No. 101844-4

SUPREME COURT

OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II NO. 56653-2-II

STATE OF WASHINGTON,
Respondent,

v.

TIM EYMAN AND
TIM EYMAN WATCHDOG FOR TAXPAYERS LLC,
Appellants/Petitioners

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The Goldwater Institute (GI) is a nonpartisan public policy foundation devoted to advancing principles of limited government and individual freedom through litigation, research, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates cases and files amicus briefs in cases involving these objectives.

Among GI's priorities is the protection of free speech against the anti-privacy mandates of "campaign finance regulations." GI has represented parties in state and federal cases defending the rights of individuals who contribute money or speak in support or opposition of ballot initiatives. *See, e.g., Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956 (10th Cir. 2021); *Colorado Union of Taxpayers Found. v. City & Cnty. of Denver*, No. 19CA0543, 2020 WL 3249258 (Colo. App. June 11, 2020); *Center for Arizona Policy v. Ariz. Sec'y of State*, No. CV2022-016564 (Maricopa Cnty. Super. Ct. filed Dec. 15, 2022)). GI is also a recognized authority on the "Private Affairs" Clause. *See*

generally State v. Mixton, 478 P.3d 1227 (Ariz. 2021); Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723 (2019).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below interpreted RCW 42.17A.235, 42.17A.240, and former RCW 42.17A.005, to require anyone who anticipates receiving or spending funds for the *indirect* support or opposition of a proposition to publicly report even private household income and expenditures, on the theory that by paying such personal bills as grocery and medical bills, that person becomes free to devote time to advocacy. *State v. Eyman*, 24 Wash. App.2d 795, 840 ¶ 151 (2022).

That extraordinary step beyond the goals of the statute essentially makes a "campaign contribution" out of every dollar someone receives, if he then supports a proposition. That contradicted basic rules of interpretation. The court acknowledged that the statutes are "ambiguous," that Eyman's argument was "reasonable," and that this was a case of first

impression. *Id*. at 839 ¶¶ 147–48. Yet it interpreted the statute "liberal[ly]" beyond its express terms. *Id.* at 840 ¶ 150.

That alone was reversible error. Yet that decision will also have drastic consequences respecting the "private affairs" of Washingtonians, protected by Article I section 7 of the Constitution. That Clause forbids the state from collecting people's personal financial information absent "authority of law," meaning a warrant or subpoena. The "liberal" interpretation adopted below empowers the state to inquire into information that is certainly private, without the lawful authority the Constitution requires.

ISSUES TO BE ADDRESSED BY AMICUS

1. Whether the registration and reporting requirements, as interpreted by the Court of Appeals, satisfy the applicable scrutiny.

2. Whether those requirements are constitutional under the Private Affairs Clause, Wash. Const. art. I, § 7.

ARGUMENT

I. The state's legitimate interests in regulation of speech about ballot propositions pale in comparison to the burdens imposed here.

A. The state's interest in requiring disclosure of information relating to ballot initiatives is far less significant than in cases involving candidates.

Courts recognize three legitimate interests that can justify forcing people to disclose private information to the government when they support a political campaign: preventing corruption, preventing the appearance of corruption, and the so-called informational interest—i.e., providing information to voters about who is funding a campaign. *See Sampson v. Buescher*, 625 F.3d 1247, 1255–56 (10th Cir. 2010). The first two are not at stake here, because propositions cannot be corrupt. Therefore, the only interest that can justify compulsory disclosure of the private information of supporters is the "informational interest."

This interest has never been endorsed by the U.S. Supreme Court. It has recognized it in cases involving candidates, but not

those involving initiatives. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) (declining to address the question). And there's good reason to doubt it is legitimate in the context of initiatives at all, because compelled disclosure of personal information is more likely to distract voters from a proposition's merits. "*Nondisclosure* could require the debate to actually be about the merits of the proposition on the ballot." *Sampson,* 625 F.3d at 1257 (emphasis added). The "informational interest" theory, if taken to its logical conclusion, would entitle government to force supporters of propositions to disclose information about their racial or religious backgrounds or sexual orientation, too, since that would presumably inform voters about who supports the proposition. *Reed,* 561 U.S. at 207 (Alito, J. concurring). Indeed, it would suggest that the secret ballot itself should be eliminated so the public can learn who endorses an initiative.

Consequently, courts have required the government to establish at least a threshold dollar amount in its disclosure requirements. *Canyon Ferry Road Baptist Church of East*

Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009), for example, invalidated a Montana law requiring disclosure of information about members of a "committee," which was defined in a manner similar to the definition at issue here, *see id.* at 1026, because there was no minimum dollar amount threshold, meaning that even small expenditures and contributions had to be disclosed. Wthout such a threshold, the law forced disclosure not of "financial sponsorship" but of "mere sympathy." *Id.* at 1033.

Here, the statute includes no threshold. It requires disclosure of "*all* contributions received and expenditures made," by "*any* person" who "ha[s] the expectation of receiving [*any*] contributions or making [*any*] expenditures" toward a proposition. *Eyman*, 24 Wash. App.2d at 816 ¶ 53 (emphasis added).

The problem is that there's an obvious connection between free speech and financial support. *Wash. State Republican Party v. Wash. Pub. Disclosure Comm'n*, 141 Wash.2d 245, 254 (2000).

Just as people have the right to speak in support of a political position, so they have the right to give money to groups who do so. To strip them of privacy for doing so plainly burdens the freedom to engage in the political debate, creating a substantial chilling effect. Many people, probably most, would choose not to donate to a candidate or campaign if the price of doing so is to waive their privacy rights. *See NAACP v. Patterson*, 357 U.S. 449 (1958); *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021). Most likely would decide that expressing political opinions "[is] simply not worth it." *FEC v. Mass. Citizens for Life, Inc*. (*MCFL*), 479 U.S. 238, 255 (1986).

MCFL declared it unconstitutional to impose significant regulatory and reporting costs on a small statewide political group as the price of speech. Imposing substantial reporting burdens on campaign organizations must be justified by a compelling interest, *id.* at 256, but while "restrict[ing] 'the influence of political war chests funneled through the corporate form'" might justify certain kinds of restraints, *id*. at 257 (citation

omitted), a small group like MCFL "do[es] not pose that danger of corruption." *Id.* at 259. "The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [the statute] as an infringement on First Amendment activities." *Id.* at 255.

Eyman is not a candidate and didn't support candidates; he supported propositions. Thus the question is whether the burden of being forced to register and publicly disclose all his income and expenses can be justified because it serves the "informational interest" without "discourag[ing] protected speech." *Id.* Here, the answer is no. If a similar burden was excessive in *MCFL*, it's surely excessive under the Washington Constitution, which is more protective of free speech rights than the federal Constitution. *Bradburn v. N. Cent. Reg'l Libr. Dist.*, 168 Wash.2d 789, 800 ¶ 19 (2010).

If "ferret[ing] out" potential malefactors who seek to "influence the political process" is sufficient to justify *that* extensive a burden, then no individual participating in

democracy can be assured of any privacy rights. *Eyman,* 24 Wash. App. 2d at 839-40 ¶ 149. In other words, the court failed to compare the fitness of the state interest with the means employed. That was reversible error.

B. When campaign finance regulations become excessively complicated, as here, they become a prior restraint on speech.

Where restrictions on the right to participate in elections become too extensive, they can operate as a prior restraint. *Citizens United v. FEC*, 558 U.S. 310, 335 (2010). The reason is that if the laws are so confusing that a person must seek legal advice before speaking—or must even ask the government itself—then the regulation will effectively require permission to speak.

Here, it is unclear that Eyman is a "committee," and the court below acknowledged that there's no precedent on that, 24 Wash. App.2d at 834 ¶ 126, or on whether the "support" referenced in the statute includes "indirect" support. *Id*. at 839 ¶ 147. It called the statute "ambiguous," and said Eyman's

argument that "support" means only *direct* support, was "reasonable." *Id.* ¶ 148.

Yet it proceeded to give the statute a "liberal construction," *id.* at 840 ¶ 150, even though laws burdening speech are supposed to be construed narrowly, against the state. *OneAmerica Votes v. State*, 23 Wash. App.2d 951, 978 ¶ 54 (2022). "Liberal construction" clashes with the tailoring required in this context. Although the court said its broad construction would serve the state's "interest in ensuring transparency," *Eyman*, 24 Wash. App.2d at 845 ¶ 170, it never even addressed the burden that the disclosure and reporting requirements would impose on Eyman's free speech—not a single word, even though the *state*, not Eyman, bears the burden of proof. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 114 (1997).

The registration and reporting requirements here impose a *remarkably* intimidating burden on speech—so much that it's far less likely to ferret out malfeasance than to persuade would-be

speakers that it's "simply not worth it." *MCFL,* 479 U.S. at 255. That means it rises to the level of a prior restraint. *Citizens United*, 558 U.S. at 324.

As noted above, it's doubtful whether the "interest in ensuring transparency in campaign finance" is even legitimate in the ballot proposition context. *Eyman*, 24 Wash. App.2d at 845 ¶ 170. But it surely is not "compelling." A "compelling" government interest is one that is "indispensable to government existence or operation," as opposed to a mere interest in "greater efficiency or effectiveness in the performance of some public function." *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal.4th 1, 22 (1994). The latter may be legitimate, but not "compelling." Without some showing by the government that forcing people to register as "committees" and report all their receipts and expenditures in order to receive donations to support their living expenses is somehow tailored to a state interest of extreme gravity, the "compelling interest" test is simply not met here.

Certainly a mere desire to "ferret out" potential malfeasance, *Eyman*, 24 Wash. App.2d at 839 ¶ 149 (citation omitted), is insufficient. *Bonta,* 141 S. Ct. at 2387, found it unconstitutional for the state to deprive nonprofits and donors of privacy for "[m]ere administrative convenience" in ferreting out potential wrongdoing. If convenience is insufficient under the federal Constitution, it's certainly inadequate under the Washington Constitution.

II. A restriction on a person's solicitation and expenditure of funds for private expenses intrudes on his "private affairs" without lawful authority.

The Washington Constitution's Private Affairs Clause is one of its most distinctive features. *See generally* Johnson & Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431 (2008). The Clause protects rights beyond those protected by the federal Constitution.

This provision was fashioned in response to a pair of Court decisions, *Kilbourn v. Thompson*, 103 U.S. 168 (1880), and *Boyd*

v. United States, 116 U.S. 616 (1886), which involved the Fourth Amendment's limits on government seeking private financial information, both of which held that the federal government could not constitutionally demand financial records without particularized suspicion and a warrant. At that time, federal constitutional protections were not viewed as binding on states, so the Washington Constitution's framers sought to constitutionalise similarly strong protections. They discarded the Fourth Amendment's language—notably eschewing the word "unreasonable"—and provided that a person's "private affairs" would not be "disturbed" except by "authority of law." Wash. Const. art. I, § 7.

The term "private affairs" referred not (merely) to the intimacy rights now associated with the term "right to privacy," but foremost to a person's *financial information*. *See* Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723, 729–33 (2019). The phrase "private affairs" even became something

of a slogan at the time, referring to a person's records of income and expenditures. *See id*.

This Court has recognized that the Clause applies to people's financial records. *State v. Miles,* 160 Wash.2d 236 (2007), barred the Department of Financial Institutions from obtaining bank records through an administrative subpoena, because they "are within the constitutional protection of private affairs," due both to the data they contain and the information they can indirectly reveal. *Id*. at 244–47 ¶¶ 13, 16, 17. Likewise, a statute that compels anyone who "expect[s]" to "receiv[e] contributions or mak[e] expenditures" in support of a proposition—*including "indirect" support*—to register and disclose all of his income and expenses is a drastic intrusion into private affairs. It can "potentially reveal[] sensitive personal information" about "what political, recreational, and religious organizations a citizen supports…where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more." *Id*. at 246–47 ¶ 17.

True, the government *may* disturb a person's private affairs if it acts pursuant to "authority of law," but that doesn't mean the state can adopt a law stripping them of privacy rights, and then call that "authority of law." First, that would fallaciously mean interpreting the Constitution to say to the legislature, "You shall not do the wrong, unless you choose to do it." *Pauly v. Keebler*, 185 N.W. 554, 556 (Wis. 1921) (citation and quotation marks omitted). Second, this Court has already defined the term "authority of law" as "a valid warrant," *State v. Hinton,* 179 Wash.2d 862, 868–69 ¶ 9 (2014), or "subpoena issued by a neutral magistrate." *State v. Villela*, 194 Wash.2d 451, 458 ¶ 10 n.2 (2019).

Here, no individualized assessment is involved. *Anybody* who *expects* to receive money or to spend it to support a proposition—even "indirectly," in the form of receiving funds to spend on personal expenses so one can campaign for a proposition—is compelled to provide information about *all*

receipts and payments. That's plainly too broad to satisfy the Private Affairs Clause.

CONCLUSION

The petition should be *granted*.

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Respectfully submitted this 17th day of May, 2023.

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Declaration of Service

I, Richard M. Stephens, declare as follows pursuant to GR 13 and RCW 9A.72.085 that counsel for all parties were served through the Court's electronic filing portal on May 17, 2023.

Executed this 17th day of May 2023, at Woodinville, Washington.

/s/ Richard M. Stephens
Richard M. Stephens

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Comments:

This is a corrected motion and corrected brief, correcting what was filed on May 12, 2023

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