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I. STATEMENT OF INTEREST

A. The Washington State Labor Council Represents the Interests of Labor Organizations Throughout the State in Appropriate Enforcement of Political Contribution Rules, and in Orderly Labor Relations

The Washington State Labor Council (“WSLC”) is the central body of the AFL-CIO for the State of Washington. The member organizations of the WSLC include over 500 labor organizations in Washington State, which collectively represent some 185,000 members.

The WSLC, through its political committee, the WSLC Committee on Political Education (“COPE”), evaluates and supports candidates for public office within Washington State, including candidates for the Legislature and for statewide office. The WSLC also provides ongoing education and assistance to its member labor organizations regarding Washington state laws governing campaign contributions.¹

Furthermore, on behalf of its member labor organizations, the WSLC, through counsel, has repeatedly consulted with the staff of the PDC in order to obtain guidance regarding the propriety of various

¹ The Washington Education Association (“WEA”) is not a member of the Washington State Labor Council.

mechanisms by which labor organizations may participate in the political process. The WSLC has utilized the information from the PDC to educate and assist its member labor organizations in structuring the political participation of those labor organizations.

In this litigation, the interests of the WSLC and its member labor organizations are: First, to assure that labor organizations in the State can rely on orderly procedures for enforcement of provisions of the Public Disclosure Act; second, to assure that labor organizations are not exposed to excessive and unpredictable monetary awards; and third, to assure that labor organizations are not subjected to massive legal expenses to defend law suits brought funded by organizations committed to the elimination of unionism, or brought by lawyers who view class action litigation as a path to personal wealth. Ultimately, the interest of the WSLC is to assure that the legal and proper political participation by labor organizations in the State of Washington is not undermined by judicial decision.

The WSLC articulated related interests in its requests for *amicus curiae* status in the trial court in *State of Washington, ex rel. Washington Public Disclosure Commission v. Washington Education Association*, Thurston County No. 96-2-14395-5, and in the Supreme Court in *State of Washington ex rel Evergreen Freedom Foundation v. WEA*, 140 Wn. 2d 615 (2000). In each case, the court granted the WSLC's request for

amicus curiae status. Simultaneous with this application, the WSLC is requesting *amicus curiae* status in WEA v. PDC, No. 28264-0-II, which is scheduled for oral argument along with the instant matter.

B. WSLC's Familiarity with the Issues Involved and with the Scope of the Argument to be Presented by the Parties.

The WSLC, through counsel, has reviewed all materials submitted to this Court. As a result, WSLC is aware that a central issue of the litigation is whether the individual agency fee payers have a private right of action under RCW 42.17.760 to recover the portion of agency fees used for political purposes. Another central issue is the statute of limitations to be applied if such actions are permitted.

C. Specific Issues to Which *Amicus Curiae* Brief Will Be Directed.

The WSLC requests permission to submit briefing on the questions of whether there is a private right of action under RCW 42.17.760 and, if there is such a right of action, what statute of limitations should apply.

D. Extent of *Amicus* Participation Requested.

The WSLC requests the opportunity to submit a brief to the Court on the issues identified in Section C.

II. INTRODUCTION

The trial court's decision creates grave and unnecessary dangers for labor organizations in Washington State. The trial court's holding permits private citizens to bypass the statutory requirements of RCW 421.7.400(4), and instead bring class actions seeking monetary remedies.

The trial court's decision is squarely inconsistent with the recent decision by Division II in *Crisman v. Pierce County Fire Protection District No. 21*, 2002 Wash. App. LEXIS 3195, 60 P. 3d 652 (Wash. App. 2002). This brief will briefly discuss why the reasoning in *Crisman* should apply in this case. But the major purpose of this amicus filing is to emphasize that implying a private right of action to enforce RCW 42.17.760 will facilitate a wholesale assault on labor organizations by well-funded entities committed to undermining the ability of labor organizations to function effectively in the State.

III. ARGUMENT

A. The Trial Court Decision Must be Reversed in Light of the Decision in *Crisman*

This Court's recent decision in *Crisman v. Pierce County Fire Protection District No. 21*, 2002 Wash. App. LEXIS 3195, 60 P. 3d 652 (Wash. App. 2002), establishes that there is no private right of action under the Public Disclosure Act. To the extent that there are factual

distinctions between the instant case and *Crisman*, they do not warrant a departure from the *Crisman* holding.

The plaintiff in *Crisman* was a candidate who allegedly was prejudiced by his opponent's improper use of public resources in his campaign. The court held that several factors mitigated against finding a private right of action against the public entity that permitted the improper use of resources.

The first basis for the *Crisman* decision, that the purpose of the Public Disclosure Act is protection of the public, rather than individuals, applies with full force here. Davenport may assert that because Section 760 speaks specifically of not using the funds of agency fee payers for political contributions, that section must be intended to protect the agency fee payers themselves. But the same logic would support an argument that members of the public could bring a class action to recover the taxes that were utilized in the wrongful use of public resources to support a candidate. In each case, the payers can be readily identified, and the wrongdoing lies in improper use of their funds. But the clear import of *Crisman* is that the thrust of RCW 42.17 is to protect the public's interest in the integrity of the political process, not to protect any one person or group of persons..

Whereas RCW 42.17.130, which was at issue in *Crisman*, was part of the original PDA, Section 760, which is at issue here, was part of Initiative 134. But the purpose of Initiative 134 was purportedly to reduce the influence of large organizations on politics, not to protect agency fee payers. In fact, the wording of Section 760 reflects that the focus is on the *use* of funds to influence the political process, not on the *collection* of funds in the first instance. In a very real sense, just as RCW 42.17.130 forbids misuse of funds exacted from taxpayers, Section 760 imposes limits on the use of agency fees. Neither section implies that the person who was the original source of the funds has a right to sue to enforce the restriction imposed.²

The *Crisman* decision also notes that Title 42.17 already provides that private citizens may bring enforcement actions under RCW 42.17.400, if they follow the procedures in RCW 42.17.400(4). *Crisman* had filed a complaint with the PDC, but had not utilized the RCW 42.17.400(4) procedure. Therefore, he had no right to initiate a suit after the PDC dismissed his complaint after conducting an investigation.

² That Section 760 is addressed to the *use*, rather than the *collection*, of agency fees, is obscured by the trial court decision in the companion case of *PDC v. WEA*, No. 28264-0-II, which was brought by the PDC in response to the Evergreen Freedom Foundation complaint alleging improper use of agency fees by the WEA.

The plaintiffs here stand in a somewhat different posture than *Crisman* with respect to Section 400. They not only failed to file a notice under RCW 421.7.400(4); they never even filed a complaint with the PDC. Therefore, permitting a private right of action in this case would endorse citizens simply bypassing the procedures of RCW 42.17 entirely, in order to pursue their own agendas.³

As the *Crisman* court reasoned, that RCW 42.17.390 permits the court to impose civil remedies and sanctions, in addition to other remedies allowed by law, indicates that the law vests in the Attorney General discretion to decide which remedies to seek.⁴ To permit individuals to seek other remedies is inconsistent with that statutory scheme.

³ As is discussed later in this brief, Davenport is represented by counsel for the Evergreen Freedom Foundation, which did file a complaint under RCW 42.17.400(4). So permitting the plaintiffs to proceed here is really tantamount to permitting citizens to proceed to court whenever they are dissatisfied with the remedy the PDC chooses to seek in a suit brought in response to a Section 400(4) complaint.

⁴ The WSLC does not agree that restitution to agency fee payers is an available remedy in the *WEA v. PDC* matter that is the companion case to this matter. Under RCW 42.17.400(4), if the Attorney General did not act on a private party's complaint, any remedies in the action brought by the private party would "escheat to the state." Thus, if the plaintiffs here had filed a complaint under RCW 42.17.400(4), and the Attorney General had refused to bring an action against the WEA, plaintiffs could not obtain restitution. It would be anomalous to permit the Attorney General to seek restitution for individuals, when the individuals themselves could not obtain restitution in an action under RCW 42.17.400(4). The more logical inference is that RCW 42.17, as whole, does not contemplate individual remedies, such as restitution, regardless of whether the action is brought by the Attorney General, or by a private citizen under RCW 42.17.400(4).

If the court were to permit a private right of action, it would eviscerate Section 400(4). That section enables private citizens to sue if the PDC fails to enforce the PDA. But to permit private citizens to sue, even after a Section 400(4) complaint has been filed with respect to the same alleged violation, effectively removes the Attorney General's discretion to decide what remedies to request. It renders the Attorney General and the Public Disclosure Commission superfluous by permitting individuals to sue whenever they are dissatisfied with the remedies sought by the Attorney General. In other words, whereas Section 400(4) enables private citizens to sue if the PDC fails to pursue a complaint, permitting a private right of action lets citizens sue any time they disagree with the specific remedy sought by the Attorney General.

The courts imply a private right of action when the legislation created rights, but did not provide a method for citizens to enforce them. Here, the legislation provides for a carefully structured procedure whereby private citizens can assure that the statute is enforced. For the Court to grant a private right of action here is not to imply a right of action, but to create a private right of action in derogation of the structure provided by the statute.

B. Permitting Private Suits Under RCW 42.17.760 Would Create Grave Dangers of Malicious Prosecution by Entities Committed to Undermining Labor Organizations

The trial court decision permits individual agency fee payers to sue their unions any time they allege that the union has “used” their agency fees for political purposes. Particularly in light of the trial court’s decision that such suits are subject to a five year statute of limitations, this ruling would have a devastating financial impact on unions.

As the briefing in the companion case of *WEA v. PDC* reflects, the procedures established by the decisions in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), provide protections for agency fee payers who object to the use of their fees for purposes other than collective bargaining. Those procedures include internal reviews and arbitrations regarding the use of agency fees before suit is initiated. These pre-judicial procedures enable unions to address and resolve any perceived improprieties before incurring the expense of class action litigation. Furthermore, that the procedures occur on an annual basis assures that unions are on notice each year if there are disputes regarding their use of agency fees.

The procedure permitted by the trial court threatens to impose massive litigation costs on unions each time their use of agency fees is

challenged, along with massive liability for all alleged improprieties within the five year statute of limitations.⁵

This law suit reflects that well-funded organizations opposed to organized labor can and will finance actions by agency fee payers against unions. A rule that permits agency fee payers to initiate law suits without regard to the procedures under Section 400 would invite such actions on a massive scale. The result would be that unions were either undermined by massive legal expenses, or forced to capitulate in such suits, without regard to the merits of the underlying claims.⁶

This concern is not fanciful. As the record in this case clearly reflects, Davenport is represented by counsel for the Evergreen Freedom Foundation ("EFF") and the National Right to Work Committee. For over six years, the EFF has devoted massive resources to attacking the WEA and other labor organizations in Washington State. The National Right to Work Committee is a well-established and well-funded national organization devoted to reducing the influence of organized labor in American life. They doubtless stand ready to initiate a major offensive against organized labor in Washington if the Court decides both that

⁵ The WSLC agrees with the WEA's contention that, if a private cause of action is to be permitted, it is subject to a six month statute of limitations.

⁶ A similar concern – that well-funded candidates could use the courts to drain the resources of their opponents – may well have been considered by the court in rejecting a private right of action in *Crisman*.

unions may be prosecuted under Section 760 despite the PDC's failure to provide guidance regarding its requirements, and that agency fee payers may bring private actions for restitution, subject to a five year statute of limitations.

In addition, it would be premature to endorse private rights of action under Section 760 at this time. If the courts ultimately determine that Section 760 requires that unions calculate the portion of agency fees used for politics, and adjust the amount of fees collected to reflect that calculation, the PDC should promulgate rules for adjudicating disputes regarding that calculation, just as the federal courts have provided guidance regarding objecting agency fee payers. If the Court were to endorse private actions to seek restitution of such fees, it would preempt the PDC from establishing orderly and efficient methods for addressing these disputes. Instead, both labor organizations and the courts would be faced with a feeding frenzy by litigators seeking to cash in on the unanticipated rulings in these two companion cases.

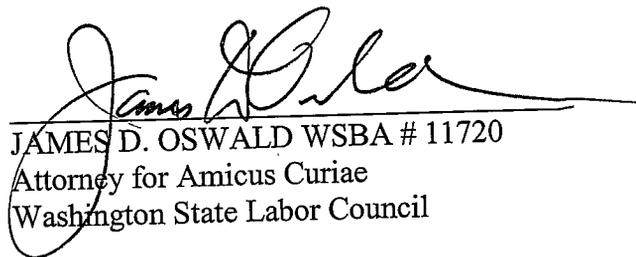
IV. CONCLUSION

The decision in *Crisman* establishes that there is no private right of action under the Public Disclosure Act. There are no factual or legal distinctions between *Crisman* and the instant case that justify departing from the conclusion there. Even if *Crisman* were not controlling, in light

of the PDC's failure to provide any substantive or procedural guidance regarding Section 760, the Court should not set off a legal free-for-all regarding enforcement of Section 760. Rather, it should permit the Public Disclosure Commission to play its appointed role in this area. That role includes not only providing guidance regarding the substantive rights created by Section 760, but also outlining fair and efficient ways to address disputes regarding the requirements of Section 760.

Respectfully submitted this 24th day of February, 2003.

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COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

WASHINGTON EDUCATION ASSOCIATION,

Appellant,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH SIMPSON,
AND TRACY WOLCOT

individually and on behalf of all other
nonmembers similarly situated,
Respondents

I hereby declare under penalty of perjury under the laws of the State of Washington, that true and correct copies of: MOTION OF WASHINGTON STATE LABOR COUNCIL TO BE GRANTED *AMICUS CURIAE* STATUS, and STATEMENT OF INTEREST AND BRIEF OF PROPOSED *AMICUS CURIAE* WASHINGTON STATE LABOR COUNCIL were served on each of the parties listed below on the 24th day of February.

Via ABC Legal Messengers:

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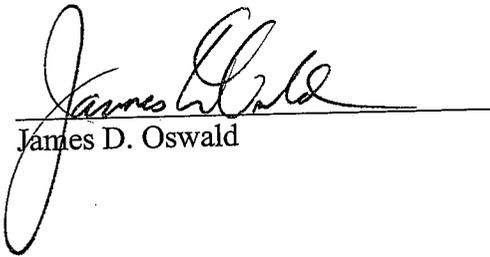
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Dated this 24th day of February, 2003.



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