NO. 89462-1

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 RESPONSE TO AMICI CURIAE MEMORANDA

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I. INTRODUCTION

The primary question presented in this case is whether the State "acts" for purposes of precluding a citizen suit under RCW 42.17A.765(4) when, as here, the State completes an investigation of allegations of Fair Campaign Practices Act (FCPA) violations by two related entities, files suit against one of the entities, concludes that no violations were committed by the other entity, and declines to file suit against that entity on that basis. Division One of the Court of Appeals answered that question in the affirmative. *Utter ex rel. State v. Building Industry Ass'n of Wash.*, 176 Wn. App. 646, 310 P.3d 829 (2013). Because that holding does not impair enforcement of campaign finance laws and balances constitutional freedoms with the remedial purposes of the FCPA, it was correctly decided and the petition for review should be denied. Nothing in the memoranda filed by Amici warrants a different result. Because Amici merely rehash the same arguments advanced by Petitioners, their claims suffer from the same defects and should be rejected for the same reasons.

II. ARGUMENT & AUTHORITY

A. *Utter* Was Correctly Decided.

Under the FCPA, the task of enforcing Washington's campaign disclosure laws falls primarily to the State, the citizen suit provision notwithstanding. RCW 42.17A.765. A citizen may bring an enforcement

action ***only*** if he or she satisfies that statute's notice requirements and only if the "[t]he attorney general and the prosecuting attorney have failed to commence an action hereunder [i.e., under this chapter]" within the statutory time period. RCW 42.17A.765(4)(a)(i). If those requirements are met, a citizen can "bring in the name of the state any of the actions ... authorized under this chapter." RCW 42.17A.765(4).

While the statute does not define the term "action," actions authorized under the Act include:

> (1) The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17A.750.
>
> (2) The attorney general and the prosecuting authorities of political subdivisions of this state may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter ....
>
> (3) When the attorney general or the prosecuting authority ... requires the attendance of any person to obtain such information or produce the accounts, bills, receipts, books, papers, and documents that may be relevant or material to any investigation authorized under this chapter, he or she shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. The order shall have the same force and effect as a subpoena ....

RCW 42.17A.765.

Based on this statutory language, the *Utter* court concluded that the term "action" means the same for citizen's actions as the kind of actions that the attorney general or the prosecuting authority may take under the Act. *Utter*, 310 P.3d at 844. Thus, because the statute authorizes investigative demands under RCW 42.17A.765(2) and (3), the court concluded that where the State obtains information about a citizen's complaint, completes an investigation into those claims, and determines that the claims do not support legal action, the State has "commence[d] an action" under the statute baring a citizen's suit. *Id.* at 843.

Here, it is undisputed that the State investigated Petitioners' complaint against BIAW and MSC. It is also undisputed that during that investigation, the PDC issued numerous subpoenas, took sworn testimony and inspected BIAW's and MSC's accounts, bills, receipts, meeting minutes, and other pertinent documents. After completing an exhaustive review of the record, the PDC determined that the claims against MSC had potential merit while the claims against BIAW did not. Accordingly, the AG filed a civil action against MSC but not against BIAW. On those facts, Division One determined, correctly, that the State "acted" for purposes of precluding the citizens' complaint under RCW 42.17A.765. *Utter*, 310 P.3d at 844.

B. Amici Arguments to the Contrary Do Warrant Review

Amici disagree. They contend that the only "action" that precludes a citizen suit is a civil lawsuit brought by the AG. According to them, a citizen's suit should be allowed to proceed any time the government declines to file a lawsuit, even when the State completes an investigation, files suit against one entity and determines that a related entity did no wrong and thus declines to sue. Amici are wrong.

1. *Amici's Interpretation Does Not Comport with Rules of Statutory Construction.*

Amici's interpretation writes terms out of the statute, inserts terms that are not there, and conflicts with express statutory language.

"Once an initiative is enacted into law, the same principles of statutory construction apply as ... when the legislature enacts a measure." *State v. Conte*, 159 Wn.2d 797, 807, *cert. denied*, 552 U.S. 992 (2007). Courts therefore construe an initiative "'in light of its various provisions ... [and] when possible, give effect to every word, clause and sentence of a statute. The goal is to avoid interpreting statutes to create conflicts between different provisions so that we achieve a harmonious statutory scheme.'" *Utter*, 310 P.3d at 838 (quoting *Am. Legion Post # 149 v. State Dep.t of Health*, 164 Wn.2d 570, 585-86 (2008)).

Here, the parties agree that the Act refers to the AG's authority to initiate legal proceedings and to seek civil remedies. *See* RCW

42.17A.765(1), (4)(b). The parties also agree that a citizen suit is precluded when the State initiates those legal proceedings. RCW 42.17A.765(4)(a). But those are not the only actions authorized by the statute. The statute also authorizes the State to "investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter" ***before*** any civil litigation is initiated. RCW 42.17A.765(2). Further, this authority to investigate allegations of wrongdoing extends to issuing orders and subpoenas enforceable by a superior court judge, again, ***before*** any litigation over the alleged violations occurs. RCW 42.17A.765(3).

Thus, the Act clearly and unambiguously contemplates multiple types of "actions" by the State, not just civil litigation. And if, as Amici admit, "the term 'action' ... mean[s] the same thing whether it refers to a citizen's action or the kind of action by the attorney general," Mem. of Amicus Curiae Public Citizen, Inc. at 4, it follows that any of those actions, if completed by the State, preclude a citizen suit. *See Utter*, 310 P.3d at 844. Any other reading would mean that the term "action" means one thing when used in reference to the State and another when used in references to the citizen's suit provision. Courts will not interpret a statute to create a conflict between its parts when it can otherwise harmonize

meaning. *Utter*, 310 P.3d at 838.[1]

Amici next contend that their interpretation should prevail because Mr. Leed, the person they claim drafted the citizen suit language, intended the term "action" to mean "civil action" as defined in Civil Rule 2. Mem. of Amicus Curiae WCOG at 8-9. But that claim too must fail.

"'In determining the meaning of a statute enacted through the initiative process, the court's purpose is to ascertain the collective intent of the ***voters*** who, acting in their legislative capacity, enacted the measure.'" *Utter*, 310 P.3d at 838 (quoting *Am. Legion Post # 149*, 164 Wn. 2d at 585) (emphasis added). Further, "[i]n construing the meaning of an initiative, the language of the enactment is ***to be read as the average informed lay voter would read it.***'" *Id.* (emphasis added). Because it is the intent of the voters that matters, not Mr. Leed's, what he personally intended is immaterial. Further, the average informed lay voter would not have known that Civil Rule 2 exists, let alone conclude that the term "action" in RCW 42.17A.765 meant only "civil action" in court, especially in light of the other actions authorized under the Act.[2]

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[1] Amici also assert that using the word "action" next to the verbs "commence, "bring" or "file" necessarily limits its meaning to civil legal proceedings only. But nothing in this verbiage inherently requires that result. The AG is empowered to commence an investigation just the same as a civil action under the statute.

[2] Amici also point to a report Mr. Leed prepared nearly 30 years ago assessing the implementation of I-276. Mem. of Amicus Curiae WCOG at 2, 8-9. Because that report was written ***after*** the Initiative's implementation, and there is no evidence that it was among the materials presented to the voters, it has no relevance to this issue.

2. *Amici Misinterpret* Utter.

Amici also base their argument on an incorrect interpretation of *Utter*. They assert (wrongly) that *Utter* held that the routine practice of referring citizen's complaints to the PDC for a subsequent investigation constitutes state "action" for purposes of precluding the citizen suit. But as explained above, that is not what the court held. *Utter* held that significantly more than a mere "customary" referral to the PDC was required to bar a citizen's suit, namely, the completion of an investigation followed by a determination that some allegations (against MSC) had merit to warrant suit and others (against BIAW) lacked such merit. Moreover, in *Utter* the state actually instituted a civil suit against one of the two entities accused of violations.

Once *Utter* is understood correctly, the remaining pillars of amici's argument collapse. For instance, Amici contend that *Utter* (as incorrectly interpreted by them) conflicts with *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n* (*EFF I*), 111 Wn. App. 586 (2002), *rev. denied*, 148 Wn.2d 1020 (2003), and *State ex rel. Evergreen Freedom Found. v. Natl. Educ. Ass'n* (*EFF II*), 119 Wn. App. 445 (2003). But *Utter* does not conflict with those cases. The principle enunciated in *EFF I* and affirmed in *EFF II* is that a citizen suit is precluded when the State fully investigates allegations and the PDC pursues administrative actions

but not when the AG merely refers the claim to the PDC for an investigation. *EFF I,* 111 Wn. App. at 594 (citizen suit precluded when PDC filed administrative action); *EFF II,* 119 Wn. App. at 453 (affirming *EFF I* while clarifying that the act of the referral alone does not preclude a citizen enforcement action). Thus, neither *Utter*, *EFF I,* nor *EFF II* stands for the proposition that the mere "customary" referral of a citizen complaint to the PDC is sufficient to preclude a citizen lawsuit.

The cases cited do not support Amici's argument for an additional reason. As *EFF I* made clear, administrative actions initiated by the PDC, not just judicial remedies initiated by the attorney general, are sufficient to preclude a citizen's suit. Amici do not attempt to reconcile this case law with their assertion that only a lawsuit brought by the AG precludes a citizen action. They do not because they cannot.[3]

3. *Petitioners' Interpretation Chills Constitutional Rights.*

Amici next claim that unless their interpretation prevails, there

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[3] Amici also suggests that *State v. (1972) Dan J. Evans Campaign Com.*, 86 Wn.2d 503 (1976), is inconsistent with *Utter*. Mem. Amicus Curiae Public Citizens, Inc., at 3. Not so. First of all, that case is silent on the preclusion issue; thus, it adds very little value if any 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 Com.*, 86 Wn.2d at at504 (emphasis added). This remark is equally compatible with the *Utter* court's interpretation of the Act as it is with Amici's, if not more so. It means that where the State refused to bring "any action"—that is, when the State refused to commence an investigation, determine the merits of the citizen's complaint, or commence legal proceedings when it determined such proceedings were otherwise warranted—the citizen suit could proceed.

may come a day when alleged FCPA violations go unaddressed due to a "lack of resources," or worse, "incompetence, mistake or misjudgment, and political favoritism." Mem. Amicus Curiae WCOG at 7. But not one of those scenarios is supported by a scintilla of evidence in this case.

The PDC (whose commissioners where appointed by the former democratic governor, Christine Gregoire, *see* RCW 42.17A.100) thoroughly investigated Petitioners' allegations. After completing the investigation, the PDC concluded that the claims against MSC had potential merit while the claims against BIAW did not. The former republican attorney general, Rob McKenna, pursued the claims against MSC but not against BIAW. No evidence exists to refute those determinative facts. Likewise, no evidence exists to support the claim that the PDC or the AG lacked the resources or political will to conduct an investigation. Indeed, Amici admit that there was no evidence of political favoritism in this case. Mem. Amicus Curiae WCOG at 7.

Besides, the speculative harms raised by Amici are unlikely to occur because they are already addressed by the statute and the cases interpreting it. *Utter*, *EFF I* and *EFF II*, all stand for the general proposition that should the State ever fail to initiate or complete an investigation, a citizen's suit could proceed. Those protections thus

provide assurances that the remedial purposes of the citizen suit provision will be maintained.

While BIAW agrees that RCW 42.17A.765(4) is designed to encourage "private attorneys general," it does not follow that such citizens have blanket authority to pursue claims that the State itself has investigated and determined have no merit. Such an overbroad interpretation upends the delicate balance between a defendant's constitutional rights and the purposes of the citizen suit provision that this Court struck in *Fritz v. Gorton*, 83 Wn.2d 275 (1974).

In *Fritz*, this Court declared the qui tam provision constitutional partly because it was self-limiting, applying ***only*** to those instances in which the state completed "no action," investigatory or otherwise, at the end of the statutory notice periods. *Id.* at 314. Amici's interpretation thus eliminates an important constitutional safeguard, and for that reason, does not pass muster under *Fritz*.

Allowing frivolous and harassing lawsuits to proceed in the name of the State is also fundamentally "inconsistent with the notion that the citizen's action is brought 'in the name of the state." *Utter*, 310 P.3d at 844. The purpose of RCW 42.17A.765(4) is not to allow "'every watchdog group ... to demand that the PDC find the watchdog's allegations meritorious or ... sue in superior court.'" *Id.* at 843 (quoting

EFF I, 111 Wn. App. at 609). If it were, the citizen suit provision would violate constitutional rights, not the least of which are rights under the First Amendment, as political opponents would use the citizen enforcement action as a cudgel (like they did here) to punish those with whom they disagree, even when the PDC has determined there is no merit to the allegations. It is difficult to imagine an abuse of process more damaging to the public confidence in the fairness of elections than this.

III. CONCLUSION

For the foregoing reasons, Amici's interpretation of RCW 42.17A.765(4) should be rejected, and the *Utter* court's interpretation upheld. Only the latter strikes a reasonable balance between the First Amendment freedom to participate in political activity and the underlying intent of the citizen suit provision.[4]

[4] Per the Rules of Appellate Procedure, BIAW understands that it is allotted 10 pages to respond to the Memoranda of Amici Curiae, for a total of 20 pages. Rather than filing separate memoranda, BIAW respectfully requests that the Court accept this 11 page brief as its response to both memoranda.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on January 10, 2014, I caused BIAW'S RESPONSE TO AMICI CURIAE MEMORANDA to be served in the above-captioned matter upon the parties herein via email:

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Stated under oath this 10th day of January, 2014.

Carol Gary

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Dear Clerk of the Court:

Attached is BIAW's Response to Amici Curiae Memoranda for filing in the Court's file today. Thank you.

Sincerely,

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