 479 U.S. 238, 249 (1986) ("*MCFL*"), the Supreme Court construed the prohibition on corporate or union expenditures "in connection with" a federal election, 2 U.S.C. § 441b(a), to encompass only "express advocacy," that is, direct exhortations to support or oppose a candidate, such as "vote for" or "vote against." The Court's rationale in *MCFL* was based on its earlier discussion in *Buckley v. Valeo*, 424 U.S. 1, 40-42 (1976), where, in order to avoid constitutionally impermissible vagueness, it had construed

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meaning. Instead, such an advertisement would be deemed issue advocacy not subject to federal campaign finance laws. This distinction between "express advocacy" and "issue advocacy" had at least two significant consequences in federal elections.

First, although federal law prohibited corporations and unions from making express advocacy "expenditures" from treasury funds, they could spend unlimited treasury funds on issue advocacy. So long as corporations and unions refrained from using so-called "magic words," they could—and did—evade federal campaign finance prohibitions by using general treasury funds to pay for so-called issue advocacy.

Second, federal laws requiring disclosure of "expenditures" did not apply to issue advocacy, so individuals, corporations and labor unions were free to raise and spend undisclosed amounts of money from undisclosed sources by avoiding the use of "magic words." Voters and candidates would see an abundance of issue ads immediately before an election, but have no idea who was funding the ads or how much they were spending. In short, issue advocacy escaped federal regulation altogether.

C. The Supreme Court in *McConnell* declared the historical distinction between "express advocacy" and "issue advocacy" functionally meaningless.

In 2002, Congress enacted BCRA—Title II of the statute, in particular—to address the problem of unregulated soft money "issue advocacy" spending, to restore efficacy to the longstanding ban on corporate and union expenditures, and "to correct the flaws it found in the existing system." *McConnell,* 124 S. Ct. at 689. Congress repudiated the long-ineffective magic words test, enacting a new "bright line" test to regulate corporate and union campaign spending.

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a statutory restriction on expenditures "relative to" a candidate to include "only explicit words of advocacy of the election or defeat of a candidate."

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By reference only to objective criteria, Congress defined "electioneering communications" as those which meet the following four standards:

1. a broadcast, cable or satellite communication,
2. that refers to a clearly identified candidate for federal office,
3. made in a period 30 days prior to a primary election or 60 days prior to a general election for that candidate, and
4. targeted to the electorate of that candidate.

2 U.S.C. § 434(f)(3)(A). Such "electioneering communications" are, of course, not banned. Instead, they are subject to certain disclosure requirements, *id.* at § 434(g), and to the same source restrictions imposed on "express advocacy" communications. Namely, corporations and labor unions may not use general treasury funds to pay for electioneering communications. Instead, they must pay for electioneering communications using a segregated PAC. *Id.* at §§ 441b(b)(2); 441b(c)(1).

When the Supreme Court in *McConnell* reviewed the constitutionality of Congress's approach to regulating electioneering communications, it upheld the BCRA provisions in their entirety. The Supreme Court acknowledged the uselessness of using magic words to distinguish between campaign speech that can and can not be constitutionally regulated. The Court reasoned:

> Not only can advertisers easily evade the [*Buckley* bright] line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley's* express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption . . . .

McConnell, 124 S. Ct. at 689. The Court observed "the overwhelming evidence that the line between express advocacy and other types of election-influencing expression is . . . functionally meaningless." *Id.* at 703. The Court continued: Indeed, Congress enacted the new "electioneering communication[s]" provisions precisely because it recognized that the express

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advocacy test was "woefully inadequate" at capturing communications designed to influence candidate elections. *Id.*

The Court conclusively rejected the *McConnell* plaintiffs' central argument that the "express advocacy" test was a constitutional mandate, emphasizing that it was instead "an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell*, 124 S. Ct. at 687. The Court said that, in *Buckley* and then again in *MCFL,* it had resorted to interpreting the statutory language at issue as limited in scope to express advocacy in order to save the statute from being held void for vagueness, but those cases "in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech." *Id.* at 688. The *McConnell* Court continued:

> Nor are we persuaded . . . that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.

Id. at 688-89.

The *McConnell* plaintiffs challenged the BCRA "bright line" test as overbroad, the Court noted, by arguing that the justifications which support the regulation of express advocacy "do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 696. But this argument failed, the Court said, "to the extent that the issue ads broadcast during the 30- and 60- day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.*

The Court observed that the "precise percentage of issue ads" that identified a candidate and were aired in the pre-election period "but had no electioneering purpose" is a matter of dispute, but noted that "the vast majority of ads clearly had such a purpose." *Id.* But even in acknowledging that a small minority of ads might *not* have that purpose, the Court nonetheless

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plainly said that the inclusion of such ads within the test of electioneering communication was permissible:

> Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions *may finance genuine issue ads during those time frames* by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.

Id. at 696. On this basis the Court in *McConnell* concluded that plaintiffs had not carried their burden of proving the statute was overbroad.

The Supreme Court thus expressly contemplated that the statute may permissibly extend even to "genuine issue ads." Rather than holding that the statute *as applied to* such ads would necessarily be unconstitutional, the Court instead held that to the extent issue ads fell within the scope of the statute, the alternatives available to a corporate or union speaker to finance such ads serve adequately to protect the speaker's constitutional rights.[6]

In sum, the Supreme Court in *McConnell* made clear that individuals and organizations do not possess a First Amendment right to engage in unlimited, undisclosed "issue" advertising immediately before an election. The *McConnell* Court upheld the regulation of *all* electioneering communications even if they not always—but only *often*—are intended to influence the election. Those electioneering communications which are not so intended—those which may be "genuine" issue ads—are nonetheless still permissibly regulated by the statute because they fall within the scope of the statutory "bright line" test, and because the statute provides acceptable alternatives (*e.g.*, a corporation or union's connected political committee subject to contribution limits and disclosure requirements) for the speakers to convey their messages.

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[6] The Court additionally sustained the statute under the facial over breadth test set forth in *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973), and held that "even if we assumed" that BCRA "will inhibit some constitutionally protected" speech, the statute would not be facially invalid unless it did so substantially. The Court concluded that

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D. The Washington Supreme Court decision in *Washington State Republican Party* does not bar regulation of VEC's political advertisements.

The supreme court of Washington has had only one occasion in recent years to address the application of state campaign finance laws to political advertisements clearly identifying a candidate but avoiding the use of magic words. In 2000, the state supreme court rendered a decision in *Washington State Republican Party* resolving a constitutional challenge to the limits placed on contributions to political parties by RCW 42.17.640. In that case, the Washington State Republican Party paid for televisions advertisements critical of Democratic gubernatorial candidate Gary Locke using "soft money" raised by the party in excess of the state contribution limit. The PDC found that the party had violated the contribution limit and referred the apparent violation to the Attorney General for further legal action. The party argued, in response, that the advertisements in question were "issue advocacy" not subject to the contribution limit or disclosure laws.

The supreme court found that in order to decide whether the funds used to pay for the advertisements could be regulated, it had to decide whether the advertisement was "express advocacy" or "issue advocacy." In analyzing the question, the court relied heavily on the U.S. Supreme Court's *Buckley* decision. *Washington State Republican Party*, 141 Wn.2d at 254-55. Concluding that it would apply "the bright-line express advocacy test of *Buckley*," *id.* at 269, the state supreme court found that "[s]o long as the ad does not constitute an exhortation to vote for

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"[f]ar from establishing that BCRA's application to pure issue ads is substantial,...the record strongly supports the contrary conclusion." *McConnell*, 124 S. Ct. at 697.

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or against a specific candidate, . . . it is not express advocacy" and may not be regulated. *Id.* at 271.[7]

The decision of the Washington Supreme Court in *Washington State Republican Party* was rendered three years before the U.S. Supreme Court's decision in *McConnell* upholding the constitutionality of BCRA's electioneering communication provisions and establishing that political advertisements need not contain "express advocacy" in order to be regulated.

Importantly, the decision in *Washington State Republican Party* relied heavily on the "express advocacy" / "issue advocacy" distinction that emanated from *Buckley*—a distinction which, as shown above, is no longer the basis on which political advertisements are viewed for purposes of determining whether they are subject to campaign finance regulation. For these reasons, we urge this Court to review the advertisements at issue in this case through the lens of *McConnell*, rather than applying the now outdated "express advocacy" / "issue advocacy" distinction forged by *Buckley* and its progeny.

Application of *McConnell* here would not put this Court at odds with the decision in *Washington State Republican Party* any more than the Supreme Court's decision in *McConnell* is at odds with *Buckley*. In *McConnell*, the Court took the law as it existed at the time (BCRA)

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[7] In reaching this decision, the state supreme court specifically rejected the approach to determining express advocacy that had been outlined in *Federal Election Comm'n v. Furgatch,* 807 F.2d 857 (9th Cir.1987). The court stated:

> [T]he court in *Furgatch* departed from *Buckley* when it concluded that context is relevant to determining whether a communication is express advocacy. Among other things, the court in *Furgatch* found the timing of an advertisement to be significant. In the court's view, an advertisement critical of a candidate appearing close to an election leaves little doubt that the ad calls for a vote against the candidate. We disagree with this approach. *Buckley* intended to protect issue advocacy which discusses and debates issues in the context of an election. Issue advocacy thus does not become express advocacy based upon timing. The right to freely discuss issues in the context of an election, including public issues as they relate to candidates for office, is precisely the kind of issue advocacy the Court recognized was beyond the reach of regulation.

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and viewed its constitutionality in light of the Court's earlier decision in *Buckley*. This Court should adopt a similar approach here—analyze the state's existing statutory definition of "expenditure" in light of the Supreme Court's *McConnell* decision. This Court should, indeed must, "apply the law as it exists" today. *Compton v. Evans*, 200 Wash. 125, 138 (1939). If the Court does so, it will find that the VEC ads may be regulated without impingement of our constitutional guarantee of free speech.[8]

E. The Washington state law definition of "expenditure" should be interpreted in a manner consistent with the purposes of Washington's campaign finance disclosure laws and the Supreme Court's *McConnell* decision.

Washington state law defines "expenditure," in operative part, as:

> a payment . . . in exchange for goods, services, property, facilities, or anything of value for the purpose of assisting, [or] benefiting . . . any public official or candidate, or assisting in furthering or opposing any election campaign.

RCW 42.17.020(19). The Washington Supreme Court has long held that, "[w]here possible, statutes should be construed so as to avoid unconstitutionality." *Washington State Republican Party*, 141 Wn.2d at 280. Washington statutory law requires that the definition of "expenditure," as well as all other provisions of the campaign finance law:

> be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns . . . so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17.010. Furthermore, as stated by the VEC, "[t]he Washington Supreme Court looks to cases interpreting and limiting the Federal Election Campaign Act of 1971's restrictions on

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Washington State Republican Party, 141 Wn.2d at 267. Like the approach in *Furgatch*, BCRA looks to the timing of the communication in order to determine whether it is an electioneering communication.

[8] Importantly, subjecting VEC's broadcast ads to regulation would not mean that such ads could not be broadcast. It would simply require VEC to disclose on a timely basis the source of its funds.

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political speech when analyzing Washington's campaign finance laws." VEC Motion for Summary Judgment p. 5.

In short, *amicus curiae* urges this Court to look to the U.S. Supreme Court for guidance in devising an interpretation of the state law definition of "expenditure" that will "promote complete disclosure of all information respecting the financing of political campaigns." RCW 42.17.010. However, rather than relying on the outdated, ineffective magic words test advocated by the VEC but rejected by the Supreme Court in *McConnell*, we implore this Court to acknowledge the failure of the magic words test over the past three decades and to adopt an interpretation of "expenditure" consistent with *McConnell*. The VEC advertisements in question involved payments for broadcast communications referring to a clearly identified candidate, made in close proximity to an election, and targeted to the electorate of the identified candidate.

In the case before this Court, VEC claims that its ads are issue advocacy protected from regulation under the First Amendment to the United States Constitution and Article I, Section 5 of the Washington State Constitution. The VEC argues that its broadcast ads, cannot be subject to the regulation imposed on such communications because they are "genuine" issue ads. Contrary to the VEC's claims, the U.S. Supreme Court made clear in *McConnell* that VEC's payments for these advertisements may be regulated by the State of Washington without violating VEC's constitutional rights. VEC's payments for the advertisements in question were clearly made for the purpose of opposing a state election campaign and, consequently, were expenditures under Washington law. VEC is a political committee under Washington law. VEC's campaign activities should be subject to the campaign finance disclosure regulations set forth in RCW 432.17.040, .080, .090 and .120.

F. VEC's broadcast political advertisements are "express advocacy" under *Washington State Republican Party*

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Even if this Court applied the holding in *Washington State Republican Party* to this case, VEC's broadcast ads constitute express advocacy. In *Washington State Republican Party,* the supreme court observed that "when a candidate's character and campaign tactics are attacked, the ad may be subject to only one reasonable interpretation: an exhortation to vote against the candidate." 141 Wn.2d at 270. Thus, an ad attacking a candidate's character constitutes express advocacy, according to the court in *Washington State Republican Party.* VEC's broadcast ads clearly cross this threshold.

There can be little doubt that the ad attacks candidate Senn's character. The ad's first sentence ("Who is Deborah Senn looking out for?") uses the candidate's name and suggests that this public official, whose first duty is to act in the public interest, is not doing so. The second sentence ("As Insurance Commissioner Deborah Senn suspended most of the $700,000 fine against an insurance company in exchange for the company's agreement to pay for four new staff members in Senn's own office") again uses the candidate's name and accuses the candidate of receiving a *quid pro quo*—dropping a hefty fine against a large corporation in exchange for getting a larger staff. Essentially, candidate Senn is being charged with bribery in this sentence. Next, the ad's third sentence ("Senn even tried to cover up the deal from state legislators") again references the candidate by name and accuses her of yet another crime, this time a cover up (or an obstruction of justice). And the final substantive sentence of the ad ("The Seattle Post Intelligencer said Senn's actions easily could lead to conflict of interest abuses") uses the candidates name a final time and suggests that the candidate's misdeeds are continuing: "abuses" committed by the candidate are so clear cut that a "conflict of interest" could "easily" develop, says the ad.

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A common sense assessment of this ad clearly shows it to be an attack on the character and integrity of candidate Senn. Though devoid of any so-called "magic words," the ad expressly and repeatedly references the candidate, was broadcast just prior to the election, and impugns the character of the candidate. As such, "the ad may be subject to only one reasonable interpretation: an exhortation to vote against the candidate." *Washington State Republican Party,* 141 Wn.2d at 270.

V. CONCLUSION

For the above reasons, *amicus curiae* submits that the broadcast ads at issue subject VEC to the disclosure requirements of RCW 42.17.040, .080, .090 and .120.

Dated this 23rd day of November, 2004.

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