

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Hon. Richard A. Jones  
Hearing Date: December 3, 2004  
Hearing Time: 8:30 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, ex rel.  
WASHINGTON STATE PUBLIC  
DISCLOSURE COMMISSION  
  
Plaintiffs,  
  
v.  
  
VOTERS EDUCATION COMMITTEE,  
  
Defendant,

No. 04-2-33247-8 SEA  
  
MOTION OF THE UNITED STATES  
CHAMBER OF COMMERCE FOR  
LEAVE TO FILE BRIEF *AMICUS  
CURIAE* IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

**RELIEF REQUESTED**

The United States Chamber of Commerce (the "Chamber") respectfully requests leave to file the accompanying brief *amicus curiae* in opposition to plaintiffs' motion for summary judgment.

The Chamber previously filed the instant brief in support of the Voters Education Committee's motion for summary judgment in the companion case, *Voters Education Committee v. Washington State Public Disclosure Commission*, No. 04-2-23551-1SEA, which is also assigned to this Court and which is proceeding pursuant to a parallel briefing schedule. A separate motion requesting that that brief be accepted by the Court is currently

1 pending. As the constitutional issues presented by the companion case are identical to those  
2 present in this action, the Chamber seeks leave to re-file its original brief in this case and  
3 further, so as not to burden the Court, directs the Court to the numerous out-of-state  
4 authorities reproduced and filed in the companion case.  
5

## 6 STATEMENT OF FACTS

### 7 Interest of *Amicus Curiae*

8 Founded in 1912, the Chamber is the only national institution that represents the  
9 unified interests of businesses in the United States. The Chamber now is the world's largest  
10 business federation, representing more than three million companies and organizations of  
11 every size, sector, and geographical region. In addition, the Chamber works with nearly  
12 3,000 state and local chambers, 830 affiliated associations, and over 90 American  
13 Chambers of Commerce abroad. At its most fundamental level, the Chamber exists to  
14 promote and defend free enterprise and individual opportunity.  
15

16 Among other activities, the Chamber engages in political activity intended to  
17 support the election of pro-business candidates for public office, and to promote the public  
18 discussion of issues that are important to business interests. The Chamber's Institute of  
19 Legal Reform also works closely with local chambers and other supporters of civil justice  
20 reform to educate the public about the importance of integrity and impartiality in the  
21 enforcement of the law. Integral to the Chamber's efforts are its endorsements of  
22 candidates for office, its organization of fund-raisers and get-out-the-vote efforts, and its  
23 voter education programs.  
24

25 As part of its voter education program in 2004, the Chamber contributed \$1.5  
26 million to the Voters Education Committee ("VEC") for the purpose of underwriting the

1 political advertisements at issue in this case. Those advertisements discussed the  
2 performance of Intervenor Deborah Senn, a candidate for Washington Attorney General, in  
3 her prior position as Washington Insurance Commissioner. The Chamber therefore has a  
4 clear and direct interest in the outcome of the pending motions for summary judgment filed  
5 in this case and in the above-referenced companion case.  
6

7 More broadly, the Chamber has an interest in the regulation of the voter education  
8 advertisements that it sponsors, and it has been an active litigant in cases involving the  
9 regulation of its political speech. Indeed, the Chamber was a plaintiff in *McConnell v.*  
10 *FEC*, 530 U.S. 93, 124 S. Ct. 619 (2003). *See also, e.g., Chamber of Commerce of the U.S.*  
11 *of Am. v. Moore*, 288 F.3d 187, 197-98 (5th Cir. 2002). Further, this highly-publicized case  
12 may have significant ramifications for the Chamber's voter education efforts nationwide in  
13 future election cycles. The Chamber respectfully submits that the imposition of registration  
14 and reporting requirements on an entity such as VEC, on the basis of advertisements such  
15 as those challenged here, would directly and adversely impact the Chamber's political  
16 speech and the broader public discussion of important issues during election season.  
17

18  
19 ***Amicus Curiae's Familiarity With the Issues Involved and With the Scope of the***  
20 ***Argument Presented by the Parties***

21 The Chamber, by undersigned counsel, has reviewed the pertinent background  
22 materials and court filings in this case, including the pleadings, deposition transcripts, the  
23 parties' motions for summary judgment, and the exhibits thereto in this and the above-  
24 referenced companion case. As noted above, the Chamber is also an active litigant in cases  
25 involving issues similar to those presented by this case, and its counsel are well-versed in  
26 the pertinent areas of law. Undersigned counsel Bobby Burchfield was lead counsel for

1 political party plaintiffs and argued before the United States Supreme Court in the  
2 *McConnell* case. Accordingly, the Chamber is familiar with the issues before the Court and  
3 the scope of the argument presented by the parties.  
4

### 5 STATEMENT OF ISSUES

6 The Chamber's brief addresses three issues that are central to the resolution of the  
7 pending motions for summary judgment, in this and the companion case filed by VEC:

8 1. Did the legal distinction between express advocacy and issue advocacy,  
9 established in *Buckley v. Valeo*, 424 U.S. 1 (1976), reaffirmed in *FEC v. Massachusetts*  
10 *Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL"), and applied in *Washington*  
11 *State Republican Party v. Public Disclosure Commission*, 141 Wn.2d 245 (Wash. 2000)  
12 ("WSRP"), survive *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003)?

14 2. Are the advertisements sponsored by VEC issue advocacy, rather than  
15 express advocacy, and, therefore, are they outside the scope of the Washington statutes at  
16 issue in this case, or, alternatively, are the statutes at issue in this case unconstitutionally  
17 overbroad unless limited in application to "express advocacy?"

19 3. Was the Supreme Court of Washington's suggestion in the *WSRP* case, that  
20 attacks on the "character" of a candidate for public office amount to express advocacy as a  
21 matter of law, mere *dicta* and, if not, did that suggestion survive *McConnell*?

### 22 EVIDENCE RELIED UPON

23 The pleadings and files on record herein.  
24  
25  
26

1 **AUTHORITY & ARGUMENT**

2 This motion complies with Rules 10.1 and 10.6 of the Washington Rules of  
3 Appellate Procedure. Although these Rules do not govern this Court, Rules 10.1 and 10.6  
4 are applicable by analogy. See *Schaible v. Pike Place Mkt. Pres. & Dev. Auth.*, No. 38243-  
5 8-I, 1997 Wash. App. LEXIS 489 at \*19 (Wash. App. April 7, 1997) (“Amicus status is  
6 most common on appeal, but these rules [of Appellate Procedure related to *amicus* briefs]  
7 may apply by analogy to the trial court as well.”).

8  
9 In its brief *amicus curiae*, the Chamber provides analysis and discussion that is not  
10 redundant with the parties’ presentation and is intended to aid the Court in its resolution of  
11 the difficult questions presented by this case. Specifically, the Chamber’s brief addresses at  
12 length several issues that the parties either did not address or discussed in only cursory  
13 fashion, namely: (1) the history, purpose, and importance of the distinction between express  
14 and issue advocacy; (2) the reasons why the United States Supreme Court’s *McConnell*  
15 decision did not void the distinction between express and issue advocacy; (3) the extent to  
16 which lower courts continue to employ this distinction even after *McConnell*; (4) the  
17 specific role the express advocacy test can play in saving one of the regulations at issue in  
18 this case from an overbreadth challenge; and (5) why the *McConnell* decision implicitly  
19 nullifies the “character attack” test for express advocacy that the PDC claims was  
20 established in the *WSRP* case. The Chamber’s brief also expands upon VEC’s explanation  
21 for why the purported “character attack” test for express advocacy is inappropriate and  
22 inapplicable here in any event.  
23  
24

25 **PROPOSED ORDER**

26 A proposed form of order is filed herewith.

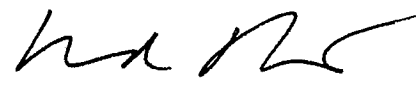
1 **CONCLUSION**

2 For the foregoing reasons, the Court should grant the Chamber's motion for leave to  
3 file a brief *amicus curiae* and accept the accompanying brief.

4  
5 DATED: November 24, 2004.

6 Respectfully submitted,

7 YARMUTH WILSDON CALFO PLLC

8 By:   
9 Harold A. Malkin, WSBA # 30986  
and

10 Bobby R. Burchfield  
11 Jason A. Levine  
12 Lauren H. Abrams  
13 MCDERMOTT WILL & EMERY LLP  
14 600 Thirteenth Street, N.W.  
15 Washington, D.C. 20004-3096  
16 Tel.: (202) 756-8000  
17 Fax: (202) 756-8087

18 *Of Counsel:*  
19 Stephen A. Bokat  
20 Judith K. Richmond  
21 National Chamber Litigation Center, Inc.  
22 1615 H Street, N.W.  
23 Washington, DC 20062  
24 Tel: (202) 463-5337

25 Attorneys for *Amicus Curiae* Chamber of Commerce  
26 of the United States