No. 100248-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ONEAMERICA VOTES, a Washington Nonprofit; ONEAMERICA, a Washington Nonprofit; LOCAL #4121, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, a labor organization; MUDIT KAKAR, an individual; VIRGINIA FLORES, an individual; and NAYON PARK, an individual, **Appellants/Plaintiffs,**

v.

STATE OF WASHINGTON, a political subdivision; WASHINGTON STATE ATTORNEY GENERAL's OFFICE, an executive department; BOB FERGUSON, in his official capacity as Attorney General; WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, a state agency; and PETER LAVALLEE, in his official capacity as Executive Director of the PDC, **Respondents/Defendants.**

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

The American Civil Liberties Union of Washington Foundation encourages the Court to reverse the trial court's grant of summary judgment for the State because Substitute Senate Bill 6152 is unconstitutional as applied to Washington-resident "foreign nationals" as defined by Section 2(24)(a). The Washington State legislature enacted SSB 6152 to address a genuine concern: the threat of foreign influence on State elections. But SSB 6152 is broader in scope than the federal Bipartisan Campaign Reform Act and includes Washington residents who are lawful temporary residents, refugees, asylees, and undocumented immigrants in its definition of "foreign nationals." The law is contrary to Washington's historical and current recognition of these individuals' contributions to the State and impacts Washington resident citizens' right to freely associate with foreign nationals. The trial court's grant of summary judgment for the State should be reversed.

II. IDENTITY AND INTEREST OF AMICUS

The ACLU is an amicus curiae and its identity and interests are set forth in the accompanying motion for leave to file an amicus brief.

III. ISSUE TO BE ADDRESSED BY AMICUS

Whether the broad definition of "foreign nationals" in SSB 6152 is contrary to Washington's history and its present-day appreciation of the role of Washington-resident foreign nationals in the State's economy and community, impacting the Court's analysis of the factors outlined in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and violating not only the Washington-resident foreign nationals' constitutional rights but those of Washington resident citizens as well.

IV. STATEMENT OF THE CASE

The parties have described the factual and procedural background in their briefs.

V. SUMMARY OF ARGUMENT

In enacting SSB 6152, the Washington State legislature sought to address the legitimate threat of foreign influence over political activity in the state. SSB 6152 prohibits "foreign nationals" from financing political activities and from participating in Washington-based organizations' decision-making processes for financing political campaigns or advertising. But SSB 6152 sweeps too broadly by defining "foreign nationals" to include lawful temporary residents, refugees, asylees, and undocumented immigrants who reside in Washington.

There are between 98,000 and 170,000 lawful, non-permanent, resident aliens, who were either issued visas or admitted as refugees or asylees. CP 44–45, 121–22, 148, 165, 171, 180. There are also between 229,000 and 264,000 undocumented immigrants who reside in Washington, including 16,030 people enrolled in the Deferred Action for Childhood Arrival program. CP 44–45, 122, 148, 171. These Washington

residents contribute to the State's economy by providing labor, starting businesses, paying taxes, and purchasing local products and services, and enriching the community through education, innovation, volunteer work, and participation in organizations that improve quality of life.

SSB 6152 deprives these Washington-resident "foreign nationals" of a voice in the state government that implements policies that directly impact their lives and the lives of their families. As discussed below, SSB 6152 is contrary to Washington's historical and current recognition of immigrants' value to the State and the rights, protections, and benefits Washington extends to resident foreign nationals, which greatly exceed those provided by the federal government. Furthermore, Washington's longstanding commitment to ideals of political and social equality is relevant to the constitutional analysis set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

SSB 6152's prohibition of foreign nationals' involvement in the decision-making process—directly or *indirectly*—also

impacts Washington resident citizens' freedom of association and drastically curtails the ability of Washington organizations dedicated to improving the lives of immigrants to serve their membership. These consequences of SSB 6152 were not relevant to the analysis of the narrower federal Bipartisan Campaign Reform Act addressed by *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104, 132 S. Ct. 1087, 181 L. Ed. 2d 726 (2012), on which the trial court's grant of summary judgment for the State largely relied.

VI. ARGUMENT

A. Washington has long recognized the contribution of resident noncitizens to the state's economy and political process.

Washington State has an extensive history of political participation by those with less than full United States citizenship. From its territorial history of "declarant alien" voting to its original draft of the State constitution, Washington has long contemplated—and accepted—that immigrants are an

important part of the State's social and economic community and have a role in the political community even if they are not naturalized American citizens. Even as the political tides turned against acceptance of immigrant populations, Washington continued to abide by its founding principles of placing the power of government in the hands of the community.

1. The Washington Territory extended voting rights to noncitizens.

Section 5 of the organic act creating the Washington Territory gave the right to vote to "every white male" above the age of twenty-one who resided in the Territory.[1] It also enfranchised noncitizens "who shall have declared on oath their intention to become [a citizen], and shall have taken an oath to support the Constitution of the United States" and the Washington Territory.[2] Although these declarant alien provisions envisioned that the declarant alien would eventually

[1] An Act to Establish the Territorial Government of Washington, 32 Cong. Ch. 90, 10 Stat. 172 § 5 (Mar. 2, 1853), https://leg.wa.gov/History/Territorial/Pages/territory.aspx.

[2] *Id.*

become a citizen, there was no actual requirement that they do so to exercise the right to vote. The territorial legislature also enacted "alien land" laws, permitting noncitizens to enjoy the same land ownership rights as white U.S. citizens.[3] These pro-immigrant policies were also included in the proposed Washington constitution of 1878,[4] although Congress declined to make the territory a state at that time.

The Washington Territory's pro-immigrant policies were principally motivated by a desire to encourage migration. Attracting people to the territory was important for two reasons. First, the territory needed more labor to develop the economy

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[3] Nicole Grant, *White Supremacy and the Alien Land Laws of Washington State*, The Seattle Civil Rights and Labor History Project, University of Washington (2007), https://depts.washington.edu/civilr/alien_land_laws.htm#:~:text=As%20old%20as%20the%20state,who%20were%20ineligible%20to%20citizenship (last accessed Feb. 1, 2022).

[4] 1878 Constitution of the State of Washington, Washington State Archives, https://www.sos.wa.gov/archives/state-constitution.aspx#:~:text=Although%20never%20recognized%20by%20Congress,of%20the%20State%20of%20Washington (last accessed Feb. 1, 2022).

and infrastructure of the frontier.[5] Second, the territory needed residents to convince Congress it was sufficiently populated to become a state.[6] Declarant voting policies were part of the push to encourage migration to Washington Territory.

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[5] *Messages of the Governors of the Territory of Washington to the Legislative Assembly, 1854-1889*, 12 U. Wash. Pub. Soc. Sci. 1, 179 (1940) ("The manifest want of our Territory is population" and the need to "procure cheap transportation for all those who desire to come hither."); *id.* at 72 (the solution to the Territory's lack of labor is to "invite hither [the] myriads of the sallow, but patient and sturdy John Chinamen" who would, in exchange for their hard work, would earn "protection by our laws," "profitable employment," and "all the aid within the constitutional limit of our power.").

[6] Although not an official requirement, Congress typically followed the lead set by the Northwest Ordinance and required territories to have at least 60,000 non-Indigenous residents to qualify for statehood. *See* An Ordinance for the government of the Territory of the United States northwest of the River Ohio, Art. 5 (1787) ("[S]o far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand."), https://www.loc.gov/resource/bdsdcc.22501/?st=gallery. Lack of population was among the reasons Washington did not become a state in 1878, in addition to political pressures in Congress against admitting additional states that would vote Republican on the national level. Keith A. Murray, *Statehood for Washington*, Columbia Magazine 2.4 (Winter 1988-1989), at 2-3, https://www.washingtonhistory.org/wp-

Washington wasn't alone in enacting laws allowing "declarant aliens" to vote. Territories and states throughout the West and Midwest allowed declarant aliens to vote to encourage them to move to the state and to integrate into the community.[7] Declarant alien suffrage was allowed in nearly 40 states for at least some time from their founding until 1917, when anti-German attitudes during World War I effectively ended the practice.[8] Beyond the political expediency of allowing noncitizens to vote, some scholars observe that "the disenfranchisement of aliens at the local level is vulnerable to deep theoretical objections since resident aliens are governed, taxed, and often drafted just like citizens [and] have a strong democratic claim to being considered members, indeed citizens,

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content/uploads/2020/04/statehood-washington.pdf (last accessed Jan. 12, 2022).

[7] Alan Kennedy-Shaffer, *Voters in a Foreign Land: Alien Suffrage and Citizenship in the United States, 1704-1926* at 12-14, 27-29, The College of William and Mary (May 2009) (unpublished M.A. thesis), https://scholarworks.wm.edu/etd/1539626580/

[8] *Id.* at 43-44.

of their local communities."[9] Extending voting rights to resident foreign nationals is thus situated within a larger concept of what it means to be a "citizen"—one that is rooted in terms of local community interests rather than national origin.[10]

2. The end of declarant alien voting in Washington.

Washington abandoned declarant alien voting when it became a state in 1889.[11] There is no complete record of the

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[9] Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1394 (1993).

[10] Fifteen municipalities—in Maryland, Vermont, New York City, and San Francisco, California—presently allow noncitizens to vote for similar reasons. Washington is one of fourteen states that has no constitutional or legislative impediments to municipalities extending voting rights to noncitizens. *See Laws permitting noncitizens to vote in the United States*, Ballotpedia, https://ballotpedia.org/Laws_permitting_noncitizens_to_vote_in_the_United_States (last visited Jan. 13. 2022); Jeffery C. Mays & Annie Correal, *New York City Gives 800,000 Noncitizens Right to Vote in Local Elections*, New York Times (Dec. 9, 2021), https://www.nytimes.com/2021/12/09/nyregion/noncitizens-voting-rights-nyc.html.

[11] Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 Mich. J. Int'l L. 259, 299 n.254 (1992) ("Montana and Washington limited their

events at the constitutional convention because the necessary funds were not appropriated to transcribe the proceedings.[12] Secondary records reveal that the delegates to the convention borrowed from the constitutions of other, older states that allowed declarant alien voting at one point or another, and copied parts of proposed documents submitted by a resident of the newly-recognized state of Oregon.[13] Suffrage was a topic of extensive debate. Although much of the debate focused on whether to extend the right to vote to women, there was discussion of whether the right to vote should be denied to people of Chinese descent.[14] The proposal was overwhelmingly defeated, and instead the delegates decided to grandfather in

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prospective enfranchisement to citizens while grandfathering in declarant aliens.").

[12] Murray, *supra*, at 4.

[13] *Id.*; *see also* Hugh D. Spitzer, *Washington: The Past and Present Populist State*, *in* The Constitutionalism of American States 771, 777 (George E. Connor & Christopher W. Hammons eds., 2008).

[14] The Journal of the Washington State Constitutional Convention 1889, 634-639 (Beverly Paulik Rosenow, ed., 1999).

anyone who could vote under the territorial government into the new state system.[15] Little else is known about the delegates' debates of declarant alien suffrage or the overarching idea of political participation by noncitizens.

Nonetheless, it cannot be denied that the shift from the territorial to the state government restricted the rights of noncitizens to participate in their government. By limiting the right to vote to "citizens"—and those who had voted under the territorial government—the new State of Washington effectively excluded everyone from voting except white men and Black men enfranchised by the 15th Amendment. Women could not vote, nor could Washington's Indigenous population or people of Asian descent, who were barred from U.S. citizenship by the Naturalization Acts of 1790 and 1870 and the Chinese Exclusion Act of 1882.[16] This shift coincided with a

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[15] *Id.* at 638-39.

[16] Naturalization Act of 1790, ch. 3, 1 Stat. 103, Pub. L. 1-3 (1790); Naturalization Act of 1870, 16 Stat. 254, Pub. L. 41-

rise in anti-Asian sentiment, as white Washingtonians—frustrated with economic downturns and corporate and special interest greed—turned their animus toward the local Chinese and Japanese populations.[17] As the State of Washington decided it was no longer politically expedient to extend political participation rights to noncitizens, it perpetuated negative attitudes, racism, and discrimination against communities that were deemed "others."[18] Further attempts to separate noncitizens from the political process only serve to characterize immigrant communities as "others" who do not truly belong.

Despite limiting voting rights to citizens, Washington never abandoned its commitment to progressive ideals. And

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254 (1870); Chinese Exclusion Act of 1882, 22 Stat. 58, Pub. L. 47-126 (1882).

[17] *See* CP 1193-1199 (amicus brief by the Fred T. Korematsu Center for Law and Equality addressing the history of violence and discrimination against Asian immigrants in Washington).

[18] *See, e.g.*, Spitzer, *supra*, at 780-81 (discussing use of English fluency requirements for suffrage as targeted at Asian and Latino immigrants, and collecting sources addressing anti-Asian sentiment in 19th and 20th century Washington).

when the Washington constitutional delegates did borrow from other governments in drafting their constitution, they relied on the strong rights provisions from other states rather than the less protective federal Bill of Rights.[19]

Even as Washington ended declarant alien voting, the Washington State Constitution pronounced that "[a]ll political power is inherent in the people …."[20] This commitment to "the people" is tied to Washington's progressive roots.[21] The drafting of the Washington State Constitution was motivated by "the public's distrust of railroad, mining, and other corporations; concerns about special-interest control of government; and general objection to the concentration of power in elites," leading to a "strong protection for individual liberties."[22] (The delegates to the convention undoubtedly had a

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[19] Spitzer, *supra*, at 777.

[20] Wash. Const. art. I, § 1.

[21] Spitzer, *supra*, at 772.

[22] *Id.*; *see also* Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government,*

narrower view of who "the people" were—primarily white men—a definition that can and should evolve to modern conceptions of personhood to truly include *all* people.)

Thus, embedded in the Washington State Constitution is a commitment to the political power of the *people*, not merely U.S. citizens. SSB 6152 stands in contrast to this commitment. SSB 6152 prevents resident foreign nationals from engaging in their communities and protecting their rights and interests, and in the process brands them as "others" who are not truly part of society.

B. Washington's continuing commitment to ideals of political and social equality.

As Appellants point out, Washington's population includes between 98,000 and 170,000 lawful, non-permanent,

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and the Washington State Constitution, 67 Wash. L. Rev. 669, 671 (1992) ("The settlers, who were primarily immigrants from other states, had extensive experience with and knowledge of legislative abuses. … The delegates to the Constitutional Convention carried these experiences with them; one delegate remarked that if a stranger were to step into the convention 'he would conclude that we were fighting a great enemy and that this enemy is the legislature.'").

resident noncitizens who were issued visas or admitted as refugees or asylees, and between 229,000 and 264,000 undocumented immigrants, 16,030 of whom are enrolled in the Deferred Action for Childhood Arrival (DACA) program. Appellants' Br. at 8-9.

Resident foreign nationals contribute to Washington's economy, providing labor and paying substantial taxes. About one in five workers in Washington is an immigrant; immigrant workers are most numerous in the healthcare, professional, scientific, and technical services, retail, manufacturing, and accommodation and food services industries.[23] Immigrant-led households paid $3.9 billion in state and local taxes in 2018. Undocumented immigrants paid an estimated $367.9 million in state and local taxes in 2018, and DACA recipients and DACA-

[23] *Fact Sheet: Immigrants in Washington*, American Immigration Council, https://www.americanimmigrationcouncil.org/research/immigrants-in-washington (Aug. 6, 2020).

eligible individuals paid an estimated $49.8 million.[24] Resident foreign nationals enrich their communities in other ways as well, shopping at local businesses, volunteering, and creating and participating in community organizations.

Washington has long been a state that welcomes immigrants and recognizes their contribution. Washington became a "sanctuary state" in May 2019 when the State legislature enacted the Keep Washington Working Act, which prohibits local law enforcement from routinely questioning individuals about immigration status, notifying ICE that a noncitizen is in custody, and detaining someone for civil immigration enforcement.[25] The legislature declared that "Washington employers rely on a diverse workforce to ensure the economic vitality of the state. … Immigrants make a significant contribution to the economic vitality of this state,

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[24] *Id.*

[25] RCW 43.17.425.

and it is essential that the state have policies that recognize their importance to Washington's economy."[26]

A year later the State legislature enacted the Courts Open to All Act, which prohibits court personnel and prosecutors from inquiring into citizenship status and providing non-publicly available information to federal immigration authorities, prohibits civil immigration arrests at courts, and requires courts to collect information about immigration agents present at courthouses.[27] The legislature found that "civil arrests at Washington court facilities have created a climate of fear that is deterring and preventing Washington residents from safely interacting with the justice system. Victims cannot seek protection, families cannot enter into custody agreements, and those charged with crimes cannot mount a proper defense or be

[26] Final Bill Report, S.B. 5497, 2019-2020 Leg. (May 21, 2019).
[27] RCW 2.28.300 *et seq*.

held accountable. … [I]t is essential that the state have policies providing safeguards protecting access to justice."[28]

Washington also allows students to enroll in public colleges and universities and pay in-state tuition rates regardless of their citizenship status if they lived in the state for three years before receiving a high school diploma or equivalent. Governor Locke vetoed an amendment to the bill that would have limited the benefits of the act to families who held certain visas or work permits or had received amnesty from the federal government.[29] Similarly, when the Trump administration announced in September 2017 that it would terminate DACA, the presidents of Washington's six public baccalaureate colleges and universities, 34 community and

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[28] Final Bill Report, H.B. 2567, 2019-2020 Leg. (June 11, 2020).

[29] Final Bill Report, H.B. 1079, 2003-2004 Leg., Reg. Sess. (Wash. 2003). While these students do not qualify for federal student aid, they may be eligible for Washington State government financial aid. *See Financial Aid for WASFA Applicants*, University of Washington, https://www.washington.edu/financialaid/hb-1079-real-hope/ (last visited Jan. 11, 2022).

technical colleges, and 10 members of the Independent Colleges of Washington, as well as the 10 members of the Washington Student Achievement Council pledged their support for the DACA program, declaring that DACA students "are some of the finest and most resilient students at our colleges and universities, often exhibiting unique character forged in the fire of adversity. They overcome major obstacles just to gain and retain eligibility without access to the federal financial assistance needed by so many to help make a college education attainable."[30]

Washington's State Food Assistance Program is available to many resident foreign nationals, unlike similar federal benefits.[31] Some resident foreign nationals are eligible for State

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[30] *Joint DACA Statement*, Washington State Council of Presidents, et al., https://wsac.wa.gov/sites/default/files/2017.09.05.Joint.DACA.Statement.pdf (Sept. 5, 2017).

[31] *State Food Assistance Program (FAP)*, Wash. State Dept. of Social and Health Services, https://www.dshs.wa.gov/esa/community-services-offices/state-food-assistance-program-fap# (last visited Jan. 11, 2022); *see also* WAC 388-400-0050, WAC 388-424-0030.

Family Assistance,[32] and Washington's Consolidated Emergency Assistance Program, which provides a once-a-year emergency cash grant to families and pregnant individuals who don't have the money to meet their basic needs. The Program provides financial support for food, shelter, clothing, medical costs, utilities, transportation to jobs and child care, and job-related clothing.[33]

Washington also extends healthcare benefits to Washington-resident foreign nationals. Some adults, and most children and pregnant persons may qualify for Washington Apple Health (Medicaid) coverage regardless of their immigration status.[34] Washington also provides emergency

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[32] WAC 388-424-0001.

[33] *Consolidated Emergency Assistance Program-CEAP*, Wash. State Dept. of Social and Health Services, https://www.dshs.wa.gov/esa/emergency-assistance-programs/consolidated-emergency-assistance-program-ceap (July 1, 2021); *see also* WAC 388-436-0015.

[34] *See Citizenship and Immigration Status*, Wash. State Health Care Auth., https://www.hca.wa.gov/assets/free-or-low-cost/citizenship_alien_status_guide.pdf (Dec. 2, 2021).

medical services, dialysis and cancer treatment, and nursing home placement as part of the Alien Emergency Medical Program to resident foreign nationals who do not otherwise qualify for medical care.[35]

To ameliorate the impact of COVID-19 on many Washington-resident foreign nationals, the Washington Governor's office allocated $62.6 million in economic relief to those who were ineligible for federal stimulus funds and unemployment benefits in 2020, with an additional $65 million allocated by the legislature in 2021. As Governor Inslee explained, "We know many immigrant workers have served on the front line during our pandemic response, and we know that their communities still need our support."[36] The funds were

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[35] *Health Care Services and Supports*, Wash. State Health Care Auth., https://www.hca.wa.gov/health-care-services-supports/apple-health-medicaid-coverage/non-citizens#program-requirements (2022); *see also* WAC 182-507-0110 and 182-507-0115 (federally-funded AEM), 182-507-0125 (state-funded Long Term Care program).

[36] *See Washington COVID-19 Immigrant Relief Fund opens for new applications*, The Office of the Governor,

distributed by immigrant organizations to ensure the applicants' information was not unnecessarily shared with the State government.[37]

Most recently, in April 2021, the State legislature passed House Bill 1297, which made the Working Families Tax Credit available to all Washington residents regardless of immigration status.[38] "Washington State is now one of only five states that includes Individual Tax Identification Number (ITIN) filers in its state-level program. ITIN filers are an important group of taxpayers that includes undocumented immigrants, some survivors of domestic violence, certain student visa holders, and

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https://www.governor.wa.gov/news-media/washington-covid-19-immigrant-relief-fund-opens-new-applications (Apr. 21, 2021).

[37] *See Frequently Asked Questions*, Washington COVID-19 Immigrant Relief Fund, https://www.immigrantreliefwa.org/faq (last visited Jan. 11, 2022).

[38] Final Bill Report, H.B. 1297, 2021-2022 Leg. (Wash. 2021).

others, who are unjustly excluded from nearly all tax benefits."[39]

C. Washington's longstanding recognition of resident noncitizens' contributions to the State is relevant to the *Gunwall* analysis.

When considering whether a provision of the Washington State Constitution should be interpreted independently of a corresponding federal constitution provision, courts analyze the non-exclusive six-factor test outlined in *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986). These factors include (1) the text of the Washington State Constitution provision, (2) differences between that text and the federal provisions, (3) state constitutional history and common law, (4) preexisting state law, (5) structural differences between the state and federal constitutions, and (6) whether the matter is of particular

[39] Margaret Babayan & Emily Vyhnanek, Opinion: Community Members and Advocates Achieved a Big Victory for Inclusive Cash Support, South Seattle Emerald, https://southseattleemerald.com/2021/04/21/opinion-community-members-and-advocates-achieved-a-big-victory-for-inclusive-cash-support/ (Apr. 21, 2021).

state or local concern. Appellants comprehensively address these factors in their brief, demonstrating that Article I, sections 4 and 5 of the Washington State Constitution provide broader speech, assembly, and association protections than the First Amendment. Appellants' Br. at 52-57.

The constitutional history and Washington's longstanding recognition of the importance of noncitizens discussed above are relevant to the third and sixth *Gunwall* factors. Consistent with their commitment to ensuring that "[a]ll political power is inherent in the people,"[40] the framers of the Washington State Constitution extended the freedom of speech to "[e]very person": "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[41] They also ensured "the people" have the right to peaceably assemble: "The right of petition and of the people

[40] Wash. Const. art. I, § 1.

[41] Wash. Const. art. I, § 5.

peaceably to assemble for the common good shall never be abridged."[42] These provisions are not limited to citizens.[43]

The difference between Washington State's positive declaration of people's rights to free speech, petition, assembly, and association and the federal First Amendment's negative prohibition of laws abridging the freedom of speech and assembly stems from the State's founding principles. As one commentator explained, the Washington framers

> adopted a broadly phrased declaration of rights containing twenty-seven individual liberties, ranging from traditional legislative prohibitions on bills of attainder and ex post facto laws to specific proclamations of individual liberties, including a right to assemble, a right to speak freely, a right to religious freedom, a right to trial by jury and other due process restrictions, a right to bear

[42] Wash. Const. art. I, § 4.

[43] *Cf.* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. Rev. 1237, 1240 (2016) (discussing Supreme Court decisions that are "conflicted, limited in scope, and, in some ways, simply unclear about how far the government can go," and "highlight[ing] the specific ways in which current law makes immigrants vulnerable to a kind of political repression that the Constitution presumably forbids").

> arms, and a right to privacy. Most of these provisions are phrased as broad affirmations of rights and are not limited, as similar federal guarantees, to infringement by the government.[44]

The Declaration of Rights concludes with Section 32, which reaffirms the overall purpose of protecting individual rights: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."[45]

Washington's extension of its Declaration of Rights to *all* people and the protections and benefits it provides to Washington-resident foreign nationals—far greater than federal protections and benefits—confirms that Washington considers the rights of resident foreign nationals to be a matter of state and local concern. Preserving resident foreign nationals' ability

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[44] Cornell W. Clayton, *Toward A Theory of the Washington Constitution*, 37 Gonz. L. Rev. 41, 68 (2002).

[45] Wash. Const. art I, § 32; *see also* Snure, 67 Wash. L. Rev. at 675–76.

to make their voices heard in the State's political process is commensurate with these principles.

D. SSB 6152 also unlawfully restricts Washington citizens' and Washington-based organizations' rights.

By prohibiting foreign nationals from participating in decision making about contributions to candidates and political committees, spending money to support or oppose a candidate or ballot measure, and sponsoring political advertising and communications "in any way,"[46] SSB 6152 directly impacts the rights of Washington resident citizens. According to the implementing regulations, foreign nationals are involved in decisions about contributions, expenditures, political advertising, or electioneering communications if they "direct[], dictate[], control[], or *directly or indirectly* participate[] in the decision-making process regarding the financing [of] any such contribution, expenditure, advertisement, or communication."[47]

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[46] SSB 6152 § 9(2)(a)–(b); RCW 42.17A.417(2)(a)–(b).

[47] WAC 390-16-330(2)(a) (emphasis added).

Washington organizations therefore cannot contribute to or sponsor any political campaign or sponsor advertising or communications if a foreign national participated in the decision in any way.

The law therefore deprives citizen members of Washington organizations of the benefit of resident foreign national members' input about the organization's political spending. Citizen members may not consult with resident foreign national members on these matters "in any way"—in formal meetings, impromptu discussions, or by newsletter or email. This is true even if the organization is dedicated to promoting the interests of resident foreign nationals. As a result, citizen members of these organizations are forced to make political spending decisions that necessarily affect resident foreign national members without their input.

The scope of SSB 6152 is also unknown because of its prohibition of foreign nationals' "indirect" involvement in the decision-making process. What constitutes "indirect

involvement" is unclear and opens the door to a broad—and worrying—array of potential prohibitions. Are organizations permitted to gather information about resident foreign national members' interests if the results may ultimately lead to a decision about political spending? When do resident foreign nationals who are board members of an organization dedicated to advancing the interests of Washington immigrant and refugee communities inadvertently cross the line into "indirect" participation in the decision-making process? And when do Washington resident citizens violate the law by communicating with resident foreign national board members about matter central to the organizations' mission? This lack of clarity further chills both citizen and resident foreign national members' participation in organizations, out of fear that they may inadvertently violate the law through "indirect" participation.

SSB 6152 infringes on Washington resident citizens' freedom of association, which is protected by both the federal

and state constitutions. *See City of Shoreline v. Club for Free Speech Rights*, 109 Wn. App. 696, 706-07, 36 P.3d 1058 (2001) ("There exists a 'right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.' … The United States Supreme Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends.'" (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 622, 104 S. Ct. 3244, 82 L. Ed.2d 462 (1984))); *Foss v. Dep't of Corr.*, 82 Wn. App. 355, 365, 918 P.2d 521 (1996) (recognizing that the Washington State and federal constitutions protect the "[f]ull freedom of association" and citing Wash. Const. art. I, § 5); *see also Pilloud v. King County Republican Cent. Comm.*, 189 Wn.2d 599, 603, 404 P.3d 500 (2017) ("The First and Fourteenth Amendments protect the freedom of an

individual to associate for the purpose of advancing beliefs and ideas.").

In reaching its decision, the trial court relied chiefly upon *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104, 132 S. Ct. 1087, 181 L. Ed. 2d 726 (2012), which addressed the narrower federal prohibition on foreign nationals' political contributions and donations. CP 1214. Unlike SSB 6152, the federal Bipartisan Campaign Reform Act does not bar resident foreign nationals from participating in the decision-making process for financing political contributions or advertising. The *Bluman* court's analysis therefore did not consider the impact of the BCRA on citizens' freedom of association.

VII. CONCLUSION

For the reasons set forth herein, this Court should reverse the trial court's grant of summary judgment in favor of the State.

I certify that this memorandum contains 3,797 words in compliance with RAP 18.17(c)(6).

RESPECTFULLY SUBMITTED AND DATED this 1st day of February, 2022.

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