NO. 96476-9

SUPREME COURT OF THE STATE OF WASHINGTON

FOOD DEMOCRACY ACTION! and FOOD DEMOCRACY ACTION! YES ON I-522 COMMITTEE TO LABEL GMOs IN WASHINGTON

Petitioner,

v.

STATE OF WASHINGTON, ex rel., WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,

Respondent.

BRIEF OF *AMICI CURIAE* WIN/WIN NETWORK, WORKING WASHINGTON, FUSE WASHINGTON, PUGET SOUND SAGE, WASHINGTON STATE ASSOCIATION FOR JUSTICE, WASHIINGTON BUDGET & POLICY CENTER, AND POLITICAL DESTINY

Dmitri Iglitzin, WSBA No. 17673
Danielle Franco-Malone, WSBA No. 40979
Ben Berger, WSBA No. 52909
BARNARD IGLITZIN & LAVITT LLP
18 W Mercer St, Suite 400
Seattle, WA 98119
(206) 257-6003
iglitzin@workerlaw.com
franco@workerlaw.com
berger@workerlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. IDENTITY AND INTERESTS OF *AMICI CURIAE*

The interests of *Amici Curiae* Win/Win Network, Working Washington, Fuse Washington, Puget Sound Sage, Washington State Association for Justice, the Washington Budget & Policy Center, and Political Destiny are fully set forth in the Motion for Leave to File Brief of *Amici Curiae* filed herewith.

Amici are interested in the outcome of this case because they may each from time to time engage in activities that the Public Disclosure Commission ("PDC") either does or could construe as subject to reporting obligations (such as making independent expenditures subject to reporting on a C-6 form). *See* RCW 42.17A.255, 305. Determining whether these expressions trigger reporting obligations is highly dependent on the individual context of a given expression. As a result, *amici* may engage in expressive activity which they believe in good faith does not constitute independent expenditures, but which the PDC or a court of law may subsequently decide is subject to reporting requirements. *Amici* are also cognizant of the possibility that, despite exercising diligence with their campaign finance and lobbying reporting, they may at some point in the future make a mistake in a PDC filing or inadvertently file a required form late. If the decision below stands, *amici* fear that such good faith, inadvertent reporting violations would necessarily be construed as

concealment violations, subject to duplicative penalties – once for failing to properly submit reports and again for supposedly concealing information in those reports.

II. INTRODUCTION

Amici urge the Supreme Court to grant review of the Court of Appeals' decision in *State v. Food Democracy Action!*, 5 Wn. App.2d 542, 427 P.3d 699 (2018) ("*FDA*"), which held that to be liable for a concealment violation under RCW 42.17A.435, a defendant need not have a specific intent to conceal; it need only fail to timely submit a required disclosure report. A concealment violation under RCW 42.17A.435 is distinct from a reporting violation and must be supported by evidence of a defendant's specific intent to conceal the source of contributions or the recipient of expenditures. Review should be granted because the scope of a concealment violation involves a significant question of constitutional law and an issue of substantial public interest. *See* RAP 13.4(b)(3)-(4).

III. STATEMENT OF THE CASE

Amici Curiae adopt Petitioner's statement of the case.

IV. ARGUMENT

A. The Decision Below Exposes *Amici* and Similarly Situated Organizations to Liability for Concealment.

Many advocacy organizations take positions endorsing or opposing candidates and/or ballot initiatives, which they articulate in op-ed pieces, website updates, and blog posts, among other media forms. Such expressive activity may constitute an "independent expenditure" that needs to be reported to the PDC, per RCW 42.17A.255, 305, depending on fact-specific inquiries such as, but not limited to, (a) whether the value of the message and the labor time invested in crafting it exceed a certain monetary threshold, RCW 42.17A.005(30)(a)(iv); (b) whether the message is disseminated through a medium whose audience is "primarily limited" to the organization's members, RCW 42.17A.005(30)(b); and (c) whether the entity's efforts were designed to elicit a news item, feature, commentary or editorial in a "regularly scheduled new medium" that is, *inter alia*, "of primary interest to the general public." *Id*.

Plainly, determining whether an organization's communicative efforts must be reported as an independent expenditure involves several subjective determinations. Yet pursuant to the FCPA, any person that makes an "independent expenditure" must file a disclosure report identifying information about that activity within five days of making it. *See* RCW 42.17A.255(2). Makers of independent expenditures must also then file subsequent reports at given intervals. RCW 42.17A.255(3). If an organization in good faith determines that its efforts are not an

independent expenditure because, for instance, it believes the value of its communication did not exceed the statute's monetary threshold or was published in a medium primarily intended for its internal audience, it runs the risk of the State or a citizen plaintiff later initiating an enforcement action based on the failure to file a C-6 report.

Amici also incur PDC reporting obligations in other circumstances. Political Destiny, for instance, is registered as a political committee and has ongoing reporting obligations, including but not limited to filing C-3 and C-4 reports on a monthly or more frequent basis. RCW 42.17A.235, 240. Additionally, Win/Win Network, Working Washington, Puget Sound Sage, Washington State Association for Justice, and the Washington Budget & Policy Center are registered with the PDC as "lobbyist employers," and as such, have ongoing reporting obligations, including but not limited to filing an annual L-3 report and monthly L-3c reports disclosing certain political expenditures made and contributions received. RCW 42.17A.630. Some of the *amici* also engage in "grass roots" lobbying, concerning which they file monthly grass roots lobbying reports (PDC Form L-6), which also must include information regarding expenditures made and contributions received. RCW 42.17A.640.

Amici here accept that they run the risk of being held liable for failing to timely or correctly file any of the aforementioned required

reports. They do, however, challenge the conclusion implicit in the decision below that such a failure necessarily also amounts to "concealment" violation under the FCPA.

In *FDA*, Petitioner contributed $200,000 it raised from its members to a ballot initiative committee. *FDA*, 5 Wn. App.2d at 545. The State claimed that Petitioner violated the FCPA because, among other things, it allegedly "failed to timely file required reports" and, separately, because it allegedly "concealed the identity of the individuals from whom it received its $200,000 in contributions to the Yes on I-522 political committee." *Id*. at 546-47. The provision on which the State relied for its concealment allegation was *former* RCW 42.17A.435.[1] That provision states:

> No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.

Id. The State's concealment theory did not rely on Petitioner's alleged concealment of any information other than what the State already alleged Petitioner had failed to report.[2] Rather, the State merely bootstrapped a

[1] Although the FCPA has been amended since the State commenced its enforcement action, the concealment provision was not affected by those changes in any way.

[2] Moreover, it is untenable to assert that the concealment claim corresponds to an activity distinct from FDA's mere failure to report – namely, the act of making contributions in the organization's own name, rather than that of its individual donors. It is undisputed that the contents of the disclosure reports which FDA initially failed to submit would have included this very information. It is also undisputed that an organization which

concealment claim onto the failure to report claim, asserting that Petitioner's failure to report the required information effected a "concealment" of the same information. *FDA*, 5 Wn. App.2d at 546-47. The Court of Appeals agreed with the State that an inadvertent failure to report also amounts to a concealment violation. *Id*. at 549-50.

As a result, *amici* and other similarly situated organizations risk being held liable *both* for failing to timely or correctly file reports *and* for concealing the information that should have been contained in those reports, including in situations where they have determined in good faith, albeit erroneously, that their expressive activity does not meet the "independent expenditure" criteria that would require reporting.

B. The Potential to be Held Doubly Liable for Reporting and Concealment Violations will Deter *Amici* and Similarly Situated Entities from Engaging in First Amendment Speech.

Courts have long cited the potential chilling effect on First Amendment speech that may result from imposing duplicative or excessive penalties on speech which is subject to civil liability. The U.S. Supreme Court first voiced this concern in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997 (1974), where it held that defamation plaintiffs who prove liability under state-law standards less rigorous than

---

timely submits a report containing this information is entitled to make a contribution in its own name rather than that of its individual donors. Thus, the activity that comprised the alleged concealment in this case was entirely subsumed within FDA's failure to submit the required reports.

New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964), may recover only actual, not punitive, damages. The court reasoned in part that "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship…." *Id.*; *see also Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976) (affirming punitive damages award for libel claim but only because it was not "excessive in relation to the potential harm," whereas excessive award "might raise first amendment problems because of the inherent chilling effect of such disproportionate awards on vigorous criticism of public officials"). Similar concerns have led some state courts to refuse to recognize duplicative causes of action that could deter protected speech. *See, e.g.*, *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002) (declining to recognize tort of false light because "it is highly duplicative of defamation both in interests protected and conduct averted" and because its lenient mental state proof element "raises the spectre of a chilling effect on First Amendment freedoms").

Those same principles apply here. *Amici* indisputably engage in protected speech when they compose articles, editorials, and blog posts supporting or opposing candidates for political office or ballot initiatives. They similarly engage in such speech when they engage in direct or grass roots lobbying. Should they face liability for both failing to report and

concealing information whenever they make an inadvertent reporting error or determine in good faith the speech is not subject to FCPA disclosure requirements, *amici* will potentially be forced to forgo engaging in this expressive activity at all.

The price tag imposed by the decision below on entities that make these types of mistakes is simply too high. Under the FCPA's enforcement provisions, each individual violation of any of the Act's provisions may result in a penalty of up to $10,000. RCW 42.17A.750(1)(c). If a violation involves the failure to submit a disclosure report, that violation may also be punished by penalizing the violator up to $10 per day for the interval during which the report was outstanding. RCW 42.17A.750(1)(e). Further, the failure to report an expenditure or contribution "may be subject to a civil penalty equivalent to the amount not reported as required." RCW 42.17A.750(1)(g). The Court of Appeals below affirmed the trial court's application of subsection (1)(g) to a concealment violation, which led to an penalty of $295,661.58 for concealment alone. This was in addition to penalties for the failure to report violation under subsections (1)(c) and (e) in the amount of $18,000 and $5,620, respectively. If upheld, the same remedial scheme could lead to awarding a penalty equivalent to the value of the independent expenditure or other improperly reported transactions for a supposed concealment, as well as additional per diem and/or per

violation penalties for failing to report. In practice, this means that an *amicus* may face tens of thousands of dollars in penalties for any individual communication it does not perceive as an "independent expenditure" under the Act, or for every single report it inadvertently files untimely or inaccurately. This prospect will significantly deter *amici* and similarly situated organizations from voicing their political opinions, making political contributions, or engaging in either direct or grassroots lobbying.

C. The Chilling of Protected Speech Resulting from the Court of Appeals' Interpretation of a Concealment Violation Implicates a Significant Constitutional Question and Raises an Issue of Substantial Public Interest under RAP 13.4(b).

The Supreme Court may accept discretionary review of an issue that involves a significant question of constitutional law under either the United States or Washington constitutions. RAP 13.4(b)(3); *see, e.g.*, *Matter of Maxfield*, 133 Wn.2d 332, 334, 945 P.2d 196 (1997) (granting discretionary review to determine whether Washington constitution recognized privacy interest that criminal defendant's counsel should have raised, and thereby triggering ineffective assistance of counsel claim). As discussed above, the Court of Appeals' decision will deter constitutionally protected speech. At the very least, this result renders the decision below suspect. *See* Pet. for Discretionary Review, 18-20. The Court should

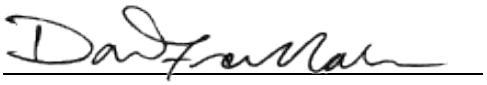
therefore accept review to resolve this constitutional question.

Discretionary review is also appropriate pursuant to RAP 13.4(b)(4). Under that provision, the Supreme Court may accept discretionary review of a petition that involves an issue of substantial public interest. RAP 13.(b)(4). The public interest is implicated when a decision will have significant real-world ramifications. *See Matter of Arnold*, 189 Wn.2d 1023, 1092, 408 P.3d 1091 (2017) (accepting review under RAP 13.4(b)(4) because holdings "affect public safety by removing an entire class of sex offenders from the registration requirements"). The curtailment of First Amendment activity in Washington is a drastic practical effect of the decision below and thus raises an issue of substantial public interest. *See In re Parmelee*, 115 Wn. App. 273, 275, n.1, 63 P.3d 800 (2003) (despite finding prisoner's personal restraint petition technically moot, reaching merits of claim because "the First Amendment issue he raises…involves a matter of continuing and substantial public interest"). Review is thus warranted on this ground as well.

V. CONCLUSION

For the foregoing reasons, the Court should accept review and address whether RCW 42.17A.435's prohibition against "concealment" requires a specific intent to conceal the source of contributions or the recipient of expenditures.

Respectfully submitted this 18th day of March, 2019.

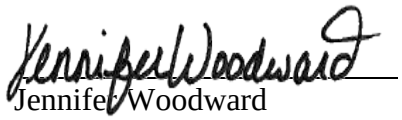


Dmitri Iglitzin, WSBA No. 17673
Danielle Franco-Malone, WSBA No. 40979
Ben Berger, WSBA No. 52909
BARNARD IGLITZIN & LAVITT LLP
18 W Mercer St, Suite 400
Seattle, WA 98119
(206) 257-6003
iglitzin@workerlaw.com
franco@workerlaw.com
berger@workerlaw.com

DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury under the laws of the state of Washington that on March 18, 2019, the foregoing Brief of Amici Curiae was filed with the Washington State Supreme Court using the Court's efiling system, which will automatically provide notice to all required parties.

Executed this 18th day of March, 2019, at Seattle, Washington.



Jennifer Woodward

BARNARD IGLITZIN & LAVITT

March 18, 2019 - 4:49 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96476-9
Appellate Court Case Title:	State Public Disclosure Commission v. Food Democracy Action!, et al.
Superior Court Case Number:	14-2-02381-0

The following documents have been uploaded:

- 964769_Briefs_20190318164851SC705711_1866.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was 2019 03 18_Brief Amici Curiae_Final.pdf
- 964769_Motion_20190318164851SC705711_2582.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was 2019 03 18_MOT re Brief Amici Curiae_Final.pdf

A copy of the uploaded files will be sent to:

- cfuolyef@atg.wa.gov
- iglitzin@workerlaw.com
- ken@kenkaganlaw.com
- todds4@atg.wa.gov
- woodward@workerlaw.com

Comments:

Sender Name: Rebecca Huvard - Email: huvard@workerlaw.com
Filing on Behalf of: Danielle Elizabeth Franco-Malone - Email: franco@workerlaw.com (Alternate Email:)

Address:
18 W. Mercer St., Ste. 400
Seattle, WA, 98119
Phone: (206) 257-6015

Note: The Filing Id is 20190318164851SC705711