☐No Hearing Set
☒Hearing is Set
Date: Friday, April 5, 2019
Time: 9:00 a.m.
Judge James J. Dixon

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON *Plaintiff,* v. TIM EYMAN, et al., *Defendant.*	Case No. 17-2-01546-34 *AMICUS CURIAE* BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF DEFEDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTEREST OF *AMICUS CURIAE*

Founded in 2005, the Institute for Free Speech is a nonpartisan, nonprofit organization that works to protect and defend the rights to free speech, assembly, press, and petition. Mr. Eyman's case, in which he is unrepresented by counsel, presents a novel question of First Amendment law: whether the right to financially manage a political organization may be permanently revoked by the State based upon its assessment of a person's trustworthiness.

INTRODUCTION

"There is no right more basic in our democracy than the right to participate in electing our political leaders," *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191, a right that extends to political participation "[i]n the ballot initiative context." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010).[1] Accordingly, "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Nevertheless, the State of Washington ("State") persists in demanding an injunction "aimed at preventing" a single citizen, Mr. Timothy Eyman, "from managing, controlling, negotiating, or directing financial transactions" for political committees ("PACs"). State Br. at 20 (quotation marks omitted). This is no temporary measure; it would apply until Mr. Eyman slips the surly bonds of earth.

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[1] Indeed, "far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources.'" *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 n.29 (1978) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

The State's brief spends significant time cataloging Mr. Eyman's alleged misdeeds. But when it comes to marshalling a legal justification for this radical demand, it protests that Mr. Eyman has not "show[n] that the conduct in question is constitutionally protected." State Br. at 20. However, "the conduct in question" is unquestionably "constitutionally protected." *Id.* In fact, the State insists on nothing short of a prior restraint on protected First Amendment activity, a demand subject to strict scrutiny. And the State cannot possibly meet that standard because a less restrictive path—the millions of dollars in threatened fines that have already ruined Mr. Eyman financially and deprived him of counsel in this case—is available to the State and adequate to its purposes.

ARGUMENT

A PAC is "any person (except a candidate or an individual dealing with his or her own funds or property) 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. This closely follows federal law, which also defines a PAC in terms of its spending. 52 U.S.C. § 30101(4) ("any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year"). As a threshold matter, then, the State is quite wrong to suggest that barring Mr. Eyman "from management of *financial transactions* of any kind for any political committee" is a "limited request." State Br. at 1 (emphasis in original, citation and internal quotation marks omitted). As a matter of statutory definition, a PAC *is* its financial transactions.

PACs are unquestionably protected by the First Amendment. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) ("We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First

Amendment protection").[2] The First Amendment protects both "lone pamphleteers or street corner orators in the Tom Paine mold" and "PACs...th[at] spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements." *Id.* at 493. "A tendency to demonstrate distrust of PACs is not sufficient" to curtail their First Amendment rights. *Id.* at 499.

Moreover, this protection is not limited to the legal entity of the PAC itself. Its constituent parts, very much including its human actors, are also secure in their First Amendment rights. "There is *no question* that participation in campaigns is a protected activity" under the federal Constitution. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (emphasis supplied). The State has offered no authority whatsoever for its suggestion that the First Amendment right to "participate in campaigns" does not apply to campaign treasurers or those otherwise charged with the management of a PAC's finances. Indeed, control of a PAC's finances is indispensable to a committee's existence, predicated as it is upon "receiving contributions or making expenditures." RCW § 42.17A.005.

Of course, it is what this money is used *for* that implicates the First Amendment. As the U.S. Supreme Court explained in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the High Court's "seminal campaign finance case," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting), "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. And "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. PACs, which have no mouth and cannot speak, must do so through the

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[2] The Fourteenth Amendment applies the protections of the First Amendment against the State. *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925); *De Jonge v. Or.*, 299 U.S. 353, 364 (1937); *NAACP v. Ala.*, 357 U.S. 449, 466 (1958).

expenditure of money—the type of actions that must be handled by a treasurer or a similar figure.[3] "We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." *Nat'l Conservative Political Action Comm.*, 470 U.S. at 501. The State seeks to bar Mr. Eyman from involvement in that essential, constitutionally-protected process. Forever.

In denying Mr. Eyman this right, the State will inevitably alter the form and flow of debate in Washington. Perhaps many would welcome that result. But that is the not the result required by our Constitution. Rather, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. This is true for the rights of those managers that control the PAC's message or finances. If Mr. Eyman is to be a PAC treasurer or otherwise handle the finances of such a committee, Washington State is well within its rights to make that fact known to the public. *Brumsickle*, 624 F.3d at 994. The public is free to "'consider, in making their judgment[s], the source and credibility of the advocate.'" *Id.* (quoting *Bellotti*, 435 U.S. at 791-792). And the State may punish Mr. Eyman, with ruinous fines or, potentially, criminal penalties, if he violates the law. RCW § 42.17A.750-755. "'[B]ut it may not suppress'" Mr. Eyman's right to participate as a financial manager "'altogether.'" *Id.* (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 319 (2010)).

Given Mr. Eyman's admitted and alleged conduct, there may be a temptation to forget that the State is seeking an unprecedented penalty rife with these constitutional concerns. After all, the Securities and Exchange Commission imposes lifetime bans on certain types of trading, and

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[3] Money locked away from a PAC's financial manager or treasurer cannot be converted into that PAC's protected speech, nor support the protected association of its contributors and staff.

attorneys are subject to disbarment. But "[i]n considering this question...we must never forget, that it is a constitution we are expounding." *McCulloch v. Md.*, 17 U.S. 316, 408 (1819). And that Constitution teaches that "[t]he loss of First Amendment freedoms," such as the State threatens here, "for even *minimal periods of time*, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality op.) (emphasis supplied). The ability to participate effectively in political campaigns, which includes the right to organize and manage PACs, is not comparable to the purely economic regulations the State relies upon. State Br. at 19.

To the contrary, the *entire point* of the Constitution's ban on prior restraints is to prevent the Government from barring protected activity "predicated upon surmise or conjecture that untoward consequences may result." *N.Y. Times Co. v. United States*, 403 U.S. 713, 725-726 (1971) (Brennan, J., concurring). But that is just what the State does here. Rather than waiting for future violations and seeking appropriate—and properly tailored—penalties, it would strip Mr. Eyman of his rights because he "cannot be trusted." State Br. at 19.

As that statement shows, the remedy the State seeks here is inherently dangerous. It asks this Court to be the very first, to anyone's knowledge, to impose an injunction of this nature, and to do so in a *pro se* case. *See Voisine v. United States*, 579 U.S. __; 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("We treat no other constitutional right so cavalierly. At oral argument the Government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction for an infraction punishable only by a fine"). That decision will then be precedent to be applied in very different circumstances and—given the State's ability to threaten crippling fines in the millions of dollars, as it has done here—the temptation to settlement in those future cases will be intense. Therefore, it may be that this question will not be litigated again for some time. Out of view of the courts, the incentives to viewpoint discrimination may

prove too tempting for some. Those who succumb may even do so unconsciously; the State's decision as to who can be "trusted" is necessarily and inherently subjective, and it is only human nature to trust allies and distrust rivals.

Thankfully, all of this can be avoided. Washington law gives the State adequate tools for deterring future violations without setting us down this path. It need not invent new ones.

CONCLUSION

Mr. Eyman's motion for partial summary judgment ought to be granted.

Dated: March 29, 2019

Respectfully submitted,

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