NO. 96476-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *ex rel.*, WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,

Respondent,

v.

FOOD DEMOCRACY ACTION! and FOOD DEMOCRACY ACTION! YES ON I-522 COMMITTEE TO LABEL GMOs IN WASHINGTON,

Petitioners.

STATE OF WASHINGTON'S ANSWER TO BRIEF OF *AMICI CURIAE* WIN/WIN NETWORK, WORKING WASHINGTON, FUSE WASHINGTON, PUGET SOUND SAGE, WASHINGTON STATE ASSOCIATION FOR JUSTICE, WASHINGTON BUDGET & POLICY CENTER, AND POLITICAL DESTINY

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I. INTRODUCTION

Amici predicate their request for review on the same inaccurate description of the record that Food Democracy Action! (FDA) offered in its brief. In particular, Amici claim that FDA's violations of the State's concealment statute were solely the result of its failure to file timely reports with the Public Disclosure Commission (PDC). Again, this is false. The record shows that FDA solicited contributions for Initiative 522 from its members and then chose to disburse those funds in its own name. If it had not done this – but had instead identified the 7,000 mostly out-of-state contributors as the source of those payments at the time they were made – then FDA would have made the public aware of them even if FDA had failed to file its reports the PDC. Instead, FDA's conduct kept their contributors' identities hidden until after the election.

Amici also rely on the premise that FDA's concealment statute violation mandated a drastic enhancement in the penalty amount assessed against it. However, the penalty imposed on FDA fell well within the trial court's discretion for the late reporting violations alone.

Accordingly, the entire premise of Amici's brief is flawed and their argument regarding their potential exposure from the Court of Appeals' ruling and the public impact that this case poses therefore is without merit.

Finally, Amici, like FDA, cannot point to any language in the concealment statute itself that justifies imposing an intentionality restriction into that statute. To the contrary, the Court of Appeal's ruling comports with both the plain language of the concealment statute and the directive that campaign finance disclosure laws should be "liberally construed." The Court of Appeals correctly affirmed the trial court's ruling that FDA's conduct constituted concealment.

II. ARGUMENT

A. The Plain Language of RCW 42.17A.435 Does Not Support Amici's Attempt to Insert an Intentionality Restriction

The Court of Appeals correctly determined that "the plain meaning of [RCW 42.17A.435] is unambiguous [and] does not require intentional or knowing concealment." *State ex rel. Pub. Disclosure Comm'n v. Food Democracy Action!* (*State v. FDA*), 5 Wn. App. 2d 542, 550, 427 P.3d 699 (2018). Thus, even if the record in this case had supported Amici's inaccurate premise that FDA's concealment violation resulted solely from filing late reports, their attempt to insert intentionality restriction into the concealment statute still would not be appropriate because the plain language of that statute does not support such a restriction.

Washington State's concealment statute, RCW 42.17A.435,[1]

[1] In 2018, the Legislature significantly revised the Fair Campaign Practice Act, RCW 42.17A, including recodifying many provisions relevant to this case. To remain

provides:

> No contribution[s] shall be made and no expenditure shall be incurred, directly or indirectly, . . . by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or *in any other manner so as to effect concealment*. (Emphasis added).

If a statute's meaning is plain on its face, then a court must give effect to that plain meaning as an expression of legislative intent. *In re Estate of Haviland*, 177 Wn.2d 68, 76, 301 P.3d 31 (2013). A statute's "plain meaning is derived from the context of the entire act as well as 'related statutes which disclose legislative intent about the provision in question.' " *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014) (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

On its face, RCW 42.17A.435 contains no restriction limiting its coverage to intentional misconduct, but rather expressly encompasses actions that *effect concealment*. In this case, FDA's misconduct "effected" concealment by keeping the identities of the true sources of its contributions to the Yes on I-522 committee—its members and supporters—hidden from the public. Specifically, FDA solicited funds from its members and

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consistent with the record and the Court of Appeals' opinion, this Answer cites the pre-2018 version of the law. RCW 42.17A.435 was not amended or recodified in 2018.

supporters and then disbursed those funds in its own name as if its members and supporters never existed.

Significantly, the campaign finance statutory scheme does address intentional misconduct elsewhere and makes those violations punishable through the trebling of a judgment pursuant to RCW 42.17A.765(5). "Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.' " *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008). Amici's attempt to insert an intentionality restriction into the concealment statute itself would render the treble damages provision superfluous in instances where a defendant's conduct causes the identities of contributors to a candidate or initiative remain hidden from the public. Only by finding that no intent is required under RCW 42.17A.435 can one harmonize these two related statutory provisions.

Amici's attempt to add an unwritten intentionality restriction into the concealment statute is also contrary to the directive that campaign disclosure laws be liberally construed "so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected." RCW 42.17A.001.

In affirming the trial court's judgment, the Court of Appeals correctly held that the plain meaning of RCW 42.17A.435, "does not require intentional or knowing conduct," but "prohibits any conduct that conceals the source of campaign contributions." *FDA*, 5 Wn. App. 2d at 549-50. This interpretation upholds the plain text of RCW 42.17A.435, and comports with the statute's purpose of providing the public with all information about who contributed to a political campaign. *See* RCW 42.17A.001.

B. Amici's Substantial Public Impact and Constitutional Arguments Rely on an Inaccurate Description of the Record

1. Amici's arguments rely on the false premise that FDA's misconduct was limited to its failure to timely file reports

Amici's claim that the Court of Appeals ruling will have a substantial impact on them and on the public relies on the false premise that FDA concealment violation was limited to filing untimely reports with the PDC.

The record does not support this argument. FDA did more than simply fail to timely file reports with the PDC. FDA's conduct included: (1) asking its members and supporters for money to support Initiative 522; (2) accepting money from its members and supporters for the express purpose of supporting Initiative 522; (3) making contributions to the Yes on I-522 committee using its own name instead of its members and supporters from whom it received the money; and (4) withholding the names of the

true contributors within the time frames required under the statute. The net effect of these acts was that the identity of over 7,000 mostly out-of-state contributors was withheld from the public until after the election. CP 241-44. Only then did FDA finally file the required reports. CP 242 (FF 20).[2]

The trial court's judgment was not based solely on the late filing of reports, but also on the particular manner FDA employed to obtain and then disburse the contributions it received. CP 241 (FF 17-18). FDA's actions had the effect of concealing the identities of its members from the public. CP 244-45; RP I 22:19:22[3] ("That's the primary basis for my ruling is that listing the contributions in the name of FDA and not in the names of the 7,000 people was in a manner so as to effect concealment."). If FDA's disbursements had identified the true sources of the contributions, those members and supporters would have been publicly disclosed even if FDA failed to file its own reports with the PDC. This did not happen; as such, FDA's conduct fell within the plain language of RCW 42.17A.435.

Amici assert that it is "untenable" that the concealment claim against FDA corresponded to activity distinct from FDA's failure to file reports

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[2] The clerk's papers in this case are referred to as "CP" in this brief. The trial court's findings of fact are referred to as "FF" in this brief.

[3] The six transcripts from the trial court proceedings are referred to as "RP I" for the summary judgment motion heard on Apr. 22, 2016; "RP II" for the Pre-Trial Conference on Aug. 19, 2016; "RP III" for the Pre-Trial Conference on Aug. 26, 2016; "RP IV" for the first trial date on Sep. 19, 2016; "RP V" for the second trial commenced on Nov. 21, 2016; and "RP VI" for the presentation of judgment on Dec. 16, 2016.

with the PDC. Amici Br. at 5 n.2. Amici base this assertion on the claim that if the reports had be properly filed with the PDC, FDA would have revealed the identities of the contributors to I-522. *Id.* However, Amici's contention misses the point. FDA could have made the contributor's identities of known to public, *even though it failed to file the required reports*, by listing the names of those contributors as the true sources of those funds.[4] Contrary to Amici's contention, nothing in the trial court's judgment or the Court of Appeals' ruling means that an inadvertent mistake in filing reports with the PDC requires a finding of concealment.

2. Amici's arguments rely on their inaccurate assertion that FDA's concealment statute violation mandated a substantial increase in the penalty amount

Amici also assert that FDA's violation of the concealment statute required a drastic increase in its penalty beyond what is could have been for only a failure to report. Nobody appeared on behalf of FDA at the November 21, 2016, trial to determine the appropriate penalty for FDA. RP V 4:10-11. Nevertheless, the trial court exercise its discretion to assess a penalty that was not only substantially less than the State had sought, but

[4] Although not relevant, the State in fact *does* dispute Amici's assertion that "an organization which timely submits a report [identifying its contributors] is entitled to make a contribution in its own name . . . ." Amici Br. at 5-6 n.2. When contributors earmark funds as contributions to a particular political committee, such as the committee supporting Initiative 522, those contributions must be attributed to the sources of those funds. *See* RCW 42.17A.460; RCW 42.17A.270; WAC 390-16-240; WAC 390-17-015; WAC 390-16-033.

also less than the full amount the trial court could have imposed for FDA's numerous reporting violations alone.

Under the campaign finance disclosure statute, the court may impose *one or more* of the following penalties for violations of that statute: (1) a "per violation" penalty of not more than $10,000; (2) a penalty equal to $10 per day for every day a required report is late; and (3) a penalty equal to the amount that went undisclosed. Former RCW 42.17A.750(1)(c), (d), (f).

The trial court followed this statute to impose a penalty of $319,281.58 against FDA. CP 245. This penalty was the total of: $295,661.58 (the amount unreported until after the election), $18,000 ($1,000 for each of the 18 late filed reports), and $5,620 ($5 per day for the cumulative 1124 days that the reports were late). CP 245; RP V 54:19-55:22.

The record does not support the Amici's claim that the penalty imposed against FDA was "duplicative" or "excessive." Amici Br. at 6. Rather, the penalty amount imposed on FDA fell well within the range provided under the law for the reporting violations alone. The State's trial brief made clear the penalty it was seeking under RCW 42.17A.750(1), but FDA chose not to attend the trial or argue for a different outcome. RP V 4:10-11. Although the trial court found that FDA had not only filed late

reports, but had also violated the concealment statute, the trial court exercised its discretion under the statute to impose a civil penalty permitted solely by the late-filed reports. CP 245; RP V 54:19-55:22.

3. Amici's substantial public impact and constitutional arguments are not supported by any data or evidence

Amici provide unsupported speculation about the purported impact the Court of Appeals ruling will have "in practice." Amici Br. at 8-10. In making these unsupported contentions, Amici again appear to rely on the false premise that FDA's concealment was limited to its late filing of reports and that it had been imposed an "excessive" penalty because FDA's conduct also had the effect of concealment. However, as noted above, the penalty was well within that which the trial court was permitted to impose for FDA's failure to file any reports disclosing $295,661.58 in contributions until after the election.

Further, Amici's situations, as set forth in their brief, are markedly different from that of FDA. The trial court found FDA had solicited and collected funds from third parties to support a particular initiative, and then failed to disclose the identities of those contributors to the public in any manner until after the election had taken place. CP 241-44. In contrast, some Amici claim to engage in "independent expenditures" that may trigger a reporting obligation. Amici Br. at 1. However, the Amici's independent

expenditures identified in the brief involve their own public media activities, not the payments of third parties for a particular initiative that are filtered through another person in a manner that concealed their identities even from the recipients of those funds. Amici Br. at 3. The concealment statute itself expressly identifies the situation where persons have made their payments through another so that their own identities remain hidden, as occurred here, as an example of concealment. RCW 42.17A.435.

A similar distinction exists for Amici who engage in lobbying activities or who have registered as a political committee that expend their own funds from contributions or otherwise, rather than third party funds that were solicited specifically to support or oppose a particular initiative or candidate. Amici Br. at 4. Amici present no facts that they solicit and receive contributions directed to a particular campaign as FDA did. In sum, Amici's claims of dramatic exposure from "good faith" reporting errors rely on a misreading of the record in this case.

In addition, to the extent that Amici are making a constitutional challenge, it is based on their own misreading of the trial court's judgment as set forth above. Amici provide no factual or legal ground for revisiting well-established case law upholding the constitutionality of the state's campaign finance disclosure requirements. State and federal courts have repeatedly rejected similar challenges to the statute, instead concluding that

the law's disclosure requirements have a substantial relationship with an important government interest in providing voters with information involved with initiatives. *See, e.g.*, *State v. Evergreen Freedom Found.*, 432 P.3d 805, 814-15 (Wash. Jan. 10, 2019). *State ex rel. Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1007 (9th Cir. 2010).

III. CONCLUSION

For these reasons and those set forth in the State's Answer to FDA's Petition for Review, the State respectfully requests that this Court deny FDA's Petition for Review.

RESPECTFULLY SUBMITTED this 9th day of April, 2019.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of April, 2019, at Tumwater, Washington.

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