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No. 93306-5

(Court of Appeals Case No. 46797-6-II)

IN THE WASHINGTON SUPREME COURT

SEIU HEALTHCARE 775NW,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

FREEDOM FOUNDATION,

Respondent.

RESPONDENT FREEDOM FOUNDATION'S RESPONSE OPPOSING PETITIONER'S MOTION TO ALLOW ADDITIONAL EVIDENCE ON REVIEW

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I. IDENTITY OF MOVING PARTY

Respondent Freedom Foundation ("the Foundation" or "Respondent") hereby responds in opposition to Petitioner's Motion to Allow Additional Evidence on Review.

II. STATEMENT OF RELIEF SOUGHT

Respondent Freedom Foundation respectfully requests that this Court deny Petitioner's Motion to Allow Additional Evidence on Review.

III. STATEMENT OF RELEVANT FACTS

SEIU 775 ("SEIU," "Petitioner," or "Appellant") filed the current lawsuit under RCW 42.56.540, seeking to enjoin the Freedom Foundation ("Foundation" or "Respondent") from obtaining nonexempt public records from the Department of Social & Health Services ("DSHS" or "State"). Specifically, the Foundation requested the names of Individual Providers, publicly-funded workers who care for disabled or elderly patients in the patients' homes and who are grouped into a single statewide bargaining unit represented by SEIU. The Foundation's sole purpose in seeking and obtaining the list of Individual Providers is to inform them of their constitutional rights recently articulated by the U.S. Supreme Court in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). That ruling held that the First Amendment prohibited the imposition of mandatory union fees upon

home care workers in Illinois (substantially identical to Washington's Individual Providers).

SEIU robustly objects to this attempt to inform its represented workers of their rights, as the instant case makes clear. The primary legal attack it has waged on the Foundation's request is that the Foundation has requested the list of Individual Providers for a commercial purpose, which is prohibited by RCW 52.56.070(9). It lost at the trial court. It then lost at the Court of Appeals. Now it seeks discretionary review from this Court. SEIU filed the instant motion on June 29, 2016. For the reasons below, the motion should be denied.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Introduction & Standard of Review.

SEIU requests that it be permitted to add ten (10) additional documents into the record to support its "commercial purpose" argument. Allowing additional evidence on review is an extraordinary remedy, and this Court should deny Petitioner's motion because it fails to meet all six conditions of RAP 9.11. However, even if this Court allows this additional evidence on review, it is not the smoking gun SEIU hopes. The Court of Appeals already considered as true and yet rejected the very allegations SEIU now attempts to "support" with this additional "evidence." SEIU mischaracterizes the Court of Appeals' ruling by suggesting that an

augmented record would change the outcome. It will not. SEIU also persists in its attempt to force an interpretation upon "direct" that is anything but.

An appellate court may accept additional evidence on review "only if all six conditions [of RAP 9.11(a)] are met[.]" *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 884, 665 P.2d 1337, 1342 (1983). *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741, 747 (2003) ("This court requires that six conditions be met before we will take additional evidence on review. RAP 9.11(a)."). RAP 9.11(a)'s requirements are as follows:

> 1) Additional proof of facts is needed to fairly resolve the issues on review;
> 2) The additional evidence would probably change the decision being reviewed;
> 3) It is equitable to excuse a party's failure to prevent the evidence to the trial court;
> 4) The remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive;
> 5) The appellate court remedy of granting a new trial is inadequate or unnecessarily expensive; and
> 6) It would be inequitable to decide the case solely on the evidence already taken in the trial court."

RAP 9.11(a). The Court of Appeals correctly noted that "RAP 9.11 allows an appellate court to take additional evidence if, among other requisite factors, additional proof of facts would fairly resolve the issues on review and *if additional evidence would probably change the decision*." *Sackett v.*

Santilli, 101 Wn. App. 128, 136, 5 P.3d 11, 15 (2000), aff'd, 146 Wn.2d 498, 47 P.3d 948 (2002) (emphasis added). Indeed, even if additional evidence is illustrative of the arguments pressed by the moving party, the evidence should not be admitted unless it would affirmatively change the decision. *See Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 613, 62 P.3d 470, 477 (2003).

B. The Decision Below.

To properly determine whether to admit additional evidence on review, this Court should first determine whether the new evidence would alter the decision issued by the courts below. The April 16, 2016 Published Opinion by the Court of Appeals was the first time a Washington appellate court has interpreted the commercial purpose provision in RCW 42.56.070(9). *SEIU Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, No. 46797-6-II, 2016 WL 1447304, at *8-14 (Wash. Ct. App. Apr. 12, 2016).[1] In its instant Motion, SEIU provides an incomplete explanation of the Court's analysis and test. *See* Appellant's Motion to Allow Additional Evidence ("SEIU Mot.") at 6.

In the process of statutory construction, the Court concluded that the commercial purpose prohibition must be interpreted like every other PRA exemption: in favor of disclosure. *Id.* at *10. To reach its adopted

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[1] Respondent/ will cite to the decision as published in Westlaw's database.

definition, the Court consulted dictionary definitions of "commercial" as well as several Attorney General Opinions construing RCW 42.56.070(9). The Court further determined that a requestor must intend to profit (or generate revenue/financial gain) *from the direct use of the list it is requesting*. *Id.* at *11-12 ("If indirect benefits are considered, a wide range of requests might fall within the commercial purposes provision and the policy of full disclosure of public records would be thwarted. In addition, a comment in the 1975 AGO opinion supports the Foundation's position. The AGO stated: "Where the requester's potential commercial benefit is remote and ephemeral and there is a clear purpose other than commercial benefit, the statute does not prohibit supplying the information in list form."[12] 1975 Op. Att'y Gen. No. 15, at 13.").[2] Ultimately, the Court defined "commercial purpose" as ***the intention "to generate revenue or financial benefit from the direct use of the lists."*** *Id.* at *13 (emphasis added). Only that type of commercial purpose triggers the prohibition on disclosure of public records under RCW 42.56.070(9).

The Court then applied its definition to various claims SEIU pressed about the Foundation's alleged commercial intent. *Id.* at *13-14. Notably, the claims the Court of Appeals assessed were the very claims SEIU now

[2] SEIU continues to press its commercial purpose argument by ignoring—as it must—this reasoning adopted by the Court of Appeals. SEIU Mot. at 11.

seeks to support with this additional "evidence." *See* SEIU Mot. at 5.[3] First, the Court addressed the allegation that the Foundation's use of the list is commercial because it will economically injure SEIU. *Id.* at *13.

> First, SEIU [775] argues that the Foundation's actions will economically injure SEIU, including by decreasing SEIU's membership and funds. SEIU suggests that this use constitutes a commercial purpose because the Foundation perceives SEIU as an "economic competitor." Economically injuring SEIU would not directly generate revenue or financial benefit for the Foundation. Even if SEIU ceases to exist there will be no direct financial benefit to the Foundation. Therefore, economically injuring SEIU does not fall within the definition of "commercial purposes" that we adopt above. We decline to hold under the facts of this case that a nonprofit entity decreasing the revenue of another nonprofit entity is a type of commercial purpose under RCW 42.56.070(9).

Id. at *13. The Court also applied the test to the appellant's allegation that the Foundation will increase its own membership and funds from its use of the records. *Id.* at *14.

> Second, SEIU argues that the Foundation's actions will increase the Foundation's membership and funds. However, SEIU does not explain how contacting the individual providers would directly increase membership or donations. The Foundation emphasizes that it will not solicit donations from the individual providers. There also is no indication that the Foundation will ask individual providers to become Foundation members. SEIU argues that the Foundation fundraises by

[3] SEIU continues to argue that the commercial purpose prohibition bars the Foundation's access to records because, SEIU claims, the Foundation seeks the records to: "1) economically injure SEIU, which it apparently perceives as an economic competitor; 2) increase its own membership and revenues; and 3) decrease the membership and funds of SEIU 775, among other purposes." SEIU Mot. at 5. SEIU tacitly concedes the nonsensical character of the allegation that the Foundation "apparently perceives [SEIU] as an economic competitor" by never explaining how that is so. Never.

> broadly publicizing its goal to defund SEIU and therefore attacking SEIU may generate donations. However, SEIU does not explain how merely obtaining the lists and contacting the individual providers will cause others to join the Foundation or donate money to the Foundation. Any such a benefit is too attenuated to constitute a commercial purpose.

Id. Notably, SEIU argues that the Court of Appeals' application of the test should be overturned because its new evidence demonstrates "both that the financial gain to the Foundation from its intended use of the list is direct, and it evidences how the Foundation will use its efforts to obtain the lists and contact IPs to request and encourage individuals to donate money to the Foundation." SEIU Mot. at 11-12. But this is the same old argument with the same fatal flaws. In briefing below, SEIU made identical arguments, insisting that the Foundation's

> intent is [] clearly 'commercial' insofar as it . . . economically benefit[s] itself by providing it a means to fundraise both from the IPs directly and from past donors, other entities and the public at large by publicizing its efforts to 'defund' SEIU and public sector unions generally through contacts with the thousands of IPs."

Brf. of Appellant SEIU 775 at 33, *SEIU 775*, *available at* https://www.myfreedomfoundation.com/sites/default/files/documents/legal/SEIU775-APP-BRF.pdf (last visited July 26, 2016). And importantly, as SEIU's counsel pointed out below, the case was before the Court of Appeals on "essentially a CR 12(b)(6) standard" because the trial court decided to accept all of SEIU 775's allegations as true. *Id.* at 32.

The Court of Appeals affirmed the trial court's decision to accept all of SEIU's allegations as true, *SEIU 775*, at *8, and the Court of Appeals then treated SEIU's allegations as true when assessing them in the context of the commercial purpose test it crafted. *Id.* at *13-14. Both courts below "resolved" any factual deficiencies by assuming the truth of SEIU's allegations and instead rejected its commercial purpose argument as a matter of law. *Id.* at 8, 13-14.

As the Court of Appeals correctly concluded:

> the Foundation's stated purpose in requesting the lists is to correspond with the individual providers and notify them of their constitutional right to refrain from union membership and fee payments. Notifying individuals of their constitutional rights *does not directly involve the generation of revenue or financial benefit*. As the trial court noted, this purpose appears to be political rather than commercial.

SEIU 775, at *13 (emphasis added). Any financial benefit SEIU speculates the Foundation may receive as a result of informing individuals of their constitutional rights is *not direct* because informing individuals of their constitutional rights "does not directly involve the generation of revenue or financial benefit." *Id.* SEIU's arguments failed as a matter of law—not for lack of supporting evidence.

Importantly, the Court of Appeals identified the facts it considered material to its decision:

> Our holding is expressly based on the Foundation's repeated

> representations that it will not (1) attempt to solicit money or financial support from the individual providers, (2) attempt to make individual providers aware of business commercial entities in their area, or (3) supply the names of individual providers to any business, third party individual, or any other entity.

SEIU 775, at *14, n. 14. Those facts have not changed, and none of SEIU's proposed new "evidence" alters those facts. According to SEIU, itself, this evidence merely supports the same allegations they levied and the courts considered and rejected below. See SEIU Mot. at 5.[4]

C. SEIU cannot satisfy the requirements of RAP 9.11(a).

In reality, SEIU opposes the legal conclusion (definition of commercial purpose provision in RCW 42.56.070(9)) adopted by both courts below. Therefore, it does not need new evidence to support facts irrelevant to those legal conclusions. Rather, to succeed, it needs to change those legal conclusions. This new evidence is unnecessary because it will not change the purely legal conclusions of the courts below.[5] And even if

[4] "SEIU 775 requests that this Court permit the record in this case to be supplemented ... because those documents, which did not exist when the instant dispute was pending before the trial court, are relevant to one of the key questions presented in this case: whether RCW 42.56.070(9) bars disclosure of a list of IP names to the Foundation where the Foundation seeks the list to: 1) economically injure SEIU, which it apparently perceives as an economic competitor; 2) increase its own membership and revenues; and 3) decrease the membership and funds of SEIU 775, among other purposes."

[5] The Court of Appeals concluded that all of the various allegations SEIU levied about the Foundation's commercial intent could—at best only constitute indirect or "attenuated" benefits. *SEIU 775*, at *14 ("SEIU does not explain how merely obtaining the lists and contacting the individual providers will cause others to join the Foundation or donate money to the Foundation. Any such a benefit is too attenuated to constitute a commercial purpose... SEIU may be arguing that informing the individual providers of

admitted, this new evidence cannot change the legal conclusions reached by the Court of Appeals and the trial court. *See Hotel Employees & Rest. Employees, Local 8 v. Jensen*, 51 Wn. App. 676, 690, 754 P.2d 1277, 1286 (1988) (accepting new evidence on review but concluding it was immaterial to the issues on appeal). But that begs the question: if the evidence SEIU seeks to admit is completely immaterial to the actual question this Court would have to address on discretionary review, why allow its admission at all? *See Retired Pub. Employees Council*, 148 Wn.2d at 613 (2003)

SEIU cannot satisfy the first, second, or sixth requirements in RAP 9.11(a). First, this additional evidence is not needed to fairly resolve the issues on review because the courts below have already assumed the truth of the facts this additional evidence seeks to establish. *See* RAP 9.11(a)(1). Second, this additional evidence would not (and cannot) change the purely legal decisions of the courts below on the commercial purpose question again because those courts ruled against SEIU as a matter of law, assuming the truth of the facts this additional evidence seeks to prove. *See* RAP 9.11(a)(2). As to the sixth element, SEIU cannot possibly

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their political views will cause the individual providers or others to join the Foundation or donate money to the Foundation. But such a benefit is too attenuated to constitute a commercial purpose."). SEIU's allegations did not fail for lack of evidence; they failed because even if 100% true, they do not constitute an intent to financially benefit from the *direct* use of the lists.

demonstrate any inequity if this Court decides the case on the existing record because both courts below considered all of their factual allegations true. *See* RAP 9.11(a)(6). SEIU was given every benefit of the doubt as to their factual allegations. Petitioner's difficulty lies with the law, not the facts. SEIU fails to meet the requirements of RAP 9.11(a), and its additional evidence should not be accepted on review.

SEIU likely also fails to satisfy the third requirement in RAP 9.11(a), which requires that it be "equitable to excuse a party's failure to present the evidence to the trial court[.]" RAP 9.11(a)(3). While it is true that the ten documents SEIU now asks this Court to admit on review were not published or extant until after the conclusion of the trial court proceedings below, SEIU could have requested that the Court of Appeals admit nine (9) of ten exhibits before that court issued its decision on April 16, 2016. Only one document, dated May 2, 2016 (Exhibit J to the Declaration of Dmitri Iglitzen), was created after the Court's published opinion. SEIU could have submitted this motion to the Court of Appeals, but it did not. If this additional evidence so significantly supports SEIU's commercial purpose argument, surely it would have acted to admit it into the record under consideration by the first appellate court to interpret RCW 42.56.070(9). But it did not do so. SEIU relinquished any equitable argument it might otherwise possess by failing to present this motion to

the Court of Appeals. But those equities never existed in the first place, because the lower courts both accepted SEIU's allegations as true. SEIU fails to satisfy RAP 9.11(a)(3).

This evidence is unlikely to change the outcome of the appeal. If the Court accepts review of the Court of Appeals' decision on the commercial purpose provision in RCW 42.56.070(9), it will be reviewing the legal conclusions of the lower court. Admission of this evidence does nothing to facilitate that consideration. SEIU fails to satisfy RAP 9.11(a)'s requirements for the same reason the evidence would be immaterial, even if admitted. SEIU's motion should therefore be denied.

The Court of Appeals accurately recognized that "One of the Foundation's central purposes is to educate public employees, including the individual providers, about their constitutional rights to drop their membership in and payment of fees to public sector unions." *SEIU 775*, at *1. The Foundation requested the instant public records solely to advance that purpose. SEIU is determined to frame this purpose as a commercial endeavor because that is the only possible (though implausible) means of stopping the Foundation's work. The question before the Court is whether to admit SEIU's additional evidence, and for the foregoing reasons, it should not.

V. CONCLUSION

Based on the foregoing, the Foundation respectfully requests the Court deny Appellant's Motion to Allow Additional Evidence on Review.

Respectfully submitted on August 1, 2016.

FREEDOM FOUNDATION

By: ______________________

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 1, 2016, I delivered a copy of the foregoing Response to Appellant's Motion to Allow Additional Evidence on Review by email pursuant to agreement to:

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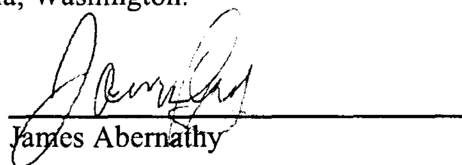
Dated August 1, 2016, at Olympia, Washington.



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Subject: SEIU 775NW v. DSHS & Freedom Foundation, Supreme Ct. No. 93306-5 (Ct. of Appeals, Div. II No. 46797-6-II)

Please see attached for filing in *SEIU 775NW v. DSHS & Freedom Foundation*, Supreme Ct. No. 93306-5 (Ct. of Appeals, Div. II No. 46797-6-II) the following:

1) Respondent Freedom Foundation's Answer to Appellant SEIU's Petition for Discretionary Review by the Supreme Court (and Appendix);
2) Respondent Freedom Foundation's Response to Appellant SEIU's Motion to Allow Additional Evidence on Review; and
3) Respondent Freedom Foundation's Response to Appellant SEIU's Motion for Injunctive Relief Preserving the Status Quo Pending Appeal.

Please contact me immediately if you have trouble with any of the documents.

Thank you!

—

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"The curious task of economics is to demonstrate to men how little they really know about what they imagine they can design." – F.A. Hayek

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