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NO. 96604-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Respondent/Cross Petitioner.

**STATE OF WASHINGTON'S ANSWER
TO AMICUS CURIAE SEIU 775**

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I. INTRODUCTION

Like Grocery Manufacturers Association (GMA), Service Employees International Union (SEIU) 775 asks this Court to rewrite Washington State’s campaign finance disclosure laws for organizations that solicit and receive money from others to spend on Washington elections. The Court should decline.

Both GMA and SEIU 775 acknowledge, as they must, that Washington’s Fair Campaign Practices Act includes no language limiting its reach to organizations whose “primary purpose” is soliciting campaign contributions to support or oppose ballot measures. They ask this Court to amend the statute to add such a requirement, arguing that the statute would otherwise be unconstitutional. But they acknowledge that no court has ever so held. And engrafting a “primary purpose” test onto the contributions prong of the definition of “political committee” is not constitutionally necessary because the definition of “political committee” and corresponding disclosure requirements already apply only to those entities seeking to influence Washington’s elections. *See* State’s Answer at 13-18; State’s Suppl. Br. at 4-6. The State has a substantial, even compelling, interest in requiring such organizations to disclose their receipt of contributions to support or oppose ballot measures. *Cf. Human Life of*

Wash., Inc. v. Brumsickle, 624 F.3d 990, 1005-06 (9th Cir. 2010). No more is needed for the disclosure requirements to satisfy the First Amendment.

Moreover, if the Court adopted GMA and SEIU 775's proposed "primary purpose" test, it would create significant loopholes in the State's campaign finance laws that the voters and the Legislature never intended. *See* State's Suppl. Br. at 5-6. It would allow organizations to secretly solicit and amass significant political war chests for spending on campaigns in the State simply because the organization's general purpose was something other than electoral activity. Neither GMA nor SEIU 775 provide any legitimate basis for the Court to adopt their novel theory and, in effect, upend the State's longstanding policy of requiring "complete disclosure" of "all" information related to campaign financing. RCW 42.17A.001.¹ This Court should affirm the Court of Appeals on this issue.

II. ARGUMENT

Washington voters adopted the Fair Campaign Practices Act by initiative in 1972 with the goal of "fully" disclosing campaign contributions and expenditures to the public and avoiding "secrecy." RCW 42.17A.001(1). To further this goal, voters imposed reporting

¹ As noted in the State's previous briefs, the legislature significantly amended the Fair Campaign Practices Act in 2018, including recodifying many provisions relevant to this case. The State continues its practice of citing to the pre-2018 version of the law to remain consistent with the record and the Court of Appeals' opinion. A copy of the relevant laws is attached to the State's Petition for Review.

requirements on “political committees,” defined as organizations “having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005(37).

GMA and SEIU 775 ask this Court to rewrite this definition to allow an organization soliciting contributions from members or others to hide the true source of the funds if the organization does not have a primary purpose of electoral activity. But the Court should override the will of the voters and rewrite this definition only if the statute’s plain language would otherwise be unconstitutional. *Cf. In the Matter of the Detention of M.W.*, 185 Wn.2d 633, 647, 374 P.3d 1123 (2016) (party challenging a statute has the burden of proving its unconstitutionality); *State v. Johnston*, 156 Wn.2d 355, 363, 127 P.3d 707 (2006) (“a statute will be invalidated *only if* the court is unable to limit sufficiently its standardless sweep by a limiting construction.”). GMA and SEIU 775 have not met their heavy burden of showing that it would be unconstitutional to apply the statute as written to organizations “having the expectation of receiving contributions . . . in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005(37). No court has ever accepted their argument, and there is no good reason for this Court to do so.

A. Courts Have Already Established Who Qualifies as a “Political Committee” Based on Receiving Contributions

SEIU 775 first expresses concern that unless this Court rewrites the definition of “political committee,” organizations will be deemed political committees merely because of some link between the receipt of funds and later political expenditures. SEIU Br. at 3. This concern is misguided for at least three reasons.

First, SEIU 775’s concern is not implicated in this case. GMA undisputedly solicited contributions from its members for the express purpose of opposing Initiative 522, and thus should have registered and reported as a political committee. *State v. Grocery Mfrs. Ass’n*, 5 Wn. App. 2d 169, 189-90, 425 P.3d 927 (2018).

Second, and more broadly, SEIU 775’s concern is unwarranted because courts have already construed the “contributions” prong of the definition of “political committee” to explain when an organization has an expectation of receiving contributions to support or oppose a candidate or ballot measure. *See, e.g., Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 341 P.3d 953 (2015); *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 546 P.2d 75 (1976); *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n (EFF)*, 111 Wn. App. 586, 49 P.3d 894 (2002); *see also Brumsickle*, 624 F.3d at 1020. An organization has “the expectation of

receiving contributions” when its members have “actual or constructive knowledge that the organization is setting aside [the members’] funds to support or oppose a candidate or ballot proposition.” *Brumsickle*, 624 F.3d at 1020; *Utter*, 182 Wn.2d at 416-17. Courts have cited a number of examples of the type of conduct that can create an expectation under the test, including if the organization: (1) solicits contributions for a political purpose; (2) segregates funds for political purposes; (3) has organizational documents that indicate that it expects to receive political contributions and it has taken steps to implement that expectation; or (4) self-identifies to the Public Disclosure Commission as a political committee. *See Human Life of Wash., Inc. v. Brumsickle*, No. C08-0590-JCC, 2009 WL 62144, at *22 (W.D. Wash. Jan. 8, 2009)²; *see also Utter*, 182 Wn.2d 416-18.

In contrast, an organization generally will not have an expectation of receiving contributions if the organization’s members pay dues into a general fund not segregated in any manner for political expenditures. *EFF*, 111 Wn. App. at 603. In that instance, the members “would have had no actual or constructive knowledge that their membership dues would be used for electoral political activity.” *Id.* And the organization would have no expectation of receiving political contributions to support or oppose a

² The State relies on this unpublished federal district court opinion per GR 14.1(b) and FRAP 32.1. A copy of the opinion is attached as required under GR 14.1(d).

particular candidate or ballot measure, thus not qualifying as a political committee under the contributions prong. *Id.*

Accordingly, Washington courts have already made clear that the simple fact that an organization later spends money on electoral activity does not mean the organization qualifies as a political committee. Rather, only if a membership organization expects to receive contributions from its members or others to support or oppose a specific candidate or ballot measure does it become a political committee and have to report its electoral activities. *Utter*, 182 Wn.2d at 416-17.

Finally, if a previously non-political organization decides to engage in electoral activity in a limited way, it does not inevitably mean that the organization must become a “political committee.” If such an organization decided that it wanted to support candidates or ballot measures in the future, it would have several options that would protect the organization as a whole from having to register as a political committee. These include creating a separate entity to solicit contributions and make expenditures, or encouraging members to contribute directly to a candidate or ballot measure (rather than gathering money from its members to donate itself). These options would allow the organization to engage in the electoral process without hiding whose money is really being used to support or oppose a candidate or ballot measure. Meanwhile, if a situation unexpectedly arose

in which an organization felt it was imperative to spend money it had already received to support or oppose a ballot measure, it would not be required to register as a political committee under the “contributions” prong of the definition because at the time it took in the money it did not “hav[e] the expectation of receiving contributions . . . in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005(37). Thus, SEIU 775’s concern that the statute as written sweeps too broadly is inaccurate.

B. There is no Constitutional Need to Rewrite the Contributions Prong

Like GMA, SEIU 775 asks this Court to hold that it would be unconstitutional to apply the definition of “political committee” to organizations that expect to receive contributions to support or oppose candidates or ballot measures but that do not have political activity as a “primary purpose.” SEIU Br. at 4-10. But rewriting the statutory language of the contributions prong is unnecessary under the constitution and relevant case law. *See* State’s Suppl. Br. at 4-6.

Under the primary purpose test, “the support of a candidate or initiative must be ‘the primary or one of the primary purposes’ of a person expending funds for the State to subject them to regulation as a political committee based on their expected expenditures.” *Utter*, 182 Wn.2d at 425

(quoting (1972) *Dan J. Evans Campaign Comm.*, 86 Wn.2d at 509). Courts have employed this test to avoid two concerns: (1) ensnaring persons or entities that make a single expenditure from their own funds on political activities, see (1972) *Dan J. Evans Campaign Comm.*, 86 Wn.2d at 508-09, and (2) ensnaring persons or entities that expend funds in furtherance of issue advocacy unrelated to a specific candidate or ballot measure, see *Buckley v. Valeo*, 424 U.S. 1, 79, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). In these select instances, courts have expressed concern that the burdens of reporting as a political committee by those expending the funds would outweigh the governmental interests in additional disclosure. See *id.*³

No court has held that similar concerns apply to those meeting the contributions prong of the political committee definition. Indeed, to the State’s knowledge, no court has ever suggested that applying a primary purpose requirement to those entities soliciting or receiving political contributions would be constitutionally necessary to satisfy exacting scrutiny.⁴ Any constitutional concern that the campaign finance laws would

³ In the first instance, the organization’s expenditure of its own funds would be publicly disclosed through the receiving political committee’s campaign finance reports. RCW 42.17A.235 (requiring reporting of all contributions received). In the second instance, the expenditure would be unrelated to any specific electoral campaign. See *Buckley*, 424 U.S. at 79.

⁴ SEIU 775 erroneously asserts that the *Brumsickle* court analyzed the primary purpose test in terms of Washington’s entire definition of “political committee.” SEIU 775 Br. at 6. Only the “expenditure prong” was at issue in that case. *Brumsickle*, 624 F.3d at 997.

unfairly sweep in those who only incidentally engage in electoral activity is not present for those expecting to receive political contributions. *See* State’s Suppl. Br. at 4-6. An organization soliciting contributions from others specifically to support or oppose a candidate or ballot measure has made a conscious choice to engage in the political process in a way that raises serious transparency concerns if no disclosure is required, and where there are other ways the organization could achieve the same goals (described above) that would not pose the same threat to transparency. *See* State’s Suppl. Br. at 4-6. Organizations that solicit contributions and become political committees under the “contributions” prong are thus meaningfully different from entities that might occasionally have reason to make limited, incidental expenditures related to electoral campaigns.

Ultimately, the Fair Campaign Practices Act “seeks to ferret out . . . those whose purpose is to influence the political process” and ensure their activities are “fully disclosed.” (1972) *Dan J. Evans Campaign Comm.*, 86 Wn.2d at 508; RCW 42.17A.001(1). Narrowing the scope of the contributions prong of the political committee definition, as GMA and SEIU 775 ask here, would defeat these goals and is simply not necessary to satisfy the Constitution.

C. Extending the Primary Purpose Test to the Contributions Prong Would Defeat the Purpose of Disclosure

Adopting SEIU 775 and GMA’s test for receivers of contributions would create significant loopholes in the State’s campaign finance laws and defeat the purpose of disclosure. Under their theory, a large organization could solicit millions in political contributions from individuals or businesses and then use that money to support or oppose candidates or ballot measures in Washington without ever disclosing the true source of the funds so long as the organization was so large that electoral activity was not one of its “primary purposes” (an easy argument to imagine, for example, with a multinational corporation). Yet, at the same time, a small grassroots organization raising money for the same purposes would be subject to the laws. Creating such variances makes no sense, especially given the purpose of the law in requiring “*complete disclosure of all* information respecting the financing of political campaigns[.]” RCW 42.17A.001 (emphases added).⁵

Courts have repeatedly emphasized the voters’ right to receive information about who is spending money to influence their votes, as well as the need for transparency in the political sphere. *E.g., Voters Educ.*

⁵ The Ninth Circuit noted the same when rejecting the argument that the definition of “political committee” was not narrowly tailored to Washington’s informational interests because it applied to more organizations than just those whose single primary purpose is political advocacy. *See Brumsickle*, 624 F.3d at 1011.

Comm. v. Pub. Disclosure Comm'n, 161 Wn.2d 470, 498, 166 P.3d 1174 (2007); *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974); (1972) *Dan J. Evans Campaign Comm.*, 86 Wn.2d at 508. Courts have also recognized that disclosure requirements provide voters important information about who is funding efforts to sway their votes, while also enabling contributors to follow how their own monetary contributions are being spent. *Brumsickle*, 624 F.3d at 997, 1005-08; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370-71, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). Allowing organizations with an expectation of receiving political contributions to avoid public scrutiny simply because they are not “fundamentally a political organization” would defeat all of these well-recognized benefits of disclosure. *See* SEIU Br. at 8.

In comparison, requiring entities that satisfy the State’s political committee definition to disclose the true source of their funds imposes “minimal, if any, organizational burdens.” *See Brumsickle*, 624 F.3d at 1014. While SEIU 775 claims these requirements are “tantamount to [the required] disclosure of a membership list,” SEIU Br. at 9, this generalization is inapt for most organizations. A “political committee” is only required to disclose those members contributing to support or oppose a candidate or ballot measure. *See* State’s Answer at 11, 15-16. Only if every member contributed to the organization for those purposes would the

organization be required to disclose its entire membership. *EFF*, 111 Wn. App. at 603. And if an organization was concerned about the organization as a whole becoming a political committee, it could always create a separate entity to solicit political contributions and make such expenditures, as described above. Thus, SEIU 775's rationale for imposing a primary purpose test on receivers of contributions does not bear any weight.

D. There is no Blanket First Amendment Right to Anonymity in Campaign Contributions

Finally, contrary to SEIU 775's suggestion, there is no blanket First Amendment right to anonymity in campaign contributions. *See Buckley*, 424 U.S. at 74; *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 299-300, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981) ("The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions."). Rather, if an entity resists disclosure of its members' contributions based on an "uncontroverted showing" of threats or reprisal, *Buckley*, 424 U.S. at 69, courts apply the same exacting scrutiny as for all state disclosure laws. *See Citizens United*, 558 U.S. at 369-71; *John Doe I v. Reed*, 561 U.S. 186, 200-01, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). At least as to how the State's campaign finance laws apply to GMA in this

case, the State's compelling interests in disclosure and preventing concealment outweighs GMA's interest in anonymity here. *See* State's Suppl. Br. at 8-11.

III. CONCLUSION

SEIU 775 asks this Court to adopt a primary purpose test for receivers of contributions that is constitutionally unnecessary and that would defeat the purpose of the State's disclosure laws in providing transparency. For the reasons stated here and in the State's briefs on the merits, this Court should decline.

RESPECTFULLY SUBMITTED this 9th day of October, 2019.

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