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No. 96604-4

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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent.

v.

GROCERY MANUFACTURERS ASSOCIATION,  
Petitioner,

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GROCERY MANUFACTURERS ASSOCIATION,  
Petitioner,

v.

ROBERT W. FERGUSON, Attorney General of the State of Washington,  
in his Official Capacity,  
Respondent.

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**BRIEF OF *AMICUS CURIAE SEIU 775***

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## **I. IDENTITY AND INTERESTS OF *AMICUS CURIAE***

Amicus curiae is SEIU 775, a labor organization that represents approximately 46,000 long-term care workers providing quality in-home care, nursing home care, and adult day health services in Washington and Montana. Although SEIU 775 does not expect to receive contributions in support of, or in opposition to, candidates or ballot propositions, and does not have as one of its primary purposes electoral political activity,<sup>1</sup> SEIU 775 itself has been sued for being an unlawfully unregistered political committee on the basis of its purported expectations in that regard.<sup>2</sup> The Court’s construction of the “receiver of contributions prong” of the test for deciding when an entity is a “political committee” under the Fair Campaign Practices Act (“FCPA”) thus directly impacts the claims against SEIU 775 and the constitutional rights of its members to freely associate.

Additionally, as an organization that also supports the missions of other non-profit organizations, SEIU 775 is concerned that the Court of Appeals decision will result in many of those organizations being accused

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<sup>1</sup> SEIU 775’s mission is to unite the strength of all working people and their families, to improve the lives of working people, and to lead the way to a more just and humane world. SEIU 775’s goals are to lift caregivers out of poverty; to build worker organizations that are powerful, sustainable, and scalable; to transform health and long-term care to ensure quality and access for all; and to increase prosperity and reduce inequality for working people.

<sup>2</sup> *Freedom Found. v. SEIU 775*, No. 18-2-00454-34 (Thurston Cty. Super. Ct. 2018) (Dixon, J.).

of being political committees even though they may expect to receive only an inconsequential amount of money every year to engage in political activity. SEIU 775 is further concerned that the risk of this happening will force those organizations to notify their contributors, tenants, customers, vendors, and suppliers, without limitation, that their identities and financial arrangements will now be subject to public disclosure, which will make those persons and entities less likely to associate with those organizations.

## II. STATEMENT OF THE CASE

SEIU 775 urges the Supreme Court to grant review of the Court of Appeals decision in *State v. Grocery Manufacturers Ass'n*, --- Wn.2d ----, 425 P.3d 927 (2018) (“*GMA*”) in order to resolve whether the “primary purpose” test that this Court enunciated in *Evans* and *Utter*<sup>3</sup> applies and must be satisfied in order for an organization to be deemed a “political committee” under the contributions prong of RCW 42.17A.005(41). Review should be granted because the scope of who is a “political committee” under the FCPA and the applicability of *Utter*’s “primary purpose” test involve significant questions of law under the U.S. Constitution. RAP 13.4(b)(3). These are also issues of substantial public

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<sup>3</sup> *State v. Evans*, 86 Wn.2d 503, 509, 546 P.2d 75 (1976); *Utter v. Building Indus. Ass’n of Wash.*, 182 Wn.2d 398, 416, 423-27, 341 P.3d 953 (2015).

interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

This Court has determined that under the First Amendment’s “exacting scrutiny” standard of review, “the support of a candidate or initiative must be ‘the primary or one of the primary purposes’ of a person expending funds for the State to subject them to regulation as a political committee based on their expected expenditure.” *Utter*, 182 Wn.2d at 425. 427. This Court has not yet addressed whether *any* expectation of *receiving contributions* for electoral political activity, however slight, converts the recipient into a “political committee.”

SEIU 775 expresses no view on GMA’s tactics or its compliance with the FCPA. It seems highly likely, based on the facts set forth in the decisions below, that one of the primary purposes of GMA’s Defense of Brands account *was* in fact electoral political activity. Thus, by filing this brief, SEIU 775 is not suggesting that GMA is not guilty of the FCPA violations of which it is accused. However, whether a “primary purpose” test applies to the definition of “political committee” under the contributions prong has a potentially significant impact on a wide range of not-for-profit and business organizations, including organizations structured under Sections 501(c)(3), (4), (5), and (6) of the Internal Revenue Code and for-profit corporations. Each of those organizations is currently in jeopardy, in light of the decision below, of being deemed to be

an unlawfully unregistered political committee should any link be alleged between its receipt of funds from outside sources and its political expenditures, however modest either or both might be. It is on behalf of all of those entities, as well as itself, that SEIU 775 weighs in to provide additional reasons why this Court should accept review.

### III. ARGUMENT

#### A. *Utter's* “Primary Purpose” Test Is A Constitutional Limitation On The Otherwise Overly-Broad Statutory Definition of “Political Committee.”

While the stakes for litigants accused of being an unlawfully unregistered political committee under the FCPA are extremely high, the case law in this area is sparse. Only *Evans*, *Utter* and *Brumsickle* have addressed whether there is or must be some limit imposed on the definition of “political committee” in the FCPA in order to ensure that organizations with only relatively minor involvement in electoral political activity do not, by virtue of such involvement, become subject to the rigors of campaign finance disclosure requirements. *Utter*, 182 Wn.2d at 423-27; *Evans*, 86 Wn.2d at 509; *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010). The definition of political committee “was not drafted to ensnare indiscriminately all persons seeking to influence governmental decision-making.” *Evans*, 86 Wn.2d at 508.

By statute, an organization may become a political committee by either: 1) expecting to receive or receiving contributions, or 2) expecting



to make or making expenditures to further electoral political goals, or both. RCW 42.17A.005(41); *Utter*, 182 Wn.2d at 415. The statute is silent as to any limit on the extent to which expecting to receive (or receiving) contributions or expecting to make (or making) expenditures for electoral political activity must be part of an organization’s purposes before the organization will meet the statutory definition and the FCPA’s disclosure and reporting requirements apply.

However, disclosure requirements in campaign finance laws implicate First Amendment rights of free speech and association.<sup>4</sup> For that reason, this Court has held that “[r]eading some stringent purpose requirement, like the primary purpose test, into our statute is *necessary* to satisfy First Amendment concerns.” *Utter*, 182 Wn.2d at 427 (emphasis added). In 2015, it thus expressly approved the “purpose test” it had first enunciated more than 40 years earlier to construe the expenditure prong of “political committee” under the FCPA: “the support of a candidate or initiative must be ‘the primary or one of the primary purposes of a person’” for the State to subject them to regulation as a political

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<sup>4</sup> *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (“compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”); *Voters Educ. Comm. v. Public Disclosure Comm’n*, 161 Wn.2d 470, 482, 494-95, 166 P.3d 1174 (2007) (“The United States Supreme Court has recognized that compelled disclosure may encroach on First Amendment rights by infringing on the privacy of association and belief.”); *Brumsickle*, 624 F.3d at 1009-11.

committee based on their expected expenditures. *Id.* at 425-27 (quoting *Evans*, 86 Wn.2d at 509). Because the statute “does not say anything about whether an entity will be treated as a ‘political committee’ even if influencing an election is a minor part of its mission,” this is “an important First Amendment issue and...*some* “purpose” test must be, or has been, added on to the statute to construe it properly.” *Utter*, 182 Wn.2d at 423 (citing U.S. CONST. amend. I) (emphasis in original). *Utter* addressed the applicability of a “purpose test” only to the expenditure prong, the only prong where it was raised. *Id.* at 416.

The discussion in *Brumsickle* was not so limited; rather, the court analyzed the constitutionality of the “political committee” definition as a whole. *Brumsickle*, 624 F.3d at 1011.

[The FCPA] is tailored to reach only those groups with a “primary” purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy. Under this statutory scheme, the word “primary” – not the words “a” or “the” – is what is constitutionally significant.

*Id.* at 1011. *Brumsickle*, relied on in *Utter*, as well as *Utter* itself are both grounded on *Buckley v. Valeo*. There, the U.S. Supreme Court reasoned that to fulfill the purposes of the Federal Election Campaign Act, the term “political committee” need only encompass candidate organizations or organizations that have as a “major purpose” “the nomination or election

of a candidate.” 424 U.S. at 79. Such organizations are “by definition, campaign related” and therefore within the “core area” Congress sought to address when it enacted the federal campaign law. *Id.* Together, these cases suggest that, absent a construction limiting the definition of “political committee” to those with a primary purpose of electoral political activity, the statutory definition is impermissibly broad because it ensnares persons and groups that are not actually campaign related.

The Court of Appeals holding in *GMA* that the “primary purpose” requirement does not apply to the contributions prong of RCW 42.17A.005(41), *GMA*, 425 P.3d at 937, runs headlong into the rationale for applying a “primary purpose” or “major purpose” test to the definition of “political committee.” To apply the test to one prong but not the other presumes there is something so fundamentally different about receiving contributions and making expenditures that a different constitutional analysis applies; but no court has stated that that is the case. *GMA* thus raises significant questions of constitutional law.

**B. The Public Needs Guidance From This Court As To Whether The “Primary Purpose” Test Applies To Both Prongs Of The Political Committee Definition.**

As noted above, the definition of political committee “was not drafted to ensnare indiscriminately all persons seeking to influence governmental decision-making.” *Evans*, 86 Wn.2d at 508. Rather, the

definition was intended to ensure that an organization that is fundamentally a political organization must meet the disclosure and reporting requirements. That *Utter* did not squarely address whether the “purpose” test applies to the contributions prong of the “political committee” definition, and that the decision below is in conflict with—or, at best, is in sharp tension with—*Buckley*, *Evans*, *Utter* and *Brumsickle*, requires immediate guidance from this Court.

There will be significant impacts on associational freedoms if even entities that do not have a primary purpose of engaging in electoral political activity are forced to register and report as political committees just because they might expect to receive some trivial amount of money to fund political activity. The FCPA requires a political committee to file a statement of organization, appoint a treasurer, create a depository, and list the candidates or ballot propositions the committee supports or opposes. RCW 42.17A.205(2). Each and every expenditure (not only those that go toward electoral political activity), as well as each and every contribution, and information about the organization’s donors, must then be disclosed. RCW 42.17A.235(1). Political committees must thereafter identify the source of contributions and destination of expenditures at regular, and sometimes irregular, intervals. *See* RCW 42.17A.240 (requiring disclosure of names and addresses of each person who has made contributions,

regardless of whether they were related to electoral political activity, and the value and date of such contributions); RCW 42.17A.235(2)(a)-(c). Such reports must also make disclosures concerning finances which do not necessarily relate to electoral political activities. RCW 42.17A.240.<sup>5</sup>

For any labor union, business league, chamber of commerce, trade association, or membership organization, such disclosures are tantamount to disclosure of a membership list. The same holds true for many other nonprofits that would have to disclose contributor lists. An organization's membership list has long been recognized as protected by the First Amendment from compelled disclosure. *See e.g., Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wan. App. 813, 824-25, 21 P.3d 1157 (2001) ("When advocacy groups are required to disclose the identity of their members and details of all their activities, the freedom of members to promote their views suffers. Privacy and anonymity are often essential to the free exercise of First Amendment rights.").<sup>6</sup>

Compelled disclosure of the name, mailing address, amount and

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<sup>5</sup> These disclosure obligations essentially allow the state to scrutinize an organization's financial affairs in detail. *See id.* at (1) (requiring disclosure of committee's "funds on hand" at beginning of period); *id.* at (3) (requiring disclosure of all "loans, promissory notes, or security instruments" issued for entity's benefit); *id.* at (8) (requiring disclosure of entity's outstanding debts).

<sup>6</sup> *See also NAACP v. State of Alabama, ex. rel. Patterson*, 357 U.S. 449, 462 (1958); *Local 1814, Int'l Longshoremens' Ass'n, AFL-CIO v. Waterfront Comm'n of New York Harbor*, 667 F.2d 267, 270 (2nd Cir. 1981).

date of contributions from an organization’s members or supporters imposes “significant encroachments on First Amendment rights.” *Buckley*, 424 U.S. at 64. The “right to join together ‘for the advancement of beliefs and ideas,’” the “right to pool money through contributions,” and the privacy in one’s belief are all group association *protected by the First Amendment*. *Id.* at 65-66 (quoting *NAACP v. Alabama*, 357 U.S. at 460). The “primary purpose” limitation “ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy.” *Brumsickle* at 1011.

#### IV. CONCLUSION

For the foregoing reasons, SEIU 775 urges the Court to grant review of the Court of Appeals decision in *GMA*.

RESPECTFULLY SUBMITTED this 5th day of February, 2019.



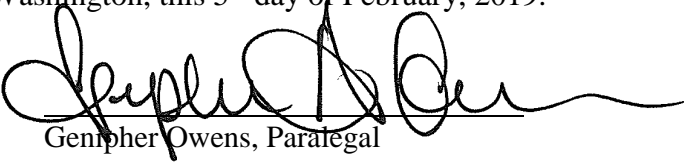
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**DECLARATION OF SERVICE**

I, Genipher Owens, declare under penalty of perjury under the laws of the state of Washington, that on February 5, 2019, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send e-mail notification of such filing to all parties of record

Signed in Seattle, Washington, this 5<sup>th</sup> day of February, 2019.



Genipher Owens, Paralegal

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