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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
LEAGUE OF WOMEN VOTERS OF WASHINGTON,
WASHINGTON COALITION FOR OPEN GOVERNMENT
and ROGER M. LEED**

Filed *E*
Washington State Supreme Court

MAY - 5 2014

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 ORIGINAL

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I. INTRODUCTION

Washington voters adopted the public disclosure law to track those who attempt to influence elections and to make better informed decisions. As this Court said in 1974 when upholding Initiative 276:¹

It has been said time and again in our history...that an informed and active electorate is an essential ingredient, if not the *Sine qua non* in regard to a socially effective and desirable continuation of our democratic form of representative government.

To ensure an informed electorate as envisioned by Initiative 276, this Court must protect the citizen's right to enforce disclosure requirements whenever the attorney general declines to do so. Stripping power from the people would undermine public trust in elections and government.

Without a citizen's right of action, disclosure violations may go unchecked at the direction of elected attorneys. Political favoritism, funding constraints or mistaken judgment are just some of the reasons why an attorney general might decline to sue an alleged violator after a government investigation. If the mere act of investigating is sufficient to block a citizen suit, as the Court of Appeals held, meritorious suits may never reach courts and voters may not learn about the true forces shaping elections. This frustrates the voters' will and must be reversed.

¹ *Fritz v. Gorton*, 83 Wn.2d 275, 283-284 (1974).

II. INTEREST AND IDENTITY OF AMICI

The League of Women Voters of Washington (“League”), a statewide, nonpartisan political organization, encourages the informed and active participation of citizens in government, and influences public policy through education and advocacy. The League was one of the sponsors of Initiative 276, the 1972 ballot measure now codified as Chap. 42.17A RCW. The League is interested in this case because it will determine the fate of the citizen suit provision which was part of the voter-approved initiative, and which is important to maintaining the integrity of the campaign finance disclosure system. In general, the League believes that representative government depends upon the informed and active participation of its citizens and requires that governmental bodies protect the citizen's right to know. The League wants to protect the citizen’s ability to enforce campaign disclosure laws to ensure that the people of Washington are fully informed about the special interests seeking to influence government.

The Washington Coalition for Open Government (WCOG) is a 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 public disclosure cases. 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, an attorney, serves on the WCOG Advisory Council. In 1971, he served on the steering committee of the Coalition for Open Government, the organization which drafted and successfully campaigned for the passage of Initiative 276. 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 is understood and implemented.

III. DISCUSSION

A. **RCW 42.17A.765 Must be Construed Liberally to Promote Enforcement of Disclosure Requirements.**

Chap. 42.17A RCW begins with the following declaration:

It is hereby declared by the sovereign people to be the public policy of the state of Washington: That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

RCW 42.17A.001(1). To ensure strict enforcement, the voters said:

The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17A.001. Thus, courts must liberally construe RCW 42.17A.765, the provision at issue here, in such a way as to maintain public confidence in elections and related government processes. *Id.*

The Court of Appeals decision, *Utter ex rel. State v. Bldg. Industry Assoc. of Wash.*, 176 Wn.App. 646, 310 P.3d 829 (Div. 1, 2013), conflicts with that fundamental rule of liberal construction. The Court construed RCW 42.17A.765 to preclude a citizen suit even when the attorney general declines to sue. *Utter*, 176 Wn.App. at 672-73.

Under the Court’s ruling, a mere government investigation – rather than a prosecution – is sufficient to block citizens from seeking judicial review of suspected disclosure violations. *Id.* The Court said:

[W]e conclude that if the State takes an action under RCW 42.17A.765—such as completing an investigation and obtaining information under subsection (2)—within the 45-day period under subsection (4)(a)(i) or the ten-day period under subsection (4)(a)(iii), a citizen's action may not be brought. To hold otherwise would mean that even where the State has thoroughly investigated an allegation and determined it to be without merit, a citizen action could still be filed in the State's name.

Id. at 673.

This holding misses the critical point that “the State” is the *people of Washington*. When an action is brought “in the name of the state,” it is on behalf of the general public, not state-paid investigators whose job is to serve the public. By interpreting RCW 42.17A.765 to permit enforcement suits only when government investigators agree with citizen complainants, the Court of Appeals diminished citizen opportunities to compel greater disclosure. This contradicts the requirement to liberally construe the statute to promote full disclosure. RCW 42.17A.001.

The Court’s interpretation also thwarts the statute’s purpose “to assure continuing public confidence of fairness of elections and

governmental processes.” *Id.* Extinguishing citizen rights and judicial oversight will not inspire confidence. Rather, weakening safeguards will breed suspicion that campaign enforcement may yield to politics.

B. The Initiative 276 Statute Precludes Citizen Suits Only When The Government Files Suit.

RCW 42.17A.765 provides:

(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, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and place designated in the county in which such person resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the *attorney general or the prosecuting authority* of any political subdivision of this state 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....

(4) *A person* who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing 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;

(ii) The person has thereafter further notified the attorney general and prosecuting attorney that the person will commence *a citizen's action* within ten days upon their failure to do so;

(iii) The attorney general and the prosecuting attorney have in fact failed to bring *such action* within ten days of receipt of said second notice; and

(iv) The *citizen's action is filed* within two years after the date when the alleged violation occurred.

(italics added). In this case, the attorney general initiated an investigation against two entities and declined to sue one of them, the Building Industry Association of Washington (BIAW), which prompted citizens to file their own suit against the BIAW. The suit should be allowed because it complied with RCW 42.17A.765,

commencing only after the government failed to bring a “citizen’s action” for “any appropriate civil remedy” within the prescribed period. RCW 42.17A.765(1) and (4).

1. “Action” means a civil suit, not an investigation.

In holding that the citizens could not sue, the Court of Appeals said, “The issue before us is what constitutes ‘action’ by the State.” *Utter*, 176 Wn.App. at 672. “Where a ‘citizen’s action’ refers to any of the actions authorized under chapter 42.17A RCW, we think it logical that an ‘action’ by the AG or the PDC [Public Disclosure Commission] also refers to any of the actions authorized under RCW 42.17A.765,” including “completing an investigation and obtaining information.” *Id.* at 672-73. In fact, to equate a “citizen’s action” with an investigation is *not* logical, conflicts with principles of statutory construction and – when taken to its extreme – leads to absurd results.

Courts look at a statute in its entirety to enforce its overall purpose. *Rental Housing Assoc. of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). Courts give effect to all language and harmonize all provisions in a statute. *Ockerman v. King County Dep’t of Dev. & Env’tl Servs.*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000). When reading RCW 42.17A.765 as a whole and giving

effect to all provisions, the only logical conclusion is that “citizen’s action” means a lawsuit, not an investigation.

RCW 42.17A.765(4) says a “citizen’s action” is “any of the actions...authorized under this chapter.”² RCW 42.17A.765(1) is the provision authorizing “actions.” It says, “The attorney general and the prosecuting authorities...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.” RCW 42.17A.750, in turn, authorizes civil actions to void an election, impose monetary penalties, or enjoin violations in addition to “any other remedies provided by law.” Reading sections (1) and (4) of RCW 42.17A.765 together, a “citizen’s action” means any suit for civil remedies, whether injunctive, equitable or declaratory.

A “citizen’s action” cannot mean an investigation authorized by RCW 42.17A.765(2), contrary to the Court of Appeals holding that both a “citizen’s action” and attorney general’s action include “any of the actions authorized under RCW 42.17A.765” such as investigating. *Utter*, 176 Wn.App. at 672-73. RCW 42.17A.765(4)(a)(iv) says a

² RCW 42.17A.765(4) says: “A person who has notified the attorney general...that...this chapter is being or has been violated may...bring in the name of the state *any of the actions (hereinafter referred to as a citizen's action)* authorized under this chapter.” (Italics added).

“citizen’s action” must be “filed within two years after the date when the alleged violation occurred.” An investigation cannot be “filed.”

Taking the Court of Appeals’ logic to its extreme, if a “citizen’s action” really means a mere investigation, then any citizen – well-intentioned or not - could compel the BIAW or other political group to appear, testify in response to allegations, and “produce all accounts, bills, receipts, books, paper and documents which may be relevant.” RCW 42.17A.765(2). Citizens without legal training or oversight could assume the attorney general’s subpoena powers simply by providing the notice required by RCW 42.17A.765(4). This is absurd, and could undermine the initiative’s over-arching goal of election fairness. Courts should not interpret statutes so as to achieve absurd results. *City of Auburn v. Gauntt*, 174 Wn.2d 321, 330 (2012); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

When the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. *Zink v. City of Mesa*, 162 Wn. App. 688, 709, 256 P.3d 384 (2011). If Initiative 276 drafters had intended to empower any citizen to compel campaign donors to testify and produce records as a “citizen’s action,” they would have said so. But sections (2) and

(3) of RCW 42.17A.765, which authorize investigations, refer only to the attorney general and prosecutors and do not say that citizens may share the government's investigative powers. In sum, when reading RCW 42.17A.765 as a whole, the only logical interpretation is that "citizen's action" means a civil suit.

This interpretation is consistent with the Court of Appeals decision in *State ex rel. Evergreen Freedom Foundation v. National Education Association ("NEA")*, 119 Wn.App. 445, 81 P.3d 911 (Div. 2 2003). In that case PDC investigators found the law was violated, but wanted to avoid filing an enforcement suit "based on the current budget cutbacks and the cost of such litigation." 119 Wn.App. at 448. A citizen's group filed its own suit, and the trial court held the suit was precluded by the attorney general initiating the PDC investigation. *Id.* at 450. The Court of Appeals reversed, stating, "We did not intend to imply that the AG's customary referral to the PDC for initial review and investigation precludes a citizen's action." *Id.* at 453, discussing *State ex rel. Evergreen Freedom Foundation v. Washington Education Association ("WEA")*, 111 Wn.App. 586, 49 P.3d 894 (Div. 2 2002). The Court said the "statute's clear intent" was "that the AG or county prosecutor's 'commencement of an action' within the proscribed time

period precludes a citizen's action (indeed such commencement obviates the need for a citizen's action)." *Id.* The same reasoning applies here, where the attorney general chose not to sue the BIAW, clearing the way for citizens to seek enforcement.

2. The statute protects against meritless suits.

In holding that a government investigation resulting in inaction precludes a citizen suit, the Court of Appeals seemed concerned about preventing meritless suits. However, such concern is unwarranted. RCW 42.17A.765(4)(b) says that, if a court finds a citizen's action "was brought without reasonable cause," the court may order the plaintiff to pay all costs of trial and the defendant's attorney fees. That cost-shifting provision and the required notice period before commencing suit provide "ample protection against frivolous and abusive lawsuits." *Fritz v. Gordon*, 83 Wn. 275, 314, 517 P.2d 911 (1974) (finding RCW 42.17A.765 comports with constitutional due process). In light of these statutory safeguards, government investigators need not function as gatekeepers.

C. Initiative 276 Sought to Increase Citizen Oversight.

In *Fritz*, this Court upheld Initiative 276, including the section now codified as RCW 42.17A.765, against various constitutional

attacks. 83 Wn. at 287, 312-314. Although the issues here differ, the broad policies discussed in *Fritz* are highly relevant. This Court said, “It is often forgotten, - but it should be remembered as axiomatic – that our representative democracy exists and operates on the basis of its delegated authority and power derived from the people...” *Id.* at 279. Initiative 276 was driven by “public dissatisfactions with government and its imagined or real unresponsiveness to social needs and to the desires and will of the people.” *Id.* at 283. The sponsors of Initiative 276, including the League of Women Voters of Washington, were concerned about the influence of money on government decision-making. *Id.* at 285. Recognizing that financial reporting requirements were controversial, this Court said, “it is not the prerogative nor the function of the judiciary to substitute what they may deem to be their better judgment for that of the electorate...” *Id.* at 287. The Court also recognized that “the right to receive information is the fundamental counterpart of the right of free speech.” *Id.* at 296.

That important backdrop was missing from the Court of Appeals decision, which shifted power away from the people, contrary to the spirit and intent of Initiative 276. The decision leaves the people with no recourse when government is unresponsive to justified citizen

complaints about stealth campaigning. If affirmed, the Court of Appeals decision may result in a less informed electorate and a government beholden to undisclosed special interests.

As the United States Supreme Court said in *Buckley v. Valeo*³:

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.

The Court has 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.” *McConnell v. Federal Election Commission*, 540 U.S. 93, 197, 124 S.Ct. 619 (2003), quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390, 120 S.Ct. 897 (2000). By removing the right of Washington citizens to independently enforce the campaign finance disclosure law, the Court of Appeals has planted the seeds of cynicism.

Lack of merit is not the only possible reason why Washington’s attorney general would decline to bring suit in response to a citizen

³ 424 U.S. 1, 15, 96 S.Ct. 612 (1976).

allegation of a disclosure violation. Other possible reasons include lack of resources (as in the *WEA* case), misjudgment and political expediency. If citizens cannot independently initiate judicial review of disclosure concerns, it will foster mistrust of the government's inaction. The public will not necessarily assume that an allegation lacks merit simply because a government investigator said so, particularly when the subject of the investigation is inherently of a political nature. In sum, RCW 42.17A.765 must be interpreted in light of the underlying policies of full disclosure and representative democracy in order to maintain public confidence in elections and government.

IV. CONCLUSION

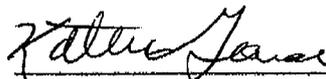
For the foregoing reasons, this Court should reverse the Court of Appeals and hold that a citizen suit may proceed under RCW 42.17A.765(4) if the attorney general declines to sue for any reason.

Dated this 25th day of April, 2014.

Respectfully submitted,

HARRISON-BENIS LLP

By:



Katherine George, WSBA 36288

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 25, 2014, I served a copy of the Motion for Leave to File an Amicus Curiae Memorandum and related memorandum by electronic mail, per agreement, to:

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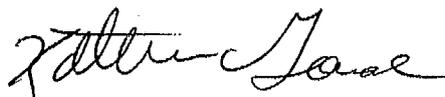
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Please find attached for filing in *Utter v. BIAW*, Case No. 89462-1, an Amicus Curiae Memorandum and related motion by the Washington Coalition for Open Government, Roger M. Leed and the League of Women Voters of Washington. The attorney filing this document is Katherine A. George, WSBA 36288, phone 425 802-1052, email kgeorge@hbslegal.com.

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