NO. 101844-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIM EYMAN, et al.,

Petitioners.

RESPONDENT STATE OF WASHINGTON'S ANSWER TO AMICUS CURIAE MEMORANDUM OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

ROBERT W. FERGUSON
Attorney General

PAUL M. CRISALLI, WSBA #40681
S. TODD SIPE, WSBA #23203
Assistant Attorneys General
ERIC S. NEWMAN, WSBA #31521
Litigation Section Chief—Consumer Protection Division
OID No. 91157

PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470
Paul.Crisalli@atg.wa.gov
Todd.Sipe@atg.wa.gov
Eric.Newman@atg.wa.gov
Attorneys for Respondent State of Washington

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I. INTRODUCTION

The Goldwater Institute (GI) never discusses the RAP 13.4 factors to explain why review is appropriate. Instead, it raises new arguments that were neither presented nor advanced by Tim Eyman, either below or in his petition for review. Even if that were not the case, GI's arguments lack any merit. Contrary to its arguments, well-settled case law holds that the Fair Campaign Practices Act (FCPA) advances important, if not compelling, governmental interests. Enforcement of the FCPA does not constitute a prior restraint. And article I, section 7 of the Washington Constitution's Private Affairs Clause is not implicated here. The Court should reject GI's arguments.

II. ARGUMENT

A. The Goldwater Institute Never Applies the RAP 13.4 Factors to Explain Why Review Should Be Granted

The Court should disregard GI's brief because it never explains why this case meets the RAP 13.4(b) factors for granting review. The Court is left to guess as to what factors are

addressed by GI's new arguments. The Court should disregard GI's brief.

B. The Goldwater Institute Raises New Arguments That Were Not Briefed Nor Argued Below by Eyman

The Court should also disregard GI's brief because it raises new arguments that were not previously raised by Eyman below nor in his petition for review. This Court has consistently refused to address new arguments raised only by amicus, including in campaign finance enforcement matters before this Court. *See State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 458 n.2, 461 P.3d 334 (2020) (*GMA* I); *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015).

Here, GI raises new arguments that were not previously briefed or argued by the parties. Eyman has never argued that initiatives should not be subject to the FCPA disclosure requirements, as GI argues here. GI Br. at 4-9. Nor has Eyman argued that the informational interest in the public knowing who is financially backing initiatives does not exist. *Id.* Eyman does

not argue to this Court (nor below) that there needed to be a threshold dollar amount in the disclosure requirements. *Id.* at 5-6. He does not argue that the regulations constitute a prior restraint, and he does not argue that "ferret[ing] out malfeasance" is an insufficient interest justifying the disclosure requirements. *Id.* at 9-12. And Eyman never argued that this case violates the Private Affairs Clause of the Washington Constitution. *Id.* at 12-16.

Nearly all—if not all—of GI's arguments have not been made by Eyman and raise issues that were not before the Court of Appeals or in his petition for review. Since Eyman never raised these arguments, and there was no opportunity to develop a record to address them, the Court should reject GI's attempt to raise them as they have never been a part of this case.

C. The Goldwater Institute's Arguments Lack Any Merit

In any event, GI's arguments are contrary to established case law, defy common sense, and would render the FCPA a nullity. The Court should disregard GI's baseless arguments.

1. The State has an important, if not compelling, interest in knowing the funding sources for Eyman's campaigns

GI first challenges the notion that there is any interest in disclosing to voters the funding sources related to ballot initiatives. But Eyman raises only an as-applied challenge based on the facts of this case, and GI's argument that any interest in requiring disclosure is outweighed by free speech would appear to facially invalidate several statutes, possibly including outside the FCPA. This Court has repeatedly rejected this challenge and similar First Amendment challenges to disclosure requirements, including involving funding for promoting or opposing initiatives. *See, e.g.*, *GMA* I, 195 Wn.2d 442; *Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 415, 341 P.3d 953 (2015); *Voters Educ. Comm. v Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 166 P.3d 1174 (2007); *see also State ex rel. Wash. State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006). The cases also

consistently apply exacting scrutiny, not strict scrutiny, as GI would have the Court apply here. *GMA* I, 195 Wn.2d at 461.

Notwithstanding the extensive case law, GI makes the flawed arguments that there can be no interest in preventing corruption in initiatives and that there is no informational interest to the public in understanding the funding sources for the support or opposition of initiatives. The State has an interest in preventing corruption in campaign financing, including when it involves initiatives. An initiative can be corrupt, contrary to GI's baseless assertion otherwise, particularly where its hidden purpose is to financially benefit one group to the detriment of another. And, as the Court of Appeals recognized in this case, the public had an interest in knowing that Eyman used contributions for his own personal benefit when promoting ballot initiatives, consistent with his history of failing to disclose that he used political contributions for his own personal benefit.

As this Court has already held, the public has an important interest in the disclosure of contributions and expenditures, as

disclosure assists the public in determining who is financially backing or opposing an initiative, as well as what might be the ultimate motives of a particular initiative. *Id.* GI fails to appreciate the importance the disclosed information serves to the public when voting on initiatives.

GI misstates a federal case and misapprehends Washington law in arguing that there must be a threshold contribution amount. Contrary to GI's arguments, *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), did not hold that statutes must have a threshold contribution amount to be constitutional. Rather, it held that campaign finance regulations serve their information interests when requiring disclosures of financial contributions. *Id.* at 1033-34. Though the Ninth Circuit held that, at some point, mandatory disclosure as the result of intangible donations is "wholly without rationality," the *Canyon Ferry* court expressly declined to address the application of disclosure requirements "to monetary contributions of any size." *Id.* (quoting *Buckley v.*

Valeo, 424 U.S. 1, 83, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). That case dealt with a one-time intangible donation (a discussion during a church presentation and a place to put a sign for signatures), not actual financial donations. *Id.*

By contrast, this case is about tangible and actual financial contributions Eyman received and expenditures he made, but failed to disclose. There was no need for a threshold.

Even if there were, the FCPA provides that the sources of contributions of no more than $25 in the aggregate can be reported in lump sum rather than itemized. RCW 42.17A.235(5), .240(2)(c). The committee has to keep internal records to know whether a contributor crossed the $25 threshold. *Id.* GI ignores the actual language of the FCPA.

Additionally, the reporting requirements do not unconstitutionally burden Eyman or others. Contrary to GI's argument, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) (*MCFL*), does not apply here. *MCFL* concerned an

incorporated entity subject to "more extensive requirements and more stringent restrictions than it would be if it were not incorporated." *Id.* at 254. The government interest in *MCFL* was to control the effect of corporate money in politics. *Id.* at 257. In contrast, the government interest in this case is far weightier: protecting the public's right to information during the election process, which is itself an important First Amendment right. *See Voters Educ. Comm.*, 161 Wn.2d at 483; *see also* RCW 42.17A.001(10) ("[T]he public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.").

The government interest is particularly strong here, where Eyman has a long history of concealing and self-dealing donations and moving funds between his campaigns without disclosing that he has done so. The public has a strong interest in knowing the source of funding for Eyman's political campaigns,

just as donors have an interest in knowing that their money is being appropriately used for the intended campaign.

2. There is no prior restraint

GI argues that the Court of Appeals' statutory analysis is wrong and constitutes a prior restraint. But this case and this petition for review addresses the unique circumstances caused by Eyman's choice to structure himself as a continuing political committee. GI fails to account for this fact-specific case.

In any event, the Court of Appeals properly held that the legislative purposes underlying the FCPA show that the indirect support that occurred here meets the legislature's intended meaning of a political committee. Political campaign and lobbying contributions and expenditures should be fully transparent to the public. And the public's right to know of political campaign financing far outweighs any right to conceal them. It would undermine the purpose of the statute and the importance of transparent disclosure if an individual, like Eyman here, can avoid disclosure requirements by soliciting

contributions for campaigns but using the funds for personal uses.

The Court of Appeals also correctly explained that by becoming a political committee, Eyman was no longer acting as an individual, but was a "continuing political committee" under the FCPA. This reading is consistent with the legislature's purpose that the FCPA be broadly construed for public transparency. RCW 42.17A.001.

The Court of Appeals' holding does not amount to a prior restraint. First, Eyman has continued to promote and support ballot initiatives, as well as solicit for donations, since the superior court's entry of the judgment and injunction. FSA 115-243. This undermines the notion that the judicial decisions forbade certain communications. *See In re Marriage of Suggs*, 152 Wn.2d 74, 80-81, 93 P.3d 161 (2004) (prior restraint occurs when judicial orders forbid certain communications before they occur).

Second, the superior court's injunction and judgment do not forbid speech before it occurs. *Id.* Instead, the superior court's orders place limits on Eyman's interaction with money, based on his history of concealment and personal benefit. There is no prior restraint.

The reporting requirements present no constitutional burden on Eyman's or GI's right to free speech. *GMA* I, 195 Wn.2d at 461-62; *Voters Educ. Comm.*, 161 Wn.2d at 492. This Court explained, "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Voters Educ. Comm.*, 161 Wn.2d at 482-83 (quoting *Buckley*, 424 U.S. at 68). GI's arguments fail.

3. The Private Affairs Clause is inapplicable

Eyman never raises a Private Affairs Clause argument, so the Court should disregard GI's argument. This is likely because the argument lacks any merit. The analysis of article I, section 7's Private Affairs Clause breaks down into two parts:

"[p]rivate affairs" and "[a]uthority of law." *State v. Reeder*, 184 Wn.2d 805, 814-15, 365 P.3d 1243 (2015). To determine whether a privacy interest exists, courts "examine whether a particular expectation of privacy is one that a citizen of this state should be entitled to hold," focusing in part "on what kind of protection has been historically afforded to the interest asserted" and "on the nature and extent of the information that may be obtained as a result of government conduct." *Id.* at 814.

Here, disclosure of campaign finance contributions and expenditures does not implicate a privacy interest. For over fifty years, the FCPA has required disclosure of contributions and expenditures for political campaigns and political committees. This information focuses on the amount given or spent, the purpose, and the identity/ies of the relevant parties. None of these disclosures touch on privacy interests, and there has not been an expectation of privacy in these transactions. To the contrary, there is an express public interest in knowing about

these transactions as they relate to elections, can inform the public about the campaigns, and can prevent or catch corruption.

If GI is correct that contributions and expenditures are private affairs, then Washington's tax code would be subject to similar concerns, as would any other financial transaction. Such a holding makes no sense and should be rejected.

The information disclosed comes nowhere near the private banking records at issue in *State v. Miles*, 160 Wn.2d 236, 249, 156 P.3d 864 (2007), as GI incorrectly claims. The FCPA requires disclosure of contributions and expenditures related to campaigns—it does not require individuals to disclose their private bank information. The FCPA does not implicate a private affair, so article I, section 7 does not apply.

Even if FCPA disclosure requirements somehow infringed on private affairs, there is sufficient authority of law to warrant the disclosure. *Reeder*, 184 Wn.2d at 815. The FCPA sets forth a carefully crafted process to provide access of information to the public to assist in elections and to ferret out corruption. As this

Court explained, these disclosure requirements are the least restrictive means to curbing the evils of campaign ignorance and corruption. GI's Private Affairs Claus argument fails.

III. CONCLUSION

GI raises new arguments that need not be considered by this Court. In any event, all of its arguments lack merit.

This document contains 2,183 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 7th day of June 2023.

ROBERT W. FERGUSON
Attorney General

/s/ Paul M. Crisalli
PAUL M. CRISALLI, WSBA #40681
S. TODD SIPE, WSBA #23203
Assistant Attorneys General
ERIC S. NEWMAN, WSBA #31521
Litigation Section Chief—Consumer Protection Division
Paul.Crisalli@atg.wa.gov
Todd.Sipe@atg.wa.gov
Eric.Newman@atg.wa.gov

OID No. 91157
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470
Attorneys for Respondent State of Washington

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be served, via electronic mail, on the following:

Timothy Sandefur
Scharf-Norton Center for Constitutional Litigation
at the Goldwater Institute
500 East Coronado Rd.
Phoenix, AZ 85004
litigation@goldwaterinstitute.org

Richard M. Stephens
Stephens & Klinge LLP
10900 NE 4th Street, Suite 2300
Bellevue, WA 98004
stephens@sklegal.pro
Counsel for Amicus Curiae Goldwater Institute

Nicholas Power
540 Guard Street, Suite 150
Friday Harbor, WA 98250
nickedpower@gmail.com
Counsel for Amicus Curiae Glen Morgan

Richard B. Sanders
Carolyn A. Lake
Goodstein Law Group PLLC
501 S G Street
Tacoma, WA 98405-4715
rsanders@goodsteinlaw.com
clake@goodsteinlaw.com
dpinckney@goodsteinlaw.com

Seth S. Goodstein
ROI Law Firm, PLLC
1302 N I Street, Suite C
Tacoma, WA 98403-2143
info@roilawfirm.com
Counsel for Tim Eyman and Tim Eyman, Watchdog for Taxpayers LLC

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

DATED this 7th day of June 2023, at Seattle, Washington.

/s/ Paul M. Crisalli
PAUL M. CRISALLI, WSBA #40681
Assistant Attorney General

WA STATE ATTORNEY GENERAL'S OFFICE, COMPLEX LITIGATION DIVISION

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