

No. 100040-5

SUPREME COURT
OF THE STATE OF WASHINGTON

TIM EYMAN AND
TIM EYMAN WATCHDOG FOR TAXPAYERS LLC,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

Richard B. Sanders, WSBA # 2813
Carolyn A. Lake, WSBA # 13980
Goodstein Law Group PLLC
501 S G Street
Tacoma, WA 98405
Telephone: 253-779-4000
Email: rsanders@goodsteinlaw.com
clake@goodsteinlaw.com
Counsel for Appellants

Seth S. Goodstein, WSBA #45091
ROI Law Firm, PLLC
1302 North I Street, Ste. C
Tacoma, WA 98403
Telephone: 253-753-1530
Email: sethg@roilawfirm.com
Counsel for Appellants

I. NATURE OF CASE AND DECISION

In March 2017 the attorney general (AG) initiated suit against Mr. Tim Eyman (Tim) claiming violations of the Fair Campaign Practices Act (FCPA) RCW 42.17A associated with initiatives 1185 and 517 filed in 2012. In February 2019 the AG added a claim Tim was personally and individually a “continuing political committee” required to register with the state and report *all* financial transactions.

Trial was in late 2020. The Court (Court) essentially granted all relief sought by the AG imposing an unprecedented, record breaking fine of \$2,601,502.81¹ on Tim individually. The Court also awarded fees and costs of \$2,891,666 based on a previously repealed statute.² Moreover, without precedent, the Court characterized Tim a “continuing political committee” requiring him to register as such, hire a treasurer, report all income and expenditures from any source for any purpose and not spend any money raised for personal expenses.³ The Court, again without precedent, enjoined by prior restraint Tim from actively participating in the initiative and referendum process in multiple ways without basis in the

¹ This amount cannot be calculated based on the Findings on their face. Moreover the Court denied Tim the opportunity to question much less object to the Finding contrary to CR 52(c)

² In 2018 the legislature passed ESHB 2938, recodified most of RCW 42.17A..765(5) to RCW 42.27A.780 removing the prevailing party provision to only benefit the defendant and the Public Disclosure Commission, not the state.

³ See RCW 42.17A.445.

FCPA⁴ and in facial violation of the 1st Amendment.

This proceeding is more than litigation: it is a conscious effort to destroy Tim's ability to participate in the political process. The AG has used the full force of the state's largest law firm with unlimited resources to force Tim into bankruptcy, destroy his marriage, defame his name, dry up his financial resources and chill his ability to attract a legal defense.⁵ Before the ink was dry on the Findings (which the AG drafted), Mr. Ferguson quoted his own work product in a political fund-raising appeal for his future unspecified political campaign. The AG also suborned a false affidavit to justify CR 37 sanctions declaring Eyman a "continuing political committee."

Tim now seeks direct review by the State Supreme Court pursuant to RAP 4.2. The Court's decision is inconsistent with Supreme Court precedent and raises a fundamental and urgent issue of broad public import which requires prompt and ultimate determination. If the state can do this to Tim, it can do it to anyone. The protection of individual rights is

⁴ RCW 42.17A.750(1)(i) allows a court to enjoin any act *prohibited* by the FCPA and to compel the performance of any *required* by the FCPA; however, none of the acts here prohibited or mandated are derived from FCPA authority. See Findings pp. 30-32
Exhibit A He is even prohibited from self-employment.

⁵ The AG objected to Mr. Joel Ard's appointment as Tim's lawyer by the bankruptcy court because Mr. Ard is a sole practitioner and could not keep up with the state's oppressive discovery. For almost a year before your undersigned' appointment Tim was ravaged as a pro se. One day after your undersigned' appointment, the state served over 500 pages in summary judgment pleadings in a case which had already docketed nearly 1,200 pleadings.

the very purpose of the state, not their destruction.⁶

A. Facts regarding 2012 initiatives 1185 and 517. Tim is perhaps the most prolific and successful initiative advocate in the history of Washington. Usually his initiatives and referendums focus on reducing taxes, which brings him friends and supporters as well as powerful enemies who find their government objectives and political ambitions threatened. I-1185 imposed a 2/3rd requirement on any legislative tax increase. In each and every ballot measure campaign Tim complies with the FCPA by forming and registering a political committee with a treasurer who regularly reports income and expenditures to the Public Disclosure Commission. Tim is *never* the treasurer as he was barred by judgment in 2002 from doing so. The treasurer for the two initiative campaigns at issue was CPA, lawyer and former IRS agent Stan Long. Mr. Long had the exclusive duty to file and sign reports. Tim had no authority to do so.

The first job of any successful initiative campaign is to obtain enough signatures to qualify for the ballot. The 1185 campaign hired a petitioning firm, Citizen Solutions, LLC, to obtain at least 300,000 signatures for over \$1,000,000. Citizen Solutions is a for profit LLC. Of course, there was no

⁶ Washington Constitution, Art. 1, Sec. 1.

guarantee of success. Many initiatives fail at the signature gathering threshold. The FCPA requires that campaign expenditures like payments to a signature gathering vendor be reported; however, the FCPA does not regulate the negotiated price, that is left wholly to the discretion of the campaign and vendor. As the signature deadline approached, the vendor forecasted difficulty obtaining the necessary petition signatures due to competition unless it paid a premium for signatures: first \$0.50 and later at \$1.50.⁷ The FCPA does not regulate much less prohibit vendor profit, nor require the vendor (or anybody else) to report profit or expenses. The drive was successful, and the vendor was paid approximately \$1.2 million, about half came from the campaign committee whereas the other half were direct payments from various business interests to the vendor. There was no evidence that the total price was not fair market value for the service. In fact, Tim was barred from producing evidence of fair market value which the AG claimed was "irrelevant." Another initiative seeking signatures at the same time paid twice as much for signatures as did the 1185 committee.

After the signature drive was complete Citizen Solutions entered into a consulting contract with Tim's LLC, Watchdog for Taxpayers, for

⁷ The vendor (who hired independent contractors who in turn hired the individual gathers) represented the additional funds would be spent on signature gathering.

\$308,000 for Tim's help to bring Citizen Solutions future business. This sum was paid from the vendor's 1185 profits. This payment was not reported to the PDC and no FCPA provision requires it be reported—*by anyone*. The vendor paid taxes on its profits and Tim paid taxes on the income from the consulting agreement. When the PDC investigated the matter Tim provided complete disclosure although not required to do so.

Shortly after receiving the money Tim loaned about \$180,000 to an out of state entity, Citizens in Charge. He expected the loan to be repaid and the Court found that about \$103,000 was in fact repaid before Tim went bankrupt in November 2018. Citizens in Charge is a national organization which promotes the initiative process. Its' executive, Paul Jacob, knew Tim and had interest in promoting I-517 which proposed to change and facilitate Washington's initiative process, and be a model for other states.

The loan to Citizens in Charge was not reported, nor did the FCPA require it be reported. Citizens in Charge then hired signature gathers for I-517. The I-517 campaign treasurer, Stan Long, faithfully reported these as in-kind expenditures. 517 qualify for the ballot. The AG later claimed Tim "gave" money to Citizens in Charge to cover up his contribution to I-517. However Tim and Paul Jacob testified the money was loaned with the intention of repayment. Tim encouraged friends and supporters to donate to Citizens in Charge to facilitate repayment. There was no reason

to coverup a donation to I-517 but Tim didn't make a donation to the campaign: he made a loan to Citizens in Charge so it would be repaid.

This phase of the litigation represents a successful attempt by the AG to convince the Court there is something unlawful about a political committee officer contracting with a vendor for financial gain and then loaning his money to an organization which makes an independent expenditure properly reported as an in-kind expenditure. The legislature could have regulated these transactions, or required reporting, but it didn't. To claim there is a reporting duty under these facts is of broad public import because it undermines the FCPA, promotes uncertainty, and chills political speech.

B. Tim Eyman as a Continuing Political Committee. The AG's amended complaint alleged Tim is a "Continuing Political Committee" as defined by RCW 42.17A.005(14) because he sought and received charitable donations from his friends and admirers to support himself and his family. Its undisputed that Tim asked, even begged, his friends to make charitable donations to support his family. Its undisputed that this is exactly how the money was used and that none of the money went to any campaign. The AG's theory is Tim needed these donations to support himself and if he couldn't support himself, he could not be politically active, or even live. While arguably a truism, that does not make him a

“political committee” much less a continuing one. This boils down to a statutory or, if necessary, constitutional question.

A “political committee” is defined as a person “having the expectation of receiving *contributions* or making expenditures *in support of*, or opposition to, any candidate or *any ballot measure*.”⁸ Tim may be a political activist, but he is *not* a ballot measure.⁹ He may advocate for a ballot measure, but that doesn’t make him a ballot measure. The definition relates to *electoral* contributions and expenditures, not personal expenses of an individual. Moreover, only an “organization” may be a “continuing political committee.”¹⁰ Characterizing Tim as a continuing political committee, as a practical matter, means he must register, hire a treasurer, file reports of all income and all expenditures, and not spend his own money on himself.¹¹ Tim was fined over \$2 million on this bogus theory, unlike anyone in the world, ever. The AG even claimed Tim is subject to fines for not publicly reporting his rent and child support payments. This is crazy.

Procedurally, the Court characterized Tim as a “continuing political

⁸ RCW 42.17A.005(40)

⁹ A “ballot proposition” means any “initiative...proposed to be submitted to the voters of the state...from and after the time when the proposition has been formally filed with the appropriate election officer or that constituency before its circulation for signatures.” RCW 42.17A.005(4).

¹⁰ RCW 42.17A.005(14).

¹¹ See RCW 42.17A.445.

committee” because of the AG’s CR 37 motion for “non-monetary relief” in September 2019. The AG claimed it was entitled to this ruling because Tim had withheld the identity of his donors and the AG was therefore prejudiced. The AG claimed Tim had concealed \$766,447 in “political contributions”. AG investigator Tony Perkins’ affidavit to this effect was false.¹² The AG had obtained canceled checks from Tim’s bank accounts more than a year prior to the declaration over the strenuous objection of Tim and his counsel on First Amendment associational grounds. The canceled checks from all of Tim’s charitable donors showed amounts, dates, names, addresses etc. The Court followed up the CR 37 order with a partial summary judgment characterizing the charitable contributions received as “political contributions” and Tim as a “continuing political committee.” At trial the Court added \$71,000 to the \$766,000, as additional “political contributions” without regard to the CR 37 order.

II. ISSUES PRESENTED FOR REVIEW

Issues for review include but are not limited to the following:

- A. Does the FCPA impose liability on an officer, not the treasurer of a political committee, for reporting to the PDC?
- B. Does the FCPA prohibit a committee officer from contracting with a committee vendor for personal benefit?

¹² “The best example of how the Eyman defendants’ longstanding misconduct in discovery has impaired the state’s ability to prepare for trial is their concealment of donor identities.” Perkins Dec. Sept. 5, 2019.

- C. May a vendor pay money from its profits to a committee officer from its profits without the committee's treasurer reporting the transaction under the FCPA?
- D. Must a loan to an entity which makes in kind donations to a political committee be reported by the committee's treasurer to the PDC?
- E. Does the FCPA require an individual to report charitable contributions received from third persons for personal expenses as a continuing political committee?
- F. If so, does the FCPA violate the First Amendment?
- G. Is it error under CR 37 to deny a person a trial on the merits for an alleged discovery violation which is not prejudicial, and/or which imposes an error of law?
- H. Did the trial court fine of over \$2.6 million violate the FCPA and/or excessive fines clause of the U.S. and Washington Constitution, Art. 1?
- I. Do the prior restraint injunctions exceed authority under the FCPA and/or violate the First Amendment and Washington Constitution Art. 1?
- J. Do 2018 amendments to the FCPA deny availability of an award of reasonable attorney fees and costs to the State of Washington?

III. GROUNDS FOR DIRECT REVIEW

Direct review is justified by conflicting appellate decisions or "a case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(3) and (4). The FCPA imposes reporting requirements and substantive restraints on virtually every campaign in the state. It is imperative it be clearly and consistently applied to protect electoral integrity and avoid constitutional deprivation. "The potential for 'broad public import' is greater when a government agency is a party..."¹³ The Supreme Court "has accepted

¹³ *Washington Appellate Practice Deskbook* (4th ed.), Sec.5.3(3)(a)

review of a broad range of issues including...application of the statute of limitations to the Public Records Act. *Rental Housing Assn' of Puget Sound v. Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009)" *Id.*

Here the AG on behalf of the state prosecuted the action to final judgment in an unprecedented application of the FCPA in blatant disregard for the most fundamental tenants of First Amendment jurisprudence. The public import could not be broader and more urgent.

A. Statutory Reporting Requirements Merit Direct Review. With respect to the 2012 initiative campaigns the Court held Tim liable for reporting direct expenditures to a campaign vendor rather reporting these expenditures as payments to Tim. This is a breathtaking departure from the text of the FCPA which vests the exclusive duty and right of reporting in the campaign treasurer, not Tim.¹⁴ If individuals other than the treasurer have a reporting responsibility that cannot be gleaned from the text. Further, the FCPA is a penal statute which provides for civil and criminal penalties up to class C felony.¹⁵ As such it must be given a literal and strict interpretation.¹⁶ The rule requires the court to adopt the interpretation of a penal statute most favorable to the defendant.¹⁷ Where

¹⁴ See e.g. RCW 42.17A.220, .225, .235.

¹⁵ RCW 42.17A.750(2).

¹⁶ *State v. Adams*, 163 Wn.2d 277, 284, 178 P.3d 1021 (2008).

¹⁷ *State v. Flores*, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008).

a statute provides both civil and criminal penalties a strict construction against the government is required.¹⁸ Moreover it must be strictly construed because it trenches on First Amendment liberties.¹⁹

The Court adopted the AG's theory that Citizen Solutions payments should have been reported as payments to Tim when actually the payment went to the vendor. This is contrary to the statute. Moreover, the FCPA imposes no reporting requirement on *anyone* to account for how the vendor spends its money for either sub vendors or profits. The Court arbitrarily selected the last five payments to the vendor which amounted to \$300,000 to be reported as payments to Tim, which has no basis in the record as all concerned testified the vendor paid Tim's LLC with its profits, and the FCPA does not regulate profits nor prices. Under the FCPA the vendor could have gifted Tim \$308,000 for any or no reason (or for a "kickback" for that matter) without statutory violation. The FCPA does not require a campaign or in-kind contributor to identify the source of loaned funds. The Court rewrote the FCPA in a manner which would render the act unconstitutionally vague and unpredictable.

B. Characterizing Tim individually as a "continuing political committee" violates the FCPA on its face and renders it unconstitutional as applied.

¹⁸ See e.g., *Leocal v. Ashcroft*, 543 U.S. 1, n.8, 125 S.Ct.377, 160 L.Ed.2d 271 (2004).

¹⁹ *Buckley v. Valeo*, 424 U.S. 1, 77-78, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976)

What the Court did under this issue category is unprecedented in this state or anywhere. It was a total perversion of the FCPA and a blatant constitutional violation. As previously noted, reporting requirements are only imposed on “political committees” or “continuing political committees” for *campaign* contributions and expenditures. *State v. Grocery Manuf. Ass’n*, 195 Wn.2d 224, para. 30, 461 P.3d 334, 345 (2020) (“It applies when an entity has ‘the *expectation* of receiving **contributions**’ to be spent in elections.”)²⁰ A political committee files a statement of organization when it has the expectation of “receiving contributions or making expenditures *in any election campaign*...”²¹ Tim is not a campaign but a private citizen. He solicited private charitable donations for his personal support, not for a campaign. Moreover, he is not an “organization,” which is the only entity which can constitute a “continuing political committee.”²² Political committee registration requirements are subject to “exacting scrutiny.”²³ The only substantial public interest justifying any financial reporting for ballot measures is

²⁰ (italics in original, bold added) .

²¹ Italics added, RCW 42.17A.205

²² RCW 42.17A.005(14), *Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 341 P.3d 953 (2015)

²³ *Utter, id.*, citing *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) (citing *Citizens United*, 558 U.S. at 366-67, 130 S. Ct. 876)

“voter education.”²⁴ “They are, by definition, campaign related.”²⁵ Not only must there be direct electoral financing to be a “political committee,” but raising money to spend in an election must be a primary purpose of the organization.²⁶ But the public has no voter education interest in charitable contributions to Tim’s personal expenses. This is an attempt to shut Tim down because he engages in personal issue advocacy, which is unconstitutional.²⁷ Moreover Tim has the First Amendment right to solicit and use charitable contributions without reporting to or seeking the permission of the government.²⁸ “Charitable solicitation by individuals is protected by the First Amendment.”²⁹ The Court violated the right of both Tim and his donors to keep them anonymous.³⁰ When

²⁴ *WIN v. Ripple*, 213 F.3d 1132, 1139 (9th Cir. 2000), *Brumsickle*, 624 F.3d at 1007.

²⁵ *Buckley*, 424 U.S. at 79

²⁶ *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508-09, 546 P.2d 75 (1976) See also *EFF v. WEA*, 111 Wn. App. 586, 599, 49 P.3d 894 (2002), *Brumsickle*, 624 F.3d at 997.

²⁷ *Buckley*, *id.*

²⁸ *Americans for Prosperity v. Bonta*, 594 U.S. __ (2021). In *Bonta* the claimed governmental interest to disclose charitable donors was “preventing charitable fraud and self-dealing.” Here, however, *no* interest is asserted to justify charitable donor disclosure; however, if a “substantial interest” were asserted it would be reviewed either under “exacting scrutiny”, i.e., “a substantial relation between the disclosure requirement and a sufficiently important government interest” “narrowly tailored to the interest it promotes”; or “strict scrutiny,” i.e. “the government must adopt ‘the least restrictive means of achieving a compelling state interest.’” *Bonta*’s plurality opinion on this issue didn’t determine the applicable test however “voter education” obviously is inapposite under either. See also *Lakewood v. Willis*, 186 Wn.2d 210, 217, 375 P.3d 1056 (2016) (citing *Schaumburg*, *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *Smith v. Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999); *Loper v. N.Y. City Police Dep’t*, 999 F.2d 699, 704 (2d. Cir. 1993).

²⁹ *ACLU of Idaho v. City of Boise*, 998 F. Supp. 908, 916 (D. Idaho 2014).

³⁰ *Bonta*, *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 462 (1958).

some donors intervened to protect their right to anonymously donate, the Court forced them to identify themselves. The AG then threatened them with hundreds of thousands of dollars in attorney fees if they did not withdraw. These were just average citizens without the financial means to risk bankruptcy and withdrew. Once identified the AG went after Tim's major donors such as Kemper Freeman, Jr. and Ken Fisher by tying them up in lengthy depositions to explain why they gave money to Tim. These and similar actions of the AG crippled Tim's ability to raise money through charitable contributions contrary cases on point such as *NAACP v. Alabama, Id.*

Although in actual possession of all the donors' cancelled checks the AG had his investigator file a false affidavit that Tim withheld donor identification in discovery to justify a CR 37 order declaring \$766,000 in charitable contributions were "political contributions" and that Tim was therefore a "continuing political committee" subject to all the reporting requirements. This violated the First Amendment because it was issue advocacy, it violated *Americans for Prosperity* because it interfered with the right to receive charity, and it violated *NAACP* because it interfered with the right of anonymous and free association. Even when statutorily justified, it violates the First Amendment rights of a person as applied when onerous reporting requirements condition the exercise of free

speech activity.³¹

C. Excessive Fines and Unauthorized Attorney Fees Justify Direct Review. First, the sole authority for the AG to recover reasonable attorney fees from Tim was repealed in 2018, however the Court awarded the AG over \$2.8 million without statutory authorization.³² “The right to attorney fees, as well as the determination of the amount thereof, is governed by the statute in force at the termination of the action, rather than at the time of its commencement.”³³ Second, the imposition of a \$2.6 million fine is unconstitutionally excessive under *State v. Grocery Manuf. Assoc.*, 195 Wn.2d 442, 476, 461 P.3d 334 (2020). The previous highest fine against an individual was under \$40,000. This fine was not proportional to prior practice, which the Court refused to consider.

D. Injunctive relief violated FCPA and First Amendment. Injunctive relief is only justified under the FCPA to prohibit what the act forbids or compel what the act requires. The injunctions here fit neither category and are prior restraint of basic First Amendment speech, and blatantly unconstitutional. This specter chills free speech for others as well facing the prospect of crippling fines when opposed by the AG.

³¹ *FEC v. Massachusetts Citizens for Life, Inc.* (MCFL), 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986).

³² See *infra* n.2

³³ *Peterson v. Port of Seattle*, 94 Wn.2d 479, 487, 618 P.2d 67 (1980)

Respectfully submitted this 30th day of July 2021.

GOODSTEIN LAW GROUP PLLC

By: s/Richard B. Sanders
Richard B. Sanders, WSBA # 2813
Carolyn A. Lake, WSBA # 13980
Email: rsanders@goodsteinlaw.com
clake@goodsteinlaw.com
Counsel for Appellants

ROI LAW FIRM, PLLC

By: s/s Seth Goodstein
Seth S. Goodstein, WSBA #45091
sethg@roilaw.com
Counsel for Appellants