NO. 89462-1

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.

AMICUS CURIAE MEMORANDUM OF WASHINGTON COALITION FOR OPEN GOVERNMENT and ROGER M. LEED SUPPORTING REVIEW

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I. INTRODUCTION

An informed electorate is the very essence of democracy. Without vigorous enforcement of campaign disclosure laws, voters are powerless to understand the influence of special interests in Washington politics. That is why, when voters passed Initiative 276 in 1972, they empowered all citizens to bring enforcement suits when government attorneys decline to do so. The people did not want to rely solely on elected attorneys, who are subject to campaign funding pressures themselves, to unmask secret donors.

Even if there is never any gamesmanship in the government's campaign enforcement decisions, it is important to preserve the option of citizen-initiated enforcement in order to maintain public confidence in the campaign disclosure system. The courts, not the attorney general or prosecutors, must be the ultimate arbiter of disclosure violations. Because citizen access to courts and the integrity of elections are of substantial public interest in this state, where the Constitution reminds us that "all political power is inherent in the people,"[1] the Petition for Review by former Justices Robert Utter and Faith Ireland should be granted.

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[1] Washington State Constitution Article 1, Section 1.

II. INTEREST AND IDENTITY OF AMICI

The Washington Coalition for Open Government (WCOG) is a Washington nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an informed and engaged citizenry. WCOG regularly participates as amicus in appeals raising open government issues. As an intervenor in *John Doe No. 1 v. Reed*, 561 U.S. 186, 130 S.Ct. 2811 (2010), WCOG helped establish the public's right to know who signs referendum petitions.

Roger M. Leed serves on the WCOG Advisory Council. He has practiced law in Washington since 1967. In 1971, he served on the steering committee of the Coalition for Open Government, the organization which conceived, drafted and successfully campaigned for the passage of Initiative 276, the Public Disclosure Act. Mr. Leed chaired the Initiative 276 drafting committee, and drafted the language in Section 40(4) of the initiative, now codified as RCW 42.17A.765(4), the citizen suit provision which is at issue in this appeal.

WCOG and Mr. Leed are interested in this case because it affects the public's ability to learn about the role of special interests in Washington elections, so as to make informed decisions. In general, WCOG has an interest in strict enforcement of disclosure laws, because such laws are a primary means by which WCOG members and other citizens may hold government accountable. As the person who drafted the citizen suit provision, Mr. Leed has an especially strong interest in ensuring that the intent of the provision is understood and implemented.

III. DISCUSSION

A. There is Substantial Public Interest in Enforcing Campaign Disclosure Requirements.

Under RAP 13.4(b)(4), review will be accepted if a petition "involves an issue of substantial public interest that should be determined by the Supreme Court." The petition by former Justices Robert Utter and Faith Ireland presents such an issue. If the Court of Appeals decision stands, citizens of Washington will lose the ability to bring suits enforcing campaign disclosure requirements if, for any reason, the government declines to sue. Because the citizen suit provision is important to maintaining public confidence in the integrity of Washington elections, and ensures that the important informational

purposes of the disclosure law are fulfilled, the petition involves an issue of substantial public interest.

1. Courts have recognized the public importance of requiring campaign finance disclosure.

Courts have repeatedly recognized the strong public interest in requiring disclosure of the sources of support for election campaigns. As the United States Supreme Court said in *Buckley v. Valeo*[2]:

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential....[B]y revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention.

In affirming the constitutionality of a federal disclosure requirement, the *Buckley* Court said that disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." 424 U.S. at 67. "The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* As the Court said:

[2] 424 U.S. 1, 15, 96 S.Ct. 612 (1976).

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

Id. at 67.[3]

In *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1005-06 (2010), the Ninth Circuit U.S. Court of Appeals said, "Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." The Court noted that "the Supreme Court consistently has acknowledged the important role played by disclosure requirements in political discourse," citing *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 130 S.Ct. 876, 915-16 (2010) (disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way); and *McConnell v. Federal Election Commission*, 540 U.S. 93, 197, 124 S.Ct. 619 (2003) (upholding federal disclosure requirements, while striking down a segregated fund requirement).

In *McConnell*,[4] the United States Supreme Court noted that it has recognized a concern about improper influence from "politicians

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[3] Quoting L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933).

too compliant with the wishes of large contributors." The Court said that, if the appearance of undue influence cannot be regulated, "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Id.*, quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 390, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

Although these cases dealt with the constitutionality of campaign disclosure requirements, rather than enforceability, they underscore that the disclosure scheme is of substantial public interest. Thus, review under RAP 13.4(b)(4) is warranted.

2. Public confidence in elections is at stake.

The petition for review concerns the interpretation of RCW 42.17A.765(4), which says:

> A person who has notified the attorney general and the prosecuting attorney... that there is reason to believe that some provision of this chapter is being or has been violated may himself or herself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter.
>
> (a) This citizen action may be brought only if:
>
> (i) The attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after the notice...

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[4] Overruled as to constitutionality of barring independent corporate expenditures by *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 130 S.Ct. 876 (2010).

The Court of Appeals held that an investigation alone, rather than a suit by the attorney general, is an "action" precluding a citizen suit.

The problem is that there may be many reasons why an attorney general would not bring suit in response to a citizen allegation of a disclosure violation. While it is true that lack of merit is one possible reason, other realistic possibilities include lack of resources to conduct a thorough investigation, incompetence, mistake or misjudgment, and political favoritism. If citizens cannot independently initiate judicial review of disclosure concerns, it will breed doubt and suspicion as to the reasons for the government's inaction. Unlike the Court of Appeals in this case, the public will not necessarily assume that an allegation lacks merit simply because a government investigator said so, particularly when the subject matter of the investigation is inherently of a political nature.

And while WCOG and Mr. Leed do not suggest that favoritism is the reason why former Attorney General Rob McKenna declined to sue the Building Industry Association of Washington (BIAW) in this case, any time a Republican attorney general declines to sue a conservative organization or a Democratic attorney general declines to sue a liberal organization accused of violating campaign laws, the

appearance of a conflict may arise. The Court of Appeals failed to recognize that public confidence in enforcement may be undermined by the mere appearance of a conflict, regardless of whether favoritism actually is at play. Because the public has a substantial interest in allowing citizen suits *any time* the government declines to sue, so as to maintain confidence in the integrity of Washington's election system, review should be granted.

B. The Intent of the Statute Must Be Fulfilled.

Whenever voters approve a law, there is substantial public interest in making sure the voters' intent is carried out. This case involves Initiative 276 passed by voters in 1972 and later codified as Chap. 42.17A RCW, the campaign finance law, and Chap. 42.56 RCW, the Public Records Act. As explained in the Declaration of Roger M. Leed attached to this brief, the drafters of RCW 42.17A.765(4) understood "action" to mean a lawsuit, and they intended to allow a citizen suit unless the government brings a lawsuit within 45 days of a citizen's notice of violation.

This intent is consistent with CR 2, which states, "There shall be one form of action to be known as 'civil action.' " Mr. Leed attests that he relied on the word "action" in drafting the citizen suit provision

because of the legal meaning of the term derived from CR 2. Because there is substantial public interest in fulfilling the intent of a voter-approved initiative, and because the Court of Appeals' interpretation of RCW 42.17A.765(4) is inconsistent with its intent, review should be granted pursuant to RAP 13.4(b).

IV. CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated this 16th day of December, 2013.

Respectfully submitted,

HARRISON-BENIS LLP

By: 

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OFFICE RECEPTIONIST, CLERK

To: Kathy George
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Subject: RE: amicus filing in No. 89462-1, Utter and Ireland v. BIAW

Rec'd 12/16/2013

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To: OFFICE RECEPTIONIST, CLERK
Cc: robmaguire@dwt.com; harrykorrell@dwt.com; Michael Withey; knoll lowney
Subject: RE: amicus filing in No. 89462-1, Utter and Ireland v. BIAW

Good afternoon,

Please find attached for filing and service a Motion for Leave to File Amicus Brief, and brief of Washington Coalition for Open Government and Roger M. Leed, in Utter and Ireland v. Building Industry Association of Washington v. Louis Chen, Case No. 89462-1.

This document is filed by Katherine George, WSBA No. 36288, phone 425 802-1052, email kgeorge@hbslegal.com.

Thank you,

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