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Division II
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No. 56653-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TIM EYMAN AND
TIM EYMAN WATCHDOG FOR TAXPAYERS LLC,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

AMICUS CURIAE BRIEF

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I. INTRODUCTION

Government must not only treat citizens fairly, but must also appear to be fair. Weaponization of Washington's Fair Campaign Practices Act ("FCPA") threatens the core of representative democracy, if one side can enforce vague statutes at will against others. A court has a scrupulous duty to require equal application and enforcement of the law.

A. The FCPA Is Designed to Provide Equal Enforcement

Since approved through voter initiative 50 years ago, the FCPA has included a "citizen's action" provision to permit citizen enforcement when the government "may be wrong." *Utter ex rel. State v. Bldg. Indus. Ass'n*, 182 Wn.2d 398, 406, 411, 341 P.3d 953 (2015). Retired Justices Robert F. Utter and Faith Ireland alleged not just that the Building Industry Association's ("BIAW") political action committee violated fair campaign practices, but that BIAW itself had as well. The former Justices initiated the citizen action process by alleging the violation in a letter to the Attorney General, who referred the

complaint to the Public Disclosure Commission (“PDC”). After investigating, neither the AG nor the PDC filed a lawsuit, whereupon the Justices filed their own citizen action lawsuit.

In what is undoubtedly the highpoint of judicial recognition of citizen’s rights to seek review of executive branch error in FCPA enforcement, the Utter court permitted the citizen’s action to proceed, because the citizen action exists to challenge the government when it is wrong.

B. Is An Entity a “Political Committee?”

The fundamental question in almost all FCPA litigation is whether an entity is a “political committee.” If so, then the entity must report essentially all financial transactions, both of money received and money spent. For example, if BIAW itself was a political committee, then it would have to report all receipts and all expenditures, whether these transactions had anything to do with political campaigning, or not.

There are two principal mechanisms to become a political committee. One is to spend money to support or oppose

candidates for office or ballot initiatives. The earliest supreme court opinion interpreting the FCPA ruled that a single \$500 contribution to another political committee did not convert the giver into a separate political committee. *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn. 2d 503, 509, 546 P.2d 75, 79 (1976) (the purpose “was not to influence the political process by supporting or opposing candidates or ballot propositions through expenditures of its funds.”).

The second principal mechanism to become a political committee is to “receive contributions” for use in an election campaign. That BIAW (and not its PAC) sought to commit incoming money to the governor’s election is sufficient to find the entity has become a political committee.¹

C. State Government or Courts Have Found Many Entities Not to be Political Committees

Many entities receive and/or spend tens of thousands of dollars on political action to support or oppose candidates or

¹ This was a disputed issue of fact; BIAW argued it used BIAW generically to refer both to the organization itself and to its PAC.

ballot initiatives, yet the state has not found they are political committees.

1. Washington Education Association

An early case found the Washington Education Association was not a political committee under either the expenditures prong or the contributions prong. The court indicated WEA contributed \$263,500 in cash and in-kind contributions to its newly formed PAC. *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 593, 49 P.3d 894, 900 (2002), as amended on denial of reconsideration (June 14, 2002). Yet that spending level did not justify determining WEA was a political committee, because political activity was not a primary purpose as indicated by WEA's stated goals. *Id.* at 599-600 (but "[i]f the activities of an organization reveal that a majority of its efforts are put toward electoral political activity, the fact finder may disregard the organization's stated goals to the contrary.>").

Nor was the WEA a political committee under the contributions prong, notwithstanding its contributions from members went directly to political activity, because its members had no actual or constructive knowledge the money would be used for electoral political activity. *Id.* at 603. If the members had been told the money would *not* be used for political activity, it is even harder to see how the entity would become a political committee.

2. Amalgamated Transit Union

The Amalgamated Transit Union Legislative Council was not a political committee, even though the PDC's own records proved it spent as much as 45% of its annual expenditures on political contributions, necessarily making electoral political activity one of the ATULC's primary purposes.² The

² The ATULC also falsely stated to the IRS that it disclosed political expenditures in Washington State. For its part, the PDC ignored its own records showing more political donations than the ATULC acknowledges, ignored the explicitly political description of its purpose given to the IRS, and argued

Foundation alleged ATULC contributed over \$110,000 in the years 2014-18 to political candidates, yet the State found it was not a political committee. See *Freedom Foundation v. Public Disclosure Comm'n*, Thurston County Superior Court No. 20-2-01470-34. The ATULC reports political activity neither to the PDC nor to the IRS.

3. Teamsters Local 117

Teamsters Local 117 spent tens of thousands of dollars in direct political contributions each election cycle, either directly or through its political action committee, as reported by recipients of these donations. Neither Local 117 nor its PAC reported spending a penny. The Foundation filed complaints with the State alleging that at least one or the other were a political committee, but the State refused to take action to

“intermediate bodies” cannot be a political body because they do not receive dues from individual donors.

determine these entities were a political committee which must file receipt and expenditure reports for public review.³

4. SEIU Local 775

SEIU Local 775 spends money both directly and through its own political action committee. Local 775 does not report its own spending, arguing it is not a political committee even though it contributes millions of dollars to political activities and lobbying, including \$1,585,000 to a single initiative in 2016 (in one reporting month, over half its total spending went to the initiative). The Freedom Foundation filed complaints with the State alleging, similarly to BIAW, SEIU Local 775 was a political committee. As with Teamsters Local 117, the State

³ The Supreme Court dismissed the Foundation citizen's action, on the basis that the Foundation did not file its lawsuit within the ten days of the notice provided to the Attorney General that the AG had ten days to file its own lawsuit. *Freedom Foundation v. Teamsters Local 117 Segregated Fund*, 197 Wn.2d 116, 480 P.3d 116 (2021). As with ATULC, the Local 117 PAC falsely stated to the IRS that it was disclosing political expenditures in Washington State.

refused to take action. *SEIU 775 v. Freedom Foundation*, Supreme Court No. 97604-0 (remanding with instructions to dismiss, based on *Teamsters Local 117*, April 7, 2021).

5. SEIU Political Education and Action Fund (2016 in-state committee)

SEIU has a national PAC, its Political Education and Action Fund, headquartered outside Washington State. The FCPA requires these out-of-state committees to report as in-state committees if the committee spends more than twenty percent of its aggregate expenditures within Washington. PEAFF unquestionably spent more than \$1,000,000 inside Washington in 2016, more than twenty percent for at minimum the beginning of the year, yet did not report as an in-state political committee. The Foundation filed complaints with the State, which again refused to take action.⁴

⁴ This case was consolidated with the *Teamsters Local 117* case in the Supreme Court, and decided on the same basis.

6. SEIU Washington State Council

Admittedly, the State did act on one Freedom Foundation complaint, that the SEIU Washington State Council donated a majority of its expenditures, over \$5,000,000 in 2014 and 2016, for electoral political activity, including to its own PAC, yet did not report as a political committee. The penalty imposed was \$128,262.75 plus \$18,300.85 in costs and fees.⁵

D. There Is No Longer a Meaningful Citizen's Action to Balance Government Enforcement

Although no legislative discussion, report, or finding evidences any intent to do away with the citizen's action, court decisions have eliminated them in fact. The legislature amended now RCW 42.17A.755 to preclude citizen's actions for "remediable violations" or "technical corrections," PDC

⁵ See *SEIU State Council to pay up to \$250,000 over campaign finance violations*, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL <https://www.atg.wa.gov/news/news-releases/seiu-state-council-pay-250000-over-campaign-finance-violations> (last visited June 21, 2022). This press release notes the Attorney General recused himself from this matter.

investigation, hearing, and orders, or refer serious violations to the attorney general. RCW 42.17A.755(1). The PDC also may determine a violation is “minor” and take no action on the complaint, precluding a citizen’s action notwithstanding the lack of statutory authority in RCW 42.17A.755(1). RCW 42.17A.775(2)(a).

Yet, notwithstanding the lack of any indication of intent to overturn *Utter*, courts will not allow a citizen’s action if the PDC does anything more than throw a citizen’s complaint in its circular file.

For example, the PDC resolved a Foundation complaint against the SEIU Political Education and Action Fund with a (second) warning letter concerning the importance of accurately complying with the FCPA. PEAFF failed to report to the PDC \$2,770,463 in SEIU contributions to PEAFF in 2018, of which \$747,983 was given to Washington State SEIU political committees, until the day before the PEAFF responded to the Foundation’s complaint to the PDC. This warning letter

precluded a citizen's action. *Freedom Foundation v Service Employees International Union Political Education & Action Fund*, 20 Wn. App. 2d 1051 (2022) (unpublished opinion).

Similarly, the PDC "closing" a matter without even an investigation precludes a citizen's action. *Freedom Foundation v. Bethel School District*, 14 Wn.App. 75, 83-84, 469 P.3d 364 (2020), review denied 196 Wn.2d 1033 (2021)(eviscerating *Utter* as changed sub silentio).

E. There Appears to Be No Meaningful Review of PDC Refusals To Act

In the ATULC case, the Foundation also sought review under the Administrative Procedures Act. The Court dismissed for lack of standing, even though the Foundation mission is harmed by being unable to publicize political contributions the ATULC admits it makes. *Freedom Foundation v. Washington State Public Disclosure Commission*, 20 Wn. App. 2d 1080 (2022) (unpublished opinion). Similarly, in the 2018 PEAFF case the Foundation lacked standing even though compelling PEAFF

properly to file disclosure forms would aid the Foundation in its outreach efforts to counteract union speech. *Freedom Foundation v. Washington State Public Disclosure Commission*, 16 Wn. App. 2d 1037 (2021) (unpublished opinion). Something more than merely being the complainant before the PDC is required to confer standing for review of PDC non-action under the APA. *Freedom Foundation v. Bethel School District*, 14 Wn.App. 75, 469 P.3d 364 (2020), review denied 196 Wn.2d 1033 (2021).

F. There Have Been Unequal Dispositions of Identical Alleged Violations

The FCPA has ambiguous provisions, and the State has pursued identical practices with unequal vigor. For example, whether an outside entity must report spending in support of an initiative which never makes it to the ballot, was unclear. The Supreme Court divided 5-4 on the question. *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 432 P.3d 805 (2019). The matter involved local initiatives in three small cities, where a

Foundation attorney argued the initiatives should be placed on the ballot, and union attorneys argued against. The State pursued just the Foundation, eventually agreeing to payment of \$80,000.00. Upon the Court's suggestion that the Attorney General had not received any citizen action complaint against the opponents, *see Id.* at 787 n.5, the Foundation decided to return the favor. The State settled for \$450 for each of three violations.⁶

⁶*See Washington State Council of County and City Employees: Alleged violations of RCW 42.17A.255 for failure to report independent expenditures in opposition to ballot propositions*, PUBLIC DISCLOSURE COMMISSION, <https://pdc.wa.gov/rules-enforcement/enforcement/enforcement-cases/56889> (last viewed June 21, 2022); *International Association of Machinists Lodge W38: Alleged violations of RCW 42.17A.255 for failure to report independent expenditures in opposition to ballot propositions*, PUBLIC DISCLOSURE COMMISSION, <https://pdc.wa.gov/rules-enforcement/enforcement/enforcement-cases/56888> (last viewed June 21, 2022); *Teamsters Local 589: Alleged violations of RCW 42.17A.255 for failure to report independent expenditures in opposition to ballot propositions*, PUBLIC DISCLOSURE COMMISSION, <https://pdc.wa.gov/rules-enforcement/enforcement/enforcement-cases/56886> (last viewed June 21, 2022).

G. The Court's role has become critical

Without a citizen's action to correct instances where the government "may be wrong," the sole enforcement power now is in the hands of the government. The PDC staff, at most, are under review by part-time Commissioners. All Commissioners have been appointed by governors of one political party since the end of 1984. The attorney generals have been members of that party since the end of 1992, except for 8 of those 30 years, and counting.

If that party gets it wrong, or weaponizes the FCPA, there is nothing but searching judicial review to serve as a check on abuse.

Even that, unfortunately, may be insufficient. "The process is the punishment" is a phrase with merit, for a reason.

I certify that this Brief contains 2,446 words.

RESPECTFULLY SUBMITTED this 21st day of June 2022.

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