IN THE SUPREME COURT OF THE STATE OF WASHINGTON

VOTERS EDUCATION COMMITTEE, a Washington corporation; BRUCE BORAM, an individual; VALERIE HUNTSBERRY, an individual, Appellants,	No. 77724-1
v.	EN BANC
WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL CONNELLY, JEANETTE 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; and CHRISTINE GREGOIRE, Attorney General of the State of Washington in her individual capacity, Respondents,	Filed September 13, 2007
and DEBORAH SENN, Respondent/Intervenor.	

FAIRHURST, J. – During the 2004 campaign for Washington State Attorney General, the Voters Education Committee (VEC)[1] sponsored television advertisements without registering as a "political committee" or disclosing information about its contributions and expenditures. The Washington State Public Disclosure Commission (PDC)[2] brought an enforcement action against VEC for failure to register and disclose. In response, VEC brought this constitutional claim against the PDC, alleging that the PDC was unconstitutionally regulating VEC's political speech. The trial court granted summary judgment to the PDC, holding that VEC's advertisement "Better" constituted "express advocacy" rather than "issue advocacy" and that, as a result, VEC was a political committee subject to regulation. On direct appeal, VEC argues that the definition of "political committee" is vague and that the trial court erred in applying the distinction between express advocacy and issue advocacy.

We hold that the definition of "'[p]olitical committee'" in former RCW 42.17.020(33) (2002) is not vague. We further hold that VEC met the definition of

[1]This opinion refers collectively to all of the appellants, including the Voters Education Committee, Bruce Boram, and Valerie Huntsberry, as VEC.

[2]This opinion refers collectively to all of the respondents, including the Washington State Public Disclosure Commission, Michael Connelly, Jeanette Wood, Francis Martin, Earl Tilly, Jane Noland, Vicki Rippie, and Christine Gregoire, as the PDC.

a political committee. As a result, we hold that the PDC did not unconstitutionally infringe on VEC's free speech rights by seeking to compel VEC to register as a political committee and to disclose its contributions and expenditures. Because the regulation at issue is not vague, we need not reach the issue of whether the trial court correctly applied the distinction between express advocacy and issue advocacy. We also hold that article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements than does the first amendment to the United States Constitution. We affirm the trial court's dismissal of VEC's constitutional claims.

I. FACTUAL AND PROCEDURAL HISTORY

Beginning on September 1, 2004, VEC sponsored two television advertisements criticizing Deborah Senn, Washington's former insurance commissioner. At the time, Senn was a candidate for attorney general of Washington. The advertisements aired on television stations throughout the state until approximately September 8, 2004. The primary election occurred on September 14, 2004.

The television advertisement at issue in this case was entitled "Better" and included a voice-over narration in combination with on-screen text and images. The script of the voice-over narration read:

> Who is Deborah Senn looking out for?

> As Insurance Commissioner, Senn suspended most of a $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."
>
> Deborah Senn let us down . . . log on to learn more.

Clerk's Papers (CP) at 51 (ellipsis in original).[3]

During the voice-over narration, the following combinations of text and images appeared on the screen:

> Text on black background: "Who is Deborah Senn looking out for?"
>
> Text with image of money: "Suspended Most of $700,000 Fine *Source: Seattle Times 2/20/97*"
>
> Text with image of Insurance Commissioner's office: "In Exchange for New Staff in Her Office *Source: Seattle Times 2/20/97*"
>
> Text with image of Washington State Capital: "Tried to Cover Up Deal from State Legislators *Source: Seattle Times 2/20/97*"
>
> Text with image of newspaper, *Seattle Post-Intelligencer* banner head: "'. . . easily could lead to conflict-of-interest abuses.' *2/27/97*"
>
> Text on black background:
> "Deborah Senn Let Us Down
> Learn More About the Insurance Crisis
> www.senninsurancecrisis.com
> Paid for by Voters Education Committee."

[3]A second television advertisement sponsored by VEC, entitled "New," aired during the same time period as "Better." The PDC did not include "New" in its enforcement proceedings against VEC. As a result, "New" is not pertinent to this case.

Dec. of Vicki Rippie (Sept. 10, 2004), Attach. E (videotape of KIRO TV Sept. 3, 2004 advertisement) (Rippie Dec.).

On September 7, 2004, the PDC sent a letter to VEC stating its opinion that VEC's advertisements constituted express advocacy and directing VEC to register as a political committee and to "file all reports of contributions received and expenditures made by the committee to date."[4] CP at 611. On September 9, 2004, VEC responded through its counsel that it did not believe that it was "subject to registration or reporting under Washington law." CP at 447. That same day, the PDC held a special commission meeting and "found apparent multiple violations" of Washington campaign financing laws by VEC. CP at 450. The PDC referred the matter to the Washington State Attorney General's office "for appropriate action . . . including seeking a court order compelling [VEC] . . . to file the

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[4]The dissent claims that the PDC, based on its "subjective designation" that VEC's advertisement "was 'malign[ing]' Ms. Senn's character" "labeled [VEC] a 'political committee'" and subjected it to "prior registration and disclosure requirements." Dissent at 3-4 (first alteration in original). The dissent's characterization of the regulations at issue here as the "*prior* registration and disclosure requirements" is inaccurate. *Id.* (emphasis added); *see* discussion, *infra,* at 28.

Moreover, as this excerpt from the PDC's letter to VEC reveals, the PDC's conduct was hardly as whimsical as the dissent seems to imply:

> After reviewing a broadcast advertisement of [VEC], PDC staff has concluded that the ad is "express advocacy" as that term is used in . . . *Washington State Republican Party v. Washington State Public Disclosure Commission et al.*, 141 Wn.2d 245, 4 P.3d 808 (July 27, 2000). When advertising maligns a candidate's character, it is "express advocacy." As such, the activities of [VEC] are reportable to the [PDC] under chapter 42.17 RCW.

CP at 611.

disclosure reports required." *Id*.

On September 10, 2004, the PDC initiated an enforcement action in Thurston County Superior Court to compel VEC to comply with the registration and reporting requirements and seeking penalties for noncompliance. *State ex rel. Wash. State Pub. Disclosure Comm'n v. Voters Educ. Comm.*, No. 04-2-01845-2, Thurston County Superior Court (*PDC v. VEC*). At the same time, VEC initiated this action in King County Superior Court against the PDC under 42 U.S.C. § 1983 seeking a declaratory judgment that VEC's advertisements were protected speech under the first amendment to the United States Constitution and under article I, section 5 of the Washington Constitution. VEC also sought attorney fees under 42 U.S.C. § 1988 and other statutes. The PDC's enforcement proceeding was later transferred to King County Superior Court and assigned to the same judge as VEC's case. *PDC v. VEC,* No. 04-2-33247-8-SEA, King County Superior Court.

After these cases were filed, VEC agreed to register with the PDC and filed reports documenting contributions to VEC and VEC's expenditures. VEC's disclosures indicated that the committee had received a single contribution from the United States Chamber of Commerce in the amount of $1.5 million and that VEC had spent more than $1.4 million of that amount. On September 21, 2004, Deborah Senn moved to intervene in the case, and the trial court subsequently granted her

motion.

Prior to trial, VEC moved for summary judgment. On August 12, 2005, following oral argument on the summary judgment motion, the trial court issued an oral ruling that VEC's advertisement was not protected speech that was beyond the reach of regulation by the PDC and that VEC had failed to prove its constitutional claims. The court denied VEC's summary judgment motion and dismissed the case. VEC sought direct review by this court, and we agreed to retain the case.[5]

II. ISSUES

A. Whether the PDC unconstitutionally infringed on VEC's First Amendment rights by enforcing disclosure requirements.

    1. Whether the definition of "'[p]olitical committee'" in former RCW 42.17.020(33) is unconstitutionally vague.

    2. Whether the trial court properly applied the distinction between express advocacy and issue advocacy.

B. Whether article I, section 5 of the Washington Constitution provides greater protection against disclosure requirements than the First Amendment.

C. Whether VEC is entitled to attorney fees and expenses.

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[5] The trial court also granted partial summary judgment for the PDC in *PDC v. VEC*, the PDC's enforcement case. The trial court has not yet proceeded to the remedy phase in that case. Although VEC also filed a motion for discretionary review in *PDC v. VEC,* No. 77725-0 in this court, VEC withdrew its motion after the parties stipulated to a stay of proceedings in the trial court, pending the outcome in this case.

III. ANALYSIS

A. The PDC did not unconstitutionally infringe on VEC's First Amendment rights by enforcing disclosure requirements

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This court has recognized time and again the particular importance of protecting political speech. "[T]he United States Supreme Court and this court have remained steadfast in protecting the right to full and vigorous discussion of political issues, free from government regulations." *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 250, 4 P.3d 808 (2000) (*WSRP)*.

At the same time, the citizens of Washington have repeatedly declared their strong commitment to disclosing the identity of and financing behind political speakers. In 1972, the citizens of Washington passed Initiative Measure No. 276, which formed the basis of Washington's campaign finance laws and established the PDC. *See* RCW 42.17.350. Part of Initiative 276 provides:

> It is hereby declared by the sovereign people to be the public policy of the state of Washington:
>
> (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

> . . . .
>
> (10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.
>
> . . . .
>
> The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying . . . 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. As this court has recognized, the purpose of Initiative 276 is "to ferret out . . . those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public information." *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976).

In 1992, the citizens of Washington also passed Initiative Measure No. 134, which, together with Initiative 276, is generally referred to as the Fair Campaign Practices Act (FCPA), chapter 42.17 RCW. The FCPA requires political committees to register with the PDC and provide information about the committee, contributions to the committee, and the committee's expenditures. *See* RCW 42.17.040-.090. The FCPA defines "'[p]olitical committee'" as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support

of, or opposition to, any candidate or any ballot proposition." Former RCW 42.17.020(33). As a result, at the time of VEC's advertisements, if VEC met the definition of a "political committee," the FCPA required that VEC register with and disclose its contributions and expenditures to the PDC.[6]

Standard of Review

VEC appeals the trial court's grant of summary judgment to the PDC, arguing that the definition of "political committee" is unconstitutionally vague and that, as a result, the PDC violated VEC's First Amendment rights by compelling VEC's disclosures. This court reviews motions for summary judgment de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is

[6]Recent amendments to the FCPA have likely altered the requirement that only a political committee must disclose its contributions and expenditures to the PDC. RCW 42.17.565 now requires the sponsor of electioneering communications to report the sponsor's identity to the PDC and to disclose information about its contributions and expenditures. The legislature also amended RCW 42.17.020 to include a new definition of "'[e]lectioneering communication.'" Laws of 2005, ch. 445, § 6. The definition of "'[e]lectioneering communication'" now includes:

> [A]ny broadcast, cable, or satellite television or radio transmission . . . that:
>
> (a) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name;
>
> (b) Is broadcast, transmitted, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and
>
> (c) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the sixty days before an election, has a fair market value of five thousand dollars or more.

RCW 42.17.020(20). As a result, the definition of "political committee" is no longer the sole determining factor of whether the sponsor of a political advertisement must disclose contribution and expenditure information to the PDC.

proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). Here, there is no genuine issue of material fact. Therefore, we need only decide whether the PDC's regulation of VEC's political speech was unconstitutional as a matter of law. This court also reviews interpretations of statutes and determinations of the constitutionality of statutes de novo. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005).

In general, "'[a] statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.'" *State v. Hughes*, 154 Wn.2d 118, 132, ¶ 25, 110 P.3d 192 (2005) (quoting *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996)), *overruled in part on other grounds by Washington v. Recuenco,* 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). However, as VEC notes, in the First Amendment context the burden shifts and the State usually "bears the burden of justifying a restriction on speech." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997).

While we must scrutinize any regulation of speech, the particular type of regulation the PDC seeks to enforce in this case also impacts our consideration of the constitutionality of that regulation. Much of VEC's discussion of the regulation

of its political speech presumes a *limitation* of that speech, as occurs with limits on political contributions or expenditures. The regulations at issue in this case, however, are disclosure requirements. The United States Supreme Court has recognized that compelled disclosure may encroach on First Amendment rights by infringing on the privacy of association and belief. *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). As a result, the Court has held that disclosure regulations must survive "exacting scrutiny" and that there must be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed. *Id*. (internal quotation marks omitted).

However, the Court has also recognized that unlike "overall limitations on contributions and expenditures, . . . disclosure requirements impose no ceiling on campaign-related activities." *Id*. The Court has also observed that "[t]he governmental interests sought to be vindicated by . . . disclosure requirements," such as providing the electorate with information and deterring corruption and the appearance of corruption, are "sufficiently important to outweigh the possibility of infringement."[7] *Id*. at 66. Therefore, the Court concluded that "disclosure

[7]The dissent states, "[d]istressingly, there is no evidence to support the claim that [VEC's] private speech triggered any compelling state interest. There is no suggestion of corruption or influence peddling." Dissent at 25. Contrary to the dissent's implication, there need be no evidence of corruption on VEC's part to find that the FCPA registration and disclosure regulations promote a compelling government interest in deterring corruption and the appearance of corruption.

requirements -- certainly in most applications -- appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Id*. at 68.

As the PDC notes, the right to free speech "includes the 'fundamental counterpart' of the right to receive information." Am. Br. of Resp'ts at 12 (quoting *Fritz v. Gorton*, 83 Wn.2d 275, 296-97, 517 P.2d 911 (1974)). "The constitutional safeguards which shield and protect the communicator, perhaps more importantly also assure the public the right to *receive* information in an open society." *Fritz*, 83 Wn.2d at 297. In *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the United States Supreme Court considered the relationship between the disclosure requirements in the Bipartisan Campaign Reform Act of 2002 (BCRA) and the First Amendment values of "uninhibited, robust, and wide-open" political speech.

> "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 (emphasis added) (citations omitted) (internal quotation marks omitted) (quoting *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003). As the *McConnell* Court observed, disclosure requirements "'d[o] not prevent anyone from speaking.'" 540 U.S. at 201 (alteration in original) (quoting *McConnell*, 251 F. Supp. 2d at 241). With this context in mind, we consider whether the FCPA's disclosure regulations unconstitutionally burdened VEC's speech.

1. The definition of "'[p]olitical committee'" in former RCW 42.17.020(33) is not unconstitutionally vague

The United States Supreme Court has repeatedly recognized that a vague regulation of speech infringes on First Amendment rights. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."). This court has also recognized that "'[i]f speakers are not granted wide latitude to disseminate information without government interference, they will steer far wider of the unlawful zone.'" *WSRP*, 141 Wn.2d at

265 (internal quotation marks omitted) (quoting *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 54-55 (2d Cir. 1980)). "'This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled or sterilized.'" *Id*.

Under the Fourteenth Amendment, a statute may be void for vagueness "if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972)). Moreover, the Supreme Court has "repeatedly emphasized that where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential." *Id.* (citing, *e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)).

VEC argues that the definition of "political committee" is unconstitutionally vague. The PDC argues that the definition of "political committee" is not vague or that, in the alternative, if this court finds that the definition is vague, this court

should construe the definition in a limiting way so as to preserve the constitutionality of the statute. In analyzing this issue, we first turn to the United States Supreme Court's seminal decision in *Buckley*.

In *Buckley*, the United States Supreme Court considered the constitutionality of a provision of the Federal Election Campaign Act of 1971 (FECA) that limited campaign expenditures "'relative to a clearly identified candidate.'" 424 U.S. at 13 (quoting former 18 U.S.C. § 608(e)(1) (1974)). The Court concluded that the phrase "relative to" was vague in that it "fail[ed] to clearly mark the boundary between permissible and impermissible speech." *Id.* at 41. However, in order to avoid rendering the statute unconstitutional, the Court adopted a saving construction of the statute. The Court construed the statute to apply only to expenditures for communications that expressly advocated the election or defeat of a clearly identified candidate. *Id.* at 42-44, 80. The Court supplied examples of words that would constitute express advocacy, "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44 n.52. However, the Court also recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id*. at 42.

Following *Buckley*, this court considered the constitutionality of FCPA

provisions limiting campaign expenditures in the context of an advertisement that criticized Gary Locke, then a candidate for governor. *WSRP*, 141 Wn.2d at 250-51. The advertisement listed facts that indicated Locke's position on fighting crime, such as voting "no" on the "Three Strikes, You're Out" law. *Id*. at 251 (internal quotation marks omitted). The advertisement ended by directing viewers to "Tell Gary Locke that's not what we call getting tough on crime. Tell Gary Locke that we deserve better." *Id*. at 252 (internal quotation marks omitted). We determined that the Locke advertisement was issue advocacy because it attacked his stance on an issue rather than his character. *Id*. at 270. Relying on *Buckley*, we stated that "in order to avoid vagueness and a chilling effect on political speech, *Buckley* requires the definition of election-related speech to be sharply drawn." *Id*. at 266. We observed that the statute at issue included multiple definitions of the word "expenditure," including defining expenditure as "a payment or contribution, with no reference to a candidate." *Id*. at 282. As a result, we concluded that the challenged statutory provisions were unconstitutional limits on issue advocacy. *Id*.

Finally, in *McConnell,* the United States Supreme Court considered the constitutionality of the BCRA. 540 U.S. at 114. In addressing the distinction between express advocacy and issue advocacy, the Court observed that although it "seemed neat in theory, the two categories of advertisements proved functionally

identical in important respects." *Id.* at 126. The Court rejected the argument 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." *Id*. at 190 (emphasis added). "That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of *statutory interpretation*, not a first principle of constitutional law." *Id*. (emphasis added). The Court further clarified that when interpreting FECA's disclosure provision in *Buckley*, the Court determined that the phrase "'for the purpose of . . . influencing'" a federal election was impermissibly vague. *Id*. at 191 (quoting *Buckley,* 424 U.S. at 77). As a result, the Court construed that section as reaching "'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'" *Id*. (quoting *Buckley*, 424 U.S. at 80). The Court emphasized that "[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, [it] nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id*. at 192.

Independent of *Buckley*, the Court in *McConnell* also acknowledged that the First Amendment does not require a strict distinction between express advocacy and issue advocacy.

Nor are we persuaded, independent of our precedents, 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 193 (emphasis added). Instead, the Court described the distinction as "functionally meaningless." *Id*. The Court recognized that even though certain "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."[8] *Id*.

In light of *Buckley*, VEC asserts that the phrase "'in support of, or opposition

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[8]Recently the United States Supreme Court handed down *Federal Election Commission v. Wisconsin Right to Life*, *Inc.,* __ U.S. __, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (*WRTL* II), its "most recent political speech decision." Dissent at 10. Although the dissent discusses *WRTL* II at length, *see* dissent at 10-12, *WRTL* II does not apply to the issue of vagueness on which this case is decided.

WRTL II involves an as-applied challenge to section 203 of BCRA, 2 U.S.C. § 441b(b)(2), which prohibits corporations and unions from using general treasury funds to finance "electioneering communications." *McConnell*, in a different section than is discussed in the text above, held that section 203 was facially constitutional to the extent that the electioneering communications were express advocacy or the "functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. Subsequently, the Court determined that, in so holding, *McConnell* did not preclude an as-applied challenge to section 203. *Wisconsin Right to Life*, *Inc. v. Fed. Election Comm'n,* 546 U.S. 410, 411-12, 126 S. Ct. 1016, 163 L. Ed. 2d 990 (2006) (*WRTL* I).

WRTL II addressed such an as-applied challenge. In the controlling opinion, Chief Justice Roberts, joined by Justice Alito, announced that an advertisement "is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL* II, 127 S. Ct. at 2667. Applying this test, Chief Justice Roberts determined that Wisconsin Right to Life's advertisements, extolling voters to contact their senators to urge an end to a filibuster, were not the functional equivalent of express advocacy and therefore "f[e]ll outside the scope of *McConnell*'s holding." *Id.* at 2670.

While *WRTL* II departs from *McConnell*'s approach to express advocacy and issue advocacy, that departure is not germane to this case. The issue we address here is whether the phrase "in support of, or opposition to, any candidate" in the definition of "'political committee'" is vague. Former RCW 42.17.020(33). That analysis is unaffected by the Court's decision in *WRTL* II.

to, any candidate'" in the definition of "'[p]olitical committee'" is unconstitutionally vague. Am. Br. of Appellants at 19 (quoting RCW 42.17.020(38)). However, the phrase "in support of, or opposition to, any candidate" is significantly more precise than the phrase "relative to a clearly identified candidate," which the Court determined was vague in *Buckley*. As the PDC notes, the United States Supreme Court has upheld the words "support" and "oppose" as sufficiently precise to withstand a vagueness challenge in *McConnell*.

> 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."[9]

McConnell, 540 U.S. at 170 n.64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). Thus, we conclude that a person of ordinary intelligence would have a reasonable opportunity to understand

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[9]The dissent argues that *McConnell* provides no guidance here because it "refer[s] only to *party speakers*," not "private, independent speech." Dissent at 10. But unlike the political party-specific statutes that are the primary focus of the *McConnell* decision, *see, e.g.,* 540 U.S. at 161-73 (addressing restrictions on state and local party committees), in note 64 the Court rejects a vagueness challenge to the definition of "[f]ederal election activity," 2 U.S.C. § 431(20)(A)(iii), a provision that is *not* limited to party speakers. The Court upheld as sufficiently precise to satisfy First Amendment concerns the definition of "[f]ederal election activity" to mean "a public communication that refers to a clearly identified candidate for Federal office . . . and that *promotes or supports* a candidate for that office, or *attacks or opposes* a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. § 431(20)(A)(iii) (emphasis added); *see also McConnell*, 540 U.S. at 170 n.64. Thus, the Court's considered endorsement of the terms "supports" and "opposes" provides relevant guidance on the matter before us.

the meaning of "in support of, or opposition to, any candidate" in the definition of "'[p]olitical committee'" in former RCW 42.17.020(33).

VEC also argues that this court previously determined that the phrase "in support of, or in opposition to, a candidate" was unconstitutionally vague in *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1974). However, *Bare* does not establish binding precedent here. First, we did not consider the definition of "political committee" in *Bare.*[10] In fact, we specifically noted that there was "no doubt" that the school district committee involved in that case was a "political committee." *Id.* at 382.

Second, the phrase "in support of, or in opposition to, a candidate," did not appear anywhere in former RCW 42.17.140 (1973), the challenged statute that we did invalidate in *Bare*. Former RCW 42.17.140 placed limitations on "expenditures made in any election campaign *in connection with* any public office." (Emphasis added.) We did observe that former RCW 42.17.140 established "limits for every election campaign for and against any ballot proposition" and wondered "what standards are to be used in determining whether a particular communication is for or

[10]Nor, contrary to the dissent's claim, did the *Bare* court "constru[e] identical 'support or oppose' language in election campaign statute former RCW 42.17.020 (1973)." Dissent at 14. The definition of "'[e]lection campaign'" does include "in support of or in opposition to" language paralleling that used in the definition of "'[p]olitical committee.'" Former RCW 42.17.020(11), (22) (1973). However, the *Bare* court did not directly construe that "election campaign" definition, as evidenced by the fact that the phrase "in support of, or in opposition to" appears nowhere in the *Bare* decision.

against a proposition."[11] *Bare*, 84 Wn.2d at 383. However, this was only one of more than six factors that we considered in determining that former RCW 42.17.140 was vague. *Id*. at 383-84.

Third, *Bare* concerned expenditure limits rather than disclosure requirements. As we observed, former RCW 42.17.140 was "fatally defective because it . . . operate[d] to prohibit absolutely plaintiff and others from exercising their constitutionally guarantied freedom of speech." *Id*. at 385. The above discussion demonstrates that *Bare* is entirely distinguishable from this case.

VEC's argument that it relied on *Bare* to determine whether the committee needed to comply with the FCPA's disclosure requirements is unpersuasive, as *Bare* did not consider the definition of "political committee" or the words "in support of, or opposition to, any candidate" and did not even concern disclosure requirements. The definition of "political committee" upon which VEC could have reasonably relied is the definition that is clear from the statutory language of former RCW 42.17.020(33). Thus, we reject VEC's argument that the PDC or this court is

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[11]We reject the suggestion that *Bare*'s use of the phrase "for or against" while discussing one factor that contributed to former RCW 42.17.140's unconstitutional vagueness is functionally equivalent to a judicial determination that the phrase "in support of or in opposition to" is itself unconstitutionally vague. Dissent at 13-14. Contrary to the dissent's assertion, a meaningful distinction can be drawn between using "for or against" while analyzing a statute that does not include "in support of or in opposition to" and analyzing "in support of or in opposition to" directly.

somehow altering the definition of "political committee" and that, if we do so, we "should do so on a purely prospective basis that would not permit the PDC to impose a fine upon the VEC." Br. in Resp. to Br. of Amicus Curiae Campaign Legal Center (CLC) at 13.

We conclude that the words "in support of, or opposition to, any candidate" are not vague and that the definition of "'[p]olitical committee'" in former RCW 42.17.020(33) is not unconstitutionally vague. We further conclude that VEC met this definition of "political committee" when it ran the television advertisement "Better" in September 2004.[12]

"Better" began by asking "[w]ho *is* Deborah Senn looking out for?", establishing a contemporary focus for the advertisement. CP at 51; Rippie Dec. (emphasis added). "Better" then presented select quotations from 1997 newspaper articles about Senn's performance as the then-incumbent Washington State insurance commissioner.[13] *Id.* "Better" concluded "Deborah Senn Let Us Down." *Id.* When VEC ran "Better" in September 2004, Senn was no longer insurance

[12]The dissent faults our analysis of "Better," stating that it does not "point to a particular phrase . . . that is 'susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate.'" Dissent at 11 (quoting *WRTL* II, 127 S. Ct. at 2667). However, determining whether VEC constituted a "political committee" when it ran "Better" does not involve applying the *WRTL* II standard for the functional equivalent of express advocacy that the dissent quotes. *See* note 8, *supra*.

[13] Deborah Senn was elected to the office of insurance commissioner in 1992, reelected in 1996, and served through 2000.

commissioner--she was a private citizen running for the office of attorney general. VEC's review of Senn's insurance commissioner record in "Better" had contemporary significance only with respect to Senn's candidacy for attorney general.

Nor can "Better" accurately be described as the type of advertisement that simply makes a neutral, factual assertion which could be "viewed as 'supporting'" by some, "but viewed as 'opposing'" by others, depending on the viewer's opinion of the neutral assertion. Dissent at 7. Unlike the dissent's example of such an advertisement, one stating no more than "'Jones will cut hospital funding,'" *id.*, "Better" expressly supplied viewers with a conclusion to be drawn from the advertisement--"Deborah Senn Let Us Down." Rippie Dec. Given Senn's status--no longer incumbent insurance commissioner and currently a candidate for attorney general--the "Better" advertisement was clearly in opposition to Senn's candidacy.[14]

[14]Moreover, as CLC observes, VEC "is registered as a Section 527 political organization under the Internal Revenue Code." CP at 4. 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). As VEC notes, the definition of "political organization" in section 527 does have a broader sweep than does the definition of "'[p]olitical committee'" in former RCW 42.17.020(33). However, VEC fails to justify how it qualifies as a "political organization" but not a "political committee." Thus, the fact that VEC registered as a "political organization" under section 527 organization is a persuasive fact that indicates that VEC was seeking the tax benefits of section 527 while disingenuously seeking to avoid the disclosure requirements of the FCPA.

We hold that the PDC did not infringe on VEC's First Amendment rights by compelling VEC to register with the PDC as a political committee and to disclose information about the committee's contributions and expenditures.

2. Because former RCW 42.17.020(33) is not vague, a determination of whether VEC's advertisement constituted express advocacy or issue advocacy is unnecessary

In *McConnell*, the United States Supreme Court clarified that a determination of whether an advertisement constitutes express advocacy or issue advocacy is unnecessary if the regulation at issue is not vague. 540 U.S. at 193-94. In its oral decision denying summary judgment to VEC, the trial court observed that the United States Supreme Court's decision in *McConnell* "changed the rules of engagement on the distinction between express and issue advocacy," "overturned a significant portion of *Buckley* as relied upon by our state supreme court in *WSRP*," and "rendered a distinction between express and issue advocacy . . . 'functionally meaningless.'" CP at 425. Despite this conclusion, the trial court proceeded to hold that VEC's advertisement was a character attack on Ms. Senn that constituted express advocacy because it "was an exhortation to vote against Senn." CP at 427.

The trial court's implication that *McConnell* overturned *Buckley* and erased the distinction between express advocacy and issue advocacy does not accurately reflect the holding of *McConnell*. However, *McConnell* did clarify that the

distinction between express advocacy and issue advocacy articulated in *Buckley* was not constitutionally mandated but was instead a tool of statutory construction. 540 U.S. at 191-92. We conclude that the trial court's determination that VEC's advertisement constituted express advocacy was unnecessary because former RCW 42.17.020(33) was not unconstitutionally vague. As a result, we decline to reach the issue of whether VEC's advertisement constituted express advocacy or issue advocacy.

B. Article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements than the First Amendment

VEC also contends that the PDC violated VEC's free speech rights under article I, section 5 of the Washington Constitution.[15] VEC argues that "article I, section 5, is more protective of election-related speech than the First Amendment, and in particular that article I, section 5, demands special scrutiny to ensure that vague regulations do not operate as prior restraints." Am. Br. of Appellants at 47. VEC also asserts that the trial court erred when it concluded that "any additional protections" provided by article I, section 5 "should be extended to the voters' right to information regarding political activity, not the right of VEC to restrict disclosure of the information." CP at 427-28.

Article I, section 5 of the Washington Constitution provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." "Unlike the First Amendment, article 1, section 5 categorically rules out prior restraints on constitutionally protected speech under any circumstances."[16] *O'Day*, 109 Wn.2d at 804; *see also Ino Ino*, 132 Wn.2d at 117.

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[15]When presented with arguments under both the Washington and federal Constitutions, this court usually reviews the state constitutional arguments first. *State v. Reece*, 110 Wn.2d 766, 770, 757 P.2d 947 (1988). However, because federal First Amendment analysis provides an important background for reviewing regulations of political speech, we follow the organizational structure of the parties and consider the federal constitutional arguments first. *See* Am. Br. of Appellants at 12 n.6 (citing *Reece*, 110 Wn.2d at 770-71).

[16]When presented with a claim that a provision of the Washington Constitution provides greater protection than is provided under a provision of the United States Constitution, this court engages in a two step inquiry. First we determine whether the state provision should be given an

As the PDC notes, "'a prior restraint is an administrative or judicial order *forbidding* communications prior to their occurrence. Simply stated, a prior restraint *prohibits* future speech, as opposed to punishing past speech.'" Am. Br. of Resp'ts at 26 n.21 (emphasis added) (quoting *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994)); s*ee also Ino Ino*, 132 Wn.2d at 117.

VEC argues that article I, section 5 is violated in this case because the disclosure requirements at issue are overly vague and thereby constitute prior restraints on speech. But other than the definition of "'[p]olitical committee'" in former RCW 42.17.020(33), VEC does not challenge any provisions of the FCPA on vagueness grounds. Because we hold that former RCW 42.17.020(33) is not vague, we also necessarily conclude that the statute does not rise to the level of a prior restraint as a result of vagueness. Thus, we need only determine whether the disclosure requirements at issue in this case *prohibit* future speech and, thereby, rise to the level of an unconstitutional prior restraint.

VEC fails to articulate how the FCPA's disclosure requirements *prohibited* its speech. This court has never specifically stated that compelled disclosure

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independent interpretation from the federal provision by analyzing the six nonexclusive, neutral *Gunwall* factors. *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). Where, as here, our precedent establishes that a separate and independent analysis of a state constitutional provision is warranted, further *Gunwall* analysis is unnecessary to establish that point. If we determine that an independent analysis is warranted, we then analyze "whether the provision in question extends greater protections for the citizens of this state." *Id.*

constitutes a prior restraint on political speech, nor have we held that article I, section 5 of the Washington Constitution provides greater protection against disclosure requirements. As noted earlier, the United States Supreme Court has recognized that compelled disclosure "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. However, in *Buckley*, the Court determined that the disclosure requirements at issue were not a "prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82. More recently the United States Supreme Court has stated that disclosure requirements "'d[o] not prevent anyone from speaking.'" *McConnell*, 540 U.S. at 201 (alteration in original) (quoting *McConnell*, 251 F. Supp. 2d at 241).

Nor has VEC established that the disclosure requirements restricted VEC's speech before it engaged in protected speech. RCW 42.17.040 states that a political committee must file a statement of organization with the PDC "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." Thus, it was possible for VEC to have received contributions and made expenditures prior to registering with the PDC without

violating the terms of RCW 42.17.040. Additionally, RCW 42.17.080, which governs the reporting of contributions to and expenditures from political committees, requires that the political committee disclose contributions only after receiving them and expenditures only after making them. Thus, the disclosure requirements did not in any way prohibit VEC's future speech.[17] VEC has failed to prove that the disclosure requirements in this case constitute an unconstitutional prior restraint on protected speech.

VEC also challenges the trial court's conclusion that "any additional protections" provided by article I, section 5 "should be extended to the voters' right to information regarding political activity, not the right of VEC to restrict disclosure of the information." CP at 427-28. VEC argues that article I, section 5 is "less tolerant of vagueness in regulations of election-related speech than is the First

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[17]The dissent engages in a lengthy discussion of the Washington Constitution's prohibition against prior restraints but fails to demonstrate that a prior restraint occurred in this case. Dissent at 22-27. The dissent's reliance on *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984), in this regard is misplaced. As the dissent notes, *Coe* does establish that "[t]he Washington Constitution 'absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech' where 'the information sought to be restrained was lawfully obtained, true, and a matter of public record.'" Dissent at 24 (quoting *Coe*, 101 Wn.2d at 375). However, the dissent's assertion that "VEC's speech is clearly lawfully obtained information," "true, and a matter of public record" does not prove that therefore "restricting publication through disclosure requirements becomes a prior restraint." *Id.* at 24. This is a faulty syllogism, akin to asserting (1) all men are mortal, (2) the cat is mortal, (3) therefore the cat is a man.

As explained above, because the FCPA registration and disclosure requirements did not impose a prior restraint on VEC's speech, the Washington Constitution's prohibition on prior restraints is inapposite.

Amendment." Am. Br. of Appellants at 39. However, as noted above, this court has previously held that article I, section 5 is only more protective if the vague regulation amounts to a prior restraint. Because VEC has not proven that the regulation amounts to a prior restraint and because we conclude that the regulation is not vague, VEC can establish no greater protection purely on vagueness grounds.

VEC also argues that "[t]here is no evidence from the State Constitutional Convention that suggests that the framers . . . contemplated regulating election-related speech" and that "at the time article I, section 5, was adopted, election-related speech was entirely unregulated in the State." Am. Br. of Appellants at 41. However, this argument does not prove that the framers or the legislature intended to protect against disclosure requirements--it proves only that history is silent on the issue.

On the other hand, the PDC argues that constitutional history and preexisting state law indicate that any additional protections found in article I, section 5 should be construed to protect the public's right to obtain information about political campaigns. The PDC identifies "at least two themes running through the history of the convention that indicate that this Court should rule on the side of the public's right to know." Am. Br. of Resp'ts at 30. The PDC identifies these two themes as (1) the framers' concern about the power of corporations and (2) the related distrust

of government and corporate influence on government. *Id*. at 30-31. As a result, the PDC states that the framers "included several provisions designed to limit the power of corporations" (*see, e.g.,* Wash. Const., art. XII) and to keep the public informed about legislative activities (*see, e.g.,* Wash. Const., art. II, §§ 19, 37). *Id.* at 31.

The PDC also asserts that preexisting law reinforces that "[t]he people of the state of Washington have a long history of protecting themselves from the exact type of secrecy VEC tried to engage in prior to the commencement of this case." Am. Br. of Resp'ts at 33. The PDC cites Initiative 276 and Initiative 134, as well as this court's decisions in *Fritz* (upholding the constitutionality of disclosure requirements of elected officials financial affairs in section 24 of Initiative 276) and *Bare* (upholding the constitutionality of campaign expenditure limits in section 14 of Initiative 276), as evidence of this commitment. Am Br. of Resp'ts at 33-34. On balance, neither constitutional history nor preexisting state law prove an intention to protect against disclosure requirements, and both prove an intention to protect citizens against powerful corporate interests. Considering all of the above, we hold that article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements than the First Amendment.

C. Whether VEC is entitled to attorney fees and expenses

Pursuant to RAP 18.1, VEC also requests that this court award it reasonable attorney fees and expenses under 42 U.S.C. § 1988. Because we affirm the trial court, VEC is not the prevailing party and is not entitled to attorney fees and expenses under 42 U.S.C. § 1988.

IV. CONCLUSION

We hold that the definition of "political committee" is not vague and that the FCPA's disclosure requirements did not unconstitutionally burden VEC's speech. Because we hold that former RCW 42.17.020(33) is not vague, we need not reach the issue of whether VEC's advertisement constituted express advocacy or issue advocacy. We also hold that article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements.

The people have declared that it is the policy of the state of Washington that groups who sponsor political advertising must disclose their identities, contributions, and expenditures. Contrary to VEC's assertions, these disclosure requirements do not restrict political speech--they merely ensure that the public receives accurate information about who is doing the speaking. As Justice Brandeis famously observed, "'[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'" *Buckley*, 424 U.S. at 67 (quoting Louis D. Brandeis, Other

People's Money 62 (Nat'l Home Library Found. ed. 1933)). We affirm the trial court's dismissal of VEC's constitutional claims.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Gerry L. Alexander	Justice Tom Chambers
Justice Charles W. Johnson	Justice Susan Owens
Justice Barbara A. Madsen	
Justice Bobbe J. Bridge	