SUPREME COURT NO. 77966-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SAN JUAN COUNTY, a political subdivision of the State of Washington, CITY OF KENT, a political subdivision of the State of Washington, CITY OF AUBURN, a political subdivision of the State of Washington, CITY OF SEATTLE, a political subdivision of the State of Washington, *ex rel.* the STATE OF WASHINGTON

Appellees,

v.

NO NEW GAS TAX, a Washington Political Action Committee, and JEFFREY DAVIS, an individual and Treasurer of NO NEW GAS TAX,

Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY
HON. CHRIS WICKHAM, JUDGE
(Case No. 05-2-01205-3)

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Michael E. Kipling
Kipling Law Group, PLLC
3601 Fremont Ave N, Suite 414
Seattle, Washington 98103
(206) 545-0345

Counsel for Amicus
American Civil Liberties Union
of Washington

Aaron H. Caplan, Staff Attorney
American Civil Liberties Union
of Washington
705 Second Avenue, Suite 300
Seattle, Washington 98104-1799
(206) 624-2184

Co-Counsel for Amicus
American Civil Liberties Union
of Washington

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 3

A. The Trial Court's Decision Leads Inevitably To A Restraint On Protected Political Speech 4

B. The Speech at Issue is Protected Political Speech 8

C. The First Amendment Does Not Allow The Speech At Issue To Be Limited By The State 10

1. The state cannot limit political speech in close proximity to the election. 11

2. As applied to the speech at issue, RCW 42.17.105(8) is an unconstitutional content-based and viewpoint-based restriction. 12

3. The standard applied by the trial court is unconstitutionally overbroad and vague. 13

4. The trial court decision is not supported by *Buckley* or *McConnell.* 16

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) 9

Brown v. Hartlage, 456 U.S. 45, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) 10

Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) 3, 16, 17, 18

Carey v. Brown, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980) 12

Central Hudson Gas & Electric Corp. v. New York Public Service Commission, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) 9

City of Houston v. Hill, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) 14

City of Spokane v. Marr, 129 Wn. App. 890, 120 P.3d 652 (Div. III, 2005) 9

Connally v. General Construction Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926) 14

Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 652 L. Ed. 2d 319 (1980) 12

Duskin v. Carlson, 136 Wn. 2d 550, 965 P.2d 611 (1998) 4

FCC v. League of Women Voters of California, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) 10

First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) 8, 13

Heffron v. International Society for Krishna Conscientiousness, Inc., 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981) 12

Laffey v. Begin, 137 Fed. Appx. 362, 2005 WL 1405479 (1st Cir. 2005) 7

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) 10

McConnell v. FEC, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) 16, 18, 19

Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988) 10

Mills v. State of Alabama, 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) 9, 11

NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 14

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) 9

Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) 12

R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) 13

Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) 18, 19

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board, 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) 12

State of Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee, 135 Wn. 2d 618, 957 P.2d 691 (1998) 10

Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc., 125 Wn. 2d 305, 884 P.2d 920 (1994) 6

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) 9

Washington State Republican Party v. Washington State Public Disclosure Commission, 141 Wn. 2d 245, 4 P.3d 808 (2000) 1, 15, 17

Whitney v. California, 274 U.S. 357, 47 S. Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) 2

Statutes and Code

RCW 42.17.020(15) ..... passim

RCW 42.17.090 ..... 3, 5, 6

RCW 42.17.105(8) 3, 5, 6

RCW 42.17.390(3) 16

RCW 42.17.390(5) 16

RCW 42.17.610 - .790 5

WAC 390-05-290 4

Other Authorities

Erwin Chemerinsky, *Constitutional Law Principles and Policies*, p. 917 (2d ed. 2002) 13

In re CBS Broadcasting, Inc., et al., MURs 5540, 5545, 5562 and 5570, Statement of Reasons of Comm'rs Mason and Smith at 8 (Federal Election Comm'n, July 12, 2005) 19

In re Dave Ross, MUR 5555, Statement of Reasons of Chairman Toner and Comm'rs Mason and von Spakovsky at 3 (Federal Election Comm'n, March 17, 2006) 19

In re Robert K. Dornan, MUR 4689, Statement of Reasons of Vice Chairman Wold and Comm'rs Elliott, Mason and Sandstrom at 8 (Federal Election Comm'n, December 20, 1999) 19

I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. Because free and fair elections – and the campaigns that precede them – are vital to our democracy, the ACLU and its affiliated organizations in other states have participated in many court cases involving campaign finance laws.

The ACLU recognizes that modern campaign finance laws have laudable goals: reducing the cost of political campaigns, equalizing the ability of lesser-funded candidates to be heard, and reducing the possibilities for corruption and the appearance of corruption. However, the means chosen in these laws may have the result of chilling or otherwise limiting socially useful and constitutionally protected campaign speech. Therefore, in addition to its longstanding policies against any direct restraint of political speech, the ACLU has developed three policy positions to judge the constitutionality of campaign finance regulations.

First, the ACLU opposes limits on campaign contributions and expenditures. Spending money is not the same as speaking, of course, but speech inevitably is restricted when the government places fixed limits on speakers' ability to produce and disseminate political messages. For this reason, the ACLU's amicus brief in *Washington State Republican Party v. Washington State Public Disclosure Commission*, 141 Wn. 2d 245, 4 P.3d 808 (2000), argued that any law limiting a political party's ability to pay for political advertising would violate the state constitution.

Second, the ACLU believes that laws requiring public disclosure of campaign contributions are constitutional only if they are written and applied in a manner that avoids chilling political speech. At a minimum, this means that disclosure laws must not be vague or overly broad, and they must include exemptions to protect the speech and association rights of unpopular groups whose supporters require anonymity to advocate their views safely.

Third, the ACLU believes that public financing of political campaigns is the one truly effective and constitutionally acceptable method for campaign finance reform. Instead of a futile and legally suspect attempt to limit some people's speech, public financing would enhance the ability of all people to present their views to the electorate. Instead of lowering the ceiling, public financing raises the floor. This model honors the goal of constitutional free speech guarantees, which is to pursue "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring).

II. STATEMENT OF THE CASE

The Honorable Chris Wickham of the Thurston County Superior Court ruled that on-air statements made by two radio talk show hosts constituted an in-kind contribution as defined in RCW 42.17.020(15)(a) and (c). The speech at issue was part of the content of the talk show; that is, the statements were made in the body of the show and not during

advertisements or other discrete portions of the show for which the station typically receives payment.

Characterizing the radio hosts' speech as a contribution has two important legal consequences under the campaign finance provisions of the Public Disclosure Act (also called the Fair Campaign Practices Act; hereinafter, "FCPA"). First, the No New Gas Tax (NNGT) campaign was required to assign a dollar value to the speech and report it to the Public Disclosure Commission. RCW 42.17.090. This was the relief sought by Plaintiffs San Juan County, *et al*. ("Municipalities") and ordered by the trial court. Second, the hosts would be precluded from making more than $5,000 worth of such "contributions" to a candidate or initiative during the 21 days immediately preceding the election. RCW 42.17.105(8). While the court did not order an injunction against future speech, the trial court's ruling inevitably leads to that result.

III. ARGUMENT

The line of recent cases examining campaign finance laws, discussed below, illustrates that in some instances regulations that appear merely to limit financial transactions (contributions or expenditures) can have the unacceptable effect of limiting speech. There has been a great deal of debate over these matters and reasonable minds have differed over which regulations cause an unacceptable chilling effect on political speech. Some people have questioned the premise of *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), that money in some instances should be treated as a form of speech. Here, however, the trial

court's order stands this notion on its head; the trial court in this case based its decision on the premise that *speech is money*. As a result of this mistaken premise, the trial court's decision to apply contribution limits to speech clearly violates the First Amendment.

The resulting constitutional problems could be avoided by construing the Act in such a way that the speech at issue is not a contribution. *Duskin v. Carlson,* 136 Wn. 2d 550, 557, 965 P.2d 611 (1998) ("Where possible, statutes will be construed so as to avoid any unconstitutionality.") As explained in more detail in the briefs of NNGT and amicus Washington State Association of Broadcasters, this result is easily reached through the plain language of RCW 42.17.020(15)(b)(iv) (definition of "contribution" that excludes the content of broadcasts by the news media) and WAC 390-05-290 (definition of "political advertising" that excludes the portion of a broadcast where payment is not normally required). In this brief, the ACLU will focus on the constitutional problems created by the trial court's ruling.

A. The Trial Court's Decision Leads Inevitably To A Restraint On Protected Political Speech

The trial court recognized that any decision limiting political speech would be very problematic. "Campaign contribution limits on speech present a complex and uncertain legal problem to any courts that might be asked to determine the validity of those limits." Decision of the Court on Motions to Dismiss and Hearing and Motion for Fees, hearing held October 24, 2005, p. 7 ("Decision") (attached to Respondents/Cross-

Appellants' Brief as Appendix II). Nonetheless, the court apparently was persuaded by the Municipalities' argument that the limit on contributions in RCW 42.17.105(8) is merely "hypothetical" in this case because the Municipalities elected only to seek an injunction that required *disclosure* of the imputed value of the airtime. Respondents' Brief, pp. 41-42. As a result, the trial court concluded that the decision to treat the speech at issue as a contribution did not result in any limit on the speech itself. "This court is aware of no contribution limits that were triggered by the issuance of the preliminary injunction." Decision, p. 7.

In fact, the trial court's ruling that defined on-air speech as a contribution within the meaning of RCW 42.17.020(15) automatically triggers application of a number of other provisions in the Act that directly limit the quantity and content of the speech. (Hereinafter, these provisions are referred to as the "spending limits" in the Act.) For example, RCW 42.17.610 - .790 (Campaign Contribution Limitations) include a number of provisions that would directly limit speech regarding a candidate. As to initiatives and candidates, RCW 42.17.105(8) provides that "[i]t is a violation of [the Act] for any person to make . . . contributions reportable under RCW 42.17.090 in the aggregate exceeding . . . five thousand dollars for any . . . campaign . . . within twenty-one days of a general election." RCW 42.17.090, which is the reporting requirement the trial court applied to the speech at issue, uses the same definition of "contribution" as is found in the spending limits.

When the same words are used in different parts of the same statute, there is a strong presumption that the legislature intended that the words have the same meaning in each place. *Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.,* 125 Wn. 2d 305, 313, 884 P.2d 920 (1994). That conclusion is inescapable here, where: (a) "contribution" is a defined term in RCW 42.17.020(15), applicable to the entirety of Ch. 42.17 ("the definitions in this section apply throughout this chapter unless the context clearly requires otherwise."); and (b) the restraint on contributions in RCW 42.17.105(8) explicitly applies to "contributions reportable under RCW 42.17.090." The trial court's ruling that the speech at issue was a "contribution" for the purpose of the reporting requirements of RCW 42.17.090 is also a ruling that the speech is subject to the spending limits in the Act.

Thus, if the speech at issue here is a "contribution," as the trial court found, broadcasters and talk show hosts will be severely limited in their ability to speak in favor of initiatives and candidates, or to solicit contributions, for 21 days preceding an election. The impact on speech is not merely hypothetical. Although the trial court was unwilling to provide guidance as to how the "value" of the speech at issue was to be computed, the record discloses that the imputed value of the speech that was reported by Appellant to the Public Disclosure Commission was approximately $20,000. Respondents' Brief, p. 11 (citing CP 497). Thus, if just over a quarter of the speech at issue had occurred in the three weeks preceding the election, the statute would have been violated. Indeed, the threat of an

inadvertent violation will lead broadcasters to refrain from such speech altogether. CP 1036.

There is strong motivation for self-censorship where broadcasters and radio personalities must fear expensive and burdensome legal proceedings (like this one) over the content of their broadcasts. There is likewise strong motivation for political opponents of a speaker to use campaign finance laws as a tool for distraction and harassment, with potentially devastating results for free speech. For example, Steven Laffey – the mayor of Cranston, Rhode Island – had a weekly radio talk show. A political opponent who planned to run against Laffey filed a complaint with the Rhode Island State Board of Elections that the mayor's receipt of airtime from the radio station was a forbidden campaign contribution under Rhode Island law. Even though the election was more than a year away and the mayor had not yet declared himself a candidate for re-election, the Board issued an order completely barring Laffey from acting as the host of *The Steve Laffey Show*.[1] The matter was ultimately resolved and the injunction vacated, but only after an interruption of speech on the radio, diversion of Laffey's resources, and a temporary governmental assist to the campaign of his opponent (who was able to use the proceedings to argue that Laffey was a violator of campaign finance laws).

[1] *See* ACLU's brief in *Laffey v. Begin*, 137 Fed. Appx. 362, 2005 WL 1405479 (1st Cir. 2005), available online at http://www.riaclu.org/20050606.html

In short, the trial court was wrong as a matter of law when it concluded that its decision would not result in any limits on speech. Decision, p. 7. The trial court's ruling that defined speech as an in-kind contribution means that the speech is subject to a number of limits under the FCPA.

B. The Speech at Issue is Protected Political Speech

The trial court based its preliminary injunction in part on its finding that the talk show hosts "intentionally promoted the campaign by advertising it in their regular radio show time slots." Decision, p. 2. In fact, Fisher Broadcasting, the owner of KVI, submitted an uncontroverted Declaration that the speech at issue was part of the content of the talk show and not during advertisements or the "commercial-designated segments" of the program. CP 1035-36. Nonetheless, the trial court was convinced that the statements of the radio hosts crossed some ill-defined line that supposedly separates constitutionally protected "editorializing" from unprotected "advertising." There are two problems with this approach: first, (as effectively described by NNGT and amicus broadcasters) the trial court's line is impossible to discern; and second, "advertising" one's political beliefs is entitled to as much protection under the First Amendment as "editorializing" about those beliefs.

Speech advocating an initiative during the campaign "is at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (regarding a referendum proposal submitted to Massachusetts

voters to amend the state constitution). As the U.S. Supreme Court said in *Mills v. State of Alabama,* 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966), "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."

Likewise, solicitation of contributions to an initiative campaign is also protected speech. "Our cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money." *Bates v. State Bar of Arizona,* 433 U.S. 350, 363, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). "Charitable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information[,] dissemination and propagation of views and ideas, and advocacy of causes – that are within the First Amendment's protection." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980); *see also City of Spokane v. Marr,* 129 Wn. App. 890, 894, 120 P.3d 652 (Div. III, 2005) ("[T]he right to beg . . . is constitutionally protected.").

The trial court may have mistakenly equated advertising for goods and services ("commercial advertising") with advertising for a political campaign ("political advertising"). The commercial speech doctrine of *Central Hudson Gas & Electric Corp. v. New York Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), allows for certain government regulation of commercial advertising in

order to protect consumers and ensure the fair functioning of the commercial marketplace. But this doctrine applies to speech proposing a commercial transaction, which is distinguished from other kinds of speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) (citations omitted). The commercial speech doctrine has never applied to political speech.

Urging listeners to take a position on "controversial issues of public importance" is the very definition of "editorializing," which is at the core of First Amendment protection. *FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (overturning ban on "editorializing" by public television stations). The trial court here erred in construing speech in favor of a political campaign as equivalent to speech about competing brands of toothpaste.

C. The First Amendment Does Not Allow The Speech At Issue To Be Limited By The State

This Court has held that "[t]he constitutional guarantee of free speech has its 'fullest and most urgent application' in political campaigns. *State of Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 135 Wn. 2d 618, 623, 957 P.2d 691 (1998), quoting *Brown v. Hartlage,* 456 U.S. 45, 53, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982). As such, "the State bears a 'well-nigh insurmountable' burden to justify [the] restriction on political speech. *Id.* at 624, quoting *Meyer v. Grant,* 486 U.S. 414, 425, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

1. The state cannot limit political speech in close proximity to the election.

In *Mills v. State of Alabama,* 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) the Supreme Court held that an Alabama statute violated the First Amendment by precluding a newspaper from publishing an editorial on election day in support of a ballot proposition. The Court held, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Id.* at 218-219. Notwithstanding the state's argument that the statute was a reasonable restriction intended only to "protect[] the public from confusive (*sic*) last-minute charges and countercharges and the distribution of propaganda in an effort to influence votes on election day," the Court held that "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." *Id.* at 219-220.

The trial court's decision here subjects broadcast speech to the 21-day ban of RCW 42.17.105(8), far greater than the one-day ban in the Alabama statute that was struck down in *Mills*. The First Amendment does not permit such a restriction on political speech.

2. As applied to the speech at issue, RCW 42.17.105(8) is an unconstitutional content-based and viewpoint-based restriction.

Under the spending limits in the Act, during the three weeks before an election, KVI and/or the talk show hosts involved in this case may discuss any other topic, except that they may not advocate the initiative. This is a content-based restriction on speech. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board,* 502 U.S. 105, 115, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 536, 100 S. Ct. 2326, 652 L. Ed. 2d 319 (1980).[2]

Making matters even worse is the fact that the trial court's decision will often result in a *viewpoint* restriction. Free speech presumes "an equality of status in the field of ideas, and the government must afford all points of view an equal opportunity to be heard." *Carey v. Brown*, 447 U.S. 455, 463, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980) (quoting *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)) (internal quotation omitted). By contrast, the trial court's rule limits the talk show hosts' ability to speak in favor of the No

[2] For the same reason, the 21-day limit in RCW 42.17.105(8) does not qualify as a "time, place and manner" restriction because such restrictions must be content-neutral. *Heffron v. International Society for Krishna Conscientiousness, Inc.,* 452 U.S. 640, 648, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981).

New Gas Tax initiative, but leaves the same talk show hosts perfectly free to *oppose* the initiative without limitation.

In many cases, initiatives do not have an organized campaign in opposition, although they will customarily have an organized campaign in support. In these situations, the trial court's approach would view speech in favor of the initiative as an in-kind contribution to a campaign, but speech opposed to the initiative would not be an in-kind contribution and would be subject to no limits. Such viewpoint-based regulations are presumptively invalid. The government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 392, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

3. The standard applied by the trial court is unconstitutionally overbroad and vague.

The constitutional concepts of vagueness and overbreadth are closely related. Erwin Chemerinsky, *Constitutional Law Principles and Policies*, p. 917 (2d ed. 2002). In this matter, the amorphous standard applied by the trial court to conclude that the talk show hosts "intentionally promoted the campaign by advertising it in their regular radio show time slots" (Decision, p. 2) results in a standard that is unconstitutional both for its breadth and its vagueness.

The trial court's decision sweeps far too broadly, limiting a vast amount of political speech that clearly is "at the heart of the First Amendment's protection." *First National Bank of Boston,* 435 U.S. at

776. When a law restricts "a substantial amount of constitutionally protected speech, and accords [law enforcers] unconstitutional discretion in enforcement," it fails to provide the "breathing space" that First Amendment freedoms need to survive. *City of Houston v. Hill,* 482 U.S. 451, 466-67, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987), citing *NAACP v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405. Here, as well, the Act as construed by the trial court might be applied to radio or television broadcasts merely because they "intentionally promote" an initiative or a candidate and one or more of the radio station's employees or on-air personalities has a connection with the campaign or candidate. The effect necessarily will be to cause broadcasters to self-censor their programs, resulting in a chilling effect on protected speech. *Id.*; CP 1036-1037.

A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. *See, e.g., Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). Vague laws that restrict speech are of particular concern because of the threat they will chill constitutionally protected speech. *NAACP v. Button,* 371 U.S. at 432. Freedom of speech is "delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 432-433 (citations omitted); *see also Houston v. Hill,* 482 U.S. at 467-68.

The trial court itself noted regarding its ruling that there is simply no way for a speaker to know in advance when it has crossed the line from unregulated political advertising to an in-kind "contribution." RP (7/1/05) 37, cited in Appellant's Opening Brief, p. 9 ("I'm not going to make a standard this morning on this calendar, on this record. I'm just going to leave it as it is[.]"). The lack of a clear standard before the fact invites far too much in the way of post-hoc judicial assessment of the meaning and intent of political speech. As this Court held in a related context:

> [T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Washington State Republican Party, 141 Wn. 2d at 268, quoting *Buckley,* 424 U.S. at 43.

The trial court's decision is fatally vague in another respect. The court purports to apply the Act to the content of the radio show, for which the station does not typically receive payment, as opposed to the advertising segment of the show. While a station will have established rates for its commercial or political advertising, there is no established rate for the "sale" of its shows' content. CP 1035-36. Thus, there is no way for a station to know in advance how the speech at issue is to be valued. This puts the station at risk of inadvertently "contributing" beyond the

spending limits in the statute and forces broadcasters and radio show hosts to limit their speech, for fear of inadvertently violating the statute.[3] CP 1036-37. Maintaining a bright-line rule between broadcast content and commercially available advertising time avoids vagueness and allows speakers and broadcasters to speak freely, without fear of inadvertent violation.

4. The trial court decision is not supported by *Buckley* or *McConnell.*

Contrary to the Municipalities' argument, the trial court's ruling does not find support in federal court decisions regarding the Federal Elections Campaign Act, such as *Buckley v. Valeo*, 424 U.S. 1 and more recently, *McConnell v. FEC,* 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003). These cases upheld various provisions of the Federal Elections Campaign Act as applied to campaign contributions, but none of the cases supports application of spending limits to pure speech.

A careful reading of *Buckley,* in fact, shows that the trial court's decision violates the rules laid down by the Supreme Court. As this Court has observed, expenditure limits in FECA were found to violate the First Amendment because they restrict the quantity and quality of speech:

> The Court [in *Buckley*] began its analysis by reaffirming First Amendment principles. It then observed that limitations on the amount of money individuals and groups are permitted to spend on political speech during an

[3] A violation of the statute may result in a civil penalty of up to $10,000. RCW 42.17.390(3); violation of RCW 42.17.640 may result in a penalty of $10,000 or three times the amount of the contribution, whichever is greater. *Id.* Failure to report a contribution may result in a civil penalty equivalent to the amount not reported. RCW 42.17.390(5).

> election campaign 'necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.'

Washington State Republican Party, 141 Wn. 2d at 255, quoting *Buckley,* 424 U.S. at 19.

In contrast to expenditure limits, the Supreme Court in *Buckley* held that limitations on contributions to a candidate to be spent on his or her campaign were permitted because they impose "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20-21. "While a contribution serves as a general expression of support for the candidate and his or her views, it does not communicate the underlying basis for the support. A limitation on contributions 'involves little direct restraint' on the contributor's political expression because such restrictions permit the symbolic expression of support and have no impact on the contributor's freedom to independently discuss candidates and issues." *Id.*

In distinguishing expenditure limits from contribution limits, the Supreme Court in *Buckley* was talking about contributions of cash or some other valuable contribution *other than speech*. Where, as here, contribution limits are applied directly to speech it is clear that the contribution limits work a "substantial rather than merely theoretical

restraint [ ] on the quantity and diversity of political speech." 424 U.S. at 19-21. Thus, the trial court's treatment of speech as a contribution has the same effect on speech as did the expenditure limitations that were struck down by the U.S. Supreme Court in *Buckley*.

The Municipalities also are incorrect when they assert that other recent federal cases have upheld application of the contribution limits of FECA to the content of radio broadcasts. Respondents' Brief, pp. 39-40. In *McConnell*, the Supreme Court made it clear that the contribution limits of FECA did not apply to the content of radio broadcasts. Section 304(f)(3)(B)(i) exempts from the reporting and other requirements of the statute any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless *such facilities* are owned or controlled by any political party, political committee, or candidate." *McConnell,* 540 U.S. at 697 (emphasis added); *see also* 11 C.F.R. § 100.73. There is no evidence that anyone connected with the initiative campaign owns or controls KVI's facilities.

Similarly, *Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005), made it clear that news stories, commentary, and editorials are expressly exempted from the FECA unless the *broadcaster* (not the host) is controlled by a political party or candidate. *Id.* at 107. Indeed, a careful reading of *Shays* reveals that the recent amendments to the FECA were intended by Congress to reach advertisements, rather than the content of radio shows, and were further focused on advertisements that appeared "functionally

identical" to ordinary campaign advertising. *Id.*, quoting *McConnell,* 540 U.S. at 126-127.

In fact, within the past 60 days the Federal Elections Commission likewise has interpreted these provisions in FECA to exclude from its coverage any: (1) news story, commentary, or editorial; (2) carried or covered by a radio station; (3) unless the facilities themselves are owned or controlled by a political party, political committee or candidate. The FEC held that, once those three elements are satisfied "this [ends] the investigation of this matter." *In re Dave Ross,* MUR 5555, Statement of Reasons of Chairman Toner and Comm'rs Mason and von Spakovsky at 3 (Federal Election Comm'n, March 17, 2006). Thus, contrary to the trial court's reasoning in this case, the content of the program is irrelevant to whether a contribution has been made. *Id.*, citing *In re CBS Broadcasting, Inc., et al.,* MURs 5540, 5545, 5562 and 5570, Statement of Reasons of Comm'rs Mason and Smith at 8 (Federal Election Comm'n, July 12, 2005). Moreover, the FEC expressly held that, for the press exemption to apply, the press need not . . . avoid express advocacy, or avoid solicitations. *Id.,* citing *In re Robert K. Dornan,* MUR 4689, Statement of Reasons of Vice Chairman Wold and Comm'rs Elliott, Mason and Sandstrom at 8 (Federal Election Comm'n, December 20, 1999). Once the three enumerated elements are established, other factors such as the content of the commentary and the presence of express advocacy or solicitation are irrelevant. *In re Dave Ross,* at 3.

IV. CONCLUSION

Amicus ACLU respectfully requests that the Court reverse the trial court's decision that the speech at issue in this case is a contribution within the meaning of RCW 42.17.020(15).

DATED this 9th day of May, 2006.

KIPLING LAW GROUP PLLC

By: s/ Michael E. Kipling
Michael E. Kipling, WSBA #7677

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

By: s/ Aaron H. Caplan
Aaron H. Caplan, WSBA #22525
Staff Attorney

Counsel for Amicus American Civil Liberties Union of Washington

PROOF OF SERVICE

I hereby certify that on this date I caused a copy of the following documents:

1. *Amicus Curiae Brief of American Civil Liberties Union of Washington*; and

2. *Motion for Leave to File Amicus Curiae Brief of American Civil Liberties Union of Washington*

to be delivered to the following people, in the manner listed below:

P. Stephen DiJulio
Michael K. Vaska
David S. Snyder
Ramsey Ramerman
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Attorneys for Appellees
(Via Hand Delivery)

William R. Maurer
Michael Bindas
Charity Osborn
Institute for Justice
Washington Chapter
811 First Avenue, Suite 625
Seattle, WA 98104
Attorneys for Appellants
(Via E-Mail and U.S. Mail)

David C. Lundsgaard
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
Attorneys for Amicus Washington Association of Broadcasters
(Via E-Mail and U.S. Mail)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of May, 2006, at Seattle, Washington.

Carol A. Cannon, Legal Assistant