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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.

BIAW'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Petitioners filed a lawsuit against the Building Industry Association of Washington (“BIAW”) alleging violations of the Fair Campaign Practices Act (“FCPA”). BIAW argued that the suit was precluded because the Public Disclosure Commission (“PDC”) (i) investigated Petitioners’ allegations against BIAW and its for-profit subsidiary, BIAW Member Services Corporation (“BIAW-MSK”); (ii) filed a lawsuit against BIAW-MSK, which the Attorney General (“AG”) later settled; and (iii) determined that the allegations against BIAW, the non-profit parent entity, lacked merit and did not warrant a lawsuit. In a unanimous decision, Division One agreed, holding that Petitioners were precluded from bringing the civil action under RCW 42.17A.765(4). *Utter ex rel. State v. Building Industry Association of Washington*, 176 Wn. App. 646 (2013). Petitioners appealed, advancing a theory that countermands the plain language of the governing statute and violates the First Amendment. Accordingly, the Court should affirm.

II. ISSUES PRESENTED

- Whether the State “acted” for purposes of precluding Petitioners’ suit against BIAW when the PDC (i) investigated Petitioners’ allegations against BIAW and BIAW-MSK; (ii) filed a lawsuit against BIAW-MSK, which the AG later settled; and (iii) determined that the allegations against BIAW lacked merit and did not warrant a lawsuit. (Yes, the State “acted” for purposes of precluding the citizens’ suit.)

- If the Court answers the first question in the affirmative, it need not address the remaining issue: whether the Court of Appeals erred by opining, in dicta, that an issue of fact existed as to whether BIAW qualified as a “political committee.” (Yes, the Court of Appeals erred.)

III. STATEMENT OF THE CASE

BIAW largely agrees with the facts as set out in *Utter*, 176 Wn. App. at 651-54. A summary of the procedural history, however, is useful for consideration of the issues here.

During the 2008 gubernatorial campaign, Petitioners wrote to the AG accusing BIAW and BIAW-MSA of FCPA violations. The PDC investigated and determined the for-profit subsidiary, BIAW-MSA, potentially violated campaign finance requirements but that the non-profit parent “BIAW [did] not receive contributions to support or oppose candidates or ballot propositions, and [did] not contribute to candidates or political committees.” Clerk’s Papers (“CP”) at 69. *See also* CP at 59. Based on the PDC’s finding, the AG sued BIAW-MSA but not BIAW. CP 109-114. (The AG ultimately settled the lawsuit against BIAW-MSA. CP 116-120.)

Dissatisfied with this result, Petitioners filed their own lawsuit against BIAW, seeking nearly \$21 million in damages on claims the State investigated and determined had no merit. CP 1-16. The complaint alleged that BIAW coordinated with candidate Dino Rossi on a

fundraising effort and that this alleged coordination converted independent expenditures by BIAW into campaign contributions in excess of allowable limits. Petitioners also alleged BIAW qualified as a “political committee” under the FCPA and failed to report contributions and expenditures that the AG and PDC determined should be reported by BIAW-MSA.¹

Pursuing claims, rejected as meritless by the State, for purposes of punishing and chilling a political opponent’s speech is an abuse of the citizens’ enforcement provision.² The statute protects against such abuses by precluding citizens’ lawsuits where, as here, the State investigates and determines that a complaint lacks merit. Accordingly, BIAW moved for summary judgment on all claims. CP 17-43. Petitioners filed an opposition addressing the “political committee” claim, but they effectively conceded the contribution claim was meritless. CP 211-237. Consistent with the PDC’s determination that Petitioners’ allegations against BIAW lacked merit, the trial court granted BIAW’s motion and entered judgment dismissing all claims. CP 833-835; 1052-53.

Petitioners appealed summary judgment on the “political

¹ BIAW-MSA reported the contribution and expenditures as part of the settlement it reached with the AG.

² Justice Utter stated that his “sole reason for involvement in this matter was [his] great concern about the nature of the BIAW involvement in the 2006 election campaign involving a number of judges.” CP 896. Justice Ireland’s motivation “stem[ed] from the unfair judicial campaign against Chief Justice Alexander orchestrated by BIAW [in 2006].” CP 901. And their lawyer explained his intent was to harass and embarrass Mr. Rossi on the eve of the election and to “taint the BIAW to the point that candidates will be ‘returning their money.’” CP 851.

committee” claim. CP 1054-59. In an unpublished split decision, the Court of Appeals reversed and remanded. *Utter ex rel. State v. Bldg. Indus. Ass’n of Wash.*, No. 66439-5-I (Wash. Ct. App. Oct. 29, 2012). BIAW moved for reconsideration, repeating many of the arguments it made at trial and on appeal.³ The Court of Appeals granted BIAW’s motion and published a unanimous opinion affirming the trial court’s summary judgment against Petitioners. *Utter v. Building Indus. Ass’n of Washington*, 176 Wn. App. 646, 674 (2013). The court held Petitioners’ suit against BIAW was precluded because the PDC (i) investigated Petitioners’ allegations against BIAW and BIAW-MSA; (ii) determined the allegations against BIAW-MSA merited suit, which the AG brought and later settled; but (iii) that the allegations against BIAW did not warrant suit. *Id.* at 672-74.

This Court should affirm.

IV. ARGUMENT & AUTHORITY

A. The State Acted, Precluding the Citizens’ Suit under RCW 42.17A.765.

1. By Investigating Petitioners’ Claims and Declining to Prosecute Them, the State “Acted.”

Only if the State fails to “act” can citizens’ suits seeking

³ The motion was supported by amici briefs from SEIU Healthcare 775NW, UFCW 21, the Washington Education Association, SEIU Healthcare 1199NW, SEIU Local 925, (attached hereto as Ex. A) and the Washington State Labor Council, AFL-CIO (attached hereto as Ex. B), all of whom criticized the unpublished decision.

enforcement of the FCPA in the name of the State proceed. Because the State “acted” for purposes of RCW 42.17A.765, Division One correctly held that Petitioners’ lawsuit is barred.

The “fundamental objective in interpreting a statute is to ascertain and carry out the legislature’s intent or the collective intent of the voters acting in their legislative capacity (for statutes enacted through the initiative process).” *Robbins, Geller, Rudman & Dowd, LLP v. State*, ___ P.3d ___, 2014 WL 839895, at *3 (Wash. App. Mar. 4, 2014). If the statute’s meaning is plain on its face, courts give effect to that plain meaning as an expression of legislative intent. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–11 (2002). Here, the plain language of the FCPA precludes Petitioners’ lawsuit.

The citizens’ suit provision states that individuals may proceed with “any of the actions ... authorized under this chapter” only after meeting statutory notice requirements and only after the State fails “to commence an action hereunder” within the prescribed statutory period. RCW 42.17A.765(4). While the statute does not define the term “action,” it authorizes three types of actions: (1) legal proceedings seeking civil remedies for FCPA violations, (2) investigations “of any person who there is reason to believe is or has been acting in violation [the FCPA]”, and (3) the issuance of orders enforceable by a superior court “to obtain ...

information or produce the accounts, bills, receipts, books, papers, and documents that may be relevant or material to any investigation authorized under this chapter.” RCW 42.17A.765(1)-(3).

Based on this language, the Court of Appeals concluded (correctly) that the term “action” means the same for citizens’ actions as the kinds of actions the attorney general or the prosecuting authority may take under the Act. *Utter*, 176 Wn. App. at 674. The court also explained, “[w]here a ‘citizen’s action’ refers to *any of the actions* authorized under chapter 42.17A RCW, we think it logical that an ‘action’ by the AG or the PDC [for preclusive purposes] also refers to any of the actions authorized under RCW 42.17A.765.” *Id.* at 672-73 (emphasis added). Thus, by referring to “actions” (plural) and actions authorized “hereunder” (i.e., any of the actions authorized by RCW 42.17A.765(1) through (3)), it follows that where the State files a civil action (as it did against BIAW-MSA) or investigates allegations of wrongdoing and determines whether those claims have merit (as it did against BIAW-MSA and BIAW), the State has “commence[d] an action” under the statute barring future citizens’ suits. *Id.* That holding is consistent with the plain language of the statute, and it should be affirmed on appeal.⁴

⁴ See BIAW’s Resp. to Pet. for Rev/Cross-Pet. for Rev. (“BIAW’s Resp. Br.”) at 6-9. See also BIAW’s Reply In Support of Resp. to Pet. for Rev/Cross-Pet. at 1-3; BIAW’s Answer to Amicus Curiae at 1-3.

2. No Conflict Exists Between the Courts of Appeal as to the Meaning of the term “Action.”

Petitioners contend *Utter* conflicts with case law from Division Two, arguing (wrongly) that under *Utter* referring citizens’ complaints to the PDC for investigation is by itself sufficient to preclude a citizens’ suit. As explained above, those are not the facts of this case and not what Division One held.⁵

Petitioners imagine an inconsistency where none exists. Division Two held that a citizen suit is precluded when the PDC investigates allegations of wrongdoing and files an administrative proceeding based on those allegations. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n (EFF I)*, 111 Wn. App. 586, 605-09 (2002). Division Two confirmed that holding in *State ex rel. Evergreen Freedom Foundation v. National Education Ass’n (EFF II)*, 119 Wn. App. 445 (2003), while at the same time it clarified that it never “intend[ed] to imply that the AG’s customary referral to the PDC for initial review and investigation precludes a citizen’s action.” *Id.* at 453.⁶ But in neither case did Division Two address whether the state “commence[s] an action’ under RCW

⁵ See also BIAW’s Resp. Br. at 9-10; BIAW’s Answer to Amicus Curiae at 7-8.

⁶ When the AG receives notice from a citizen alleging FCPA violations, the AG customarily refers the allegations to the PDC. *EFF II*, thus, stands for the proposition that the referral itself does not preclude a citizen suit. Rather, some additional action from the State is required; for instance, when the PDC opens a formal investigation (which does not happen for all routine referrals) or makes a determination about the merits of the allegations. That is precisely what occurred in this case.

42.17A.765(4) when it takes action under RCW 42.17A.765(2) or (3) but declines to bring a civil action under subsection (1).” *Utter*, 176 Wn. App. at 672. Division One answered that question in the affirmative. *Id.* at 673. *Utter* thus comports with *EFF I* and *EFF II*, and nothing in Division Two precedent warrants reversal.⁷

3. Petitioners’ Interpretation Renders the Citizens’ Suit Provision Unconstitutional.

Petitioners’ interpretation of RCW 42.17A.765(4) fails for additional reasons: it injects ambiguity into a statute where none exists and undermines the constitutional integrity of the FCPA.⁸

The parties agree that the FCPA grants the State authority to initiate legal proceedings and to seek remedies for a disclosure violation. *See* RCW 42.17A.765(1), (4)(b). The parties also agree that a citizen suit is precluded when the State initiates those proceedings. RCW 42.17A.765(4)(a). But as explained above, those are not the only actions authorized by RCW 42.17A.765. The statute empowers the State to

⁷ Petitioners may also try to argue that *State v. (1972) Dan J. Evans Campaign Committee*, 86 Wn.2d 503 (1976), is inconsistent with *Utter*. Not so. First of all, that case is silent on the preclusion issue; thus, it adds little value to deciding the issue in this case. But more importantly, the court stated, albeit in passing and without factual development, that the AG “declined to bring *any action* under the Act.” *Dan J. Evans Campaign*, 86 Wn.2d at 504 (emphasis added). Thus, that case is equally compatible with Division One’s interpretation of the Act in *Utter*. Namely, if the State refuses to bring “any action”—that is, if the State refuses to commence an investigation, determine the merits of the citizen’s complaint, or commence legal proceedings when it determines such proceedings are otherwise warranted—the citizen suit could proceed.

⁸ *See* BIAW’s Answer to Amicus Curiae at 4-6; 8-11.

“investigate” under RCW 42.17A.765(2) and (3). The Act thus contemplates multiple “actions,” not just civil litigation. If, therefore, the term “action” is to have a consistent meaning throughout RCW 42.17A.765, then the commencement of any of those “actions” by the State precludes a citizens’ suit.

Petitioners, on the other hand, ascribe inconsistent meanings to the term “action” as used in the statute. Petitioners agree that when used in RCW 42.17A.765(4) in the phrase “any of the actions ... authorized under this chapter,” the term means any of the actions authorized under RCW 42.17A.765(1)-(3). But when used in RCW 42.17A.765(4)(a)(i) in the phrase, “[t]he attorney general and the prosecuting attorney have failed to commence an action hereunder,” the term means civil litigation under RCW 42.17A.765(1) only. Petitioners’ narrowing of the definition thus excludes “actions” authorized under RCW 42.17A.765(2)-(3), creating ambiguity with their interpretation. Courts should not interpret statutes to create ambiguity where none exists. *State v. Bolar*, 129 Wn.2d 361, 366 (1996).

Even worse, Petitioners’ argument undermines the constitutional basis of the FCPA. The preclusion principles embodied by RCW 42.17A.765 act as bulwark against abusive lawsuits. Indeed, in *Fritz v. Gorton*, 83 Wn.2d 275, 312-13 (1974), this Court declared the *qui tam*

provision constitutional because it kept the flood gates closed to such suits. As this Court explained, the citizen suit provision did not deprive defendants of due process because it applied *only* in those instances where the state took “no action,” investigatory or otherwise, at the end of the statutory notice periods. *Id.* at 314.

Under Petitioners’ interpretation, this protection all but disappears, with the result that individuals animated by a political grudge would be free to file expensive and time-consuming lawsuits in the name of the State on issues the State investigated and deemed without merit. As illustrated by this case, this is not merely a hypothetical harm.

The FCPA does not sanction abusive litigation such as this. Allowing such claims is “inconsistent with the notion that the citizen’s action is brought ‘in the name of the state.’” *Utter*, 176 Wn. App. at 674. And as two divisions in the Courts of Appeal have observed, the FCPA is not intended to allow “‘every watchdog group ... to demand that the PDC find the watchdog’s allegations meritorious or ... sue in superior court.’” *Id.* at 673 (quoting *EFF I*, 111 Wn. App. at 609). If it were, the FCPA would allow political operatives to deprive the State of the power to enforce campaign finance laws evenhandedly.

B. The Enforcement of the FCPA Sought by Petitioners is Unconstitutional.

Though Petitioners' suit is precluded, it also fails on the merits. The definition of "political committee" contains two prongs: the contribution prong and the expenditure prong. *Id.* at 655. The court below confirmed BIAW was entitled to summary judgment on the "contribution prong" but, in dicta, it erroneously opined that a factual dispute existed as to the "expenditure prong." *Id.* at 656-59, 667.

1. Requiring BIAW to report as a political committee does not satisfy "exacting scrutiny."

The interpretation of the Act advanced by Petitioners violates the First Amendment. There is no dispute that the financial information at issue has already been reported *twice*: once by the political committee that ran advertisements and once by BIAW-MSA pursuant to its settlement agreement with the State. The question before this court is whether requiring BIAW, the non-profit parent, to register as a political committee and to make a *third* disclosure advances any substantial state interest. The answer is no. Subjecting BIAW to the complex array of registration and disclosure requirements does not pass constitutional muster.

Statutes that require registration and disclosure present "significant encroachments on First Amendment rights." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1003 (9th Cir. 2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)). The State's enforcement of the

FCPA is therefore subject to “exacting” judicial scrutiny. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366 (2010); *Brumsickle*, 624 F.3d at 1005. To meet this standard, Petitioners bear the burden of showing “a ‘relevant correlation’ or ‘substantial relation’” between the compelled disclosure and the governmental interest in informing Washington voters about elections. *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 482 (2007); *Brumsickle*, 624 F.3d at 1008.

Among other requirements, Washington political committees must file reports with the PDC for any month in which they receive contributions or make expenditures totaling more than \$200. RCW 42.17A.235(2)(c). In election years, they must file additional weekly reports detailing “each bank deposit made during the previous seven calendar days.” RCW 42.17A.235(3). Even more reports are required on the twenty-first and seventh days before an election and ten days after the election. RCW 41.17A.235(2)(a), (b).

Imposing these onerous reporting obligations on specialized Political Action Committees makes some sense, but imposing them on BIAW, an active state-wide trade association with thousands of members, does not. BIAW exists whether an election takes place or not, and it receives dues that it spends on a variety of activities having no connection

to Washington elections. Thus, requiring BIAW to register and make monthly disclosures of “all bank accounts, all deposits and donations, and all expenditures, including the names of each person contributing funds” even when unrelated to election campaign activities, *see EFF I*, 111 Wn. App. at 598 (citations omitted), would impose a substantial burden on it and on the associational rights of its members.

Furthermore, there is no dispute that the contributions at issue in this case (the portion of the retro-program marketing assistance fees withheld by BIAW-MSA from the local associations) have already been reported to the PDC by ChangePAC as contributions from local associations. Nor is there any dispute that BIAW-MSA agreed to report the information pursuant to its settlement of the AG’s suit. Requiring BIAW to report the same information for a third time promotes no state interest whatsoever, let alone a substantial one. *See Dan J. Evans Campaign*, 86 Wn.2d at 508-09 (requiring those who “make a single contribution” to report “would result in an unnecessary and unreasonable duplication and extension of the Act’s detailed and somewhat lengthy reporting requirements”); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“First Amendment freedoms need breathing space to survive, [and] government may regulate in the area only with narrow specificity.”).

Since the enforcement demanded by Petitioners (and rejected by

the PDC) would impose significant burdens on BIAW while serving no important purpose, it does not satisfy the “exacting” scrutiny required to justify a government limitation on political speech. If this Court reaches the merits on this issue, it should affirm summary judgment.

2. The Court of Appeals Applied an Unconstitutional Standard

Division One also applied an unconstitutional standard when, in dicta, it suggested that, for purposes of its expenditure prong analysis, a question of fact existed as to whether “one” of BIAW’s primary purposes included electoral activities. *Utter*, 176 Wn. App. at 667-68.

In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the U.S. Supreme Court held that under the First Amendment the definition of “political committees” in federal campaign finance laws must be limited to “organizations that are under the control of a candidate or *the* major purpose of which is the nomination or election of a candidate.” (Emphasis added). Washington may not have a rule imposing greater burdens on political speech than is permitted under the U.S. Constitution. The *Buckley* decision expressed “the Supreme Court’s insistence that political committees can only be regulated if they have the support or opposition of candidates as their primary purpose.” *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008). Accordingly, the court in *Leake* held it

was not enough to show that *one of* the organization's major purposes was the support of candidates. Instead, it had to be *the* major purpose. *But see Brumsickle*, 624 F.3d 990. This Court should adhere to *Buckley* and confirm the test is "*the* primary purpose" not "*a* primary purpose."

3. BIAW Is Not a "Political Committee."

Even if the "a" primary purpose test applies, BIAW still does not qualify as a political committee, and it was error for the Court of Appeals to suggest otherwise. An organization satisfies the expenditure prong definition by expecting to make or by making expenditures to further electoral goals *and* if the organization has as its primary purpose "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *Utter*, 176 Wn. App. at 657 (citing *Dan J. Evans Campaign*, 86 Wn.2d at 509). The test is stated in the conjunctive; thus, to qualify as a political committee, there must be expenditures *and* the primary purpose must be electoral activities. A failure of evidence on either element is fatal to the claim as a matter of law.

Here, Division One agreed that there is no dispute that BIAW-
MSC (and not BIAW) made the expenditures shown in the PDC report. *Id.* at 658. Astonishingly, however, the court averred that a 2008 Form 990 created a material issue of fact under the "expenditure prong" because

it listed \$165,214 as “Political expenditures.” *Id.* at 658-59. It also found that a question of fact existed as to whether remarks by BIAW-MSA officers and board members (who were also BIAW officers and board members) showed that electoral activities were one of BIAW’s primary purposes during the 2008 election. *Id.* at 667. The court is wrong on both counts.

The listing in the 2008 tax form was a clerical error arising from a new tax form.⁹ The form was corrected prior to appeal to show that BIAW had not, in fact, spent any money on political expenditures. Moreover, no reasonable trier of fact would conclude that BIAW’s primary purpose (or even “a” primary purpose) was electoral activity. The evidence showed that BIAW, a statewide trade association affiliated with the National Association of Homebuilders, promotes the interests of and provides services to its 13,000 Washington members. BIAW serves as a clearinghouse of information of interest 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. Given this undisputed evidence, no rational trier of fact could conclude that engaging in political activity is a

⁹ *See* BIAW’s Resp. Br. at 14-16.

primary purpose of BIAW.

The statements attributed to BIAW officers and board members are also insufficient to create a material issue of fact. The uncontroverted evidence showed that such statements were made on behalf of BIAW-MSA and not BIAW. BIAW and BIAW-MSA both referred to themselves as "BIAW." CP 701 n.2; CP 156. Petitioners admit as much. CP 1041. Even Division One acknowledged elsewhere in the opinion that "BIAW" was used generically to refer to BIAW-MSA, BIAW, or both, and agreed that this shorthand was not sufficient to cast doubt on the fact that BIAW-MSA, not BIAW, managed the funds or engaged in electoral activity.

Utter, 176 Wn. App. at 656.¹⁰

Petitioners failed to produce any evidence from which a reasonable juror could conclude that BIAW (as opposed to BIAW-MSA) made electoral expenditures.

¹⁰ Even if a question of fact exists to whether the statements can be attributed to BIAW, the Court of Appeals erred in relying on them for an additional reason. Organizational leadership, whether in a trade association like BIAW or in a union like SEIU, routinely advises members of threats to their interests. Often, these communications include statements in support of or opposition to a candidate or ballot proposition. Such statements constitute core political speech protected by the First Amendment. *See United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 121-22 (1948). The Court of Appeals implies that such statements are sufficient to qualify an organization as a "political committee" under the FCPA. This is incorrect. If it did, leadership would self-censure to avoid subjecting their organization to the onerous reporting obligations under the FCPA. This sets dangerous precedent and unconstitutionally chills free speech. *See also* Ex. B at 10. Member communications are protected speech.

C. The Contribution Prong Analysis was Correct.

1. *In re WBBT* is Inapposite

Petitioners assign error to the determination that BIAW did not qualify as a political committee under the contribution prong. Petitioners failed to produce any evidence in the trial court below, so now they support their claim by citing *In re Wash. Builders Benefit Trust (In re WBBT)*, 173 Wn. App. 34 (2013). Petitioners wrongly assert that the facts found there preclude summary judgment here.

Collateral estoppel bars relitigation of determinative facts in a subsequent proceeding involving the same parties. *See Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307 (2004). “[T]he party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.” *Id.* These elements cannot be satisfied in this case.

In re WBBT is a ***different*** case with ***different*** parties involving an entirely ***different*** legal matter. That case turned on whether retro program

enrollment agreements created a “trust” for the benefit of certain employer participants and whether the trustees breached their fiduciary duties in the handling of those accounts. 173 Wn. App. at 51-52. The court held that, for purposes of the Trust and Estate Dispute Resolution Act (TEDRA), all defendants were trustees and owed fiduciary obligations to the beneficiaries. *Id.* at 70-71. But the court did not suggest that the definition of a trustee for TEDRA purposes has any bearing on the definition of a “political committee” for FCPA purposes. Accordingly, Petitioners’ attempt to avoid summary dismissal fails.¹¹

2. The “Attribution Rule” Does Not Apply.

Petitioners’ final argument is that BIAW “controlled” BIAW-
MSC’s expenditures, thereby making BIAW-MSC’s expenditures
attributable to it under RCW 42.17A.455. Again, Petitioners are wrong.

For purposes of determining whether contribution caps have been met, contributions can be attributed to a parent entity when that entity “control[s]” contributions made by the subsidiary. RCW 42.17A.455; *Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 590 (2004) (“[RCW 42.17A.455] specifies a relationship between entities in which those entities are considered a single entity *for purposes of campaign contribution limits.*”) (emphasis added). Petitioners contend

¹¹ Furthermore, that case was settled and no judgment on the merits was entered.

that the attribution rule expands the definition of “political committee” because RCW 42.17A.455 states that it applies “to this chapter.” But this Court has already rejected the argument that “this chapter” necessarily refers to the entire Act in which it appears. *See Am. Legion Post # 149 v. Dep’t of Health*, 164 Wn.2d 570, 587-91 (2008). Division One’s interpretation that the attribution rule applies only to contribution caps, not to the definition of “political committee” is consistent with that guidance. *See Utter*, 176 Wn. App. at 660-66.¹² It also consistent with the Act’s legislative history¹³ and with guidance from the PDC and the AG. *See EFF I*, 111 Wn. App. at 594 n.3; *Political Committees; Campaign Disclosure Instructions* (PDC June 2012) at 6.¹⁴

If RCW 42.17A.455 is applied to the definition of “political committee,” many trade associations, labor unions, and community groups would be turned into political committees, even if the entity under scrutiny did not make any political expenditures. *See Utter*, 176 Wn. App. at 666.

¹² *See* BIAW’s Resp. Br. at 12-13.

¹³ Washington campaign finance reporting and disclosure rules, including the definition of “political committee” were enacted by voters in 1972 through I-276. Twenty six years later, voters enacted I-134, which focused on capping campaign contributions. *See Utter*, 176 Wn. App. at 664. Given this gap, it is nonsensical to assert, as Petitioners do, that the voters intended to revise the definition of “political committee” simply by including a general reference to “to this chapter” in I-134. *See* BIAW’s Mot. for Reconsideration at 4-18, *see also* Ex. B at 6.

¹⁴ Even if the statute is ambiguous (which it is not), the Court should still defer to the executive agencies charged with enforcing it. “Where an agency is charged with the administration and enforcement of a statute, the agency’s interpretation of an *ambiguous* statute is accorded great weight in determining legislative intent.” *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 628 (1994).

Expanding the definition of “political committee” in this way would force entities that sponsor a PAC, including trade associations like the Trial Lawyers Association, to register as a political committee and disclose all of their sources of income and expenditures on a monthly basis. RCW 42.17A.455 imposes no such requirement.

V. CONCLUSION

The trial court’s grant of summary judgment should be affirmed for the foregoing reasons.

RESPECTFULLY SUBMITTED this 14th day of April, 2014.

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By

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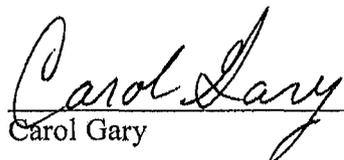
I certify under penalty of perjury under the laws of the State of Washington that on March 20, 2014, I caused BIAW's Supplemental Brief to be served in the above-captioned matter upon the parties herein via US

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Stated under oath this 14th day of April, 2014.



Carol Gary

EXHIBIT A

NO. 66439-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent and Cross-Appellant

**BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION OF
REALTORS IN SUPPORT OF THE BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON'S MOTION FOR
RECONSIDERATION**

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I. IDENTITY OF AMICUS CURIAE

The Washington Realtors represent nearly 15,000 real estate professionals throughout Washington State. In addition to providing representation for these professionals, the Washington Realtors advocate for the interests of thousands of home buyers and sellers each year and the interests of some 2 million Washington homeowners. The Washington Realtors also operate the largest political committee in the state with more than 5,000 contributors.

II. STATEMENT OF THE CASE

The *amicus curiae* finances, maintains and controls a political action committee ("PAC") that makes candidate contributions, contributions to political committees, and independent expenditures in support of, or in opposition to, various candidates and ballot propositions. This PAC is the largest in Washington State and is registered properly with the Washington State Public Disclosure Commission ("PDC"), it discloses both the source of its funding and its expenditures, and is in every other way in full compliance with the requirements of the Fair Campaign Practices Act ("FCPA"), RCW 42.17A.

The *amicus* is not currently registered as a political committee, however. Because the result of this Court's October 29, 2012 Unpublished Opinion ("the Opinion"), as is explained further in the

recently filed Brief of *Amici Curiae* by the Washington State Labor Council *et al.*, is to potentially force entities sponsoring a PAC to register as a political committee themselves and thereafter to disclose all of their sources of income and expenditures on a monthly basis, the Washington Realtors, (like the *Amici Curiae*), are dramatically and negatively impacted by the Opinion.

The Opinion is of particular interest to non-litigants in this matter because of the likelihood of its application by campaign finance regulators, even if it remains unpublished. The PDC and its staff routinely look to the courts for guidance on the promulgation of new regulations and the application of existing ones. It is a certainty that the Opinion will be reviewed by the PDC and its staff and its logical application would lead to broad and burdensome changes in regulations that currently apply to the *amicus*.

For the reasons articulated above, the *amicus* joins the arguments advanced and relief requested in the Brief of *Amici Curiae* by the Washington State Labor Council *et al.* in their entirety, and asks the Court to give due and full consideration of the same.

Respectfully submitted this 31st day of December, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2012, I caused the foregoing Brief of *Amicus Curiae* and the Declaration of Counsel in support thereof to be delivered via legal messenger to the Court of Appeals, Division 1, and true and correct copies of the same to be delivered via legal messenger to:

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NO. 66439-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent and Cross-Appellant

**MOTION OF WASHINGTON ASSOCIATION OF REALTORS
FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT
OF THE BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON'S MOTION FOR RECONSIDERATION**

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MOTION

The proposed *amicus curiae*, Washington Association of Realtors (“Washington Realtors”), hereby move the Court pursuant to Washington State Rule of Appellate Procedure (“RAP”) 10.6 for leave to file an *amicus curiae* brief.

I. IDENTITY OF THE PROPOSED AMICUS CURIAE.

The Washington Realtors represent nearly 15,000 real estate professionals throughout Washington State. In addition to providing representation for these professionals, the Washington Realtors advocate for the interests of thousands of home buyers and sellers each year and the interests of some 2 million Washington homeowners. The Washington Realtors also operate the largest political committee in the state with more than 5,000 contributors.

II. THE PROPOSED AMICUS CURIAE HAS AN INTEREST IN THE OUTCOME OF THIS LITIGATION BECAUSE AN ADVERSE RULING BY THIS COURT COULD IMPOSE UNINTENDED BURDENSOME OBLIGATIONS UPON IT AND THE MEMBERS IT REPRESENTS

The *amicus curiae* finances, maintains and controls a political action committee (“PAC”) that makes candidate contributions, contributions to political committees, and independent expenditures in support of, or in opposition to, various candidates and ballot propositions.

This PAC is the largest in Washington State and is registered properly with the Washington State Public Disclosure Commission ("PDC"), it discloses both the source of its funding and its expenditures, and is in every other way in full compliance with the requirements of the Fair Campaign Practices Act ("FCPA"), RCW 42.17A.

The Washington Realtors is not currently registered as a political committee, however. Because the result of this Court's October 29, 2012 Unpublished Opinion ("the Opinion"), as is explained further in the recently filed Brief of *Amici Curiae* by the Washington State Labor Council *et al.*, is to potentially force entities sponsoring a PAC to register as a political committee themselves and thereafter to disclose all of their sources of income and expenditures on a monthly basis, the Washington Realtors, (like the *Amici Curiae*), are dramatically and negatively impacted by the Opinion.

The requirements effectively imposed on the Washington Realtors by the Opinion relate to and burden the receipt of income and the making of expenditures, under circumstances where the receipt of income and the making of expenditures manifestly bears no relationship to the organization's involvement in electoral politics and therefore serves no purpose enunciated in or protected by the FCPA.

MOTION FOR LEAVE TO FILE BRIEF
OF *AMICUS CURIAE* - 2

The Opinion also burdens the free speech rights of trade associations and professional groups to educate members in support of or opposition to candidates and ballot propositions by making such speech a significant basis for finding that an organization is a political committee subject to the requirements described above.

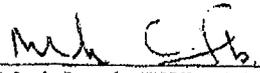
The Washington Realtors argue that that additional argument is required because of the implications of the Opinion for unions, trade associations and professional membership organizations as laid out more specifically in the Brief of *Amici Curiae* by the Washington State Labor Council *et al.*

For these reasons, *amicus curiae* have an interest in the outcome of this litigation such as to make acceptance of this *amicus curiae* brief appropriate.

CONCLUSION

For the foregoing reasons, we ask that this Motion for leave to file brief of *amicus curiae* be granted.

Respectfully submitted this 31st day of December, 2012.


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MOTION FOR LEAVE TO FILE BRIEF
OF AMICUS CURIAE - 4

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EXHIBIT B

NO. 66439-5-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent and Cross-Appellant

**BRIEF OF AMICI CURIAE WASHINGTON STATE LABOR
COUNCIL, SEIU HEALTHCARE 775NW, UFCW 21,
WASHINGTON EDUCATION ASSOCIATION, SEIU
HEALTHCARE 1199NW AND SEIU LOCAL 925 IN SUPPORT OF
THE BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON'S MOTION FOR RECONSIDERATION**

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I. IDENTITY OF AMICI CURIAE.

Amici Curiae are five major Washington State unions, SEIU Healthcare 775NW, UFCW 21, the Washington Education Association, SEIU Healthcare 1199NW and SBIU Local 925, and the Washington State Labor Council ("the Labor Council"), all of whom are concerned about the potential negative impact on them and/or the unions they represent of this Court's October 29, 2012 Unpublished Opinion ("the Opinion"). The interests of *amici* in this matter were further discussed in the Motion for Leave to File Brief of *Amicus Curiae* filed simultaneously with this brief.

II. STATEMENT OF THE CASE

Each of the *amici*, and many of the Labor Council's affiliated unions, finance, maintain or control a political action committee ("PAC") that makes candidate contributions, contributions to political committees, and/or independent expenditures in support of, or in opposition to, various candidates and ballot propositions. Each of these PACs is registered properly with the Washington State Public Disclosure Commission ("PDC"), discloses both the source of its funding and its expenditures, and is in every other way in full compliance with the requirements of the Fair Campaign Practices Act ("FCPA"), RCW 42.17A.

None of the *amici* are currently themselves registered as a political committee. Because the result of the Opinion, is to potentially force each one of these unions to register and report as a political committee, these labor organizations are dramatically and negatively impacted by the Opinion.

These organizations ask this Court to grant Respondent and Cross-Appellant the Building Industry Association of Washington (“BIAW”)’s pending Motion for Reconsideration in order to clarify two things.

First, we ask that this Court reconsider its earlier ruling and conclude, for the reasons set forth below, that so-called “attribution rule,” RCW 42.17A.455(2), applies only for the purpose of determining whether the contribution limits set forth in RCW 42.17A.405 have been met, and not to the question of whether an entity meets the definition of “political committee” set forth in RCW 42.17A.005(37).

Second, we ask that this Court reconsider its earlier ruling and return to the language and holding of *Evergreen Freedom Found. v. Washington Educ. Ass’n*, 111 Wn. App. 586, 599, 49 P.3d 894 (2002) (“*EFF*”) by emphasizing, as that case did, that resort to electoral political activity as “merely one means [an] organization uses to achieve its legitimate broad nonpolitical goals,” does not make electoral political activity one of the organization’s primary purposes, such as to have it fall within the definition of political committee. Instead, we ask that this Court rule that unless “a majority of [an organization’s] efforts are put toward electoral political activity,” 111 Wn. App. at 600, the entity should be deemed to fall outside of that definition.¹

Amici seek this relief for two reasons.

¹ In asking the Court to reconsider its Opinion to enunciate this test, *amici* are not expressing any opinion or judgment regarding the application of this test to the particular facts that are before it, i.e., to the claim that BIAW is a political committee. It may be, based on the record before this Court, that material facts exist sufficient to support the conclusion that a majority of BIAW’s efforts during the applicable time period were put toward electoral political activity, in which case a remand for trial on that question would be appropriate.

First, under the Opinion's application of the attribution rule, all contributions made by union-sponsored PACs will hereafter be imputed to the unions themselves, thus increasing the apparent significance to those unions of these financial expenditures made in relation to electoral activity. This alone could make it substantially more likely that any union that has a PAC will potentially be obligated to register as a political committee and make the monthly disclosures that registration compels.

Second, because the Opinion indicates that BIAW's status as a political committee may be based on certain statements made by BIAW's representatives, rather than on an analysis of whether BIAW's "electoral political activity is merely one means the organization uses to achieve its legitimate broad nonpolitical goals," it impedes the ability of unions to educate their members by threatening an onerous reporting obligation on unions if their leaders communicate to those members about the urgent need to support or oppose specific candidates or ballot measures.

Reporting the entire union to the PDC as a political committee would mean, among other things, that *amici* would have to disclose monthly the name and address of every contributor (i.e., dues-paying or non-member fee payer) who has paid more than \$25 to the union, plus the occupation and employer of each member and fee payer who has paid more than \$100. It would also mean disclosing on a monthly basis each expenditure by the union in excess of \$50.

Complying with these disclosure requirements not only imposes an extremely onerous bookkeeping and administrative burden on *amici*, providing the name, address, occupation and employer of every person who pays dues or fees to a union, in the current political climate, also

invades the privacy of those people without serving any useful social purpose.

The fear of incurring all of these requirements also burdens both the free speech rights of unions and their non-electoral and non-political activities. Imposing these requirements on a union a majority of whose efforts are not put toward electoral political activity serves no purpose enunciated in or protected by the FCPA and the FCPA should therefore not be interpreted as imposing this obligation.

III. ARGUMENT

A. **The Plain Language Analysis Utilized in the Majority Opinion with Regard to the Attribution Rule is Inconsistent with Supreme Court Precedent, the Intent of Initiative 134, and the Context of the Disputed Language**

The central premise of the majority opinion is that the “plain language” of RCW 42.17A.455 requires that the attribution rules in subsections (1) and (2) be applied to determine whether an entity is required to register and report as a political committee. This reasoning is inconsistent with both the Supreme Court’s prior pronouncements regarding the obligation to register as a political committee and established standards for interpreting statutory language, both of which were addressed in *State v. (1972) Dan Evans Campaign Committee*, 86 Wn.2d 503, 546 P.2d 75 (1976) (“*DECC*”) -- the first decision to apply the original Public Disclosure Act.

Relying on the “plain language” of RCW 42.17A.020(22), which defines as a political committee “any person . . . having the expectation of receiving contributions or making expenditures in support of, or

opposition to, any candidate or ballot proposition,” the complainant in *DECC* asserted that, because the Evans campaign committee had made a single contribution after the effective date of the PDA, it thereby became a political committee. *DECC* squarely rejected that argument, explaining that that “statutory provisions are interpreted in a manner so as to avoid strained or absurd consequences which could result from a literal reading,” and “the spirit or intention of the law prevails over the letter of the law.” 86 Wn.2d at 508.

Reasoning from those premises, the court concluded that, even though the Evans campaign made an expenditure to support other candidates, it was not a political committee under the statute. After considering the “purpose of Initiative 276 as it relates to the basic function of persons who should be brought within the ambit of the term ‘political committee,’” the court concluded that an entity was only a political committee under the statutory definition if “the primary or one of the primary purposes of the person making the contribution is to affect, directly or indirectly, governmental decision-making by supporting or opposing candidates or ballot propositions.” *Id.* at 509

Instead of considering the underlying purpose of the statute, as prescribed by *DECC*, the Opinion relies for the most part on an inference that the attribution rules in RCW 42.17A.455 are intended to apply to the definition of political committee because the section begins with the words, “for the purposes of this Chapter.” The justification offered is that “had the legislature intended for the statute to apply only for this purpose of determining whether campaign contribution limits had been reached, it could have easily said so.”

Because the section was not adopted by the legislature, however, but through the Initiative process, this inference regarding legislative intent is not warranted. Where a statute was passed by initiative, the court must determine the “intent of the electorate” from the language of the initiative itself, as well as from statements in the Voters Pamphlet. *State ex rel Evergreen Freedom Foundation v. WEA*, 140 Wn.2d 615, 636-37, 999 P.2d 602 (2000) (“*EFF v. WEA*”). As the Voters Pamphlet appended to BIAW’s Motion to Reconsider reflects, there is not a single reference in the Voters Pamphlet to expanding the obligation of entities to register and report to the PDC as political committees. Rather, the pamphlet focuses on the need to limit the size of contributions to candidates.

The Court in *EFF v. WEA* also emphasized that the court must “focus on the language of the initiative” as “the average informed voter would read it.” *Id.* In this case, there was nothing in the text of Initiative 134 to inform the average voter that the provision that is now RCW 42.17A.455 would impose new obligations to register as political committees.²

In addition, the disputed provision was included as Section 6 of Part III of the Initiative. Part III is entitled “CONTRIBUTIONS.” The first section of Part III (which is designated Section 4) limits the amount that can be contributed to candidates. Section 5 addresses attribution of contributions by family members. Section 6, which is at issue in this case, addresses attribution of contributions by controlled entities. Section 7

² Because the Initiative encompassed changes not only to RCW 42.17, but also to RCW 41.04, and the added provisions were not referenced by Title and Chapter, the average voter could not have determined to which “chapter” the opening clause of what was then Part III, Section 6 referred.

provides that “earmarked” contributions made through a third party are attributed to the original contributor. None of the sections expressly states that it is directed solely to determining whether contribution limits in Section 4 had been exceeded, although that was the clear purpose of all sections in Part III of the Initiative.

Therefore, the context of the disputed provision, as well as the intent of the Initiative, as evidenced by the Voters Pamphlet and the language of the Initiative as a whole, indicate that the attribution rules in RCW 42.17A.455 relate only to contribution limits.

B. The Interpretation of the Attribution Rule Adopted by the Majority Opinion Leads to Strained or Absurd Results

Applying the attribution rules in RCW 42.17A.455 to determine whether the political committee’s sponsor is itself a political committee leads to strained or absurd results because the attribution rules in RCW 42.17A.455 fail to consider *independent expenditures*, which make up a substantial and increasingly large portion of overall political expenditures.

In *DECC*, the Supreme Court adopted the rule that an entity becomes a political committee when “the primary or one of the primary purposes of the person making the contribution is to affect, directly or indirectly, governmental decision-making by supporting or opposing candidates or ballot propositions.” 86 Wn.2d at 509. The “plain language” approach adopted in the Opinion turns not on the extent of its efforts to affect candidates and ballot measures, but on whether those efforts take the form of contributions or independent expenditures.

This logical inconsistency arises because RCW 42.17A.455 addresses only contributions. Subsection 1 of RCW 42.17A.455 provides that "a contribution" by a political committee is treated as a contribution by the entity that funds the political committee making the contribution. Subsection 2 provides that "all contributions" made by a local unit of a person or political committee controlled by another entity are considered made by the controlling entity.

Nothing in RCW 42.17A.455 addresses independent expenditures. Thus, under the "plain language" rule, although an entity whose political committee or affiliate makes *contributions* must include those contributions in determining its status as a political committee, the *independent expenditures* of the same political committees or affiliates are disregarded in making that determination.

In fact, it makes perfect sense, that RCW 42.17A.455 addresses only contributions, not independent expenditures, because Initiative 134 was aimed at limiting contributions, and the sponsor and its political committee share a common contribution limit. Because the Initiative imposed no limit on independent expenditures, there was no need for a rule attributing independent expenditures by a political committee to its sponsor.

Thus, this anomaly arises only when RCW 42.17A.455 is applied to determine whether the sponsor must register as a political committee. By contrast, applying the attribution rules only to enforce contribution limits is completely consistent with the purposes of Initiative 134, and the context of the RCW 42.17A.455 language within the Initiative.

C. By Disregarding the Clear Rule in the 2002 *Evergreen Freedom Foundation v. Washington Education Association* Decision, the Opinion Exposes Labor Organizations to Substantial Uncertainty and Potential Litigation Expense

The decision in *EFF* clarified the “primary purpose” standard outlined in *DECC*. In *EFF*, the court established a rule that if “a majority of [an organization’s] efforts are put toward electoral political activity” the entity may be a political committee, notwithstanding its stated goals. 111 Wn. App. at 600. If that threshold is not met, a labor organization that generally focuses its efforts toward advancing the economic interest of its members does not become a political committee by devoting substantial resources to a particular election. This framework provides a reasonable and workable guide to action for labor organizations.

The Opinion appears to put that framework in doubt by concluding that an issue of fact was created by the BIAW’s focus on the importance of a Rossi victory in the 2008 campaign, without regard to the overall size of BIAW’s budget and without apparent reference to or reliance upon BIAW’s long-term goals and mission.

A major goal of *amici* is to avoid the expense and uncertainty of litigation. For the most part, the *EFF* framework has avoided needless complaints and investigations by the PDC.³ The approach adopted by the Opinion threatens to trigger another round of expensive and time-

³ The major violations by the BIAW were addressed in the suit initiated by the Attorney General regarding its failure to report the activity of the BIAW-MSA. The allegation that BIAW is a political committee based on its expenditures appears to have been the least prominent of the claims made by the plaintiffs, and might well not have been pursued in the absence of questions about whether the BIAW and BIAW-MSA were separate entities.

consuming disputes over “political committee” status of labor organizations.⁴

D. The Majority Decision Burdens Free Speech by Leaders of Labor Organizations

The majority decision relies on public statements by BIAW leadership regarding the need to support Rossi’s candidacy as evidence that the BIAW could have been a political committee during the 2008 election cycle. *Amici* believe this reasoning creates a dangerous precedent.

A major function of union leadership is to monitor the public sphere and advise members of actual and potential threats to their economic interest. Union leaders, in oral and written speech, commonly educate members to support or oppose candidates and ballot propositions. Any standard that imposes legal consequences on union leadership based in part on communications with their members – which the United States Supreme Court has acknowledged would implicate First Amendment issues, *see United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121-22, 68 S.Ct. 1349, 1357 (1948) – should be avoided.

To assure that such problems do not arise, *amici* respectfully submit that determination of whether the BIAW was a political committee should not be based to any degree on words spoken by its leadership.

Respectfully submitted this 20th day of December, 2012.

⁴ WEA in particular is only too familiar with the fact that even the *risk* of being deemed a political committee under the standard set forth in the Opinion places it in an untenable situation. Although WEA was determined by this Court in 2002 to *not* be a political committee, the uncertainty created by the new standard means that WEA must now weigh the risks of not registering and reporting as a political committee, although it very likely is not one even *under* the new test, against the risk of potentially having to defend itself against yet another meritless, but extremely expensive and time-consuming, lawsuit such as the one that resulted in the 2002 *EFF* decision.



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I hereby certify that on this 20th day of December, 2012, I caused the foregoing Brief of Amici Curiae to be delivered via legal messenger to the Court of Appeals, Division 1, and true and correct copies of the same to be delivered via legal messenger to:

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Case No.: 89462-1
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