Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

BRUCE E. H. JOHNSON
AMBIKA K. DORAN
DIRECT (206) 757-8069
brucejohnson@dwt.com

SUITE 2200
1201 THIRD AVENUE
SEATTLE, WA 98101-3045

TEL (206) 622-3150
FAX (206) 757-7700
www.dwt.com

March 23, 2009

Honorable Steve Conway
Chair, House Committee on Commerce and Labor
John L. O'Brien Building
Room JLOB 208-A
P.O. Box 40600
Olympia, WA 98504-0600

Dear Representative Conway:

We have been asked by the Association of Washington Business, Associated General Contractors of Washington, Washington Restaurant Association, Washington Retail Association, Building Industry Association of Washington, and Washington Farm Bureau to review some constitutional issues raised by the proposed retrospective rating program bill, ESSB 6035.

As the legislature has recognized, the retrospective rating program, by allowing employers to pool their insurance risk and obtain refunds on premiums, appears to have greatly increased workplace safety. The program has also become an invaluable way for individuals to associate and express their political ideas. The proposed law appears to be an overbroad attempt to silence them. The Committee should reject this partisan effort to silence conservative ideas, an attempt that deeply offends a bipartisan, indeed, a universal goal—upholding the Constitution.

Sections 1 and 3 of the Bill do not appear to be problematic, but the remainder raises significant concerns. Because members ***voluntarily*** join retro groups, any attempt to silence their political speech must survive the Constitution's strictest First Amendment tests. We believe ESSB 6035 fails to do this, and urge the Committee to reject it. In addition, we believe the new portion of Section 5, which has no temporal restriction, may interfere with existing contracts in violation of the Constitution's Contract Clause.

The Supreme Court has long recognized that corporations are entitled to free speech rights on political issues.[1] As it noted in *First Nat'l Bank of Boston v. Bellotti*, "the inherent worth of the speech in terms of its capacity of informing the public [does] not depend on the true identity of its source, whether corporation, association, union, or individual" but rather "affording the public access to discussion, debate, and the dissemination of information and ideas."[2] Thus, the First Amendment affords corporations the same speech rights as it does individuals.

Equally important, in allowing retro program sponsors to fund certain speech—such as that on workplace safety—but not other speech, Section 4 discriminates against corporations based on content.[3] In other words, the Bill does not merely restrict the time, place, or manner of the sponsor's speech, but rather tells sponsors what type of speech they may fund. Time, place, and manner regulations require the legislature to have only a rational basis for its decision. Content-based restrictions, however, are subject to the First Amendment's so-called "strict scrutiny" test. Under this test, the law is valid "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."[45]

ESSB 6035 fails both portions of this test. First, no compelling interest exists. Section 2 states the Bill is designed to "improve workplace safety, prevent accidents, and improve worker outcomes while distributing the remainder of the refund to employer members of the group"; and to "restore public confidence in the use of retrospective rating funds." Distribution of refunds to employer members is not a compelling interest, because members voluntarily join the group. Nor is there a compelling interest in "restoring public confidence" where there is no demonstrated lack of confidence. Regardless, these interests pale in comparison to the interest in fair elections underlying campaign finance limits, which the Supreme Court has routinely invalidated under the strict scrutiny test.[6]

The voluntary nature of an employer's participation in a retro group is particularly important, as it renders inapplicable cases involving compelled speech. Such cases find that the government may not constitutionally force individuals to subsidize speech through ***compulsory*** dues to

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[1] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Cons. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 533 (1980).

[2] *Id.* at 777, 783.

[3] *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 (prohibition on political speech near polling places was content-based); *Cons. Edison Co.*, 447 U.S. at 537-40 (prohibition on speech on controversial issues was content-based).

[4] *Id.* at 540 (citing *Bellotti*, 435 U.S. at 786; *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

[5] Even if the proposed law were not content-based, it would be subject to strict scrutiny under the Article 1, Section 5 of the Washington Constitution, as the Washington Supreme Court has held that it "diverge[s]" from First Amendment jurisprudence because "we believe restrictions on speech can be imposed consistent with Const. art. 1, § 5 only upon showing a compelling state interest."[5]

[6] *E.g., Buckley*, 424 U.S. at 25.

organizations like bar associations and unions.[7] Participation in a retro group, by contrast, is ***voluntary***, and, as the Supreme Court has warned, "dissent is not to be presumed."[8] As noted First Amendment advocate Justice Black observed: "There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it."[9]

Even if the asserted interest in "restoring public confidence" were compelling, the proposed law is not narrowly tailored to serve that interest. The law would require sponsors to obtain prior written authorization to retain funds for other purposes, § 4(1)(h). A less restrictive alternative, for example, would require sponsors to disclose to prospective members how it uses refunds from the program. Other less restrictive alternatives likely exist, and render the proposed legislation subject to serious constitutional concerns.

Notably, the proposed legislation burdens another First Amendment right—the right of association. The sponsoring entities for retro groups often have as their central purpose pooling of resources to exert political influence. Consider, for example, one sponsor's mission statement, stating the group aims to be the "voice of the housing industry in the state of Washington" by "educat[ing], influenc[ing] and affect[ing] the legislative, regulatory, judicial and executive agencies of Washington's government."[10]

Sponsors thus have as their primary purposes associating like-minded individuals to exert political influence, a core First Amendment activity. As the Supreme Court has noted,

> [T]he right of association is a basic constitutional freedom that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.... [G]overnmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[11]

Again, ESSB 6035 does not serve a "sufficiently important interest," nor does it have a "closely drawn" means to accomplish it.

Subsection 6 of Section 5 of the Bill is troubling for another reason—its potential interference with existing contracts, which would violate the Contract Clause of the United States and Washington State Constitutions. By restricting sponsors' abilities to contract in a variety of

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[7] *E.g., Keller v. State Bar of Calif.*, 496 U.S. 1 (1990) (compulsory dues to state bar association); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (compulsory fees to public-school teachers' union); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (same).

[8] *Abood*, 431 U.S. at 238.

[9] *International Ass'n of Machinists v. Street*, 367 U.S. 740, 788 (1961) (dissenting opinion) (footnote omitted).

[10] *See* http://www.biaw.com/About_Welcome.aspx (emphasis added).

[11] *Buckley*, 424 U.S. at 25 (internal quotation marks and citations omitted).

ways, the law would directly interfere with, and change, material terms to which the sponsors and members already agreed. These changes, for which the Bill states no rationale, create substantial doubt as to the section's constitutionality if applied to existing contracts.[12]

ESSB 6035 is contrary to our Constitution, and to the marketplace of ideas that it promotes, because it would undermine the First Amendment rights of individuals and companies to share information necessary for our political system to function. It also risks unconstitutional interference with private contracts. Because the Bill does not appropriately recognize any of these societal interests, we urge the Committee to seriously consider, investigate, and if necessary, reject ESSB 6035.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

Davis Wright Tremaine LLP

Bruce E. H. Johnson
Ambika K. Doran

cc: Governor Christine Gregoire
Rep. Frank Chopp, Speaker of the House
Rep. Richard DeBolt, House Republican Leader
Rep. Lisa Brown, Senate Democratic Leader
Sen. Mike Hewitt, Senate Republican Leader
Sen. Jeanne Kohl-Welles, Chair, Senate Labor Commerce & Consumer Protection Committee

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[12] *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 247 (1978) (invalidating law changing required payment to employees because it "nullifie[d] express terms of the company's contractual obligations and impose[d] a completely unexpected liability in potentially disabling amounts"); *Birkenwald Distributing Co. v. Heublein, Inc.,* 55 Wn. App. 1, 9, 776 P.2d 721 (1989) ("unfairness does not change special interest legislation into a type that justifies contractual impairment").