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NO. 89462-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT F. UTTER and FAITH IRELAND,
in the name of the STATE OF WASHINGTON,

Petitioners,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

**BRIEF OF AMICI CURIAE WASHINGTON STATE LABOR
COUNCIL, SEIU HEALTHCARE 775NW, UFCW 21,
WASHINGTON EDUCATION ASSOCIATION, SEIU
HEALTHCARE 1199NW AND SEIU LOCAL 925 IN SUPPORT OF
RESPONDENT'S POSITION REGARDING RCW 42.17A.455**

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I. IDENTITY OF AMICI CURIAE

Amici curiae are five major Washington State unions, SEIU Healthcare 775NW, UFCW 21, the Washington Education Association, SEIU Healthcare 1199NW and SEIU Local 925, and the Washington State Labor Council (“the Labor Council”), all of whom are concerned about the potential negative impact on them and/or the unions they represent if this Court reverses that portion of the September 16, 2013 opinion of the Court of Appeals (“the Opinion”) that held that RCW 42.17A.455, the so-called “attribution rule,” does not apply to the definition of “political committee” set forth in RCW 42.17A.005(37) (pages 13-20 of the Opinion).

The interests of *amici* in this matter are further discussed in the Motion for Leave to File Brief of *Amicus Curiae* filed simultaneously with this brief.

II. STATEMENT OF THE CASE

Each of the *amici*, and many of the Labor Council’s affiliated unions, finance, maintain or control a political action committee (“PAC”) that makes candidate contributions, contributions to political committees, and/or independent expenditures in support of, or in opposition to, various candidates and ballot propositions. Each of these PACs is registered properly with the Washington State Public Disclosure Commission (“PDC”), discloses both the source of its funding and its expenditures, and

is in every other way in full compliance with the requirements of the Fair Campaign Practices Act (“FCPA”), RCW 42.17A.

As the Opinion correctly notes, at page 18, note 7, none of the *amici* are themselves registered as a political committee. Because the result of overturning the portion of the Opinion that relates to the meaning and application of RCW 42.17A.455(2) could potentially be to require *amici* to register and report as a political committee, *amici* ask this Court to deny Petitioners’ request that this Court reverse the Court of Appeals’ ruling that RCW 42.17A.455 applies only for the purpose of determining whether the contribution limits set forth in RCW 42.17A.405 have been met, and not to the question of whether an entity meets the definition of “political committee” set forth in RCW 42.17A.005(37).

If the Opinion’s application of the attribution rule were to be reversed by this Court, all contributions made by union-sponsored PACs would hereafter be imputed to the unions themselves, thus increasing the apparent significance to those unions of these financial expenditures made in relation to electoral activity. This could make it substantially more likely that any union that has a PAC will potentially be obligated to register as a political committee and make the monthly disclosures that registration compels.

Reporting the entire union to the PDC as a political committee would mean, among other things, that unions and other labor organizations would have to disclose monthly the name and address of every contributor (i.e., dues-paying or non-member fee payer) who has paid more than \$25 to them, plus the occupation and employer of each member and fee payer who has paid more than \$100. It would also mean disclosing on a monthly basis each expenditure by the union or labor organization in excess of \$50.

Complying with these disclosure requirements not only imposes an extremely onerous bookkeeping and administrative burden on unions and other labor organizations, providing the name, address, occupation and employer of every person who pays dues or fees to such an organization, in the current political climate, also invades the privacy of those people without serving any useful social purpose.

The fear of incurring all of these requirements also burdens both the free speech rights of unions and their non-electoral and non-political activities. Imposing these requirements on a union or other labor organization, the majority of whose efforts are not put toward electoral political activity, serves no purpose enunciated in or protected by the FCPA, and the FCPA should therefore not be interpreted as imposing this obligation.

III. ARGUMENT

A. It Would Be Inconsistent with Supreme Court Precedent, the Intent of Initiative 134, and the Context of the Disputed Language, To Interpret RCW 42.17A.455 In The Manner Urged By Petitioners

Petitioners assert that the “plain language” of RCW 42.17A.455 requires that the attribution rules in subsections (1) and (2) be applied to determine whether an entity is required to register and report as a political committee. This reasoning is inconsistent with both the Supreme Court’s prior pronouncements regarding the obligation to register as a political committee and established standards for interpreting statutory language, both of which were addressed in *State v. (1972) Dan Evans Campaign Committee*, 86 Wn.2d 503, 546 P.2d 75 (1976) (“*DECC*”) – the first decision to apply the original Public Disclosure Act.

Relying on the “plain language” of RCW 42.17A.020(22), which defines as a political committee “any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or ballot proposition,” the complainant in *DECC* asserted that, because the Evans campaign committee had made a single contribution after the effective date of the PDA, it thereby became a political committee. *DECC* squarely rejected that argument, explaining that that “statutory provisions are interpreted in a manner so as to avoid

strained or absurd consequences which could result from a literal reading,” and “the spirit or intention of the law prevails over the letter of the law.” 86 Wn.2d at 508.

Reasoning from those premises, the court concluded that, even though the Evans campaign made an expenditure to support other candidates, it was not a political committee under the statute. After considering the “purpose of Initiative 276 as it relates to the basic function of persons who should be brought within the ambit of the term ‘political committee,’” the court concluded that an entity was only a political committee under the statutory definition if “the primary or one of the primary purposes of the person making the contribution is to affect, directly or indirectly, governmental decision-making by supporting or opposing candidates or ballot propositions.” *Id.* at 509

Instead of considering the underlying purpose of the statute, as prescribed by *DECC*, Petitioners rely for the most part on an inference that the attribution rules in RCW 42.17A.455 are intended to apply to the definition of political committee because the section begins with the words, “for the purposes of this Chapter.”

Because the section was not adopted by the Legislature, however, but through the Initiative process, this inference regarding legislative intent is not warranted. Where a statute was passed by initiative, the court

must determine the “intent of the electorate” from the language of the initiative itself, as well as from statements in the Voters Pamphlet. *State ex rel Evergreen Freedom Foundation v. WEA*, 140 Wn.2d 615, 636-37, 999 P.2d 602 (2000) (“*EFF v. WEA*”). As the 1992 General Election Voters Pamphlet reflects, there is not a single reference in the Voters Pamphlet to expanding the obligation of entities to register and report to the PDC as political committees. (Pamphlet available at https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/documents/1992%20general%20election.pdf.) Rather, the pamphlet focuses on the need to limit the size of contributions to candidates.

The Court in *EFF v. WEA* also emphasized that the court must “focus on the language of the initiative” as “the average informed voter would read it.” *Id.* In this case, there was nothing in the text of Initiative 134 to inform the average voter that the provision that is now RCW 42.17A.455 would impose new obligations to register as political committees.¹

In addition, the disputed provision was included as Section 6 of Part III of the Initiative. Part III is entitled “CONTRIBUTIONS.” The first section of Part III (which is designated Section 4) limits the amount

¹ Because the Initiative encompassed changes not only to RCW 42.17, but also to RCW 41.04, and the added provisions were not referenced by Title and Chapter, the average voter could not have determined to which “chapter” the opening clause of what was then Part III, Section 6 referred.

that can be contributed to candidates. Section 5 addresses attribution of contributions by family members. Section 6, which is at issue in this case, addresses attribution of contributions by controlled entities. Section 7 provides that “earmarked” contributions made through a third party are attributed to the original contributor. Although none of the sections expressly states that it is directed solely to determining whether contribution limits in Section 4 had been exceeded, that was the clear purpose of all sections in Part III of the Initiative.

Therefore, the context of the disputed provision, as well as the intent of the Initiative, as evidenced by the Voters Pamphlet and the language of the Initiative as a whole, indicate that the attribution rules in RCW 42.17A.455 relate only to contribution limits.

B. An Interpretation of the Attribution Rule Other Than That Adopted by the Opinion Below Would Lead to Strained or Absurd Results

Applying the attribution rules in RCW 42.17A.455 to determine whether the political committee’s sponsor is itself a political committee leads to strained or absurd results because those rules fail to consider *independent expenditures*, which make up a substantial and increasingly large portion of overall political expenditures.

Subsection 1 of RCW 42.17A.455 provides that “a contribution” by a political committee is treated as a contribution by the entity that funds

the political committee making the contribution. Subsection 2 provides that “all contributions” made by a local unit of a person or political committee controlled by another entity are considered made by the controlling entity. Nothing in RCW 42.17A.455 addresses independent expenditures.

Thus, under the analysis urged by Petitioners, although an entity whose political committee or affiliate makes *contributions* would have to include those contributions in determining its status as a political committee, the *independent expenditures* of the same political committees or affiliates would be disregarded in making that determination.

This is illogical on its face. The proper analysis, adopted by the Court below, is that RCW 42.17A.455 addresses only contributions, not independent expenditures, because Initiative 134 was aimed at limiting contributions, and the sponsor and its political committee share a common contribution limit. Because the Initiative imposed no limit on independent expenditures, there was no need for a rule attributing independent expenditures by a political committee to its sponsor.

This anomalous failure to consider both contributions and independent expenditures, or neither, in assessing whether an entity is or is not a political committee arises only when RCW 42.17A.455 is applied in the manner Petitioners propose. By contrast, applying the attribution rules

only to enforce contribution limits is completely consistent with the purposes of Initiative 134, and the context of the RCW 42.17A.455 language within the Initiative.

C. The Opinion Below Properly Avoids Exposing Labor Organizations to Substantial Uncertainty and Potential Litigation Expense and Discouraging Them from Engaging in The Free Speech Activity of Financing Their PACs

In *Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 111 Wn. App. 586, 600, 49 P.3d 894 (2002) (“*EFF*”), the Court of Appeals clarified the “primary purpose” standard outlined in DECC. It did so by establishing a rule that if “a majority of [an organization’s] efforts are put toward electoral political activity” the entity may be a political committee, notwithstanding its stated goals. If that threshold is not met, a labor organization that generally focuses its efforts toward advancing the economic interest of its members does not become a political committee by devoting substantial resources to a particular election. This framework provides a reasonable and workable guide to action for labor organizations.

A major goal of *amici* is to avoid the expense and uncertainty of litigation. For the most part, the *EFF* framework has avoided needless complaints and investigations by the PDC. The approach advocated for by the Petitioners threatens to trigger another round of expensive and time-

consuming disputes over “political committee” status of labor organizations.²

It also threatens to discourage unions and labor organizations from engaging in the constitutionally protected free speech activity of financing their own PACs. If the portion of the Opinion that is of issue here were to be reversed by this Court, unions and labor organizations would be chilled from exercising their free speech rights in this way out of fear of the disproportionate and unwarranted consequences that might follow. This Court should reject interpreting the FCPA in such a manner as to have these unintended and unwanted consequences.

IV. CONCLUSION

For the foregoing reasons, *amici curiae* ask this Court to reject Petitioners’ request that this Court reverse that portion of the September 16, 2013 opinion of the Court of Appeals that held that RCW 42.17A.455 does not apply to the definition of “political committee” set forth in RCW 42.17A.005(37) (pages 13-20 of the Opinion).

² WEA in particular is only too familiar with the fact that even the *risk* of being deemed a political committee under the standard set forth in the Opinion places it in an untenable situation. Although WEA was determined by this Court in 2002 to *not* be a political committee, the uncertainty created by the standard proposed by Petitioners would mean that WEA must weigh the risks of not registering and reporting as a political committee, although it very likely is not one even *under* the proposed new test, against the risk of potentially having to defend itself against yet another meritless, but extremely expensive and time-consuming, lawsuit such as the one that resulted in the 2002 *EFF* decision.

Respectfully submitted this 22nd day of April, 2014.



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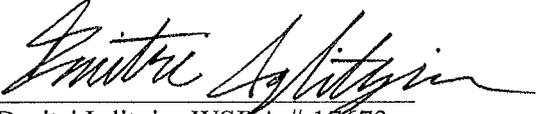
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2014, I caused the foregoing Brief of Amici Curiae to be delivered via email to the Supreme Court, and true and correct copies of the same to be delivered via legal messenger to:

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Good Morning,

Please find the attached Motion for Leave to File Brief of Amici Curiae, and proposed Brief of Amici Curiae, for filing in case number 89462-1. If you have any difficulty with the attachments please let me know. Thank you for your time and attention in this matter.

Sincerely,

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