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SUPREME COURT
STATE OF WASHINGTON
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No. 98320-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLINT DIDIER,

Appellant Intervenor,

v.

GARFIELD COUNTY TRANSPORTION AUTHORITY;
KING COUNTY; CITY OF SEATTLE;
WASHINGTON STATE TRANSIT ASSOCIATION;
ASSOCIATION OF WASHINGTON CITIES;
PORT OF SEATTLE; INTERCITY TRANSIT;
AMALGAMATED TRANSIT UNION;
LEGISLATIVE COUNCIL OF WASHINGTON;
CITY OF BURIEN; ADAPT WASHINGTON; and
MICHAEL ROGERS;
Respondents/Appellees.

REPLY OF RESPONDENT / APPELLANT

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REPLY

Government Plaintiffs assert that Didier's "appearance of bias" claim fails claiming the authority found in *State v. Chamberlin*, 161 [sic] Wn.2d 30, 37, 162 77 P.3d 389 (2007). However, as the court stated in *Chamberlain*, "under the CJC, which is designed to provide guidance to judges and candidates for judicial office, '[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.' CJC Canon 3(D)(1). See also *State v. Dominguez*, 81 Wash.App. 325, 328, 914 P.2d 141 (1996) (judge must disqualify self if "his impartiality may reasonably be questioned)"). *State v. Chamberlin*, 162 Wn.2d 30, 77 P.3d 389, 393 (2007).

Government Plaintiffs claim that there is no violation of RCW 42.17A.555 in litigating 1976's constitutionality by Plaintiffs who are clearly identified in the statute itself.

RCW 42.17A.555 specifically prohibits the use of public office or agency facilities, "directly or indirectly, for the purpose of assisting . . . opposition to any ballot proposition."

WAC 390-05-273 also provides that "[n]ormal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17A.555, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate

enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.”

As the court of appeals said in *Herbert v. PDC*, 136 Wash.App. 249, 148 P. 3d 1102, (2006), “the statute does not contain any *de minimus* use exception in its wording and that the PDC repealed a WAC section that contained a *de minimus* use exception in 1978 and replaced it with a WAC section without such an exception. Compare WAC 390-04-040 (repealed) with WAC 390-05-273. *Herbert v. PDC*, 148 P. 3d 1102, 1106.

As this Court held in 2019 “any expenditure that is made in support of or in opposition to any candidate or ballot proposition,’ RCW 42.17A.255(1) (emphasis added), with ‘ballot proposition’ defined to include ‘any initiative ... proposed to be submitted to the voters.’ RCW 42.17A.005(4) (emphasis added). The noted language is simply not restricted to electioneering.” *State v. Evergreen Freedom Foundation*, 432 P.3d 805, 812 (2019).

“Moreover, where litigation is being employed as a tool to block adoption of an initiative or to force an initiative onto the ballot, as was

attempted here, the finances enabling such support (or opposition) would indeed appear to fall within the ‘any expenditure,’ triggering the reporting obligation noted above. The contention that litigation support does not qualify as a reportable independent expenditure ignores the express purpose of the FCPA in the context of modern politics. See, e.g., *Huff v. Wyman*, 184 Wash.2d 643, 645, 361 P.3d 727 (2015) (litigation brought by initiative opponents seeking to enjoin placement of initiative on the ballot); *Filo Foods, LLC v. City of SeaTac*, 179 Wash. App. 401, 403, 319 P.3d 817 (2014) (litigation over whether a local minimum wage initiative qualified for the ballot). *State v. Evergreen Freedom Foundation*, 432 P.3d 805, 812 (2019).

Plaintiffs who are public offices and agencies, none of whom are state officers or state employees qualifying for the exception to the statute, violate the prohibition found in RCW 42.17A.555, in appearing, funding litigation to challenge the ballot measure, and bringing this appeal. As a result, government plaintiffs have unclean hands in respect of this action, and may not be accorded equitable relief.

It is well settled that a party with unclean hands cannot recover in equity. *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash.2d 45, 73, 113 P.2d 845 (1941).

Government plaintiffs have unclean hands, having acted illegally to bring this action at the outset. “Equitable relief is available to innocent parties only.” *Christman v. General Constr. Co.*, 2 Wn. App. 364, 467 P.2d 867, *review denied*, 78 Wn.2d 994 (1970).

On Didier’s summary judgment motion, whether or not the City of Burien has contracts is not a material issue, because I-976 is not law, and Burien has not been impaired. There are no other material issues of fact, and the failure of the plaintiffs to prove any unconstitutionality means Didier is deserving of judgment as a matter of law.

Equitable relief requires clean hands, and the Government plaintiffs were unlawfully violating a statute prohibiting them from using any resources to challenge a ballot issue. To allow these Government plaintiffs to proceed is to turn a blind eye to the expectation of taxpayers that all Washingtonians are equal under the law and to render RCW 42.17a.555 meaningless and unenforceable as applied.

Respectfully submitted this 5th day of June 2020.



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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused true copies of the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will send notification to all counsel of record, and by email this 15th day of May 2020 upon the following parties:

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