



**State of Washington
PUBLIC DISCLOSURE COMMISSION**

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908
(360) 753-1111 • FAX (360) 753-1112

Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

Memo

To: PDC Commissioners
From: Sean Flynn, General Counsel
Date: May 19, 2023
Re: Staff Presentation of SEIU Petition for Declaratory Order

This memo presents the petition for declaratory order submitted on April 12, 2023, by the Service Employees International Union Washington State Council (SEIU) on behalf of the various political committees it represents. The Commission has set the matter for hearing at its regular meeting on May 25, 2023.

The Petitioner requests the Commission to issue an order to suspend any potential future enforcement of RCW 42.17.405(12) & .442 against the SEIU's PACs. The laws in question prohibit political committees from making contributions to state office candidate committees or other political committees, respectively, unless the contributing committee itself has received contributions from at least 10 registered Washington voters.

Background

Certain entities are prohibited from making contributions to a state office candidate (or state office holder subject to voter recall), including out-of-state corporations, labor unions with fewer than 10 state resident members, and any PAC that has not received contributions of \$10 or more¹ from at least ten Washington registered voters within 180 days preceding the time of the contribution. RCW 42.17A.405(12). The prohibition is part of the original regulatory scheme enacted by voter initiative in 1993 (I-134) to regulate the influence of money within the political process.

The prohibition was expanded in 2011 separately to require any PAC to receive \$10 contributions from least from 10 state-registered voters before it can contribute to another PAC. RCW 42.17A.442. The purpose of the prohibition was to promote transparency and prevent attempts to hide the sources of PAC funding by creating pass-through PACs.

¹ The contribution threshold was raised to \$25 by rule in 2023. See WAC 390-05-400.

The PAC-to-PAC restriction under section .442 was challenged as part of a 2013 case against the Grocery Manufacturers Association (GMA). *See State v. GMA*, 13-2-02156-8 (Thurston Co. Sup. Ct. 2013). In a pre-trial order, the trial court found that RCW 42.17A.442 was unconstitutional under the First Amendment as applied to ballot measure committees such as the GMA and that the state had not provided justification for the law’s restrictions on speech and association.²

The court reasoned that the PAC-to-PAC requirement of 10 contributors could be so easily overcome that it did not effectively achieve the intended goal of preventing the creation and use of “sham” committees to conceal the source of funding. The court went on to question the purpose of requiring PACs to seek contributions from 10 registered state voters, as opposed to other categories of contributors, such as corporations. Finally, the court acknowledged that the required contributions forced PACs to associate with certain contributors. The state did not appeal the court’s pre-trial order, but successfully defended the court’s ultimate judgment and unprecedented penalty award, which both were affirmed in the state supreme court. *See State v. GMA*, 198 Wn.2d 888 (2022).

Elements of a Petition for Declaratory Order

Any person may petition an agency for a declaratory order regarding “the applicability to specified circumstances of a rule, order, or statute enforceable by the agency.” RCW 34.05.240(1). The petition must show there is uncertainty in the law and that an actual controversy exists arising from that uncertainty so that the order “will not be merely an advisory opinion.” RCW 34.05.240(1)(b). Furthermore, the uncertainty must have an adverse effect on the Petitioner, which must be weighed against the likely adverse effect an order on the requested petition may have towards others. RCW 32.05.240(c)&(d).

Application of the Elements to This Petition

The petition does not allege that the statutory language is ambiguous or otherwise questions how the law is applied, but frames the issue as a direct challenge to the constitutionality of both RCW 42.17A.405(12) & 442, based on the trial court order in *GMA*. While that case only involved a challenge to .442 specifically as applied to ballot measure committees, the Petitioner argues that the reasoning has “equal application” to section .405(12) and should be extended to the circumstances of its represented PACs.³

The Petitioner acknowledges that the court order does not control the constitutional question, and is not binding on the Commission, but reasons that the decision rests on well-established First Amendment precedent. Because the state did not appeal the court’s decision, in the context of the larger litigation of that case, we do not have the benefit of any appellate review on this matter, and therefore an assessment on the merits of the Petitioner’s constitutional challenge is beyond the scope of this memo.

² See Petition for the relevant transcript of the proceedings.

³ The Petitioner cites several federal cases as persuasive support for its argument, but those cases did not directly involve the laws in question and are not cited as binding precedent.

The petition offers the constitutional question as creating the uncertainty, actual controversy, and adversity to be resolved. The uncertainty is presented in the legal argument that the law is unconstitutional under the reasoning of the *GMA* decision. Furthermore, the actual controversy stemming from the uncertainty is simply the continued application of the law. The adverse effect is how the law compels the represented PACs to engage in fundraising activities that burden the First Amendment rights recognized in *GMA*.

The Petitioner does not expressly ask the Commission to determine the constitutionality of the challenged laws, but cites to prior declaratory orders issued by the Commission to show a way for how the limited “as applied” challenge in *GMA* could be applied in this situation.⁴ In Declaratory Orders 17 & 19, the Commission issued orders that restricted the enforcement of contribution limits against two recall committees, based on a Ninth Circuit federal court opinion in *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012). In *Farris*, the court held that the imposition of contribution limits was unconstitutional as applied to the plaintiff recall committee in the absence of any factual evidence that the campaign had any connection to a candidate. The Commission applied that analysis in the two declaratory orders to establish a similar factual record (that no candidate was connected to the campaign), which conditionally placed the Petitioners in those matters in the same position as the plaintiff in the *Farris* case.

The *GMA* order does not quite fit within the same framework as applied to the *Farris* case. The *Farris* decision was issued by the Ninth Circuit, which is binding on the Commission. Furthermore, the represented PACs do not sit in the same position as the committee in *GMA*. Unlike *Farris*, the *GMA* order does not rely upon on any particular factual record that could be established in a petition to reach the same conclusion.

Recommendations

The Commission may enter an order or declaring the applicability of the law, or decline to enter a declaratory order, stating the reasons for its action. RCW 34.05.240(5)(d). *See also* WAC 390-12-250(5). If the Commission denies the petition, it may still choose to consider the merits of the Petitioner’s argument as policy matter that could be addressed in an alternative manner.

⁴ PDC Declaratory Order No. 17, *In the Matter of the Petition of Recall Mark Lindquist for a Declaratory Order* (2015) at <https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/matter-petition-recall-mark-lindquist-declaratory-order>; PDC Declaratory Order No. 19, *A Better Seattle* (2021) at <https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/petition-declaratory-order-better-seattle>