No. 77724–1

IN THE

SUPREME COURT OF THE STATE OF WASHINGTON

VOTERS EDUCATION COMMITTEE *et al.*,
Plaintiffs/Appellants,

v.

STATE OF WASHINGTON *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION *et al.*,
Defendants/Respondents,

and

DEBORAH SENN,
Intervenor.

BRIEF *AMICUS CURIAE* OF THE CAMPAIGN LEGAL CENTER IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST

Amicus Curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding disclosure, political advertising, contribution limits, enforcement issues, and many other matters. In addition to participating as *amicus curiae* in this case before the trial court and in many other campaign finance-related cases throughout the nation, the CLC served as counsel to defendant intervenors Senator John McCain, Senator Russell Feingold, *et al.*, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), before the U.S. Supreme Court. The CLC has a longstanding, demonstrated interest in campaign finance law and this case directly implicates the CLC's interest.

II. STATEMENT OF THE CASE

Between September 1 and September 10, 2004, appellants Voters Education Committee *et al.* (VEC) aired a television ad throughout the State of Washington critical of Deborah Senn, a candidate for Attorney General in the September 14, 2004 primary election.[1] Clerk's Papers (CP)

[1] The script of the VEC ad at issue in this case, entitled "Better," read:

4, 20, 440. The VEC had neither registered nor filed reports with the Public Disclosure Commission (PDC) prior to running the ad, as is required by state law of entities meeting the definition of "political committee." CP 5, 478.

On September 10, 2004, the PDC initiated an enforcement proceeding against the VEC, alleging that the VEC had failed to comply with state law requirements of "political committee" registration and reporting under RCW 42.17.040–090. CP 89. On the same day, the VEC initiated this lawsuit against the PDC alleging, *inter alia*, that the PDC violated the VEC's constitutional rights through enforcement of the "political committee" registration and reporting requirements. CP 6–7.

The PDC's enforcement proceeding was moved to the King County Superior Court and assigned to the same judge scheduled to hear the VEC's case. On August 12, 2005, Judge Richard Jones issued an oral decision granting the PDC's summary judgment motion—ruling that the

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> 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.

AMENDED BRIEF OF APPELLANTS at 6–7.

VEC ad triggered "political committee" registration and reporting requirements, and that the obligation to register and report as a "political committee" did not violate the VEC's federal or state constitutional rights. CP 422–29. The VEC appealed the Superior Court decision to this Court.

III. ARGUMENT

The VEC admittedly exists for the purpose of influencing candidate elections in the State of Washington. The VEC registered with the Internal Revenue Service (IRS) as a Section 527 political organization—the tax status reserved *exclusively* for organizations with the purpose of influencing candidate elections. The VEC spent more than $500,000 on advertising opposing a candidate for state office—advertising which the VEC itself characterized in its brief as "election-related speech." *See* CP 134; AMENDED BRIEF OF APPELLANTS at 38–48. The VEC falls squarely within the state law definition of "political committee"—a state law that is clearly constitutional under U.S. Supreme Court precedent.

The State of Washington's "political committee" registration and reporting requirements are a clear and constitutional means of advancing

the state's long-recognized compelling interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. *See also Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976); *Alaska Right To Life Committee (AKRTL) v. Miles*, 441 F.3d 773, 792 (9th Cir. 2006).

The U.S. Supreme Court in *Buckley* made clear that disclosure requirements for Section 527 political organizations such as the VEC raise no vagueness problems. *Buckley*, 424 U.S. at 76–80. The *McConnell* Court made clear that the statutory terms "support" and "oppose," which serve as the foundation of Washington's definition of "political committee," are not unconstitutionally vague. *McConnell*, 540 U.S. at 170 n.64. We respectfully urge this Court to reject the VEC's contention that the now-outdated distinction between "express advocacy" and "issue advocacy" (a distinction the U.S. Supreme Court declared "functionally meaningless" in *McConnell*) bars the PDC from enforcing state disclosure laws with regard to the VEC. 540 U.S. at 217.

A. The VEC admittedly exists for the purpose of influencing candidate elections and is a "political committee" under Washington state law.

1. By registering with Internal Revenue Service as a Section 527 political organization, the VEC publicly declared that its purpose is to influence candidate elections.

The VEC "is registered as a Section 527 political organization under Internal Revenue Code." CP 4. The VEC's choice of tax status is a compelling fact in this case. Under federal tax law, a Section 527 "political organization" *must* be "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures . . . for the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State or local public office." 26 U.S.C. § 527(e)(1)–(2).[2] Section 527 tax status is reserved for organizations existing for the purpose of influencing *candidate elections*—and is not available to organizations dedicated to other activities.[3]

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[2] *See also* FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶ 18.03[1] (2002).

[3] Organizations dedicated to activities not intended to influence candidate elections—such as legitimate issue advocacy—but wishing to obtain tax-exempt status, must do so under a different section of the tax code. Religious and charitable organizations, for example, may obtain tax-exempt status under Section 501(c)(3) of the tax code and are *prohibited* from intervening in candidate campaigns. *See* 26 U.S.C. § 501(c)(3); *see also* HILL &

By registering as a Section 527 organization with the IRS, the VEC publicly declared that its purpose was to influence candidate elections and it ran expensive ads to do so. As a 527 organization, the VEC gained the benefit of federal tax exemption for unlimited candidate-oriented fundraising and spending. Because the VEC's avowed purpose and election-related ads establish that it is a "political committee," it was required to register with the state and comply with state disclosure laws. But the VEC wants to have its cake and eat it too. It wants to enjoy the tax-exempt status reserved for political committees, while claiming immunity from Washington's political committee disclosure requirements.

2. The VEC made payments for the purpose of opposing the election of a state candidate. As a result, it became a "political committee" under Washington state law.

On September 1, 2004, VEC began airing a television advertisement criticizing Deborah Senn, a candidate for Attorney General in the September 14, 2004 primary election. CP 4. By September 9, 2004, the VEC had made payments totaling more than $500,000 for the ad—

MANCINO at ¶ 2.02[7]. Section 501(c)(4) of the tax code establishes tax-exempt status for nonprofit social welfare organizations—but strictly limits the extent to which such organizations can intervene in candidate elections. *See* 26 U.S.C. § 501(c)(4); *see also* Internal Revenue Service, Rev. Rul. 81–95, 1981–1 C.B. 332; *and* HILL & MANCINO at ¶ 13.04. The VEC's activities, however, do not correspond to the requirements for tax-

payments made for the purpose of opposing candidate Senn and, therefore, clearly meeting the state law definition of "expenditure." CP 134. *See also* RCW 42.17.020(22).

These undisputed facts show that, by early September 2004, VEC was 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(38). Washington state law requires political committees such as the VEC to file with the PDC a statement of organization and to make periodic campaign finance reports. RCW 42.17.040(1) and .080. The VEC violated these statutes.

3. In its brief, the VEC characterizes its advertising as "election-related speech"—conceding its intent was to influence a candidate election.

The VEC's argument is at odds with itself. Although the VEC argues that its speech may not constitutionally be regulated under allegedly-vague state laws distinguishing election-related speech from other types of speech, the VEC simultaneously and repeatedly characterizes its speech as "election-related." The VEC dedicates ten pages of its brief to arguing why its "election-related" speech deserves

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exemption as one of these section 501(c) organizations, because its activities do not

special protection. AMENDED BRIEF OF APPELLANTS at 38–48. The VEC argues, for example, that the state constitution "affords election-related speech greater protection" than the U.S. Constitution, and that this Court "has consistently afforded election-related speech greater protection than has the United States Supreme Court." AMENDED BRIEF OF APPELLANTS at 39, 42.

Although conceding that its ad was "election-related speech," the VEC also characterizes its political speech as "issue advocacy" in an effort to evade state campaign finance laws by invoking the historical—but now outdated—distinction between "express advocacy" and "issue advocacy." CP 6. But the distinction between "express advocacy" and "issue advocacy" has been declared by the U.S. Supreme Court to be "functionally meaningless," as we discuss fully below. *McConnell*, 540 U.S. at 217.

The VEC's concession that its ad was "election-related speech" establishes that its ad was indeed election-related. And the fact that the VEC acted as a "political committee" intending to influence the 2004 Washington Attorney General election is further evidenced by the VEC's

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constitute "issue advocacy" as the term is used for tax law purposes.

registration as a Section 527 political organization.

B. U.S. Supreme Court decisions in *Buckley* and *McConnell* make clear that the VEC's election-related speech may constitutionally be regulated.

1. The U.S. Supreme Court in *Buckley* made clear that disclosure requirements for Section 527 political organizations such as the VEC raise no vagueness problems.

The VEC's argument boils down to an assertion that the state law definition of "political committee" is unconstitutionally vague. *See, e.g.*, AMENDED BRIEF OF APPELLANTS at 19. Under state law, a "political committee" is "any person . . . having the expectation of receiving contributions or making expenditures in support of, or in opposition to, any candidate or any ballot proposition." RCW 42.17.020(38).

The U.S. Supreme Court considered and rejected a nearly identical argument in *Buckley*, 424 U.S. at 76–80. Although the Court had vagueness concerns regarding the application of a Federal Election Campaign Act (FECA)[4] disclosure provision to *individuals*, the Court had

[4] More specifically, at issue in *Buckley* were the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431 *et seq.*).

no vagueness concerns with regard to *political organizations* such as the VEC. *Buckley*, 424 U.S. at 79. The Court explained:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly . . . [to] only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. (footnotes omitted).

Like the "major purpose" organizations referenced by the U.S. Supreme Court in *Buckley*, the VEC declared its major purpose to be influencing candidate elections when it registered with the IRS as a Section 527 political organization.[5]

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[5] Although the above-quoted *Buckley* passage refers to "political committee" and Section 527 refers to "political organization," the only legal distinction between the two terms is that the FECA definition of "political committee" encompasses only those Section 527 "political organizations" with the major purpose of influencing *federal* candidate elections, while Section 527 encompasses *all* "political organizations" with the major purpose of influencing candidate elections—federal, state and local. In other words, all FECA "political committees" are Section 527 "political organizations," but all Section 527 "political organizations" are not FECA "political committees." Those Section 527 organizations that are not FECA "political committees," such as the VEC, are state

2. The *Buckley* distinction between "express advocacy" and "issue advocacy" led to widespread circumvention of campaign finance laws and was declared "functionally meaningless" by the U.S. Supreme Court in *McConnell.*

Although the U.S. Supreme Court in *Buckley* made clear that Washington's disclosure statutes may constitutionally be applied to political committees whose major purpose is to influence candidate elections, the VEC nevertheless argues that only "express advocacy" expenditures may be subject to disclosure requirements. *See, e.g.*, AMENDED BRIEF OF APPELLANTS at 36.

The distinction between "express advocacy" and "issue advocacy" grew out of a 1974 amendment to FECA providing that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which . . . exceeds $1,000." *Buckley*, 424 U.S. at 39.

FECA's restriction on "expenditures . . . relative to a clearly identified candidate" was challenged in *Buckley* on First Amendment grounds. The Court found the phrase to be unconstitutionally vague and narrowed its application to "save" its constitutionality—interpreting the phrase to apply only to communications that included explicit words of

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"political committees." *Cf.* 2 U.S.C. § 431(4) (definition of "political committee"), *with*

advocacy of election or defeat of a candidate. *Id.* at 42–44. In a footnote, the *Buckley* Court provided examples of such words of express advocacy, including "vote for," "elect," "support," "defeat," and "reject." *Buckley*, 424 U.S. at 44 n.52. These phrases quickly became known in the world of campaign finance law as *Buckley*'s "magic words"—and thus was born the now-legendary distinction between "express advocacy" and "issue advocacy."[6]

From the 1976 *Buckley* decision until Congress' adoption of the Bipartisan Campaign Reform Act of 2002 (BCRA),[7] a federal election advertisement was not subject to federal campaign finance laws unless it contained express advocacy using "magic words" or language constituting a clear exhortation to vote for or against a candidate.[8] Such ads instead

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26 U.S.C. § 527(e)(1)–(2) (definition of "political organization").

[6] 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*, 424 U.S. at 42–44.

Similarly, this Court applied "the bright-line express advocacy test of *Buckley*" in *Washington State Republican Party v. State of Washington Public Disclosure Comm'n*, 141 Wn.2d 245, 269 (2000), when considering a constitutional challenge to Washington state law limits on contributions to political parties. This Court found that, "[s]o long as the ad does not constitute an exhortation to vote for or against a specific candidate, . . . it is not express advocacy" and may not be regulated. *Id.* at 271.

[7] Pub. L. No. 107–155, 116 Stat. 81 (2002).

[8] *See, e.g.*, *MCFL*, 479 U.S. at 249; *see also Washington State Republican Party*, 141

were deemed issue advocacy not subject to federal regulation. 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—and did—evade the prohibition by refraining from using so-called "magic words." Second, and similarly, individuals, corporations and labor unions evaded disclosure requirements by avoiding the "magic words."

In 2002, Congress enacted BCRA to address the problem of undisclosed sham issue ads. Congress repudiated the ineffective "express advocacy" test, enacting a broad new "electioneering communications" test to reign in spending that had the purpose and effect of influencing candidate elections, but that evaded regulation through avoidance of "magic words." Congress defined "electioneering communications" to encompass any broadcast, cable or satellite communication referring to a clearly identified federal candidate, within 30 days of a primary or 60 days of a general election, that targeted the electorate of that candidate.

Wn.2d at 269. In the event this Court chooses to employ the "express advocacy" standard in the present case, we submit that the VEC ad in question constitutes a clear exhortation to vote against Deborah Senn and is, therefore, express advocacy subject to regulation

McConnell, 540 U.S. at 189–90. *See also* 2 U.S.C. § 434(f)(3)(A).

The new BCRA restrictions on broadcast ads were challenged in *McConnell* on the grounds that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." *McConnell*, 540 U.S. at 190. The Court flatly rejected this assertion, making clear that "the express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command," and that the Court had not suggested that "a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 191–92.

The Court rejected the notion that the First Amendment "erects a rigid barrier between express advocacy and so-called issue advocacy," and explained that such a notion "cannot be squared with [the Court's] longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *Id.* at 193. The Court continued:

Not only can advertisers easily evade the [express

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under state law.

> advocacy] 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 . . . .

Id. at 193–94; *see also AKRTL*, 441 F.3d at 785 ("[A]s the Supreme Court noted in *McConnell*, the line between express and issues advocacy is, in any event, not constitutionally compelled."); *ACLU of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("After *McConnell*, the line between 'express' and all other election-related speech is not constitutionally material[.]").

The U.S. Supreme Court concluded in *McConnell* that "the line between express advocacy and other types of election-influencing expression is . . . functionally meaningless." *McConnell*, 540 U.S. at 217.

3. The U.S. Supreme Court in *McConnell* made clear that the statutory terms "support" and "oppose"—which serve as the foundation of Washington's definition of "political committee"—are not unconstitutionally vague.

In addition to reigning in sham issue ads, BCRA also established new restrictions on political party public communications that promote, support, attack or oppose candidates—"regardless of whether the

communication expressly advocates a vote for or against a candidate." 2 U.S.C. § 431(20)(A)(iii).

Like the VEC, plaintiffs in *McConnell* claimed the terms "support" and "oppose" were unconstitutionally vague. *McConnell*, 540 U.S. at 170 n.64. The Court rejected this argument, reasoning:

> The words "promote," "oppose," "attack," and "support" clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision. These words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."

Id. (*quoting Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972)).

The Court continued, "This is particularly the case here, since actions taken by political parties are presumed to be in connection with election campaigns[,]" *id.*, and paraphrased the passage from *Buckley* referenced in section III(B)(1) of this brief, noting that:

> a general requirement that political committees disclose their expenditures raised no vagueness problems because the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" and thus a political committee's expenditures "are, by definition, campaign related[.]"

Id. (*quoting Buckley*, 424 U.S. at 79).

The U.S. Supreme Court could not have been clearer. The statutory terms "support" and "oppose," which serve as the foundation of Washington's statutory definition of "political committee," are not vague and may constitutionally be applied to the VEC. Despite the VEC's claims to the contrary, *see* REPLY BRIEF OF APPELLANTS at 8–11, the VEC is *precisely* the type of organization—a registered Section 527 political organization with a self-identified purpose of influencing candidate elections—to which political committee reporting requirements may constitutionally be applied.

4. Washington's statutory definition of "political committee" clearly and constitutionally encompasses the VEC.

The State of Washington defines "political committee" to mean "any person . . . having the expectation of receiving contributions or making expenditures in support of, or in opposition to, any candidate or any ballot proposition." RCW 42.17.020(38). Despite the VEC's claims to the contrary, this definition "provide[s] explicit standards for those who apply them and give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *McConnell*, 540 U.S. at 170 n.64

(internal quotation marks omitted) (*quoting Grayned,* 408 U.S. at 108-109). This is particularly true here, since actions taken by Section 527 political organizations such as the VEC are presumed to be in connection with candidate elections.

The VEC ad at issue in this case clearly entailed an expenditure in opposition to a candidate for state office. As a result, the VEC was required, but failed, to timely register with the PDC as a "political committee" and file disclosure reports. The U.S. Supreme Court decisions in *Buckley* and *McConnell* make clear that the VEC's payments for these advertisements may be regulated by the State of Washington without violating the VEC's federal constitutional rights. One passage from the *McConnell* opinion, upholding BCRA's disclosure requirements for *non-express advocacy* electioneering communication, provides particularly clear insight into the constitutional interests raised by the case before this Court:

> BCRA's disclosure provisions require . . . organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they

> should be permitted to spend . . . funds . . . on broadcast advertisements, which refer to federal candidates, because speech needs to be "uninhibited, robust, and wide-open." Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

Id. at 196–97 (internal citations and quotation marks omitted) (quoting *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)); *see also AKRTL*, 441 F.3d at 793.

Like the plaintiffs in *McConnell*, the VEC "never satisfactorily answer[s] the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public." *Id.* at 197. The VEC's argument for striking down Washington's disclosure provisions "does not reinforce the precious First

Amendment values" that the VEC argues are trampled by Washington state law, "but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.*

IV. CONCLUSION

For the above reasons, *amicus curiae* respectfully submits that the broadcast ad at issue subjects the VEC to state law "political committee" registration and reporting requirements without violating the VEC's constitutional rights.

Dated this 3rd day of May, 2006.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on May 3, 2006, I caused service of the foregoing Motion of the Campaign Legal Center For Leave To File A Brief *Amicus Curiae* In Support Of Respondents upon all Parties and counsel of record herein, as follows:

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