

NO. 93786-9

SUPREME COURT
OF THE STATE OF WASHINGTON

ANDREW PILLOUD,

Appellant,

v.

KING COUNTY REPUBLICAN CENTRAL COMMITTEE

and

LORI SOTELO,

County Chairman, King County Republican Central Committee,

Respondents.

RESPONDENTS' REPLY TO *AMICUS CURIAE* BRIEF
OF THE STATE OF WASHINGTON

John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
Rebecca L. Penn WSBA # 46610
Attorneys for Respondents

LIVENGOOD ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
(425) 822-9281
(425) 828-0908 (fax)
email: white@livengoodlaw.com

Table of Contents

I. INTRODUCTION	1
II. ARGUMENT	2
A. The Court should decline the State’s request to disregard the statute’s admitted state constitutional defects.	2
B. The court should accept the State’s admission that its 50-year refusal to enforce the statute or to defend it is because it indefensibly violates the federal constitution.	6
C. RCW 29A.80.061 still mandates different party structures around the state and still violates the Fourteenth Amendment.	7
III. CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Eu v. San Francisco County Democratic Central Committee</i> , 479 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989).....	6, 7, 8, 9
<i>First Covenant Church of Seattle v. City of Seattle</i> , 120 Wn.2d 203, 840 P.2d 174 (1992)	2
<i>Jones v. Allen</i> , 14 Wn.2d 111, 127 P.2d 265 (1942).....	2
<i>Lee v. State</i> , 185 Wn.2d 608, 374 P.3d 156 (2016)	1, 5, 6
<i>McCleary v. State</i> , 173 Wn.2d 477, 269 P.3d 227 (2012).....	4, 5
<i>Neuenschwander v. Wash. Suburban Sanitary Comm'n</i> , 187 Md. 67, 48 A.2d 593 (1946))	5
<i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007).....	2
<i>Seattle Times Co. v. Eberharter</i> , 105 Wn.2d 144, 713 P.2d 710 (1986)....	2
<i>State ex rel. Wash. Toll Bridge Auth. v. Yelle</i> , 54 Wash.2d 545, 342 P.2d 588 (1959).....	5
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	8
<i>State v. Hastings</i> , 119 Wn.2d 229, 830 P.2d 658 (1992).....	2
<i>State v. Reece</i> , 110 Wn.2d 766, 757 P.2d 947 (1988).....	2
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987)	8
<i>State v. Smith</i> , 93 Wn.2d 329, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980).....	8

Statutes

RCW 29A.80.061.....	1, 2, 3, 6, 7, 9
---------------------	------------------

Other Authorities

2004 Wash. Sess. Laws Ch. 271	1, 2 4, 5, 6
-------------------------------------	--------------

Constitutional Provisions

U.S. Const. Amend. I..... 1, 2, 3, 6, 8
U.S. Const. Amend. XIV 1, 7, 9
Wash. Const. Art. I, §127
Wash. Const. Art. II, §19 1, 3, 4

I. INTRODUCTION

Amicus Curiae State of Washington admits two constitutional defects in RCW 29A.80.061, but suggests the Court ignore one. The Court should ignore neither the legislature's violation of the First Amendment nor its "subject-in-title" violation of Art. II, §19, of the State Constitution.

Amicus is also incorrect in stating that the challenge was only to the subject-in-title rule. See CP 44:10-11; 81:21-23; 82. Ch. 271, Laws of 2004, violates both prongs of Art. II, §19, of Washington's Constitution, as the Republican Party has argued from the outset of this case. As this Court held just last year, violation of the single subject rule can render the act "void in its entirety." *Lee v. State*, 185 Wn.2d 608, 613, 374 P.3d 156 (2016).

As its predecessors, RCW 29A.80.061 creates two different structures for political parties, arbitrarily imposing greater restrictions on the King County Republican Party. It violates the equal protection clause of the Fourteenth Amendment, and should be struck down on that ground as well.

II. ARGUMENT

A. **The Court should decline the State's request to disregard the statute's admitted state constitutional defects.**

The State admits RCW 29A.80.061 (Laws of 2004, Ch. 271, §150) violates both the subject-in-title prong of Washington's Constitution and the First Amendment to the federal constitution. Br. *Amicus* 10, 4-7. However, it urges the Court to disregard one of the two admitted constitutional violations – the subject-in-title violation. The Court has the power to and should invalidate the statute on both grounds. Where multiple grounds are present to uphold a judgment, this Court will address both bases. See e.g. *Jones v. Allen*, 14 Wn.2d 111, 127 P.2d 265 (1942); *State v. Hastings*, 119 Wn.2d 229, 237, 830 P.2d 658 (1992).

Where questions arise under the state and federal constitutions, the Court generally addresses state constitutional issues first, but will address both. See *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007); *State v. Reece*, 110 Wn.2d 766, 770, 757 P.2d 947 (1988), *Seattle Times Co. v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986). Resolution of both state and federal constitutional issues is particularly proper where resolving both avoids future uncertainty in the law. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 223, 840 P.2d 174 (1992).

A violation of the subject-in-title prong of Art. II, Sec. 19 may be overcome by a future legislature properly disclosing the subject in a future piece of legislation. But, dictating the internal organization of the Republican Party, as RCW 29A.80.061 does, is beyond remedy by disclosure in an act's title. Disclosed or not, it infringes on core First Amendment rights of political association. The Court should declare the statute unconstitutional for both of its admitted defects.

While admitting the constitutional defect under the subject-in-title prong of Art. II, Sec. 19, *Amicus* does not expressly admit the defect under the single-subject prong. The State further argues that the subject-in-title rule “most accurately” characterizes this case, implying that the single subject rule, while also accurate, is not the argument the State wants to address. The second defect is clearly present and warrants invalidation on that ground, too.

Notwithstanding the lack of a formal concession, the State's brief makes sufficient admissions to confirm the statute's invalidity under the single-subject prong. *Amicus* acknowledges that this case “is not about a public election” and that RCW 29A.80.061 regulates “internal governance” of the Republican Party. Br. *Amicus*, at 7. The provision's

incorporation into Laws of 2004, Ch. 271 is a prohibited second subject.¹ The bill's title, "An Act relating to a qualifying primary" is a separate subject from "internal governance" of the Republican Party.

The Court should decline the State's invitation to abdicate its constitutional role. "[I]t is emphatically the province and duty of the judicial department to say what the law is." *McCleary v. State*, 173 Wn.2d 477, 516, 269 P.3d 227 (2012) (citations omitted). "This is so . . . even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch." *Id.* (quotation marks and citations omitted).

Amicus raises the question of the effect of the Art. II, Sec. 19 violation on other portions of Laws of 2004, Ch. 271. *Amicus* contends that "many" portions of Ch. 271 have been amended, that those amendatory acts are not defective,² and the acts would be unaffected by invalidation of Ch. 271 here. But, Ch. 271 is not "too big to fail." This Court recently addressed the consequences to an enactment that contains two distinct subjects. "The key inquiry is whether the subjects are so unrelated that 'it is impossible for the court to assess whether either

¹ See Br. Resp. at 11-14.

² Whether other portions of Ch. 271 might be defective for some reason is not presented by the parties to this case.

subject could have received majority support if voted on separately.’ *Kiga*, 144 Wn.2d at 825, 31 P.3d 659. If so, the initiative is void in its entirety. *Id.*” *Lee v. State*, 185 Wn.2d 608, 620, 374 P.3d 157 (2016). If the Court concludes a “qualifying primary” and political party “internal governance” are “so unrelated,” the proper course is to invalidate Ch. 271 in its entirety. Curing that constitutional defect is within the legislature’s scope. *McCleary, supra*. If portions of Ch. 271 have been properly, separately enacted later, the later statutes would be unaffected by resolution of the question here. Unchanged portions of Ch. 271 would fall.

It is important to recall the harmful legislative practice the single-subject rule is designed to curtail:

The single-subject rule was written into our constitution because

“there had crept into our system of legislation a practice of engrafting upon measures of great public importance foreign matters for local or selfish purposes, and the members of the Legislature were often constrained to vote for such foreign provisions to avoid jeopardizing the main subject or to secure new strength for it, whereas if these provisions had been offered as independent measures they would not have received such support.”

State ex rel. Wash. Toll Bridge Auth. v. Yelle, 54 Wash.2d 545, 550–51, 342 P.2d 588 (1959) (quoting *Neuenschwander v. Wash. Suburban Sanitary Comm'n*, 187 Md. 67, 48 A.2d 593, 598–99 (1946)).

Lee, supra 185 Wn.2d at 620. Ch. 271 is a pointed example of how “foreign matters” still creep into legislative enactments, and why this Court should remain vigilant in applying the constitutional limits on the legislative branch.

B. The court should accept the State’s admission that its 50-year refusal to enforce the statute or to defend it is because it indefensibly violates the federal constitution.

Amicus is correct in its analysis that RCW 29A.80.061 violates the First Amendment and cannot be enforced.

Amicus acknowledges that “superior courts have long held that [RCW 29A.80.061] is unconstitutional.” Br. *Amicus*, at 5-6. For the first half of the fifty-year history of the statute and its predecessors the express basis was that the statute violated the Fourteenth Amendment. CP 28-29; CP 64-65. The State’s long refusal to enforce the statute after those earlier court decisions (Br. *Amicus* at 6) is difficult to square with its later argument that RCW 29A.80.061 survives Fourteenth Amendment scrutiny. Br. *Amicus* at 13-14.

The Supreme Court’s expansive rejection of such state intervention in internal party governance under the First Amendment came 22 years after RCW 29A.80.061’s predecessor was first invalidated. *Eu v. San Francisco County Democratic Central Committee*, 479 U.S. 214, 109 S.

Ct. 1013, 103 L. Ed. 2d 271 (1989). *Amicus* was correct in declining to defend the indefensible.

C. RCW 29A.80.061 still mandates different party structures around the state and still violates the Fourteenth Amendment.

Amicus claims that RCW 29A.80.061 survives judicial scrutiny under the Fourteenth Amendment. No, it doesn't. California had no legitimate objective in mandating a single, unified internal structure for a political party. *See Eu*, 479 U.S. at 229-30. Mandating different structures for some parts of a Washington political party still lacks any legitimate objective. The Superior Court correctly struck the original version of RCW 29A.80.061 down fifty years ago, relying on the Fourteenth Amendment. *Amicus* has declined to enforce the statute since its first invalidation under the Fourteenth Amendment. Br. *Amicus*, at 1. The current version suffers the same defect.

Judicial scrutiny of legislation in the face of a Fourteenth Amendment challenge depends on whether the legislation infringes on fundamental rights or not. *Amicus* misstates the scrutiny given to a statute that affects fundamental rights. Br. *Amicus* at 14. Strict scrutiny governs, not rational relationship. However, under whatever scrutiny given to RCW 29A.80.061, it fails.

Under the equal protection clause of the Washington State Constitution, article 1, section 12, and the Fourteenth

Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). Traditionally one of two tests has been used in analyzing an equal protection claim. *Schaaf*, at 17, 743 P.2d 240. Under the rational relationship test, the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective. *Schaaf*, at 17, 743 P.2d 240. This test is used “whenever legislation does not infringe upon fundamental rights or create a suspect classification.” *State v. Smith*, 93 Wn.2d 329, 336, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). The other traditional test is strict scrutiny, under which the State’s purpose must be compelling and the law must be necessary to accomplish that purpose. *Schaaf*, 109 Wn.2d at 17, 743 P.2d 240. Strict scrutiny applies “if an allegedly discriminatory statutory classification affects a suspect class or a fundamental right.” *Schaaf*, at 17, 743 P.2d 240.

State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). When a state imposes disparate treatment under the law, a legitimate state objective is required to survive the more deferential rational relationship scrutiny. *Eu* rebuts any claim Washington’s substitution of its judgment for the party’s is a “legitimate state objective.” *Eu*, 479 U.S. at 232.

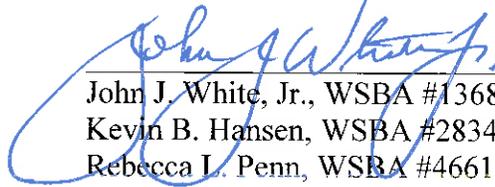
Eu also makes clear that the King County Republican Party’s right to determine its internal structure is a fundamental First Amendment right. 479 U.S. 229-233. Therefore, the State must demonstrate a compelling interest, tailored to accomplish that compelling interest, or the statute is invalid. *Amicus* identifies no rational basis for the statute, much less any compelling interest for imposing greater restrictions on the King County

Republican Party's ability to organize itself than Washington does for other Republican county organizations.³

III. CONCLUSION

The Court should decline the State's invitation to abdicate the judiciary's role in the face of admitted, repeated, legislative overreach. It should not give a statute a "pass" under the State Constitution because the statute also violates the federal Constitution. It should declare RCW 29A.80.061 unconstitutional on each ground set forth in the Republican Party's brief.

RESPECTFULLY SUBMITTED this 17th day of August, 2017



John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
Rebecca L. Penn, WSBA #46610
of LIVENGOOD ALSKOG, PLLC
Attorneys for Respondents
PO Box 908
Kirkland, WA 98083-0908
425-822-9281
white@livengoodlaw.com
hansen@livengoodlaw.com
penn@livengoodlaw.com

³ *Amicus* also wrongly suggests that the King County Republican Party's 14th Amendment challenge should be disregarded because it was inadequately raised. The Party has challenged the State's fifty-year infringement, based on the protections of the 14th Amendment since the State enacted the first predecessor to RCW 29A.80.061. *See* CP 28-29. *Eu* makes the 14th Amendment violation even clearer than when the King County Superior Court invalidated the first iteration of RCW 29A.80.061 in 1967. *Eu* and its analysis of the limits on state interference in internal political party affairs permeates Respondent's brief-in-chief in this matter, evidenced by the "passim" reference in its table of contents. *Amicus* acknowledges the Superior Court's 1967 invalidation of the statute, but ignores the reason why.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on August 17, 2017, I caused service of the foregoing to the following counsel of record:

<p>Appellant, Pro Se: Andrew Pilloud 10229 – 35th Avenue S.W. Seattle, WA 98146 email: andrew@pilloud.us</p>	<p><input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile - xx <input type="checkbox"/> via Overnight Mail <input checked="" type="checkbox"/> via electronic mail andrew@pilloud.us</p>
<p>Attorney for State of Washington: Jeffrey T. Even, AAG Attorney General’s Office 1125 Washington Street S.E. P.O. Box 40100 Olympia, WA 98504-0100 WSBA #20367 Tel: 360-586-0728 email: jeffe@atg.wa.gov</p>	<p><input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile - xx <input type="checkbox"/> via Overnight Mail <input checked="" type="checkbox"/> via electronic mail: jeffe@atg.wa.gov</p>

Dated: August 17, 2017



Lee Wilson

LIVENGOOD ALSKOG, PLLC

August 17, 2017 - 11:26 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 93786-9
Appellate Court Case Title: Andrew Pilloud v. King County Republican Central Committee, et al.
Superior Court Case Number: 15-2-01252-5

The following documents have been uploaded:

- 937869_Briefs_20170817112129SC318454_6014.pdf
This File Contains:
Briefs - Attorneys Reply Brief
The Original File Name was Respondents Reply to Amicus Curiae Brief of State.pdf

A copy of the uploaded files will be sent to:

- JeffE@atg.wa.gov
- andrew@pilloud.us
- jeff.even@atg.wa.gov

Comments:

Sender Name: Kathryn Barr - Email: barr@livengoodlaw.com

Filing on Behalf of: John James WhiteJr. - Email: white@livengoodlaw.com (Alternate Email:)

Address:
121 Third Ave.
PO Box 908
Kirkland, WA, 98083
Phone: (425) 822-9281 EXT 7311

Note: The Filing Id is 20170817112129SC318454