No. 89462-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

vs.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

PETITIONER'S REPLY TO PETITION FOR REVIEW AND RESPONSE TO CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

Respondent and Cross-Petitioner Building Industry Association of Washington ("BIAW") asks this Court to deny the Petition which seeks this Court's review of whether the Court of Appeals' interpretation of RCW 42.17A.765 (4) results in the abolition of the vitally important citizen's suit provision of the Fair Campaign Practices Act ("Act"). Petitioners Justices Utter and Ireland ("Justices") establish here that the BIAW:

(1) Relies on a misguided reading of the term "commence an action" to include the mere act of the Attorney General starting an investigation of a claimed violation of the Act, when the actual language of the Act makes it clear that "commence an action" means initiate a lawsuit;

(2) Misreads the contrary authority, *Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586 (Div. II 2002)("WEA")(finding there is no "investigatory exclusion" in the Act), a case the Court of Appeals' decision fails to even cite;

(3) Continues to argue the factually discredited notion (which was unfortunately adopted by the Attorney General in failing to bring an enforcement action against the BIAW and by the Court of Appeals) that it was the BIAW-MSC, not the BIAW, who controlled the use of

Marketing Assistance Fees ("MAF") to make campaign contributions to Republican gubernatorial candidate Dino Rossi. This assertion was flatly rejected by the recent holding of the Court of Appeals (Div. II) which found that the MAFs became the property of the BIAW, not the BIAW-MSC. See *In Re Washington Builders Benefit Trust*, 173 Wn. App. 34 (2013), review denied, 2013 Wash.LEXIS 521 (July 9, 2013) ("In re WBBT");

(4) Asks this Court to accept at face value the BIAW's bald assertion that it was merely a "clerical error" in a tax form referring to the BIAW as expending campaign funds on the issue of whether the BIAW qualified as a "political committee" (expenditure prong) when in fact this assertion is hotly contested and for the trier of fact;

(5) Claims that it is entitled to an award of attorneys' fees because the trial court abused its discretion in not awarding it fees even though the Justices brought this action in good faith and prevailed on the merits of their central claim in the Court of Appeals that the BIAW acted as a political committee.

For these reasons the Petition should be granted and the Cross Petition denied.

II. THE CLEAR LANGUAGE AND UNDERLYING POLICY OF THE ACT DISPELS ANY NOTION THAT THE TERM 'COMMENCE AN ACTION' REFERS TO ANY ACT

UNDERTAKEN BY THE ATTORNEY GENERAL IN INVESTIGATING A CLAIMED VIOLATION OF THE ACT OR REFERRAL OF SUCH CLAIM TO THE PDC

The BIAW repeats the same fundamental errors of the Court of Appeals by attempting to read the Act as precluding a citizen suit if the AG merely takes the administrative step of investigating the complaint through referral to the Public Disclosure Commission ("PDC"). The BIAW completely ignores the fact that the Act itself uses the words "commence an action" and "action" as meaning a lawsuit, not an investigation. The BIAW is silent on how its definition of "action" as including a mere investigation by the AG, can be squared with the provisions of the very same Act which states the statute of limitations for "any action brought under the provisions of this act" (See Initiative 276 Section 41) and Section 5 authorizing the recovery of attorney fees in "any action" brought under this Section. There is no statute of limitations for an "investigation" by the AG, nor can attorney's fees be awarded in such an investigation. Nor does the BIAW address how the policy of liberally construing the terms of the Act, including "commencing an action" to effectuate its underlying goals and purposes, is in any way advanced by such a constrained construction.

Because this important issue was decided *sua sponte* by the Court of Appeals without the benefit of the parties' briefing and analysis, the

Justices were unable to advance the policy reasons why defining "failed to commence an action" means failed to file a lawsuit, could not explain how the rules of statutory construction favor their interpretation of these terms, and could not point out the fact that the Court of Appeals, Division II had already ruled that there is no "investigative exclusion" which bars citizens action. This would be the first court, at least in this case, to take briefing and hear arguments on this vitally important issue. The Petition should be granted for this reason alone.

The BIAW cannot in good faith dismiss the notion that the Court of Appeals interpretation of the Act would, if carried to its logical conclusion, bar all citizen actions other than in the extremely unlikely event that the AG announced that it was not going to even investigate the complaint or refer it to the PDC. Such a rule would end citizen's actions to redress campaign violations.

Such a result is completely contrary to the policy and purposes of the Act itself. Although the BIAW makes a half-hearted attempt to distinguish the *WEA* case cited by the Justices, but ignored by the Court of Appeals, such efforts fail miserably. The *WEA* case stands for the proposition the *Utter* Court of Appeals decision rejected: "We do not intend to imply that the AG's customary referral to the PDC for initial review and investigation precludes a citizen's action." *WEA*, 119 Wn.

App. at 452. The BIAW is silent on how this holding can be squared with the *Utter* Court of Appeals holding that a citizen's suit is forever precluded if the AG merely undertakes "any of the actions authorized under RCW 42.17A.765." Published Opinion Para. 44. Such a ruling guts the citizen's suit provisions because there are many steps the AG is authorized to take under the Act.

The BIAW attempts to distinguish the facts of these two cases, stating the undeniable fact that the AG did NOT bring a lawsuit against the BIAW after initiating a PDC investigation. The BIAW ignores the fact that this investigation was flawed because the PDC accepted at face value the BIAW's assertion that it was the BIAW-MSC, not the BIAW, which controlled the MAFs, solicited the campaign contributions, and made the suspected expenditures.

This is why the *In re WBBT* case is so important in this context. That case held that it was the BIAW who received the MAFs from the state through the WBBT trustees. That case was fully litigated in our adversarial system, with depositions, written discovery, and a trial, none of which occurred during the PDC investigation of the Utter complaint as to the BIAW. The BIAW fails in its attempt to distinguish this case on the facts and legal theories advanced in each. But as to the key factual assumption of both the PDC and the Court of Appeals (that it was the

BIAW-MSC who solicited and made the expenditures during the Rossi campaign) the *In Re WBBT* case resolves this key factual controversy in favor of Petitioners here. The MAFs went to the BIAW.

But the failure of the AG to commence an action in this circumstance is precisely the reason citizen actions are so important to retain: sometimes investigations are flawed; sometimes the political branches of government, for whatever reason, are unwilling to bring campaign finance enforcement actions; sometimes the political will to act is lacking. The Act leaves it up to the citizens, through their access to justice in the courts, to prosecute the claim when the AG elects not to file suit.

The BIAW claims that the provisions of RCW 42.17A.765 (4) support the Court of Appeals ruling. But this section says nothing about when citizen suits may be brought or not. It merely defines the kinds of steps the AG is authorized to undertake under the Act. These include bringing a civil enforcement action, investigating activities of any person, requiring such person to appear and give information under oath, issuing an order setting the time and place attendance is required, etc. Surely a citizen's action cannot be precluded by the AG merely issuing an Order for attendance of a person. Yet it was the Court of Appeals ruling that such a result would be "logical" and preclude citizen

enforcement. See Slip Opinion at p. 27. Unfortunately, the Court of Appeals failed to analyze or even cite the *WEA* decision, which is clearly contrary to such a ruling. It is precisely because of the division of authority in these two divisions of the Courts of Appeals that Supreme Court review is justified. Otherwise a citizen suit would be allowed in one part of this state (Division II) but precluded in another (Division I) where the AG investigates a claimed violation but does not prosecute it. Such a result cannot stand.

III. AN ISSUE FOR THE TRIER OF FACT IS PRESENTED AS TO WHETHER THE BIAW ITSELF, AND NOT SOLELY THE BIAW-MSC, WAS A POLITICAL COMMITTEE UNDER BOTH THE CONTRIBUTION AND EXPENDITURE PRONGS.

The BIAW urges this Court to accept as gospel the disputed factual assertions that have been central to the BIAW's defense of the action from the outset. "Trust us, it wasn't the BIAW doing all of these fundraising, solicitation and expenditure activities, it was the BIAW-MSC." But the worn out nostrum "trust us" is not evidence, particularly when the overwhelming body of evidence, summarized in the Petition for Review, supports the conclusion that it was the BIAW, not merely its subsidiary, who solicited, received, and expended campaign contributions in its name. The more apt notion is this one: "Tell it to the

trier of fact." That is what trials are for, to separate fact from fiction, a search for the truth.

Nothing bring this adage home more than the BIAW's assertion in its Response that it was a mere "clerical error in a tax form" that the Court of Appeals relied upon in finding that a genuine issue of triable fact exists on whether the BIAW, as the BIAW, was a political committee. The Court of Appeals was right. This is for the trier of fact. A trier of fact could believe that the original tax filing was not a clerical error and that the subsequent "correction" (undertaken after Petitioners had filed this action) was an effort to escape liability for a campaign finance violation, i.e. a cover-up. This issue comes to this Court on a bare record, devoid of any factual development. No depositions of the person filing in this form were taken. No cross examination or impeachment under oath of such a witness has taken place. That is precisely what a citizen's suit provision is all about. It allows the citizen and the judicial branch of government to test the recollections, excuses, minimizations, denials, and obfuscations of a purported violator of campaign finance laws in a court of law, when the political branches are unable or unwilling to do so.

The same can be said of the BIAW's argument that "everyone knew" the contributions were being made to the BIAW-MSC, not the

BIAW. See Petition at p. 16. Tell it to the trier of fact. The same is true of the BIAW's denial that the BIAW controlled the MSC and is therefore liable under the "attribution rules." See Petition at pp 17-20. RCW 42.17A.455 (2) would make BIAW the contributor of campaign funds if it financed, maintained, or controlled the contribution and the same result would obtain under RCW 42.17A.460 if BIAW made the contribution through a conduit (e.g. the MSC) but earmarked the contribution for a particular purpose. This issue presents a question for the trier of fact. The Court of Appeals simply got it wrong by holding that these attribution rules apply to identifying the contributor for purposes of contribution limits, not whether that contributor is a political committee. For these reasons Review by this Court is needed to clarify the law.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FEES TO THE BIAW AS THE COURT OF APPEALS HELD.

The BIAW attempts to muddy the waters by making outlandish claims about the Petitioners' deposition of Dino Rossi and the Justices' alleged "political" motivation in bringing their citizen suit as a basis of seeking fees. See Response at pp. 2, 4, and 5. Suffice to say that it was King County Superior Court Judge Paris Kallas who ordered the deposition of Dino Rossi to go forward prior to the election despite the

"hundreds of pages" of pleading filed by the BIAW and Dino Rossi's counsel in opposing such a deposition. The BIAW neglects to inform the Court of this fact. Neither the trial court nor the Court of Appeals abused its discretion in pointing out that the alleged political motivation of the Justices is irrelevant in determining whether there was a reasonable basis for bringing this action. This lawsuit is not "frivolous," i.e. unsupported by any rational argument. *See Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986). The Court of Appeals, in both their unpublished and published opinions, found this lawsuit was not frivolous when it held that there were genuine issues of material fact which precluded summary judgment on the issue of whether the BIAW acted as a political committee as alleged by the Justices. The Cross-Petition fails to meet the abuse of discretion threshold. *See Highland School Dist. No. 203 v. Racy*, 149 Wn. App 307, 312, 202 P.3d 1024 (2009). For these reasons and the reasons stated by the Court of Appeals at pp. 30-32 of its Slip Opinion, the Cross-Petition should be denied.

V. CONCLUSION

The continued viability of the Fair Campaign Reporting Act is of great public interest and importance in this state. It is at stake in this

case. In this day of continued and heightened concern about the impact of wealthy and powerful corporations (a description that clearly applied to the BIAW in the past decade) on political campaigns and the elective process, it is hardly time to turn our backs on what the vast majority of this state's voters enacted into law in 1972 with Initiative 276. The right of citizens to challenge illegal campaign practices was a centerpiece of this Initiative and the legislation that followed. It should not be abandoned.

Our system of government is built on checks and balances. These constraints on executive enforcement powers would be a chimera were an empowered citizenry unable to petition the courts of this state for a redress of those grievances in the funding of political campaigns. Where the political branches of government, for whatever reason, were unwilling or unable to prosecute, the citizens and the courts have that power and right. By definition, a citizens' suit provision should be allowed where the AG fails to bring a suit to redress an alleged violations. The fact that such a citizen's suit is brought in the name of the State is not, as the Court of Appeals erroneously held, a reason to disallow it where the AG has found no cause to file it. Rather it is brought in the name of the State because the voters in 1972 believed it should rise to the dignity and honor of that title. By abolishing the

citizen's suit remedy except if the AG failed to even investigate a citizen's complaint, the Court of Appeals struck a harsh blow at the entire legislative scheme of addressing campaign finance violations. The Petitioners ask this Court to right this wrong, resurrect the vitality of the citizen's suit provision in the enforcement of this crucial law, and grant this Petition for Review.

RESPECTFULLY SUBMITTED this 27th day of November, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on November 27, 2013, I caused PETITIONER'S REPLY TO PETITION FOR REVIEW AND RESPONSE TO CROSS-PETITION FOR REVIEW to be served in the above-captioned matter upon the parties herein via hand delivery:

Harry J. F. Korrell
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Stated under oath this 27th day of November 2013

/s/ AJ Rei-Perrine
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Dear Supreme Court Clerk:

Please find Petitioner's Reply in the above-captioned matter attached.

Best,
AJ

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