No. 77724-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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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.

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# BRIEF IN RESPONSE TO BRIEF OF AMICUS CURIAE OF THE CAMPAIGN LEGAL CENTER

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## INTRODUCTION

The Voters Education Committee ("VEC") submits this response to the amicus brief of the Campaign Legal Center ("CLC"). The CLC's brief argues that VEC's status under federal tax law renders it a political committee under state law. This contention is both wrong and irrelevant. The CLC is wrong because even under federal law VEC's status as a 527 organization does not govern its status as a political committee. And the CLC's position is irrelevant because this case is governed by state law and by this Court's interpretation of that law, not by federal statutes.

## ARGUMENT

1. The amicus brief of the CLC argues that the federal tax status of VEC "is a compelling fact in this case." CLC Br. at 5. The CLC offers the following syllogism: (1) all tax-exempt "political organizations" under 26 U.S.C. § 527 ("527 organizations"), a status restricted to organizations whose primary purpose is "influencing or attempting to influence" elections, are necessarily "political committees" under *State* law; (2) VEC is a registered 527 organization; therefore, (3) the VEC is a political committee under State law. This seemingly tight syllogism falls apart, however, in its major premise, which is demonstrably false.

The Federal Election Commission ("FEC") has recognized that there are two ways for political speakers to influence elections: (1) speakers may attempt to influence elections directly through express advocacy, which will result in their being treated as "political committees" under *federal* law, or (2) speakers may engage in issue advocacy, which will not result in their being treated as federal political committees. But "it has been the administrative practice of the FEC since *Buckley* to deny jurisdiction over independent organizations that do not engage in any express advocacy." Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1006 (2005). The FEC has taken this position in full knowledge of the fact that these entities, by definition, operate "primarily for the purpose of . . . influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization." § 527(e)(1)-(2).[1] Both before

[1] The significance that the CLC attaches to VEC's status as a 527 organization is misguided also because § 527 sweeps much more broadly than either federal or Washington election laws, including extending to those organizations engaged solely in issue advocacy. IRS Private Letter Ruling ("PLR") 9652026; PLR 9808037. Section 527 encompasses not only organizations operated "for the purpose of . . . accepting contributions or making expenditures … for the function of influencing . . . [the] election . . . of any individual to any . . . public office," § 527(e)(1) & (2), but also those that seek "to influence the selection, nomination, election or appointment of any individual to any . . . office in

and after the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93, 24 S. Ct. 619, 157 L. Ed. 2d 491 (2003), political speakers attempting to influence federal elections have been able to rely upon this clear guidance.

The CLC suggests that the FEC will treat political organizations with the "major purpose" of influencing elections as political committees. CLC Br. at 10 n.5. But, in fact, the FEC regulations confine the definition of a "political committee" to entities that engage in express advocacy. 11 C.F.R. § 100.5(a).[2] The FEC *expressly declined* to depart from this

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a political organization" (which would be the political party bodies under RCW 42.17.020(6)(b) and (c)) or the "appointment of any individual to any Federal, State, or local public office." *Id.* The latter two categories—groups seeking to influence the filling of positions in *political organizations* and groups seeking to influence *appointments* to public offices (such as federal judicial appointments, *see* Ann. 88-114, 1988-37 I.R.B. 26)—fall within § 527 but outside RCW 42.17.020(38), which covers only "candidate[s]" for "election to public office." *See* RCW 42.17.020(9) (defining "candidate").

[2] The regulation defines political committees as those entities that "receive[s] contributions aggregating in excess of $ 1,000 or which make[] expenditures aggregating in excess of $ 1,000 during a calendar year is a political committee." 11 C.F.R. § 100.5(a). The term "expenditure" is, in turn, understood to reach only expenditures for express advocacy. *See* MASON Polasky & Charles, *supra*, at 1006 ("It has been the administrative practice of the FEC since *Buckley* to deny jurisdiction over independent organizations that do not engage in any express advocacy."); *527 Reform Act of 2005: Hearings on S.271 Before the S. Comm. on Rules and Administration*, 151st Cong. 1 (Mar. 8, 2005) (testimony of David M. Mason, Commissioner, Federal Election Commission). The other standards for political committee status, which apply to PACs and candidate committees, have no bearing here since it is clear that the VEC is not one of the enumerated entities. *See* 11 C.F.R. § 100.5(b)-(g).

standard in a 2004 rulemaking procedure when it was urged to adopt the "major purpose" test posited by the CLC. 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004).[3] For this reason, the CLC recently decried the FEC's creation of a regulatory "loophole" for 527 organizations. 152 CONG. REC. H1526-27 (daily ed. Apr. 5, 2006) (letter of Apr. 4, 2006, from the CLC *et al*. to all Representatives). In light of the FEC's approach, CLC urged passage of a bill in the United States House of Representatives that would close the alleged "loophole" and require the FEC to treat most 527 organizations, including those that refrain from engaging in express advocacy, as political committees. The fact that legislation is required to bring about this result confirms that the FEC currently does not treat all 527 organizations as political committees.[4]

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[3] The FEC did claim for itself a residual authority under *Buckley* to apply the major purpose test. 69 Fed. Reg. at 68,065. But the FEC has sparingly invoked this power, as the CLC implicitly recognizes with its charge that the FEC has created a regulatory loophole for 527 organizations. And on the rare occasion when the FEC has applied the major purpose test, it appears to have done so when the 527 organization engaged in express advocacy. *See, e.g.*, Compl. for Declaratory, Injunctive, and Other Appropriate Relief, at ¶ 37, *FEC v. Club for Growth, Inc.*, No. 05-1851, (D.D.C. Sept. 19, 2005) (pointing to expenditure for an ad that exhorted listeners to action by stating that it was their "mission" to elect a proponent of tax cuts and that "only a tax cutter like Ric Keller can help you accomplish your mission").

[4] The bill passed the House, but the Senate has yet to act upon this measure. *See* 527 Reform Act of 2006, H.R. 513, 109th Cong. (as passed by House, Apr. 5, 2006).

2. The CLC invokes *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), contending that, even if the disclosure regulation here is vague as applied to individuals, there are "no vagueness concerns with regard to *political organizations* such as the VEC." CLC Br. at 9-10 (original emphasis). As a threshold matter, we note that the FEC has rejected the CLC's reading of *Buckley*—if the FEC agreed with the CLC, then it would treat all 527 organizations as political committees. The CLC interpretation is plainly incorrect, for the CLC wants to borrow *Buckley*'s holding with respect to "political committees" as defined in the Federal Election Campaign Act's ("FECA") disclosure provision and apply it to the "political committee[s]" defined in RCW 42.17.020(38). But the CLC ignores the express limitation on the definition of "political committees" that *Buckley* deemed essential to its holding. The Supreme Court held that FECA's disclosure provision was rescued from unconstitutional vagueness only insofar as the "lower courts have construed the words 'political committee' *more narrowly* … [to] *only* encompass organizations [1] that are *under the control of a candidate* or [2] the *major purpose* of which is the nomination or *election of a candidate*." 424 U.S. at 79 (emphases added). Thus, *Buckley* essentially limited the disclosure requirement's reach to candidates' own committees[5]

[5] This category appears to be the same as the "authorized committee"

and to committees dedicated to electing a specific candidate. The types of committees identified in *Buckley*—committees devoted to the "election of a candidate"—exist solely to elect a specific candidate. Thus, it was quite natural for the Court to assume that such candidate-specific organizations are by definition supporting or opposing candidates when they engage in political speech. In this regard, the Court's reasoning is similar to its analysis in *McConnell*, where a similar presumption was applied to political parties. *See* VEC Reply Br. at 9-11. By contrast, 527 organizations can engage in a multiplicity of conduct that includes genuine issue advocacy, as the IRS itself has recognized. *See supra* note 1.

Neither of *Buckley*'s limitations fits VEC. It is undisputed that VEC is not "under the control of a candidate." Nor is the VEC's "major purpose . . . the *election* of *a* candidate." Thus, the VEC is not akin to the candidate committees addressed in *Buckley*. That takes VEC outside the narrow confines of *Buckley*'s presumption.

3. The CLC echoes the PDC's extended diatribe against the express advocacy standard. The CLC's discussion of the Supreme Court's observation in *McConnell* that the line between express advocacy and issue advocacy is "functionally meaningless" conflates two wholly distinct constitutional issues, only one of which is relevant to this case. CLC Br.

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defined in RCW 42.17.020(3).

at 11-15. In *McConnell*, the Court rejected the view, often ascribed to *Buckley*, that the First Amendment itself establishes the line between express advocacy and issue advocacy, flatly prohibiting government from regulating issue advocacy. This issue has no relevance here because VEC does not contend that the State is prohibited from regulating election-related speech other than express advocacy. VEC merely contends that the State—in the statutory definition of "political committee" and the PDC's character attack test—has not exercised its power to regulate election-related speech with the requisite specificity. The Court's decision in *McConnell* did nothing to relieve the State of this obligation. The Court in *McConnell* explicitly approved of *Buckley* insofar as it saved an otherwise vague regulation from constitutional invalidity by construing it to reach only express advocacy. The *McConnell* Court explained, "Our adoption of a narrowing construction [in *Buckley*] was consistent with our vagueness and overbreadth doctrines." 540 U.S. at 192 n.75.

In the aftermath of *McConnell*, courts have acknowledged uniformly that *Buckley*'s express advocacy standard continues to afford a valid and appropriate saving construction for otherwise unconstitutionally vague regulations of election-related speech. *Center for Individual Freedom v. Carmouche*, No. 04-30877, 2006 U.S. App. LEXIS 11729, at **20-24 (5th Cir. May 11, 2006); *Anderson v. Spear*, 356 F.3d 651, 664

(6th Cir.), *cert. denied*, 543 U.S. 956, 125 S. Ct. 453, 160 L. Ed. 2d 317 (2004); *ACLU v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004). The CLC, like the PDC, fails even to mention, let alone attempt to distinguish, these post-*McConnell* precedents.

5. Even if the CLC's syllogism were correct and VEC's registration as a 527 organization implied that VEC qualified as a political committee under Washington law, the PDC still could not enforce the disclosure requirements against VEC. It is well-settled that, even if a plaintiff's own speech is clearly within the scope of a statute that regulates political speech, the plaintiff can nonetheless succeed on a facial challenge if the statute's vagueness threatens to chill *anyone*'s political speech. As the Supreme Court explained in *Gooding v. Wilson*:

> It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. . . . Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face.

405 U.S. 518, 520-21, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972) (quotation marks omitted); *see also, e.g.*, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 n.7, 102 S. Ct. 1186, 71 L. Ed. 2d 362

(1982) (Vagueness "challenges to statutes *which do not involve First Amendment freedoms* must be examined in the light of the facts of the case at hand.") (emphasis added) (quotation marks omitted); *Plummer v. City of Columbus*, 414 U.S. 2, 3, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973) (per curiam) ("For although [the ordinance {regulating speech}] may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others.") (second alteration added); *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004) ("Vagueness challenges are evaluated in light of the particular facts of each case, *unless the First Amendment is implicated*.") (emphasis added) (quotation marks omitted) (collecting cases).

The CLC's argument, if correct, would show only that the definition of "political committee" is not vague *as applied* to VEC. VEC has elsewhere demonstrated exhaustively that the definition of "political committee" under Washington law is vague *on its face*. *See* Pl.'s Br. at 19-22; Pl.'s Reply Br. at 16-19. The CLC has offered no defense whatsoever of the statute's *facial* validity. Thus, the CLC's strained manipulation of the tax code is entirely irrelevant to the resolution of this case.

6. Finally, the CLC's exclusive focus on *federal* statutes and judicial decisions obscures the fact that this case is about the meaning of a *state* regulatory statute and the decisions of this Court construing it authoritatively. Specifically, in *Bare v. Gorton*, this Court established that the key phrase in the definition of "political committee"—"in support of, or in opposition to"—is unconstitutionally vague on its face. 84 Wn.2d 380, 383-87, 526 P.2d 379 (1974). The CLC fails to acknowledge this important decision, as did the PDC. Subsequently, in *Washington State Republican Party v. Washington State Public Disclosure Commission*, this Court embraced *Buckley*'s express advocacy narrowing construction for vague regulations of election-related speech, and further directed that only speech that contained explicit words of advocacy would qualify as express advocacy. 141 Wn.2d 245, 263-69, 4 P.3d 808 (2000). Therefore, this Court's decisions have made clear that the term "political committee" under Washington law reaches only those persons using explicit words of advocacy. VEC governed itself strictly in accord with this Court's teaching; it is undisputed that VEC's ads did not call for any action for or against Ms. Senn's candidacy. Thus VEC was not a political committee under Washington law, *as authoritatively construed by this Court*.

The CLC attempts to avoid this conclusion by steadfastly ignoring this Court's decision in *Bare* and focusing exclusively on federal courts'

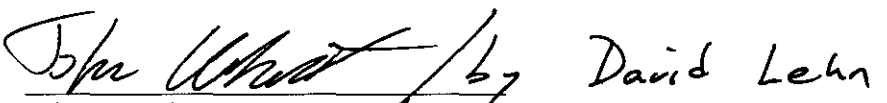
interpretation of federal laws that were amended in recent years to eliminate the vagueness of prior campaign finance statutes, such as the FCPA. But even if this Court should choose now to revisit and modify the holding in *Bare*, that decision was nevertheless this Court's authoritative construction of state law at the time VEC engaged in the speech that the PDC now attempts to punish with a fine. Surely, speakers in Washington State are entitled to rely upon this Court's interpretation of state law without having to divine whether federal courts' interpretation of federal statutes would cause this Court to reassess its interpretation of state law. The First Amendment compels the courts to "take[] special care to insist on fair warning when a statute regulates expression." *Marks v. United States*, 430 U.S. 188, 196, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (citing *Buckley*, 424 U.S. at 40-41). A speaker is entitled to rely on a governing judicial decision that narrowed the "sweeping language" of a law regulating speech. *Id.* at 195; *see also id*. (Defendants, "engaged in the dicey business of marketing films subject to possible challenge, had no fair warning that their products might be subjected to the new standards."); *id.* at 191-92 (holding that Supreme Court's new obscenity standard, which departed from prior precedent in a way detrimental to defendant, could not be applied against defendant because the principle of a "right to fair warning" on which the Ex Post Facto Clause is based "is protected

against judicial action by the Due Process Clause . . . ."); *Burgess v. Salmon*, 97 U.S. 381, 385, 24 L. Ed. 1104 (1878) (state cannot evade Ex Post Facto Clause by clothing its legal prohibitions in form of civil sanctions) (refusing to apply retroactive tax increase on tobacco).

This principle has special importance when the state regulates speech with legal sanctions because of the problem of chilling effect that is anathema to the First Amendment. If a decision like *Bare v. Gorton*, which authoritatively limits statutory language that would otherwise be unconstitutionally vague—and that would otherwise chill protected speech—can be overturned and a new, more expansive speech regulation applied to a speaker who had taken refuge in the safe harbor provided by the earlier case, then the chilling effect originally induced by the vague statute was never dissipated. No speaker would rely on a judicial decision that ruled a speech regulation unconstitutional if that decision could be overturned and the resurrected regulation could be applied, without warning, to any speaker in a future state enforcement action. Free speech requires—and the First Amendment mandates—more "breathing room" than that. *Illinois v. Telemarketing Assocs*., 538 U.S. 600, 620, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003); *New York Times v. Sullivan*, 376 U.S. 254, 272, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

In light of this precedent, even if the Court were to abandon its decision in *Bare v. Gorton* and adopt the CLC's interpretation of political committee, it should do so on a purely prospective basis that would not permit the PDC to impose a fine upon the VEC.

Respectfully submitted this 12th day of May 2006.



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I hereby certify that on this 12th day of May 2006, I caused to be served via FedEx a copy of the foregoing Brief in Response to Brief of Amicus Curiae of the Campaign Legal Center on the following:

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