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NO. 89462-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT UTTER and FAITH IRELAND in the name of the STATE OF WASHINGTON,

Petitioners,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

RESPONDENT'S REPLY TO CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

This Court should deny review. The decision in *Utter ex rel. State v. Building Industry Ass'n of Wash.*, __ Wn. App. __, 310 P.3d 829 (2013), is consistent with the holdings from Division Two in *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n* (*EFF I*), 111 Wn. App. 586 (2002), and *State ex rel. Evergreen Freedom Foundation v. National Educ. Ass'n* (*EFF II*), 119 Wn. App. 445 (2003). Because there is no split in authority between the divisions, Petitioners have not satisfied the standards of RAP 13.4, and review should be denied.

But if this Court grants review, it should grant review of the decision to deny BIAW attorney's fees and costs. BIAW is entitled to fees under the Fair Campaign Practices Act (FCPA) as the prevailing defendant in this saga of politically motivated litigation.

II. ARGUMENT

A. The State Acted, Precluding the Citizen Suit.

1. *Utter* was Correctly Decided.

It is undisputed that the State investigated Petitioners' citizen complaint against BIAW and MSC, determined that only the claims against MSC had merit (the claims against BIAW were determined to be meritless), pursued the claims against MSC, and decided not to pursue claims against BIAW. On those facts, Division One determined, correctly,

that the State "acted" for purposes of precluding the citizens' complaint under RCW 42.17A.765. *Utter*, 310 P.3d at 844 ("[t]he State took an action against BIAW under RCW 42.17A.765 when it caused PDC to investigate the allegations that BIAW was a political committee and then declined to file a lawsuit based on the PDC's conclusion that BIAW did not receive contributions or make expenditures to further electoral political goals and was not a political committee.").

In an attempt to manufacture a dispute between the courts of appeal where none exists, Petitioners mischaracterize the holding in the case below. They contend *Utter* held that the mere act of referring a complaint to the PDC for an investigation precludes a citizen suit. Pet.'s Reply Br. at 3. But, as just explained, that is not what the court held.

Further, the holding in *Utter* is consistent with the holdings from Division Two in the *EFF* line of cases. Those cases stand for the general proposition that a citizen suit is preluded under RCW 42.17A.765 when the State (whether the AG or the PDC) proceeds with an enforcement action.[1] Likewise, Division One in *Utter* also held that something significantly more than a referral by the AG was required to preclude a citizen suit. As noted above, Division One held the State "acted" for

[1] *EFF I* held a citizen suit is precluded when the PDC investigates allegations of FCPA violations and files an administrative proceeding based on those allegations. *EFF I*, 111 Wn. App. at 609. In *EFF II*, the court confirmed its holding in *EFF I*. *EFF II*, 119 Wn. App. at 453.

purposes of RCW 42.17A.765 because it investigated the claims against MSC and BIAW (including the political committee claims) and, after completing a full investigation, decided to press claims against MSC but not BIAW. Thus, in all three cases, the courts held that the meaning of "state action" for purposes of RCW 42.17A.765 encompassed much more than a mere customary referral to the PDC for an investigation. There is, therefore, no difference of interpretation between the divisions, and Petitioners cannot satisfy the grounds for review.

2. *In re WBBT* is of No Assistance to Petitioners.

Petitioners contend *In re Washington Builders Benefit Trust* (*In re WBBT*), 173 Wn. App. 34 (2013), somehow determines the outcome of this case. They are wrong. First, Petitioners cite no authority to support their claim that collateral estoppel bars BIAW's arguments in this case. The Court need not address an argument unsupported by citations to authority. *Eyman v. McGehee*, 173 Wn. App. 684, 699-700 (2013) (citing *State v. Johnson*, 119 Wn.2d 167, 171 (1992)).

Second, and more importantly, *In re WBBT* was a *different* case with *different* parties involving an entirely *different* legal matter, i.e., whether retro program enrollment agreements created a "trust" for the benefit of certain employer participants, who (and what entities) constituted trustees under the alleged trust, and whether those trustees

breached their fiduciary duties in the handling of those accounts. 173 Wn. App. at 51-52. Absent from that case was any claim or determination that the funds at issue were attributable to BIAW for purposes of campaign finance law. *In re WBBT* did not address whether BIAW solicited and made political expenditures for purposes of the FCPA. Petitioners grossly mischaracterize that case and its significance here.

3. Because BIAW Briefed the Preclusion Argument, It Was Not Decided *Sua Sponte.*

Petitioners are also wrong that the court below considered the effect of state action *sua sponte*. BIAW briefed the preclusion issue to the trial court and Division One. CP 27-30; BIAW's Answering Br. and Opening Cross-Appeal Br. at 34-36; BIAW's Mot. for Recons. at 19-20. Petitioners, however, failed to respond. *See Utter*, Unpublished Decision at 6 n.4 ("Utter and Ireland [did] not respond [to BIAW's argument.]"). If anything can be concluded from this record, it is that by failing to respond to BIAW's argument, Petitioners waived it. *New Meadows Holding Co. v. Wash. Water Power Co.*, 34 Wn. App. 25, 29 (1983).

4. Petitioners' Interpretation Chills First Amendment Rights.

The state action holding in *Utter* strikes a proper balance between the First Amendment freedom to participate in political activity and the underlying intent of the citizen suit provision. Petitioners disagree,

offering a list of theoretical potential harms, none of which is present here.

First, the State possessed the political will to enforce the FCPA in this case, as evidence by the AG's pursuit of Petitioners' clams against MSC. That Petitioners disagreed with the State's analysis of their legal claims against BIAW does not mean the State lacked the will to act. It merely means Petitioners' claims lacked merit.

Second, allowing plaintiffs to pursue claims deemed by the State to lack merit does not advance the public interest or deter wrongdoing. Indeed, allowing the citizen suit to proceed would ***cause*** significant damage, as it did here, by forcing defendants to endure lengthy, expensive, and meritless litigation. It would also chill First Amendment activity as political activists (like counsel for Petitioners) would use citizen enforcement (as they did here) to punish those with whom they disagree, even when the State has determined there is no merit to the claims. It is not the purpose of the citizen suit provision to allow "'every watchdog group … to demand that the PDC find the watchdog's allegations meritorious or [allow] the watchdog … [to] sue in superior court.'" *Id.* at 843 (quoting *EFF I*, 111 Wn. App. 586, 609 (2002)).

B. The Trial Court Properly Granted Summary Judgment On the Expenditure Claims.

The Court need not address Petitioners' remaining claims if it

agrees that the State's action precluded the citizen suit. But even if the Court disagrees, the Court should still affirm summary dismissal.

To qualify as a "political committee" under the expenditure prong, there must be expenditures ***and*** the primary purpose of the organization must be electoral activities.[2] *Utter*, 310 P.3d at 835 (citing *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 509 (1976)). Because the test is in the conjunctive, the claim fails as a matter of law where evidence of either element is lacking. In this case, Petitioners produced zero admissible evidence on either element.

As to the expenditure element, the PDC reviewed BIAW's expenditures from 2006 to 2008, and after an exhaustive review of these and other pertinent documents and testimony, concluded that "BIAW did not solicit or receive contributions to support or oppose [political activity], nor did it contribute to candidates or political committees or use its general treasury for other campaign-related expenditures." CP at 57.

Instead of offering admissible evidence to refute the PDC's findings, Petitioners rely on a tax form that contained a clerical error.[3] As

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[2] Petitioners do not respond to BIAW's argument that Division One applied an unconstitutional standard when it found that a question of fact existed as to whether "one" of BIAW's primary purposes included electoral activities. *See* BIAW's Resp. Br./Cross-Pet. at 16-18. By not responding, Petitioners apparently concede the appropriate standard to apply is whether "***the*** major purpose" of an organization is the nomination or election of a candidate. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (emphasis added).

[3] The 2008 IRS Form 990 mistakenly listed $165,214 as a political expenditure.

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soon as the mistake was discovered, it was corrected to show BIAW had not, in fact, spent any money on political expenditures. An error on a tax form, later corrected, does not create a dispute as to what actually occurred, especially where it is undisputed that the PDC reviewed BIAW's actual expenditures and concluded that BIAW "does not contribute to candidates or political committees." *Utter*, 310 P.3d at 843.[4] The corrected form is also consistent with all the sworn testimony in the case. *See* Appx. A to Resp. to Pet. for Rev/Cross-Pet. for Rev at ¶¶ 4-6.

Still, even if a trier of fact were to consider the erroneous tax form instead of the corrected one, it could not reasonably conclude that BIAW qualified as a political committee in light of all the evidence offered to the trial court. BIAW provides services to its 13,000 Washington members and serves as a clearinghouse of information to small homebuilders; engages in a variety of communications with its members; publishes an award-winning industry magazine; offers award-winning education programs on a wide range of topics; and offers members other benefits, including health insurance. *See, e.g.*, CP 152-154. And during the period in question, BIAW spent $1,517,592 on Wages/Benefits; $688,045 on Education Programs; $142,834 on Membership Promotion; $576,794 on

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[4] Underscoring this point, Petitioners do not allege (nor do they provide any evidence to support a claim) that the transaction underlying the amount incorrectly listed on the 2008 tax form was not already reviewed by the PDC and determined to not constitute a political expenditure.

Newsletter; $52,730 on Legislative Policy; and $452,181 on Overhead/Administration. CP at 57. Against this backdrop, it would not be reasonable to conclude that political activity was a *primary* purpose (let alone "the" purpose) of BIAW based on the comparatively small amount listed in 2008 form and the overwhelming evidence that MSC and not BIAW spent any money on political campaign activity.

It is undisputed that both BIAW and MSC referred to themselves as "BIAW." CP 701 n.2; CP 156. Petitioners admit that the use of "BIAW" referred to both BIAW and MSC. CP 1041. As Division One observed, "BIAW" was used generically to refer to MSC, BIAW, or both, but this shorthand is not sufficient to cast doubt on the fact that MSC, not BIAW, managed the funds or engaged in electoral activity. *Utter*, 310 P.3d at 835. Thus, the uncontested evidence showed that statements wrongly attributed by the court of appeal to BIAW presidents and board members were in fact made on behalf of MSC.

Because all the evidence showed that BIAW made no expenditures, BIAW is still entitled to summary judgment.

C. BIAW is Entitled To Attorneys' Fees and Costs.

The trial court abused its discretion by failing to award fees and costs to BIAW. *See Utter*, 310 P.3d at 844 (denial of a motion for attorneys' fees reviewed for abuse of discretion.). One purpose of RCW

42.17A.765(4)(b) and RCW 42.17A.765(5)—the FCPA fee shifting provisions—is to prevent "***harassing*** lawsuits" such as this. *EFF I*, 111 Wn. App. at 615 (emphasis added). Petitioners' lawsuit, filed after the AG investigated and refused to take action against BIAW and maintained for two years without any factual or legal basis, was plainly harassing and filed without reasonable cause. Because the evidence does not suggest otherwise, BIAW is entitled to a fee award. *See id.*; *Fritz v. Gorton*, 83 Wn.2d 275, 314 (1974). At a minimum, fees should be awarded on the coordination claim Petitioners abandoned only after BIAW filed its motion for summary judgment. *See EFF I*, 111 Wn. App. at 615.

As counsel for Petitioners knew, and used to their advantage, the identity of the Petitioners also made it especially difficult for BIAW to defend against the now discredited claims. At every turn, Petitioners reminded the courts they are ex-Supreme Court Justices (Petitioners' briefing in this case refers to them as "the Justices"). This tactic appears to have been an attempt to garner special deference from the courts.[5] If

[5] Indeed, this tactic seems to have worked. Washington Courts do not issue advisory opinions or address issues not ripe for review. *Walker v. Munro*, 124 Wn.2d 402, 414 (1994); *Davidson v. State*, 116 Wn.2d 13, 30 (1991). Yet, the bulk of the published *Utter* opinion, including the court's erroneous expenditure analysis, is pure dicta apparently attempting to justify the underlying action. Division One also declined initially to decide the preclusion issue even though BIAW briefed it because "Utter and Ireland [did] not respond"' to it. *Utter*, unpublished opinion, at 6 n.4. But the rule in Washington is that if a party does not respond to an argument, the party waives it. *New Meadows Holding Co*, 34 Wn. App. at 29. Division One also found that even though the PDC and AG determined that Petitioners' claims lacked merit, that fact did not warrant awarding

the Justices were still sitting, such conduct would be improper under Canon 1.3 of the Code of Judicial Conduct, which states, "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interest of the judge or others, or allow others to do so." Yet the justices (like their counsel) admitted that their motivation for prosecuting their meritless claims had everything to do with advancing their own political interests and punishing BIAW for its activity adverse to those interests. *See* CP 851, 896, CP 901.

This case exemplifies how denying a fee award chills free speech. Absent a fee award, nothing will deter citizens from using a meritless campaign finance case as a sword to attack political opponents or to silence them. Indeed, the citizen enforcement provision is constitutional in part *because* it provides fees to a defendant who, like BIAW, has been subject to a harassing suit. *Fritz*, 83 Wn.2d at 314. If fees are not warranted in this case, then it is difficult to imagine a scenario in which they would be. Justice requires an award of fees to BIAW.

Because BIAW prevailed in this litigation, and was compelled to endure years of vexatious and oppressive litigation, BIAW is entitled to

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BIAW fees because "Utter and Ireland disagree with the conclusion of the PDC and the AG." This remarkable reasoning should be rejected. Petitioners' disagreement does not mean the litigation is justified or reasonable or that the identity of the Petitioners making meritless claims entitles them to special treatment. If anything, Petitioners should be held to a higher standard when making meritless attacks on First Amendment activities.

attorneys' fees and costs in this appeal. *See* RAP 18.1.

RESPECTFULLY SUBMITTED this 12th day of December, 2013.

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By ______________________________

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 14, 2013, I caused Respondent/Cross-Appellant's Response to Petition for Review/Cross-Petition for Review to be served in the above-captioned matter upon the parties herein via messenger:

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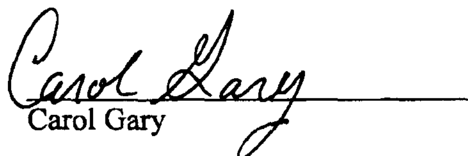
Stated under oath this 12th day of December, 2013.



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Dear Clerk of the Court:

Attached is Respondent's Reply to Cross-Petition for Review for filing in the Court's file today. Thank you.

Sincerely,

Carol Gary

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