89462-1

No. ~~894621~~-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.

AMICUS CURIAE MEMORANDUM OF KAREN SAMPSON IN SUPPORT OF CROSS-PETITION OF RESPONDENT

William R. Maurer, WSBA #25451
INSTITUTE FOR JUSTICE
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004
(425) 646-9300

Counsel for Amicus Curiae
Karen Sampson

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

STATUTES AND RULES

OTHER AUTHORITIES

I. INTRODUCTION AND STATEMENT OF INTEREST

Karen Sampson ("Sampson") is a resident of the state of Colorado who lives in the Parker North neighborhood outside Denver. In 2006, a private citizen filed a complaint against her and a number of other residents of Parker North for their alleged failure to register as an "issue committee" under Colorado law after they opposed attempts to annex Parker North into the town of Parker. *Sampson v. Buescher*, 625 F.3d 1247, 1251 (10th Cir. 2010). Both the person who filed the complaint and the lawyer representing her supported annexation. As with those sued in a "citizen's action" in Washington, Sampson and her neighbors had to hire a private attorney, respond to discovery, and participate in a hearing. *Id.* After registering, Sampson and her neighbors settled with the plaintiff to minimize the cost of defending against the complaint. Sampson and her colleagues then obtained pro bono counsel and sued the state regarding the statute under which they had been forced to register. The United States Court of Appeals for the Tenth Circuit ultimately held that the statute was unconstitutional as applied to them. *Id.* at 1253.

Sampson's experience as a concerned citizen who became a defendant in a politically motivated private enforcement proceeding provides her with a valuable viewpoint for this Court's consideration of

whether to accept the cross-petition of Building Industry Association of Washington (BIAW).[1] While the case before this Court concerns a large organization sued by prominent individuals, Washington's incredibly broad campaign finance laws affect practically everyone who participates in politics, not just political professionals. *See* RCW 42.17A.005(37) ("political committee" is any person "having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition"). Without a system in which prevailing defendants in citizen's suits receive attorneys' fees, the private enforcement provisions joined with the law's expansive reach become a cudgel to intimidate and impoverish one's political opponents.

Unfortunately, under the standards used by the court of appeals in this case, there are few, if any, instances in which prevailing defendants could recover attorneys' fees. If allowed to stand, the court of appeals' interpretation of the attorneys' fees provisions will turn the courts of this state into just another field on which political campaigns are conducted. This would chill free speech and violate the guarantees of due process in the U.S. and Washington Constitutions. It would drive small speakers out

[1] Sampson takes no position on whether Petitioners' case was politically motivated. This memorandum instead seeks to alert this Court to the "potentially wide ramifications" application of the court of appeals' decision may have in other factual situations—this is precisely the role of an amicus. *See* Judith S. Kaye, *One Judge's View of "Friends of the Court"*, 61 N.Y. St. B. J. 8, 13 (1989). Sampson likewise takes no position on whether Petitioners' petition should be granted.

of politics and leave the political playing field to those who can afford the lawyers and accountants necessary to defend against such suits.

In a state with a long tradition of free political speech, this outcome would be ruinous to public discourse. This Court should grant BIAW's cross-petition, reverse the court of appeals, and set standards for the award of attorneys' fees to prevailing defendants that are consistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

II. ARGUMENT

Review is appropriate here because BIAW's cross-petition raises a significant question of law under the federal and state constitutions and because the decision involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b) (3) & (4).

The court of appeals' decision on the issue of attorneys' fees sets out standards for the award of such fees that are impossible to meet. As such, it is unsound as a matter of law and, if adopted across the state, will result in the suppression of a substantial amount of political speech and deprivations of the process to which all Washingtonians are due.

A. The Court Of Appeals Interpreted The Attorneys' Fees Statutes Out Of Existence

Washington's campaign finance law sets out two mechanisms under which a prevailing defendant may recover attorneys' fees after prevailing in a private citizen's action. First, "[i]n the case of a citizen's action that is dismissed and that the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorneys' fees incurred by the defendant." RCW 42.17A.765(4)(b). Even though BIAW prevailed at both the trial court and on appeal, the court of appeals below denied fees under RCW 42.17A.765(4) because, among other reasons, the basis of the lawsuit "continues to be disputed by the parties on appeal" and the plaintiffs "disagree[d] with the conclusions" of the government not to bring suit against BIAW. *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 176 Wn. App. 646, 676, 310 P.3d 829 (2013).

This test would have the same outcome—the denial of fees—in practically every application because it gives the plaintiff a *de facto* veto over the prevailing defendant's ability to recover fees. If the plaintiff does not agree that their suit was meritless (an unlikely occurrence), then there was "reasonable cause" to bring suit. This effectively repeals the statute. Such a subjective test means that prevailing defendants will be able to recover fees only from the (almost unimaginable) plaintiff who professes absolutely no conviction in his or her own case.

Under the second mechanism, a defendant may recover fees, to be paid by the state of Washington, if he or she "prevails." RCW 42.17A.765(5). The court of appeals denied fees under this statute as well, noting that "the State was never given notice of BIAW's motion for attorneys' fees, let alone given an opportunity to appear and contest such motion." *Utter*, 176 Wn. App. at 677. This test will also always result in a denial of fees. If the state did not want to pay fees here, it should have intervened in the case. Washington's statute exposes the state to fees when a citizen suit fails; if that is unfair to the state (as the court of appeals seems to suggest), then the legislature should amend the law. However, prevailing defendants should not bear the financial cost of lawsuits when the state does not participate.

The court of appeals' decision guts the statutes permitting attorneys' fees for prevailing defendants. The availability of attorneys' fees is crucial to alleviate a number of constitutional concerns raised when interested parties possess enforcement powers in cases involving political speech. Without the likelihood of fees in cases involving politically motivated or meritless claims, political intimidators will have no disincentive to bring such claims. The end result will be less speech and more abuse of process.

B. Private Enforcement Mechanisms Raise Serious Constitutional Concerns That Are Somewhat Mitigated By A Vigorous System Of Attorneys' Fees For Prevailing Defendants

This Court has specifically recognized that fees for prevailing defendants were a crucial component to the constitutional viability of "citizen's actions." In *Fritz v. Gorton*, 83 Wn.2d 275, 314, 517 P.2d 911 (1974), this Court held that such fees provided "no small deterrent" against frivolous and harassing suits brought under the campaign finance laws. Thus, this Court concluded there was "no problem of constitutional dimension" with the private enforcement provision. *Id.* The court of appeals removed this deterrent and the disincentives for politically motivated and harassing suits are now gone. Without action by this Court, the constitutional problems inherent in the private enforcement of laws regulating political speech will come to fruition.

1. Absent Safeguards Like Attorneys' Fees, Private Enforcement Statutes Violate The First Amendment

The U.S. Supreme Court and this Court have made clear that First Amendment freedoms need breathing room to survive and each has taken a dim view of laws that threaten speakers with financial ruin simply for speaking. To survive, private causes of action that implicate speech require built-in safeguards to ensure that they do not chill free speech rights. These safeguards include attorneys' fees if a defendant prevails.

See Fritz, 83 Wn.2d at 314 (attorneys' fees are "safeguards ... against frivolous and abusive lawsuits"). The decision below has removed this protection so this Court must determine if other, similar safeguards exist.

Unfortunately, they do not, as Washington private enforcement law contains no additional protections against chilling speech. Such safeguards would include a heightened pleading standard or burden of proof for plaintiffs. *See Sullivan*, 376 U.S. at 279 (actual malice standard was necessary to avoid forcing people to "steer far wider of the unlawful zone" in order to ensure that their speech would pose no risk of liability) (citation and quotation marks omitted); *Tan v. Le*, 177 Wn.2d 649, 669, 300 P.3d 356 (2013) (First Amendment requires the court to evaluate the record to determine actual malice). The courts also protect speech by requiring that the plaintiff demonstrate actual harm. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (states' interest in permitting a private cause of action for speech "extends no further than compensation for actual injury"); *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 852, 168 P.3d 826 (2007) (campaign statute prohibiting untrue statements unconstitutional in part "because there is no requirement that the prohibited statements tend to be harmful").

Washington's "citizen's action" provision contains none of these protections. Any "person" may file suit (assuming the state takes no

action). The government has no discretion over the suit once it declines to take action and enforcement is left to the private actor, who may conduct discovery and pursue sanctions. RCW 42.17A.765(4). The plaintiff is under no obligation to prove harm to himself or others. There is no *de minimis* standard either—private suits can be brought for the most picayune violations. And now after the court of appeals' decision, a politically motivated or harassing plaintiff need not fear paying the defendant's "high costs of legal services." *Fritz*, 83 Wn.2d at 314.

The lack of protections in the "citizen's action" provision creates the precise chill to speech that the Supreme Court and this Court have sought to prevent. And it is not just the fear of damage awards in civil suits that will chill speech, but "fear of the expense involved in their defense" that drives all but the well-capitalized from the public square. *Time, Inc. v. Hill*, 385 U.S. 374, 389, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). The court of appeals' decision thus chills core political speech. This Court should grant the cross-petition and reverse.

2. Absent The Attorneys' Fees Provisions, The Private Enforcement Statute Violates Due Process

Washington delegates its enforcement authority to private citizens, whose ability to sue is limited now only by their desire to sue. The prospect of enforcement proceedings brought to silence speech or to gain

political advantage then becomes a certainty.[2] But direct and substantial personal incentives for police and prosecutors are impermissible under the Due Process Clause. "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980). *See also Young v. U.S. ex rel. Vuitton*, 481 U.S. 787, 805-07, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987) (financial incentives for prosecutors created an improper conflict of interest). This is because a prosecutor "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all...." *Berger v. U.S.*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

The parties dispute whether the plaintiffs here were politically motivated, but that question is ultimately irrelevant for purposes of deciding whether to grant review. What is important is that the court of

---

[2] This conclusion is self-evident and even if it were not, others have noted the potential for abuse inherent in private enforcement provisions. For instance, in June 2000, a bipartisan commission appointed by the Governor of California recommended reforming the state's private enforcement provision because it could be used for political gain or to silence speech. *See* Bipartisan Commission on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* 2, 44-45 (2000), available at http://www.fppc.ca.gov/taskforce/pdf/mcpherson_report.pdf.

appeals' decision creates a substantial probability that plaintiffs will use the citizen's action provision to bring politically motivated and harassing suits. This is unacceptable under the Due Process Clause. This Court should grant the cross-petition and reverse.

III. CONCLUSION

This case presents important questions whose resolution will determine whether political actors may use private enforcement to silence the speech of their opponents. The cross-petition easily meets the standards in RAP 13.4(b) (3) & (4). For the foregoing reasons, this Court should grant the BIAW's cross-petition for review and reverse the decision of the court of appeals on the issue of attorneys' fees.

RESPECTFULLY SUBMITTED this 13th day of December, 2013

INSTITUTE FOR JUSTICE
Washington Chapter

By: /s/ William R. Maurer
William R. Maurer
WSBA #25451

Attorneys for Amicus Curiae
Karen Sampson

OFFICE RECEPTIONIST, CLERK

From: Bill Maurer <wmaurer@ij.org>
Sent: Friday, December 13, 2013 11:20 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Madeline Roche
Subject: Motion to File Amicus Curiae Memorandum and Memorandum of Karen Sampson in Utter v. BIAW, No. 894621-1
Attachments: Motion in Support of Memo (FINAL).pdf; Amicus memo in support (FINAL).pdf; CERTIFICATE OF SERVICE Amicus.pdf

Clerk of Court,

Attached to this email are three documents for submission in *Utter, et al v. Building Industry Association of Washington* (No. 894621-1) on behalf of Karen Sampson: Motion for Leave to File Amicus Curiae Memorandum of Karen Sampson in Support of Cross-Petition of Respondent, Amicus Curiae Memorandum of Karen Sampson in Support of Cross-Petition of Respondent, and Certificate of Service.

Thank you,

William R. Maurer, WSBA #25451
Institute for Justice Washington Chapter
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004
Phone: (425) 646-9300
Fax: (425) 990-6500
Email: wmaurer@ij.org

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on December 13, 2013, I caused a true and correct copy of this MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM OF KAREN SAMPSON IN SUPPORT OF CROSS-PETITION OF RESPONDENT and AMICUS CURIAE MEMORANDUM OF KAREN SAMPSON IN SUPPORT OF CROSS-PETITION OF RESPONDENT to be served in the above captioned matter upon the parties herein via legal messenger:

Harry J. F. Korrell
Robert J. Maguire
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

Attorneys for Respondent/Cross-Appellants Building Industry Association of Washington

Knoll Lowney
SMITH & LOWNEY, PLLC
2317 East John Street
Seattle, WA 98112

Michael E. Withey
LAW OFFICES OF MICHAEL W. WITHEY
601 Union Street, Suite 4200
Seattle, WA 98101

Attorneys for Petitioners

/s/ William R. Maurer
WILLIAM R. MAURER

OFFICE RECEPTIONIST, CLERK

From: Bill Maurer <wmaurer@ij.org>
Sent: Friday, December 13, 2013 11:20 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Madeline Roche
Subject: Motion to File Amicus Curiae Memorandum and Memorandum of Karen Sampson in Utter v. BIAW, No. 894621-1
Attachments: Motion in Support of Memo (FINAL).pdf; Amicus memo in support (FINAL).pdf; CERTIFICATE OF SERVICE Amicus.pdf

Clerk of Court,

Attached to this email are three documents for submission in *Utter, et al v. Building Industry Association of Washington* (No. 894621-1) on behalf of Karen Sampson: Motion for Leave to File Amicus Curiae Memorandum of Karen Sampson in Support of Cross-Petition of Respondent, Amicus Curiae Memorandum of Karen Sampson in Support of Cross-Petition of Respondent, and Certificate of Service.

Thank you,

William R. Maurer, WSBA #25451
Institute for Justice Washington Chapter
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004
Phone: (425) 646-9300
Fax: (425) 990-6500
Email: wmaurer@ij.org