No. _____

In The Supreme Court of the United States

EVERGREEN FREEDOM FOUNDATION
D/B/A FREEDOM FOUNDATION,
Petitioner,

V.

STATE OF WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner presents two issues for review:

1. Do Washington campaign finance statutes Wash. Rev. Code §§ 42.17A.255 and 42.17A.005 violate Due Process under the Fifth and Fourteenth Amendments because they are vague as applied to legal services provided to citizens engaged in litigation pertaining to proposed initiative petitions when no campaign or election ever occurred?

2. Does Washington's enforcement action under the Fair Campaign Practices Act, Wash. Rev. Code §§ 42.17A.255 *et seq*. violate the First Amendment to the United States Constitution—made applicable to the States through the Fourteenth Amendment to the United States Constitution—when it is extended to cover legal fees for litigation concerning Washington's local ballot initiative process where no campaign or election ever occurred?

PARTIES TO THE PROCEEDING BELOW

Petitioner Evergreen Freedom Foundation, d/b/a Freedom Foundation ("Foundation") was the Defendant in the initial enforcement action in Thurston County, Washington Superior Court ("Trial Court"), pursuant to Washington's Fair Campaign Practices Act ("FCPA"). The Foundation was the Respondent before Division Two of the State of Washington Court of Appeals, and the Petitioner-Appellant before the Supreme Court of Washington.

Respondent State of Washington was the plaintiff in the initial enforcement action, the Appellant before the Court of Appeals, and the Respondent-Appellee before the Supreme Court of Washington.

CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of Federal Rules of Appellate Procedure, no party the owns more than 10 percent of the Foundation's ownership interests.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES AND RULES

PETITION FOR CERTIORARI

The Foundation respectfully requests review of *State v. Evergreen Freedom Found.*, 432 P.3d 805 (Wash. 2019) (affirming the Court of Appeals' reversal of the trial court's dismissal of the State's Fair Campaign Practices Act ("FCPA") regulatory enforcement action and remanding to the trial court for further proceedings) (App. A1-A34).

OPINIONS BELOW

The Trial Court's order and ruling granting the Foundation's motion for dismissal under CR 12(b)(6) (failure to state a claim), and dismissing the State's regulatory enforcement action, is Docket No. 15-2-01936-5 (App. A70-A76). The Division Two Court of Appeals opinion reversing the Trial Court's dismissal is located at *State v. Evergreen Freedom Found.*, 404 P.3d 618 (Wash. Ct. App. 2017) (App. A35-A69). The Supreme Court of Washington's divided 5-4 opinion affirming the Court of Appeals' reversal of the trial court's dismissal of the State's action and remanding to the trial court for further proceedings is located at *State v. Evergreen Freedom Found.*, 432 P.3d 805 (Wash. 2019) (App. A1-A34).

JURISDICTION

The opinion and judgment below were filed January 10, 2019. Jurisdiction is invoked under 28 U.S.C. § 1257.

STANDARD OF REVIEW

Questions pertaining to constitutionality are reviewed de novo. *See State v. Evans*, 298 P.3d 724, 726 (Wash. 2013); *Columbia Riverkeeper v. Port of Vancouver USA*, 395 P.3d 1031, 1036-37 (Wash. 2017); *United States v. Quinones*, 313 F.3d 49, 60 (2d Cir. 2002); *Galdikas v. Fagan*, 342 F.3d 684, 688 (7th Cir. 2003); *Vasquez v. Rackauckas*, 734 F.3d 1025, 1041-42 (9th Cir. 2013); *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009) (per curiam).

CONSTITUTIONS, STATUTES & REGULATIONS

Appended are the relevant FCPA statutes Sections 42.17A.255 and 42.17A.005 of the Washington Revised Code. (App. A77-A100).[1] The First, Fifth, and Fourteenth Amendments to the United States Constitution are incorporated by reference throughout the Petition.

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[1] The FCPA was amended twice in the recent legislative session. Laws of 2018, chapter 111 did not take effect until January 1, 2019. Laws of 2018, chapter 304 took effect June 7, 2018; the amendments to RCW § 42.17A.255 in that bill were vetoed. The amendments otherwise added a definition unrelated to this case, resulting in the "ballot proposition" definition at issue here to be renumbered as RCW § 42.17A.005(5). To avoid confusion, and to remain consistent with the parties' briefing and court opinions below, the relevant definitional subsection addressing "ballot proposition" is addressed by its former designation as RCW § 42.17A.005(4). Similarly, the other cited portions of the FCPA will be to the 2011 Laws.

STATEMENT OF THE CASE

This case strikes at the very heart of the right of individuals to be on fair notice of the laws and penalties that the state enforces against them. It simultaneously strikes at the heart of the individual rights to speak, associate, and petition government without unwarranted government interference. The enforcement of these laws not only violates due process, but also threatens to chill and vitiate protected First Amendment rights under the guise of a byzantine disclosure law which proponents must face when navigating the legal thicket of initiative petitions in small municipalities—a cherished component of the political process in the state of Washington.

The FCPA, as interpreted and applied to Petitioner by Washington's Attorney General, Division Two Court of Appeals, and Supreme Court, treats pro bono legal services for litigation in the courts—in connection with proposed initiative petitions in non-charted municipalities—as reportable independent campaign expenditures, even when the ballot measures never actually reach the ballot and for which there is no campaign or traditional electioneering. The FCPA as applied, therefore, requires invasive disclosure and reporting, even when no campaign or election occurs, contrary to its plain language. Such requirements are unconstitutional both because: (i) the statute is impermissibly vague in violation of due process, and; (ii) it infringes on freedom of speech and association under the First Amendment.

The State of Washington's campaign finance regulations, codified as part of the FCPA, chapter

42.17A, RCW. RCW 42.17A.255(2), require a person to report to the Public Disclosure Commission ("PDC") certain "independent expenditures." These expenditures are defined in RCW 42.17A.255(1) to include any expenditure made in support of a "ballot proposition." RCW 42.17A.005(4) defines "ballot proposition" to include any initiative proposed to be submitted to any state or local voting constituency "from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures."

While this reporting procedure makes sense when examining initiative processes for statewide measures and certain larger charter cities, it is vague, confusing, and non-sensical as applied to smaller non-charter municipalities because their ballot initiative procedures are different than those used at the statewide and charter city levels in important respects. For statewide and certain charter city initiatives, many steps must be navigated prior to the signature gathering stage; whereas the proponents of initiatives in the three non-charter cities at issue in this case gather signatures first. Specifically, in statewide and certain charter cities, an initiative's proponent files the initiative with the city first and gathers signatures after. By contrast, in non-charter municipalities the initiative's proponent gathers signatures first and files the initiative with the city after. *Compare* RCW 35.17.260 (establishing procedures for initiatives in cities with the commission form of government) *and* RCW 35A.11.100 (generally adopting for code cities the initiative procedures used in cities with the

commission form of government), *with* chapter 29A.72, RCW (establishing procedures for statewide initiatives).

In 2014, groups of citizens in Sequim, Chelan, and Shelton,[2] each non-charter municipalities in the State of Washington (hereinafter, the "Non-charter Cities"), sought to approve initiatives concerning collective bargaining between municipalities and the bargaining representatives of their employees. (App. A2). There were two proposed initiatives in each Non-Charter City. The first proposed initiative would have required collective bargaining negotiation sessions to be publicly conducted. 432 P.3d at 808. (App. A2). The second proposed initiative would have prohibited union security clauses in city collective bargaining agreements. *Id.*

The initiative proponents prepared and circulated the proposed initiatives, obtaining signatures from the communities. (App. A36-A37). The proponents then filed the proposed initiatives and signatures for all three municipalities requiring the legislative bodies to either adopt the legislation outright or place it on the next ballot as an initiative to the people. *See* RCW §§ 35.17.260, 35A.11.100; SEQUIM, WASH., MUNICIPAL CODE ch. 1.15 (adopting the initiative and referendum processes set forth in RCW § 35A.11.080-.100); SHELTON, WASH., CITY CODE ch. 1.24.010 (adopting the initiative and referendum processes in chapter 35.17, RCW, via adoption of chapter 35A.11, RCW); cf. CHELAN, WASH., MUNICIPAL CODE ch 2.48.050-.210 (providing

[2] Each of the communities at issue had a population of under 10,000 in 2014 and the number of signatures required to submit an initiative to the city council was in the low hundreds.

for the initiative process). (App. A2, A37). Despite these legal obligations none of the Non-Charter Cities adopted the proposed initiatives as legislation or placed it on the next ballot. The Sequim City Council outright failed to take any action. (App. A2, A37). The Chelan City Council directed its city attorney to file an action to determine the initiative's validity. (App. A2, A37). The Shelton City Commission declared the initiatives invalid and took no further action. (App. A2, A37).

The Non-charter Cities proponents of the initiatives filed lawsuits against their respective municipalities requesting that the initiatives be passed by the council or placed on the ballot to be voted on by city residents, as required by law. (App. A3, A37, A123-A142).

The Foundation, founded in 1991, is a non-partisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation advocates reforms to increase election security, transparency, and accountability through its Voter Integrity Project, both in Washington state and nationwide.

In accordance with its mission and purpose, the Foundation provided pro bono legal services to the residents of the Non-charter Cities, who were seeking to protect their First Amendment right to political speech, associate together, and petition government through the local initiative process.[3]

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[3] The proponents were opposed in each lawsuit by attorneys from a single law firm representing various labor unions, who were also providing pro bono legal services. (App. A37, A68-A69, A123-A142).

(App. A2-A3, A37, A123-A142). These legal efforts to compel placement of the proposed initiatives on to the ballots failed and they never reached the ballot. (App. A2-A3, A37, A123-A142). Therefore, no ballot initiative campaigns ever occurred. The Foundation did not file any campaign finance disclosure reports with the PDC identifying the value of the legal services it provided to the resident proponents in connection with the initiative petitions because nothing in the plain reading of FCPA required such disclosures. (App. A3, A38).

In response to a "citizen complaint," the State filed a civil enforcement action against the Foundation in October 2015, alleging that the FCPA required the Foundation to report to the PDC the legal services provided to the proponents as independent expenditures.[4] (App. A3, A38). The State sought imposition of a civil penalty as well as temporary and permanent injunctive relief. (App. A3, A38).

The Foundation moved to dismiss the action under CR 12(b)(6), the Washington State court equivalent of Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. (App. A4, A38). The trial court concluded that the tension between the FCPA's language and the initiative process in non-charter municipalities could not be resolved. (App. A26, A113). It noted that it had

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[4] Interestingly, the State did not bring any civil enforcement action against the labor union entities funding the legal services utilized by the opposition to the ballot initiative's proponents. (App. A37, A68-A69, A123-A142). Those entities were not subjected to any injunctions or civil penalties.

"difficulty working through [the FCPA] and understanding the position of the parties[ ] because there is not a *clearly stated* policy regarding this kind of a situation . . . ." (emphasis added) (App. A26, A71). It therefore held that RCW § 42.17A.005(4) was "ambiguous and vague." (App. A26, A38, A71). Accordingly, the trial court granted the Foundation's motion and dismissed the State's complaint. (App. A70-A71).

The State appealed the trial court's dismissal order to Division Two of the Washington Court of Appeals. The Court of Appeals agreed that RCW § 42.17A.005(4) was "ambiguous" and even added that the statute was "confusing." 404 P.3d at 624-25 (App. A26, A47-A48). Nevertheless, that court reversed the trial court's dismissal on the ground that RCW § 42.17A.005(4) encompassed initiatives not yet on the ballot in non-charter municipalities. (App. A62, A69). The Court of Appeals acknowledged that its interpretation of former RCW § 42.17A.005(4) disregarded the "literal interpretation" of the statute's text. 404 P.3d at 625-26 (App. A26, A50). That court explicitly stated that it "can and must ignore statutory language." *Id*. at 626-27 (App. A26, A51).

The Foundation petitioned the Supreme Court of Washington for review. *State v. Evergreen Freedom Found.*, 412 P.3d 11 (Wash. 2019). Impliedly acknowledging that the FCPA is ambiguous, the Supreme Court of Washington acknowledged that RCW § 42.17A.005(4)'s language "creates tension as to the noted local initiative procedures in that the second prong of RCW § 42.17A.005(4) expressly applies to both state and local initiatives, but its final phrase, 'before its

circulation for signatures,' seems at odds with the local initiative procedures . . ." 432 P.3d 805 at 811 (App. A11-A12). Nevertheless, a majority of the court resolved that ambiguity against the Foundation, the speaker, and in favor of the State. It interpreted RCW § 42.17A.255 and RCW § 42.17A.005(4) to require the Foundation to report its pro bono legal services for litigation involving matters that never became ballot initiatives to the PDC despite the plain language of the statute stating otherwise. It did so because it determined that the legislative history of the FCPA demonstrated the intent of the legislature to capture such pro bono legal advice before the proposals even became ballot measures under the FCPA. 432 P.3d at 812. (App. A6-A10, A15, A27-A33). Moreover, the majority held, inter alia, that the FCPA was not unconstitutionally vague because it believed the Foundation did not show "that there is no set of facts, including the circumstances here, in which the statute could not be constitutionally applied", 432 P.3d at 814 (App. A17); thus, the FCPA did not impermissibly infringe on the Foundation's First Amendment free speech and associative rights because the FCPA advanced the "State's important governmental interest in informing the public about the influence and money behind ballot measures . . ." 432 P.3d at 815 (App. A21). Once again, this is a campaign finance prosecution where all parties and lower courts agree no campaign or election ever occurred.

Four of the nine justices of the Supreme Court of Washington dissented from the majority opinion because the majority impermissibly relied on the underlying history of RCW § 42.17A.005(4) to interpret the statute. 432 P.3d at 818 (App. A22-

A34). Specifically, the majority relied on historical information that was not part of the FCPA as it existed in 2014—when the Foundation provided the pro bono representation—and no reasonable person would have - or could have - consulted it to figure out whether expenditures were reportable in that context. 432 P.3d at 818 (App. A27-A31). The dissent noted that laws regulating speech do not enjoy the same presumption of constitutionality as other statutes and that it is the State who must carry the burden of clarity. 432 P.3d at 819 (App. A32-33). Invoking the First Amendment, the dissent maintained that RCW § 42.17A.005(4) is ambiguous as applied to the circumstances of the Foundation, just as the trial court, the court of appeals, and impliedly the majority of the Supreme Court of Washington noted. *Id*. Unlike the narrow majority, the dissent agreed with the trial court that the statute is unconstitutionally vague as applied and that:

> The majority resolve[d] that ambiguity against the speaker and in favor of the government. But resolving an ambiguity in a statute implicating free speech against the speaker and in favor of the government violates controlling precedent of this court and of the United States Supreme Court.

Id. at 815-16, 819. (App. A22).

REASONS TO GRANT THE PETITION

The Court has long been wary of laws that are ambiguous or vague because they ". . . trap the innocent by not offering fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Critically, to prevent ". . . arbitrary and discriminatory enforcement . . . ", laws must provide explicit standards for those who apply them." *Id*. The Court looks to two prongs to test the constitutional vagueness of a law: fair notice and arbitrary enforcement. *See Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). The FCPA as applied in this case fails both prongs. Further, this Court has held that stricter specificity standards apply to a statute when it implicates the First Amendment and the presumption of constitutionality normally afforded other statutes does not apply. *See NAACP v. Button*, 371 U.S. 415, 432 (1963); *Buckley v. Valeo*, 424 U.S. 1, 77 (1976). The Supreme Court of Washington erred in failing to rebut this presumption in this case, where the statute undisputedly implicates First Amendment rights. This error creates a conflict between the precedent of this Court and the Washington Supreme Court which will sow confusion in the enforcement of campaign finance laws.

Moreover, the Court has recognized that disclosure laws have "[t]he potential for substantially infringing the exercise of First Amendment rights." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). This infringement occurs when potential donors are deterred from exercising their First Amendment rights due to their fear of retribution or harassment. *Id*. at 68; *see also id*. at 237 (Burger,

C.J., concurring in part and dissenting in part). Accordingly, although the Court has upheld disclosure statutes involving elections in other challenges under the First Amendment, *e.g., Citizens United v. FEC*, 558 U.S. 310, 367 (2010), it has not sanctioned disclosure statutes *carte blanche* when there is no ballot measure pending or lobbying occurring.[5] Instead, disclosure statutes must be substantially related to a sufficiently important state interest. *Citizens United*, 558 U.S. at 366-67. The Court has recognized only the following interests as sufficiently important: the prevention of corruption and the appearance thereof; enforcement of contribution limits; and the provision of information for voters to evaluate messages and candidates. *See Buckley*, 424 U.S. at 83-84; *Citizens United*, 558 U.S. at 371. But, as the connection with candidates and elections becomes more attenuated, the state's interest in regulating an entity's activities decreases. *See, e.g., Colorado Republican Fed. Campaign Comm. v. FEC,* 518 U.S. 604, 616-18 (1996); (Breyer, J., joined by O'Connor & Souter, JJ.); *id.* at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part); *SpeechNow.org v. FEC,* 599 F.3d 686, 694-95*,* (D.C. Cir. 2010) (en banc); *Sampson v. Buescher*, 625 F.3d 1247, 1255-59 (10th Cir. 2010).

[5] There is no regulation of municipal lobbying whatsoever under the FCPA (RCW § 42.17A.600) and small cities are totally exempted from all of its provisions (RCW § 42.17A.200).

I. THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER WASHINGTON'S FAIR CAMPAIGN PRACTICES ACT IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO BALLOT INITIATIVES IN NON-CHARTER MUNICIPALITIES

The Court should grant this petition because this case presents the important question of whether a campaign finance statute, which, as applied, punishes conduct outside of its plain language, is unconstitutionally vague under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

A. Due Process Protects Against Vague Laws In The Context Of Civil Penalties

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. "A statute can be impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). This case presents a quintessential example of a statute which is impermissibly vague and which, in fact, led to arbitrary and discriminatory enforcement. *See supra* at n. 5.

The prohibition against vague laws is an "essential" component of due process, required by both "ordinary notions of fair play and the settled

rules of law." *Johnson*, 135 S. Ct. at 2557, (quoting *Connally v. Gen. Constr. Co.*, 269 U. S. 385, 391 (1926)). The void for vagueness doctrine accordingly guarantees that ordinary people have "fair notice" of the conduct a statute proscribes. *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972). *See also Excel Corp. v. U.S. Dep't of Agric.*, 397 F.3d 1285, 1297 (10th Cir. 2005) (explaining lack of fair notice in administrative context). Moreover, the void for vagueness doctrine guards against arbitrary or discriminatory enforcement on an ad hoc bases by demanding that statutes provide standards to govern the actions of law enforcement, prosecutors, juries, and judges. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Grayned*, 408 U.S. at 108-109. Courts should not "insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). "In that sense, the doctrine is a corollary of the separation of powers—requiring that [lawmakers], rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). *Cf. Kolender*, 461 U.S. at 358 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department" (internal quotation marks omitted)). "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned*, 408 U.S. at 109 (citing *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Bd. of*

Public Instruction, 368 U.S. 278, 287 (1961)) (internal quotation marks and alterations omitted).

Accordingly, "[l]aws that are insufficiently clear are void for three reasons: (1) To avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *CPR for Skid Row v. City of Los Angeles*, 779 F.3d 1098, 1102-1103 (9th Cir. 2015) (citing *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996)).

When a law includes a penalty, courts are particularly diligent at enforcing vagueness standards. *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999) (applying more stringent vagueness test because civil law inhibited exercise of constitutional rights). Even more important to the circumstances of this case, the "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963). *See also CPR for Skid Row*, 779 F.3d at 1102-1103. Accordingly, "[w]here First Amendment rights are involved, an even 'greater degree of specificity' is required." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)). S*ee also Voters Educ. Comm.,* 161 Wash. 2d 470, 484 (Wash. 2007); *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (treating disclosure requirements as burdens on the First Amendment). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311

(1940)). "If the line drawn … is an ambiguous one, [the court] will not presume" that the statute is constitutional. 371 U.S. at 432. Rather, an ambiguous statute bearing on such an important right must not be given effect. *Id*.

Lastly, courts have recognized the preference for as-applied challenges to vague laws. *See Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 127 (2d Cir. 2014) (citing *United States v. Farhane*, 634 F.3d 127, 138 n.9 (2d Cir. 2011)).

B. Washington's Fair Campaign Practices Act As Applied

1. The Fair Campaign Practices Act Reporting Requirements

In 1972, voters in Washington adopted Initiative 276, which established the Public Disclosure Commission and formed the basis of the State of Washington's campaign finance laws. *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wash. 2d 470, 479 (2007). Initiative 276 is codified in portions of chapter 42.17A, RCW, which is now known as the FCPA. RCW § 42.17A.909.

The FCPA requires any person who makes an "independent expenditure" to file a report with the PDC if the expenditure by itself or added to all other such expenditures made during the same "election campaign" equals $100 or more. RCW § 42.17A.255(2). These filing requirements include the filing of an initial report with the PDC within 5 days after the date of making an independent expenditure, and then the filing of further reports at varying intervals that contain disclosure of certain

specified information. RCW § 42.17A.255(2)-(3). These disclosures include otherwise private information such as the name of the person submitting the report, the name and address of each person to whom an independent expenditure was made, the amount, date, and purpose of each such expenditure, and the total sum of all independent expenditures made during the "campaign" to date. RCW § 42.17A.255(5). In the context of legal services, this information is especially sensitive and, in cases including pending legal matters, could be privileged. *See, e.g., County of Los Angeles Bd. of Supervisors v. Superior Court*, 219 Cal. Rptr. 3d 674, 678-680 (Cal. Ct. App. 2017); *Los Angeles Cty. Bd. of Supervisors v. Superior Court*, 386 P.3d 773, 781-83 (Cal. 2016).

A person who violates any provision in chapter 42.17A, RCW may be subject to a civil penalty of up to $10,000 for each violation. RCW § 42.17A.750(1)(c). In addition, a court may compel the performance of any reporting requirement. RCW § 42.17A.750(1)(h). The attorney general and local prosecuting authorities "may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17A.750." RCW § 42.17A.765(1). The PDC also may refer certain violations for criminal prosecution. RCW § 42.17A.750(2).

The FCPA defines the term "independent expenditure" as "any expenditure that is made in support of or in opposition to any candidate or *ballot proposition* and is not otherwise required to be reported" under other provisions, with certain

exceptions. (Emphasis added.) RCW § 42.17A.255(1).[6]

2. Ballot Propositions Under the Fair Campaign Practices Act

Most important and central to this case, the FCPA defines "ballot proposition" to mean:

> any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency *before its circulation for signatures*.

RCW § 42.17A.005(4) (Emphasis added.). Under the FCPA, "measure" includes "any proposition or question submitted to the voters", RCW § 29A.04.091, and "election campaign" includes "any

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[6] The FCPA defines "Expenditure" as including a "payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. 'Expenditure' also includes a promise to pay, a payment, or a transfer of anything of value in exchange for goods, services, property, facilities, or anything of value for the purpose of assisting, benefiting, or honoring any public official or candidate, or assisting in furthering or opposing any election campaign." RCW § 42.17A.005.

campaign in support of, or in opposition to, a ballot proposition." RCW 42.17A.005(17).

Under RCW 42.17A.005(4), there are two separate prongs of the definition of "ballot proposition." First, a ballot proposition is a "measure," RCW 42.17A.005(4). In other words, under this prong a proposed initiative becomes a "ballot proposition" only after it is placed on the ballot. This prong very obviously does not apply in this case because none of the propositions were submitted to the voters.

Second, a ballot proposition is a proposition that is "proposed to be submitted to the voters" of any state or local voting constituency, but only "from and after the time when the proposition [1] has been *initially* filed with the appropriate election officer of that constituency [2] *before* its circulation for signatures." (emphasis added) RCW 42.17A.005(4).

While statewide initiatives and initiatives in larger charter cities fit neatly into RCW 42.17A.005(4)'s procedures, initiatives in non-charter cities do not because their procedures differ. For a statewide initiative, many steps have to be navigated *before* the signature gathering stage is reached: proponents file the proposed initiative with the secretary of state, RCW 29A.72.010, the code reviser reviews the proposed measure and then certifies that it has been reviewed and has suggested revisions to the proponent, RCW 29A.72.020, the proposed initiative is then given a serial number by the secretary of state, RCW 29A.72.040, the attorney general then formulates a ballot title and summary, RCW 29A.72.060, and any person or proponent dissatisfied with the title or summary may appeal to the superior court, RCW 29A.72.080. Only after

these procedures does the proponent begin gathering signatures. RCW 29A.72.090-.150. *See also generally* RCW 29A.72.010-.150. If an initiative to the people has enough valid signatures, it goes on the ballot at the next general election. Wash. Const. art. II, § 1. If an initiative to the legislature does not have enough valid signatures, it is presented to the legislature first; if the legislature declines to adopt the initiative, it appears on the following general election ballot. *Id.* § 1(a).

For local initiatives in non-charter cities, as were the initiatives at issue in this case, the proponent generally gathers signatures *first* and then submits them along with the proposed ballot measure to the local election official. *See*, RCW 35.17.260; 35A.11.100; SEQUIM, WASH., MUNICIPAL CODE ch. 1.15 (adopting the initiative and referendum processes set forth in RCW 35A.11.080-.100); SHELTON, WASH., CITY CODE ch. 1.24.010 (adopting the initiative and referendum processes in chapter 35.17 RCW, via adoption of chapter 35A.11 RCW); cf. CHELAN, WASH., MUNICIPAL CODE ch. 2.48.050-.210 (providing for the initiative process). If the petition contains the required number of valid signatures, the city's or the town's council or commission must either pass the proposed ordinance or submit the proposition to a vote of the people. *Id.* In the instant case, the three city councils failed to do either, inspiring the proponents to initiate the litigation at issue here.

C. Washington's Fair Campaign Practices Act is Unconstitutionally Vague as Applied

At what point do proposed ballot initiatives in Washington's non-charter cities legally become ballot initiatives under the FCPA's unclear language? The answer to that question is not only "confusing" and "ambiguous" but also unconstitutionally vague.

It is well established that reporting requirements like those contained in the FCPA implicate the First Amendment right to free speech. U.S. CONST. amend. I; *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 341 P.3d 953 (2015); *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 166 P.3d 1174 (2007); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); 432 P.3d 805, 815 (Gordon McCloud, J. dissenting). Therefore, a great degree of statutory specificity is required and the standards by which courts must adjudicate such vagueness claims must be strict. *See NAACP v. Button*, 371 U.S. at 432; *CPR for Skid Row*, 779 F.3d at 1102-1103. *Buckley*, 424 U.S. at 77 (quoting *Goguen*, 415 U.S. at 573). The FCPA also includes penalties for noncompliance - penalties the State seeks to enforce against the Foundation in this case. *See* App. A3, A38. Accordingly, courts should be particularly diligent in its enforcement of the vagueness standards in this case. *See Karlin*, 188 F.3d at 458; *Vt. Right to Life Comm., Inc.*, 758 F.3d at 127 (citing *Farhane*, 634 F.3d at 138 n.9). It is for these reasons that the FCPA as applied to the Foundation must be held to a particularly high standard of specificity.

While the language of RCW 42.17A.005(4) perfectly tracks the initiative process for statewide measures and some charter cities, it does not track the initiative process in non-charter cities, leaving it unclear when exactly a proposed ballot initiative becomes a ballot initiative for reporting purposes under the FCPA. As the entirety of the Supreme Court of Washington acknowledged, "the text of former RCW 42.17A.005(4) is 'at odds' and in 'tension' with the initiative process in noncharter cities." 432 P.3d at 817-18 (Gordon McCloud, J. dissenting) (citing 432 P.3d at 811 (majority op.)) (App. A28). Indeed, each court to have examined this question has found it "confusing", 1 Wn. App. 2d at 302-03, 432 P.3d at 816, 817 (Gordon McCloud, J. dissenting) (App. A24), and "ambiguous", App. A48; A71, 1 Wn. App. 2d at 302-03, 432 P.3d at 805 (majority op.) (App. A10-A13); 432 P.3d at 816-20 (Gordon McCloud, J. dissenting) (App. A27-A31, A33); *supra* at 7-10. It should be unsurprising therefore that the FCPA's language is unconstitutionally vague.

The majority of the Washington Supreme Court resolved the FCPA's ambiguity against the Foundation, the speaker in this instance, and in favor of the government by relying almost entirely on legislative history that is anything but clear to persons of "ordinary intelligence." The majority relied on "historical information that is not even part of the FCPA as it existed in 2014 when the Foundation provided the free legal representation at issue here." 432 P.3d at 818 (Gordon McCloud, J. dissenting). No reader, let alone one of ordinary intelligence, would have consulted or been required to consult this information to figure out when

supporting a proposed ballot initiative triggers reporting requirements. Rather, initiative proponents in non-charter cities read the FCPA and find it ambiguous because its language does not track with the initiative procedures in non-charter cities. The statute is therefore violative of due process and unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

The fact that the judges and justices of the trial court, Division Two of the Court of Appeals, and the Supreme Court of Washington cannot agree on what the FCPA's disclosure triggers are in this instance demonstrates how the statute's meaning is vague to people of reasonable intelligence. If the brightest legal minds in the State of Washington cannot agree on the meaning of "ballot initiative" under the FCPA as applied to non-charter cities, how can ordinary speakers be expected to have a reasonable opportunity to understand it? They cannot. This situation is hardly the narrow specificity due process demands; the FCPA is therefore unconstitutionally vague as applied in non-charter cities.

Moreover, in finding the FCPA constitutional, the Washington Supreme Court did not apply a narrowing construction of the FCPA. *Cf. Yamada v. Snipes*, 786 F.3d 1182, 1187-1194 (9th Cir. 2015). The United States Circuit Court of Appeals for the Ninth Circuit has repeated emphasized that the terms of statutes that might otherwise be vague are not vague when they are construed narrowly. *See id.*; *ACLU of Nev. v. Heller*, 378 F.3d 979, 986 n.5 (9th Cir. 2004). No state agency or court in the present case have applied this sort of "narrowing gloss."

Yamada, 786 F.3d at 1190. In fact, just the opposite: the majority of the Supreme Court of Washington interpreted and applied the independent expenditure disclosure provisions of the FCPA to the Foundation using the most "liberal construction" possible. 432 P.3d at 813.

Accordingly, the Court should grant this petition in order to hold that RCW 42.17A.005(4), as applied to proposed ballot initiatives in non-charter cities, is unconstitutionally vague.

D. The Supreme Court Of Washington Applied An Incorrect Burden In Contravention Of The Precedent Of This Court And Other State Supreme Courts, Necessitating Review By This Court

An additional reason this Court should grant this petition is because the Supreme Court of Washington applied an incorrect burden to the Foundation's vagueness challenge below, which runs counter not only with the precedent of this Court, but also the precedent of other state supreme courts. Specifically, the Supreme Court of Washington forced the Foundation to overcome an improperly heightened "beyond a reasonable doubt" burden when that burden should shift when the statute implicates the First Amendment. Failing to do so violated both the precedent of the Supreme Court of Washington and the precedent of this Court.

The Supreme Court of Washington has previously analyzed potentially vague statutes under a set two-part burden shifting scheme. In general, statutes are presumed to be constitutional and any parties challenging their constitutionality must

prove unconstitutionality beyond a reasonable doubt. *Voters Educ. Comm. v. Pub. Disclosure Comm'n.*, 161 Wn.2d 470, 481 (Wash. 2007). However, if a statute implicates the First Amendment, that burden shifts then shifts to the State. *Id.* at 482.

Tellingly, in this case the Supreme Court of Washington very selectively cited to its own previous opinion for the "beyond a reasonable doubt" standard. The case that opinion cites is *Voters Educ. Comm. v. Pub. Disclosure Comm'n.*, 161 Wn.2d 470, 481 (Wash. 2007). However, the fullest and most honest recitation of that citation must be:

> "'[a] statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.'" *State v. Hughes*, 154 Wn.2d 118, 132, ¶ 25, 110 P.3d 192 (2005) (quoting *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996)), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). However, as VEC notes, in the First Amendment context the burden shifts and the State usually "bears the burden of justifying a restriction on speech." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997).

(emphasis added) (alteration in original) *Voters Educ. Comm.*, 161 Wn.2d at 481-82. Furthermore,

"where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is *essential*" in a statute's language. (emphasis added) *Id*. at 484 (citing *O'Day v. King Cty.*, 109 Wn.2d 796, 810 (Wash. 1988)).

The Supreme Court of Washington's usual standard of shifting the burden in First Amendment cases mirrors this Court's approach. This Court has stated that the "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963). Accordingly, "[w]here First Amendment rights are involved, an even greater degree of specificity is required." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (citations omitted). *See also Goguen*, 415 U.S. at 573; *Grayned*, 408 U.S. 104, 109 (1972); *Kunz v. New York*, 340 U.S. 290 (1951).

This is because First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. at 433 (1963) (internal citations omitted). "If the line drawn … is an ambiguous one, [the Court] *will not presume the statute curtails constitutionally protected activity as little as possible*". *Id*. at 432. This Court does not presume those statutes are constitutional beyond a reasonable doubt despite implicating First Amendment rights. This Court has determined, in effect, that the burden shifts to the government or at the very least the presumption of constitutionality no longer applies.

When analyzing the Foundation's vagueness argument below, the Supreme Court of Washington stated "[s]tatutes are presumed to be constitutional, and the party asserting that a statute is unconstitutionally vague must prove its vagueness beyond a reasonable doubt", 432 P.3d at 814, but it never rebutted that presumption. Indeed, in its decision the dissent below noted the majority's need to shift this presumption and failure to do so. *Id.* at 819 (Gordon McCloud, J. dissenting). The Supreme Court of Washington was not only required to shift this burden by its own precedent, *see Voters Educ. Comm.*, 161 Wn.2d at 481-84; *O'Day*, 109 Wn.2d at 810, but was also required to do so by the precedent of this Court. *See NAACP v. Button*, 371 U.S. 415, 432 (1963); *Buckley v. Valeo*, 424 U.S. 1, 77 (1976). That court's refusal to follow the precedent of this Court now creates inconsistency. That inconsistency results in a situation where litigants and courts must choose between following the mandates of a state supreme court or the United States Supreme Court. This Court should grant this petition in order to settle the burden shifting inconsistency and lend guidance to what will surely be a confused legal community in the critical and constitutionally protected arena of state campaign finance regulation and enforcement.

II. THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER WASHINGTON'S FAIR CAMPAIGN PRACTICES ACT AS APPLIED VIOLATES THE FIRST AMENDMENT

Assuming, arguendo, that the FCPA is not unconstitutionally vague, which it is, the Court should grant this petition because this case presents the important question of whether a statute that regulates the provision of pro bono legal services as independent expenditures in instances where no election or campaign ever occurs, is violative of the First Amendment.

A. The State of Washington Lacks Interest To Regulate Such Conduct And Such Regulation Is Overbroad

"According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). "Premised on mistrust of governmental power," *Citizens United*, 558 U.S. at 312, "[t]he First Amendment protects a number of rights under its different clauses, including the rights to speak and associate freely under the Free Speech Clause and the right to petition the government for a redress of grievances under the Petition Clause." *Moore v. Darlington Twp.*, 690 F. Supp. 2d 378 (W.D. Pa. 2010); U.S. Const. amend. I. The Court has recognized that disclosure laws, like the one at issue in the present case, have "[t]he

potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. This infringement occurs when potential donors are deterred from exercising their First Amendment rights due to their fear of retribution or harassment. *Id.* at 68; *see also id.* at 237 (Burger, C.J., concurring in part and dissenting in part); ("Rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy. Similarly, potential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent.").

Although the Court has upheld disclosure statutes in other First Amendment challenges, *e.g., Citizens United*, 558 U.S. at 367, it has not sanctioned disclosure statutes *carte blanche* in every circumstance; rather, disclosure statutes must meet "exacting scrutiny." *Citizens United*, 558 U.S. at 366-67. While strict scrutiny or its equivalent should apply to the FCPA's reporting requirements in this case, *see, e.g.*,*Colo. Republican Fed. Campaign Comm.,* 518 U.S. at 631 (Thomas, J. concurring), the statute as applied to the Foundation's actions fails even under exacting scrutiny. *See Citizens United*, 558 U.S. at 366-67. Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest. *Id.* (citing *Buckley*, 424 U.S. at 64, 66; *McConnell v. FEC*, 540 U.S. 93, 231-232 (2003). *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we

uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

The Court has recognized such a state interest only in: (i) the prevention of quid pro quo corruption and the appearance thereof; (ii) the enforcement of contribution limits; and (iii) the provision of information for voters to evaluate messages and candidates as sufficiently important interests. *See Buckley*, 424 U.S. at 83-84; *Citizens United*, 558 U.S. at 371. Moreover, as the nexus between candidates and elections becomes more attenuated, the government's interest in regulating conduct diminishes. *See Van Hollen v. FEC*, 811 F.3d 486, 499-502 (D.C. Cir. 2016) (discussing the tension between free speech and association, constitutional values, and disclosure, an extra-constitutional value).

The FCPA, as applied by the State and the majority of the Supreme Court of Washington, regulates protected speech outside of any election or campaign whatsoever. In this case, the filings to the state's judiciary involved no appeal to voters or the general public. Rather, the actions at issue included only pro bono litigation to vindicate the rights of citizens in small communities imploring their city council to follow the law governing initiative petitions. There is no danger of corruption, no campaign contribution limits, and indeed no campaign or election. The Foundation's conduct in this case is a perfect example of government requiring disclosure without adequate justification.

Simultaneously, the State lacks a "sufficiently important interest" to regulate the Foundation's conduct and fails to tailor its regulation to be substantially related to its purported interest, thus,

making it overbroad. "[B]allot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates," *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999). The government lacks any interest in regulating this conduct because there is absolutely no risk of corruption or the appearance thereof in the absence of an election, candidate, or campaign. There is no risk of quid pro quo corruption if there is no "pro quo." There is no danger of any "pro quo" because there can be no political favors where there is no election, campaign, or candidate whatsoever. *See FEC v. NCPAC*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial quid pro quo: dollars for political favors.").

There needs to be at least *SOME* political activity in order for there to be a danger of political favors. The further one gets from political activity, candidates, and campaigns, the more attenuated the State's interest in regulating that protected conduct gets. *See Van Hollen*, 811 F.3d at 499-502 (discussing the tension between free speech and association, constitutional values, and disclosure, an extra-constitutional value); *Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 299-300 (1981).[7] The proponents' legal actions in the courts at issue in this case consisted of legal activity and are entirely detached from any political activity. Accordingly, the state lacks any

[7] This decision also upheld disclosure for contributions to ballot measure committees, however it did so in the context of appearing to voters. No such political activity is present in this case.

interest in corruption prevention in regulating the Foundation's pro bono legal services in this case.

Further, there can be no danger of appearance of corruption because the court filings in the subject legal actions are all public. (App. A123-A142). Any person may obtain the documents created by the pro bono legal counsel in those cases and view the pro bono legal counsel's information which plainly and repeatedly lists the Proponents' attorneys as being from the Foundation. (App. A123-A142). It was and is no mystery who was representing the proponents in their actions. (App. A123-A142). Surely, there can be no appearance of corruption where the information pertaining to the proponents' legal representation is accessible by the public. For these same reasons the statute is also overbroad because it regulates conduct beyond what is necessary to protect the state interest in corruption prevention.

In addition to the lack of any political activity, election, and campaign in this case, it concerns ballot initiatives which courts have recognized implicate significantly less disclosure interests than other activity. The Court has repeatedly emphasized that such an interest is far diminished in the referendum context: "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (internal citation omitted); *see also Doe v. Reed*, 561 U.S. 186, 233 (2010) (recognizing that the risk of fraud or corruption is more remote at the petition stage of an initiative than at the time of balloting); *Citizens Against Rent Control*, 454 U.S. 290, 298 (1981) (stating that the

risk of corruption in cases involving candidate elections is not present in a popular vote on a public issue).

In *Sampson v. Buescher*, the United States Court of Appeals for the Tenth Circuit determined that challenged disclosure requirements were unconstitutional as applied to a small group of individuals who opposed the annexation of their neighborhood through ballot initiatives. 625 F.3d 1247. In so holding, that court focused on the difference between communications relating to candidates versus those pertaining to ballot issues. *Id.* at 1255-57. Specifically, that court recognized the state's informational interest in disclosure is "significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight." *Id.* at 1259. *See also Hatchett v. Barland*, 816 F. Supp. 2d 583 (E.D. Wis. 2011) (finding disclosure requirement unconstitutional as applied to an individual advocating defeat of a ballot initiative); *Swaffer v. Cane*, 610 F. Supp. 2d 962, 969-70 (E.D. Wis. 2009).

Surely, a state's interest in transparency for transparency's sake cannot be sufficiently important to justify burdens on a citizen's First Amendment rights when there is absolutely no risk of quid pro quo corruption. This point is especially true when regulating pro bono legal services that take place before the judiciary and are completely attenuated from any campaign or election.

B. Requiring Such Disclosure Provides No Benefit To The Public and Is Not Justified by Any Governmental Interest

Requiring persons and nonprofits in small towns to file independent expenditure reports for pro bono legal services disconnected from any election or campaign provides absolutely no public benefit whatsoever, let alone one sufficiently important to support infringing First Amendment rights. There is no justifiable governmental purpose to add campaign finance disclosures to judicial proceedings that do not involve items on any ballot.

In this case, the Foundation was not campaigning anonymously for the proposed ballot initiatives because the proposed initiatives were not even going to be on the ballot. It was merely representing *people*—the initiative proponents—before the judiciary in open court proceedings. What is the public benefit in disclosing participation in ballot measure litigation when no voters, no public communication, and no elections are involved? What government interest is there in requiring campaign finance disclosure in these circumstances? There is none.

In *Chisom v. Roemer*, the Court noted the "The fundamental tension between the ideal character of the judicial office and the real world of electoral politics . . ." *Chisom v. Roemer* 501 U.S. 380, 400 (1991). In dissent, Justice Scalia joined by Justice Kennedy, went even further, by expressing the view that judges, even those who are elected, are not "representatives" for purposes of the Voting Rights Act, because, inter alia, judges are not included in the ordinary meaning of the word

"representative." *Id.* at 404-17. This is because the word "representative" connotes one who is not only elected, but also one who acts on the people's behalf, which judges do not do in the ordinary sense. *Id.* "[T]he judge represents the Law -- which often requires him to rule against the People." *Id.* at 411.

Petitioners are unaware of any other court which has required litigants to disclose pro bono legal services as reportable political expenditures in the absence of any campaign or election. *See also Coloradans for a Better Future v. Campaign Integrity Watchdog*, 2018 CO 6 (Colo. 2018) (pro bono legal services fell outside of Colorado FCPA's definitions of "contribution" and "gift" and were therefore not required to be reported.); *Campaign Integrity Watchdog v. Alliance for a Safe & Indep. Woodmen Hills*, 2018 CO 7 (2018) (Legal expenses were not considered "expenditures" under Colorado law, but were considered "contributions").

In *Farris v. Seabrook*, 2012 U.S. Dist. LEXIS 159220 * 2012 WL 5410072 (W.D. Wash. 2012) *affm'd* 677 F.3d 858 (9th Cir. 2012), two attorneys volunteered their legal services to a recall committee in Washington State after the committee had filed the recall charges with election officials. Subsequently, the PDC issued a "Notice of Administrative Charges" to the committee alleging violations of the FCPA's reporting requirements. In that case the PDC stipulated that the legal pro bono legal services did not constitute "contributions" under the FCPA. *Id.* at 9-10. Even more, the United States Court of Appeals for the Ninth Circuit eventually affirmed a Preliminary injunction prohibiting the State of Washington from enforcing that statute against the committee because plaintiffs

satisfied their burden of demonstrating that is was an unconstitutional and harmful burden on their First Amendment free speech rights. 677 F.3d 858.

The chill on individuals' and entities' First Amendment rights would be deep and wide if the Supreme Court of Washington's ruling is permitted to stand. And the government has advanced no interest in applying campaign finance disclosure requirements to judicial actions involving the rights of citizens to petition their local government where no campaign or election ever occurred. Many would simply opt not to support litigation or engage in judicial proceedings pertaining to proposed ballot initiatives for fear of triggering a complicated and vague filing requirement; and the citizenry would no longer benefit from the diversity of those citizen driven initiatives and the benefit of court rulings on these types of preliminary matters. Even more would chose to forgo valid and justified litigation altogether, and citizens would be deprived of pro bono counsel to assist in vindicating their rights under the Washington Constitution. This chill would be abhorrent to the First Amendment, would be detrimental to the people of the State of Washington, and is not justified by any state interest previously accepted by this Court to justify campaign finance disclosures.

CONCLUSION

Accordingly, Petitioners respectfully request that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

EVERGREEN FREEDOM FOUNDATION
D/B/A FREEDOM FOUNDATION,
Petitioner,

V.

STATE OF WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Washington

APPENDIX

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APPENDIX:

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 95281-7

En Banc

Filed: January 10, 2019

STATE OF WASHINGTON,
Respondent,

v.

EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,
Petitioner.

MADSEN, J.-This case involves statutory interpretation concerning application of the reporting requirements contained in the Fair Campaign Practices Act (FCPA), chapter 42.17A RCW. The specific issue is how the FCPA reporting requirements in RCW 42.17A.255 and the definition in RCW 42.17A.005(4) ("ballot proposition")[1] are to be applied in the context of

[1] The FCPA was amended twice in the recent legislative session. Laws of 2018, chapter 111 does not take effect until January 1, 2019. Laws of 2018, chapter 304 took effect June 7, 2018, but the amendments to RCW 42.17A.255 in that bill were vetoed. The amendments otherwise added a definition unrelated to this case, but resulted in the "ballot proposition" definition at issue here to be renumbered as RCW 42.17A.005(5). To avoid confusion, and to remain consistent with the parties' briefing, we refer to the relevant definitional subsection addressing "ballot proposition" by its former designation as RCW 42.17A.005(4).

local initiatives. For the reasons explained below, we hold that under the circumstances of this case, pro bono legal services, which Evergreen Freedom Foundation provided to initiative proponents, were reportable to the Public Disclosure Commission (PDC) under the above noted statutes. We affirm the Court of Appeals' reversal of the trial court's CR 12(b)(6) dismissal of the State's FCPA regulatory enforcement action and remand to the trial court for further proceedings.

FACTS

In 2014, Evergreen Freedom Foundation (EFF) staff created sample municipal ordinances and ballot propositions for citizens to use to advance certain causes to their local city councils or commissions. Local residents in the cities of Sequim, Chelan, and Shelton utilized those samples in filing two ballot propositions in each city, one to require collective bargaining negotiation sessions to be publicly conducted and the second to prohibit union security clauses in city collective bargaining agreements.

The proponents submitted the proposed measures to their local city clerks along with signatures they had gathered in support of the measures. They asked their respective city councils or commissions either to pass the measures as local ordinances or, if the councils or commissions did not agree, to alternatively place each measure on the local ballot for a vote. None of the cities passed the measures as ordinances or placed the ballot propositions on the local ballots.[2]

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[2] The cities of Chelan and Shelton voted to neither adopt the propositions nor place them on the ballot. The city of Sequim concluded that it would table the issue until a later meeting but never acted further.

In response, EFF employees, who are attorneys, participated in lawsuits against each jurisdiction on behalf of the local resident proponents. Each suit sought a judicial directive to the respective city to put each measure on the local ballot. Each lawsuit ended in a superior court dismissing the case, and those decisions were not appealed.

EFF did not file any campaign finance disclosure reports with the PDC identifying the value of the legal services it provided to the resident proponents in support of the local ballot propositions.[3] In February 2015, the attorney general received a citizen action complaint about EFF' s failure to report the value of legal services it provided in support of these local ballot measures.[4] The State

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[3] As discussed below, the FCPA, RCW 42.17A.255, requires a person (organization) to file a report with the PDC disclosing all "independent expenditures" totaling $100 or more during the same election campaign. RCW 42.17A.255(2). Subsection (1) of that statue defines "independent expenditure" as "any expenditure that is made in support of or in opposition to any candidate or ballot proposition." RCW 42.17A.255(1). "Ballot proposition" is defined in RCW 42.17A.005(4) as

> any "measure" as defined by RCW 29A.04.091 [i.e., "any proposition or question submitted to the voters"], or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and *after the time when the proposition has been initially filed with the appropriate election officer* of that constituency *before its circulation for signatures.*

(Emphasis added.)

[4] The letter was filed on behalf of the Committee for Transparency in Elections and contained notice that if the State did not take action within 45 days, the complainant intended to file a citizen's action against EFF "as authorized under [RCW] 42.17A.765(4)." Clerk's Papers at 65.

conducted an investigation and then filed a civil regulatory enforcement action against EFF in Thurston County Superior Court, alleging that EFF failed to report independent expenditures it made in support of the noted local ballot propositions.[5]

EFF moved to dismiss the State's enforcement action, asserting that the local propositions were not "ballot propositions" as defined in RCW 42.17A.005(4). Clerk's Papers at 24. EFF argued that because the local initiative process generally requires signatures to be gathered and submitted before the ballot propositions are filed with the local elections official, the local propositions were not "ballot propositions" under RCW 42.17A.005(4) and, therefore, no disclosure was required unless and until the proposition became a "measure" placed on a ballot. *Id.* at 19-33.

The State opposed the motion and the statutory interpretation asserted by EFF. The State argued that EFF's reading of the statute would effectively exclude from public disclosure all funds raised and spent on local ballot propositions until they advanced to the ballot, contrary to the stated purpose and intent of the FCPA.

The superior court granted EFF's motion for dismissal under CR 12(b)(6) (failure to state a claim). It found the statutes at issue here to be "ambiguous and vague." Verbatim Report of Proceedings at 23. The superior court further found that the State had not "sufficiently established that this situation involved a ballot measure that gave them the opportunity to require that such be reported," explaining that "such" meant "legal services that

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[5] No other citizen action complaints related to these local ballot propositions have been filed with the Attorney General's Office.

were provided on a pro bono basis before the matter ever went to any kind of vote." *Id.* at 23-24.

The State sought direct review and this court transferred the case to Division Two of the Court of Appeals. Order, *State* v. *Evergreen Freedom Found.,* No. 93232-8 (Wash. Mar. 29, 2017). The Court of Appeals reversed, holding in a partially published opinion that "under the only reasonable interpretation" of the definition of "ballot proposition" in the FCPA, the local initiatives qualified as ballot propositions at the time EFF provided legal services because the initiatives had been filed with local election officials. *State v. Evergreen Freedom Found.,* 1 Wn. App. 2d 288, 293, 404 P.3d 618 (2017) (published in part). The Court of Appeals also rejected EFF's argument that reporting requirements could apply only to electioneering that occurs once a proposition has been placed on the ballot. *Id.* at 306. The court concluded that RCW 42.17A.255 does not violate EFF's First Amendment rights. *Id.* at 307. In the unpublished portion of the opinion, the Court of Appeals rejected EFF's other arguments, including that the statute is unconstitutionally vague. *Evergreen Freedom Found.,* No. 50224-1-II, slip op. (unpublished portion) at 22-24, http://www.courts.wa.gov/opinions/pdf/D2%2050224-1-II%20Published%20Opinion.pdf. EFF petitioned for review, which this court granted. *State v. Evergreen Freedom Found.,* 190 Wn.2d 1002 (2018).

ANALYSIS

Standard of Review

This court reviews issues of statutory construction and constitutionality de novo. *State v. Evans,* 177 Wn.2d 186, 191,298 P.3d 724 (2013); *Columbia Riverkeeper v. Port of Vancouver USA,* 188 Wn.2d421, 432,395 P.3d 1031 (2017). When possible, this court derives legislative intent from the plain language enacted by the legislature; "[p]lain language that is not ambiguous does not require construction." *Evans,* 177 Wn.2d at 192. However, if more than one interpretation of the plain language is reasonable, the statute is ambiguous, and the court must then engage in statutory construction. *Id.* at 192-93. The court may then look to legislative history for assistance in discerning legislative intent. *Id.* at 193.

In construing a statute, the fundamental objective is to ascertain and carry out the people's or the legislature's intent. *See Lake v. Woodcreek Homeowners Ass'n,* 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). This court looks to the entire "'context of the statute in which the provision is found, [as well as] related provisions, amendments to the provision, and the statutory scheme as a whole."' *State v. Conover,* 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) *(quoting Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.,* 182 Wn.2d 342, 350, 340 P.3d 849 (2015)); *see also G-P Gypsum Corp. v. Dep't of Revenue,* 169 Wn.2d 304,310,237 P.3d 256 (2010) ("enacted statement of legislative purpose is included in a plain reading of a statute").

> The meaning of words in a statute is not gleaned from [the] words alone but from "all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another."

Burns v. City of Seattle, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (internal quotation marks omitted) (quoting *State v. Krall,* 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)); *see also Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 11,43 P.3d4 (2002) (clarifying "plain meaning" is "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question").

FCPA Background and Application

In 1972, voters in Washington adopted Initiative 276 (I-276), which established the PDC and formed the basis of Washington's campaign finance laws. *Voters Educ. Comm. v. Pub. Disclosure Comm'n,* 161 Wn.2d 470, 479, 166 P.3d 1174 (2007). I-276 is codified in portions of chapter 42.17A RCW, which is now known as the FCPA. RCW 42.17A.909. I-276 was designed, in part, to provide the public with full disclosure of information about who funds initiative campaigns and who seeks to influence the initiative process. *See* Laws of 1973, ch. 1, § 1. In I-276, the people declared that it would be

> the public policy ofthe State of Washington:
>
> (1) That political campaign and lobbying contributions and expenditures *be fully disclosed* to the public and that secrecy is to be avoided.
>
> . . .
>
> (10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.
>
> (11) ... The provisions of this act shall be *liberally construed to promote complete disclosure* of all information respecting the financing of political campaigns and lobbying.

Laws of 1973, ch. 1, § 1 (emphasis added); *see also* RCW 42.17A.001(1), (10), (11). With a 72 percent supporting vote, Washington voters adopted I-276 and required financial disclosure for campaigns, including those related to initiatives, referenda, and ballot measures. *Human Life of Wash. Inc. v. Brumsickle,* 624 F .3d 990, 996 (9th Cir. 2010).

I-276 established reporting requirements for anyone supporting or opposing a "ballot proposition." LAWS OF 1973, ch. 1, §§ 2(2), 10(1); *see also id.* §§ 3-11 (I-276 provisions establishing reporting requirements); RCW 42.17A.255. For example, an "'independent expenditure' [is] any expenditure that is made *in support of or in opposition to any* candidate or *ballot proposition* and is not otherwise required to be reported." RCW 42.17A.255(1) (emphasis added). Reporting requirements are

triggered once an expenditure amount crosses a threshold of $100. RCW 42.17A.255(2).[6]

I-276 defined "ballot proposition" to mean "any 'measure' as defined by [former] R.C.W. 29.01.110, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of any specific constituency *which has been filed with the appropriate election officer of that constituency."* Laws of 1973, ch. 1, § 2(2) (emphasis added). When I-276 was adopted in 1972, "measure" meant "any proposition or question submitted to the voters of any specific constituency." Laws of 1965, ch. 9, § 29.01.110; former RCW 29.01.110 (1972).[7]

In 1975, soon after the adoption of I-276, the legislature made adjustments to the definition of "ballot proposition" to clarify that the term applied to both statewide and local initiatives, recalls, and referenda:

> "Ballot proposition" means any "measure" as defined by [former] RCW 29.01.110, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of

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[6] As originally adopted in I-276, this provision was worded differently, but it reflected the same intent: "Any person who makes an expenditure in support of or in opposition to any candidate or proposition (except to the extent that a contribution is made directly to a candidate or political committee), in the aggregate amount of one hundred dollars or more during an election campaign, shall file with the [PDC] a report." Laws of 1973, ch. 1, § 10(1).

[7] In 2003, the legislature removed the last phrase of the definition of "measure," so that the term now includes "any proposition or question submitted to the voters." Laws of 2003, ch. 111, § 117. Former RCW 29.01.110 is now codified as RCW 29A.04.091.

> ((~~any specific~~)) the state or any municipal corporation, political subdivision or other voting constituency ((~~which~~)) from and after the time when such proposition has been initially filed with the appropriate election officer of that constituency prior to its circulation for signatures.

Laws of 1975, 1st Ex. Sess., ch. 294, § 2(2). Thus, the 1975 legislature clarified that "ballot proposition" includes local propositions "from and after the time when such proposition has been initially filed with the appropriate election officer ... prior to its circulation for signatures."[8] *Id.*

As noted, the 1975 legislature added the language in the definition that refers specifically to "any municipal corporation, political subdivision or other voting constituency." *Id.* It simultaneously added "prior to its circulation for signatures." *Id.*

The issue here is that the procedures for statewide and local initiatives differ. For a statewide initiative, many steps have to be navigated *before* the signature gathering stage is reached: the proponent files the proposed initiative with the secretary of state (RCW 29A.72.010), the code reviser reviews and then certifies that (s)he has reviewed the proposed measure and suggested revisions to the proponent (RCW 29A.72.020), then the secretary of state gives the proposed measure a

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[8] The definition of "ballot proposition" has since been updated to reflect the current codification of the definition of "measure" and to replace "prior to" with "before," but it otherwise remains the same today. RCW 42.17A.005(4); *see* LAWS OF 2010, ch. 204, § 101(4).

serial number (RCW 29A.72.040), then the attorney general formulates a ballot title and summary (RCW 29A.72.060), and any person dissatisfied with the title or summary may appeal to the superior court (RCW 29A.72.080); after all that, the proponent then begins gathering signatures (RCW 29A.72.090-.150). *See generally* RCW 29A.72.010-.150. If an initiative to the people has sufficient valid signatures, it goes on the ballot at the next general election. Const. art. II, § 1. If an initiative to the legislature has sufficient valid signatures, it is presented to the legislature first, but if the legislature declines to adopt it, the initiative appears on the following general election ballot. *Id.* § l(a).

For a local initiative, the proponent generally gathers signatures and submits them along with the proposed ballot measure to the local election official. *See* RCW 35.17.260. If the petition contains the required number of valid signatures, the city's or the town's council or commission must either pass the proposed ordinance or submit the proposition to a vote of the people.[9] *Id.*

Thus, RCW 42.17A.005(4)'s language fits neatly with the statewide initiative procedures, but it

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[9] *See also* RCW 35.17.240-.360 (authorizing cities using the commission form of government to adopt the initiative and referendum processes); RCW 35A.11.100 (authorizing same processes for noncharter code cities); SEQUIM MUNICIPAL CODE 1.15 (adopting the initiative and referendum processes set forth in RCW 35A.11.080-.100); SHELTON CITY CODE 1.24.010 (adopting the initiative and referendum processes in chapter 35.17 RCW, via adoption of chapter 35A.11 RCW); *cf* CHELAN MUNICIPAL CODE 2.48.050-.210 (providing for the initiative process), .080 (providing sponsors with an extended 90-day window within which to gather sufficient valid signatures after the initiative is initially submitted).

creates tension as to the noted local initiative procedures in that the second prong of RCW 42.17A.005(4) expressly applies to both state and local initiatives, but its final phrase, "before its circulation for signatures," seems at odds with the local initiative procedures noted above.

The State argues that "[p]re-amendment, the definition already incorporated propositions as soon as they were filed and it already incorporated signature gathering for state initiatives, so there was no need to add the phrase 'prior to circulation for signatures' unless the legislature intended to clarify that the definition also covers the signature-gathering period for local propositions."[10] State of Washington's Suppl. Br. at 9. In the State's view, the amendment "ensured the statute would be applied according to the people's purpose: full and complete public disclosure of expenditures related to ballot propositions, including those made before a proposition appears on the ballot." *Id.* This is a fair and plain reading of the above statute, giving effect to all its parts. And, as importantly, the State's reading of the statute comports with the FCPA's stated policy and express directive that its provisions be "liberally construed to promote complete disclosure of all information respecting the financing of political campaigns." RCW 42.17A.001(11); *see*

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[10] As noted, the original definition of "ballot proposition" in the FCPA included "any initiative ... proposed to be submitted to the voters of any specific constituency which has been filed with the appropriate election officer of that constituency." Laws of 1973, ch. 1, § 2(2). For statewide initiatives, this definition already incorporated the signature-gathering phase because, for a statewide initiative, the sponsor must file the proposed initiative before circulating it for signatures. *See* RCW 29A.72.010-.150 (discussed above).

Campbell & Gwinn, 146 Wn.2d at 11 (plain meaning is discerned from all that the legislature has said in the statute and related statutes); *see also Fila Foods, LLC* v. *City of SeaTac,* 183 Wn.2d 770, 792-93, 357 P.3d 1040 (2015) (this court assumes the legislature does not intend to create inconsistency and, thus, reads statutes together to achieve a harmonious total statutory scheme that maintains each statute's integrity).

EFF counters that the plain language of the statute controls, arguing that because the signatures were already gathered when the proposed initiatives were filed with the local election officials, the definition of "ballot proposition" is not met and no reporting requirement is triggered. But this reading not only undermines the stated purpose of the FCPA, it also ignores the language added to RCW 42.17A.005(4) in 1975 that expressly applies that provision to local initiatives.

EFF further contends that RCW 42.17A.005(4) and RCW 42.17A.255(1) "apply only to electioneering," which EFF contends never occurred here because the local initiatives were never placed on the ballot. EFF Suppl. Br. at 11 (emphasis omitted). First, EFF's reliance on *Brumsickle* as supporting EFF's contention is misplaced. That case did not so hoId. *See id.* (misquoting *Brumsickle,* 624 F.3d at 998). Further, as noted, both statutes at issue here broadly impose reporting requirements concerning *"any expenditure* that is made in support of or in opposition to *any* candidate or *ballot proposition,"* RCW 42.17A.25 5(1) (emphasis added), with "ballot proposition" defined to include *"any initiative* ... proposed to be submitted to the voters." RCW 42.17A.005(4) (emphasis added). The noted

language is simply not restricted to electioneering, as EFF asserts. Moreover, where litigation is being employed as a tool to block adoption of an initiative or to force an initiative onto the ballot, as was attempted here, the finances enabling such support (or opposition) would indeed appear to fall within the "any expenditure," triggering the reporting obligation noted above. The contention that litigation support does not qualify as a reportable independent expenditure ignores the express purpose of the FCP A in the context of modern politics. *See, e.g., Huff v. Wyman,* 184 Wn.2d 643,645,361 P.3d 727 (2015) (litigation brought by initiative opponents seeking to enjoin placement of initiative on the ballot); *Fila Foods, LLC* v. *City of SeaTac,* 179 Wn. App. 401, 403, 319 P .3d 817 (20 14) (litigation over whether a local minimum wage initiative qualified for the ballot).[11]

In sum, giving meaning to *all* of the language in RCW 42.17A.005(4) and complying with the FCPA's

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[11] EFF cites *Coloradans for a Better Future v. Campaign Integrity Watchdog,* 2018 CO 6, 409 P.3d 350, as supporting its viewpoint, but that case is inapposite. The court there held that uncompensated legal services to a political organization were "not 'contributions' to a political organization under Colorado's campaign-finance laws." *Id.* at ¶ 41. But that determination turned on application of specific statutory language that is not present here. *Id.* at ¶¶ 28-40.

EFF also cites to *Farris v. Seabrook,* 677 F.3d 858 (9th Cir. 2012), but that case is also inapposite. There, the Ninth Circuit Court of Appeals affirmed the grant of a preliminary injunction barring enforcement of a statute that imposed contribution limits regarding a political (recall) committee. But that case applied a different standard in the contributions limitations context (i.e., applying "closely drawn" scrutiny to contribution *limits* based on a First Amendment challenge). *Id.* at 865 n.6. As discussed below, that is not the appropriate standard here.

directive for liberal construction, we determine that the amended language in RCW 42.17A.005(4) was intended to pick up the expenditures prior to signature gathering, regardless of when they are gathered, but only if the measure is actually filed with an election official. Applying this holding here, and in light of the FCPA's history, purpose, and the particular facts of this case, EFF's pro bono legal services were reportable to the PDC under RCW 42.17A.255 and RCW 42.17A.005(4).

The FCPA Provisions Are Not Unconstitutionally Vague

EFF contends that RCW 42.17A.255(1) and RCW 42.17A.005(4) are unconstitutionally vague because "[n]o reasonable person can know how to conform to the applicable statutory requirements." EFF Suppl. Br. at 16-17. We disagree.

Statutes are presumed to be constitutional, and the party asserting that a statute is unconstitutionally vague must prove its vagueness beyond a reasonable doubt. *Voters Educ. Comm.,* 161 Wn.2d at 481. In the First Amendment context, the asserting party may allege that a statute is either facially invalid or invalid as applied. *Am. Legion Post No. 149 v. Dep't of Health,* 164 Wn.2d 570,612, 192 P.3d 306 (2008). A facial challenge asserts that the statute cannot be properly applied in any context. *City of Spokane v. Douglass,* 115 Wn.2d 171, 182 n.7, 795 P.2d 693 (1990). In an as applied challenge, the statute must be considered in light of the facts of the specific case before the court. *Am. Legion Post,* 164 Wn.2d at 612.

"'A statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. The purpose of the vagueness doctrine is to ensure that citizens receive fair notice as to what conduct is proscribed, and to prevent the law from being arbitrarily enforced.'" *In re Contested Election of Schoessler,* 140 Wn.2d 368, 3 88, 998 P.2d 818 (2000) (internal quotation marks omitted) (quoting *Haley v. Med. Disciplinary Bd.,* 117 Wn.2d 720, 739-40, 818 P.2d 1062 (1991)). However, vagueness is not simply uncertainty as to the meaning of a statute. *Am. Legion Post,* 164 Wn.2d at 613. In determining whether a statute is sufficiently definite, the provision in question must be considered within the context of the entire enactment and the language used must be afforded a sensible, meaningful, and practical interpretation. *Id.* "A court should not invalidate a statute simply because it could have been drafted with greater precision." *Id.* Moreover, "'a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which [that person's] actions would be classified as prohibited conduct.'" *Schoessler,* 140 Wn.2d at 3 89 (alteration in original) (quoting *City of Seattle v. Eze,* 111 Wn.2d 22, 27, 759 P.2d 366 (1988)).

A statute's language is sufficiently clear when it provides explicit standards for those who apply them and provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Voters Educ. Comm.,* 161 Wn.2d at 489. Here, EFF contends that the definition of "ballot proposition" cannot apply to local initiatives and the obligation to

report independent expenditures cannot apply to activities beyond electioneering. But those assertions are refuted by the statutory language as discussed herein. As explained above, a local initiative becomes a ballot proposition when it is filed with local elections officials, and here all of the initiatives in question were filed before EFF expended resources to support them. RCW 42.17A.005(4). Accordingly, the portions of the FCPA at issue here (RCW 42.17A.255 and .005(4)) are not unconstitutionally vague as applied. Likewise, there is no facial invalidity because the statutes at issue establish a clear course of conduct, requiring persons to report their independent expenditures. *Any* nonexempt independent expenditures in support of a ballot proposition must be reported under RCW 42.17A.255. EFF has not shown that there is no set of facts, including the circumstances here, in which the statute could not be constitutionally applied. *Douglass,* 115 Wn.2d at 182 n.7. We hold that RCW 42.17A.005(4) and RCW 42.17A.255 are not unconstitutionally vague.

The FCPA Provisions Do Not Violate the First Amendment

EFF contends that the "State's enforcement action impermissibly infringes on the Foundation's [First Amendment] free speech and privacy of association rights." EFF Suppl. Br. at 21; U.S. CONST. amend. I. We disagree.

In addressing a First Amendment challenge to the "independent expenditure" provision of the FCPA at issue here, the Ninth Circuit Court of Appeals concluded in *Brumsickle,* 624 F.3d at 994-

95, that "Washington State's disclosure requirements do not violate the First Amendment." The Ninth Circuit court noted that the Supreme Court had concluded that "the government 'may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."' *Id.* at 994 (quoting *Citizens Unitedv. Fed. Election Comm'n,* 558 U.S. 310,319, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)). "[A] campaign finance disclosure requirement is constitutional if it survives *exacting scrutiny,* meaning that it is substantially related to a sufficiently important governmental interest." *Id.* at 1005 (emphasis added). As the *Citizens United* Court held, "' [D]isclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking.'" *Id.* (internal quotation marks and citation omitted) (quoting *Citizens United,* 558 U.S. at 366). Accordingly, "exacting scrutiny applies in the campaign finance disclosure context." *Id.* (citing *Citizens United,* 588 U.S. at 366-67; *Doe v. Reed,* 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010); *Davis v. Fed. Election Comm 'n,* 554 U.S. 724, 728-30, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)).

In explaining the governmental interest at stake, the *Brumsickle* court noted that providing information to the electorate is "vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Id.* Such vital provision of information has been repeatedly recognized as "a sufficiently important, if not compelling, governmental interest." *Id.* at 1005-06. The Ninth

Circuit expounded on the importance of disclosure regarding candidates, and then drew parallels regarding ballot measures.

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Id. at 1006 (alteration in original) (quoting *Buckley v. Valeo,* 424 U.S. 1, 66-67, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)).

Relevant here, the court observed that such considerations apply equally for voter-decided ballot measures. *Id.* "In the ballot initiative context, where voters are responsible for taking positions on some of the day's most contentious and technical issues, '[v]oters act as legislators,' while 'interest groups and individuals advocating a measure's defeat or passage act as lobbyists.'" *Id.* (quoting *Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1106 (9th Cir. 2003)). The "high stakes of the ballot context only amplify the crucial need to inform the electorate that is well recognized in the context of candidate elections." *Id.*

> Campaign finance disclosure requirements ... advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another. The increased "transparency" engendered by disclosure laws "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United,* [558 U.S. at 371]. As the Supreme Court has stated: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *[First Nat'! Bank v. Bellotti,* 435 U.S. 765, 791-92, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)]. Disclosure requirements, like those in Washington's Disclosure Law, allow the people in our democracy to do just that.

Id. at 1008 (third alteration in original). The *Brumsickle* court concluded that "[t]here is a substantial relationship between Washington State's interest in informing the electorate and the definitions and disclosure requirements it employs to advance that interest." *Id.* at 1023; *see also Voters Educ. Comm.,* 161 Wn.2d at 483 (the right to free speech held by organizations that engage in political speech includes a "fundamental counterpart" that is

the public's right to receive information); *State ex rel. Pub. Disclosure Comm 'n v. Permanent Offense,* 136 Wn. App. 277, 284, 150 P.3d 568 (2006) ("Washington State has a substantial interest in providing the electorate with valuable information about who is promoting ballot measures and why they are doing so[;] ... it is particularly important ... that voters know whether other influences-particularly money-are affecting those who are otherwise known as grass-roots organizers.").

Given the State's important governmental interest in informing the public about the influence and money behind ballot measures, as noted above, and the FPCA's vital role (via application ofRCW 42.17A.255 and RCW 42.17A.005(4)) in advancing that interest, the disclosure requirement that operates under these statutes satisfies the exacting scrutiny standard. Accordingly, there is no impermissible infringement of EFF's First Amendment rights, and we so hoId.

CONCLUSION

We affirm the Court of Appeals' reversal ofthe trial court's CR 12(b)(6) dismissal of the State's regulatory enforcement action under the FCPA. Under the circumstances of this case, EFF's pro bono legal services were reportable to the PDC under RCW 42.17A.255 and RCW 42.17A.005(4). Those statutes are not unconstitutionally vague, nor does their application here violate EFF's First Amendment rights. We remand to the trial court for further proceedings.

/s/ J. Madsen

GORDON McCLOUD, J. (dissenting)-The Fair Campaign Practices Act (FCPA), chapter 42.17A RCW, establishes requirements for political spending and reporting. One FCPA statute requires people and organizations that make certain political expenditures to report those expenditures to the Public Disclosure Commission. It is well established that such a reporting requirement implicates the First Amendment right to free speech. U.S. CONST. amend. I; *Utter v. Bldg. Indus. Ass'n of Wash.,* 182 Wn.2d 398,341 P.3d 953 (2015); *Voters Educ. Comm. v. Public Disclosure Comm 'n,* 161 Wn.2d 470, 166 P.3d 1174 (2007); *Human Life of Wash. Inc. v. Brumsickle,* 624 F.3d 990 (9th Cir. 2010).

In this case, both the trial court and the Court of Appeals expressly acknowledged that the FCPA is ambiguous with respect to whether it compels reporting of independent expenditures in support of initiatives not yet on the ballot in noncharter cities. Clerk's Papers (CP) at 102 (order); Verbatim Report of Proceedings (May 13, 2016) (VRP) at 23; *State v. Evergreen Freedom Found.,* 1 Wn. App. 2d 288, 303, 404 P.3d 618 (2017) (published in part). The majority implicitly acknowledges the same thing. Majority at 10. The majority resolves that ambiguity against the speaker and in favor of the government. But resolving an ambiguity in a statute implicating free speech against the speaker and in favor of the government violates controlling precedent of this court and of the United States Supreme Court.

I therefore respectfully dissent.

BACKGROUND

The State brought a civil enforcement action against Evergreen Freedom Foundation (Foundation) for failing to report independent expenditures in support of several "ballot propositions." CP at 5-10 (State's complaint); *see also* RCW 42.17A.255(3) (requiring reporting of independent expenditures in support of ballot propositions). Under the FCPA, a "ballot proposition" is

> any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency *before its circulation for signatures.*[1]

Former RCW 42.17A.005(4) (2014), *recodified as* RCW 42.17A.005(5) (Laws of 2018, ch. 304, § 2) (emphasis added).

The Foundation admits that it did not report the expenditures at issue here free legal representation for citizens attempting to place initiatives on the ballot in their municipalities. CP at 14-18 (Foundation's answer). The Foundation defends itself on the ground that its expenditures were not reportable. It argues that the FCPA's RCW

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[1] Under RCW 29A.04.091, a "'[m]easure' includes any proposition or question submitted to the voters."

42.17A.255 requires a person or organization to report expenditures for "ballot propositions" "after" the submission to the election officer, which is "before its circulation for signatures." But the initiatives at issue here were not submitted to the election officer before circulation for signatures. The Foundation therefore concludes that those initiatives did not constitute ballot propositions within the meaning of former RCW 42.17A.005(4). CP at 22-28 (Foundation's motion to dismiss).

The Foundation continues that even if the initiatives did constitute ballot propositions within the meaning of former RCW 42.17A.005(4), that definition particularly the language italicized above- is unconstitutionally vague as applied in this case. VRP at 8-9; Foundation's Suppl. Br. 13-17; Wash. Supreme Court oral argument, *State v. Evergreen Freedom Found.,* No. 95281-7 (June 28, 20 18), at 9 min., 18 sec. through 10 min., 32 sec., *video recording by* TVW, Wash. State's Public Affairs Network, https://www.tvw.org/watch/?eventiD=20 18061095.

The language of the statute defining "ballot proposition" is certainly confusing as applied to this case as the trial court, appellate court, and majority all note. The reason is that in this case, citizens were attempting to place initiatives on the ballot in three noncharter cities: Sequim, Shelton, and Chelan.[2] CP at 7. The initiative process in noncharter cities differs from the initiative process for statewide

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[2] *See* SEQUIM MUNICIPAL CODE 1.16.010 (identifying Sequim as a code city); SHELTON MUNICIPAL CODE 1.24.010 (identifying Shelton as a code city); CHELAN MUNICIPAL CODE 1.08.010 (identifying Chelan as a code city).

measures and the initiative process for certain charter cities. In noncharter cities, an initiative's proponent gathers signatures first and officially files the initiative with the city after. By contrast, at the statewide level and in certain charter cities, the proponent files first and gathers signatures after. *Compare* RCW 35.17.260 (establishing procedures for initiatives in cities with the commission form of government) *and* RCW 35A.11.100 (generally adopting for code cities the initiative procedures used in cities with the commission form of government), *with* chapter29A.72 RCW (establishing procedures for statewide initiatives). *See also* RCW 35.22.200 (recognizing that charter cities "may provide for direct legislation by the people through the initiative"); *e.g.,* SEATTLE CITY CHARTER art. IV,§ l.B; SEATTLE MUNICIPAL CODE ch. 2.08; TACOMA CITY CHARTER art. II, § 2.19.

There is no dispute that former RCW 42.17A.005(4) would have covered the Sequim, Shelton, and Chelan initiatives if they had made it onto the ballot, because at that point they would have fallen within the definition of reportable "measures" in cross-referenced RCW 29A.04.091. The issue in this case is whether former RCW 42.17A.005(4) encompasses initiatives not yet on the ballot in such noncharter cities.[3]

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[3] I assume for the purposes of this opinion that the Foundation's provision of free legal representation to the citizens trying to place the initiatives on their local ballots qualifies as "independent expenditures" under RCW 42.17A.255(1). The majority makes the same assumption. As the Court of Appeals noted, the Foundation has not argued otherwise. *Evergreen Freedom Found.,* 1 Wn. App. 2d at 306 n.5.

The trial court concluded that the tension between the statute's language and the initiative process in noncharter cities could not be resolved. It noted that it had "difficulty working through [the statutes] and understanding the position of the parties[] because there is not a clearly stated policy regarding this kind of a situation .... " VRP at 23. It therefore held that former RCW 42.17A.005(4) was "ambiguous and vague." *Id.* Accordingly, it granted the Foundation's CR 12(b)(6) motion to dismiss for failure to state a claim on which relief could be granted. CP at 102 (order).

The Court of Appeals agreed that former RCW 42.17A.005(4) was "ambiguous" and added that the statute was "confusing." 1 Wn. App. 2d at 302-03. But it reversed the trial court's decision to dismiss on the ground that former RCW 42.17A.005(4) encompassed initiatives not yet on the ballot in noncharter cities. The Court of Appeals acknowledged that its interpretation of former RCW 42.17A.005(4) disregarded the "literal interpretation" of the statute's text. *Id.* at 304. That court explicitly stated that it "can and must ignore statutory language." *Id.* at 305.

The Foundation petitioned for review, which we granted. *State v. Evergreen Freedom Found.,* 190 Wn.2d 1002 (2018).

ANALYSIS

I. Standard of Review

We review a trial court's grant of a CR 12(b)(6) motion to dismiss de novo. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.,* 180

Wn.2d 954, 962, 331 P.3d 29 (2014) (citing *Kinney v. Cook,* 159 Wn.2d 837, 842, 154 P.3d 206 (2007)).

II. The Plain Language of Former RCW 42.17A.005(4) Is Ambiguous as Applied to Ballot Propositions Not Yet on the Ballot in Noncharter Cities

In interpreting a statute such as former RCW 42.17A.005(4), "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent ..." *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court discerns the legislature's intent by conducting a plain-meaning analysis-that is, by examining the statute's text and context. *Id.* at 11-12. "Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." *Id.* at 12 (citing *Cockle v. Dep 't of Labor & Indus.,* 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.,* 125 Wn.2d 305, 312, 884 P.2d 920 (1994)).

The language of former RCW 42.17A.005(4) perfectly tracks the initiative process for statewide measures and the initiative process for certain charter cities. It states that a "ballot proposition" is "any initiative ... proposed to be submitted to the voters of the state or any ... other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures." Former RCW42.17A.005(4). A statewide measure or an initiative in a charter city following

the statewide process *is* "filed ... before its circulation for signatures." *Id.*

But the language of former RCW 42.17A.005(4) does not perfectly track the initiative process in noncharter cities. An initiative in a noncharter city *is not* "filed ... before its circulation for signatures." *Id.* It is filed *after* its circulation for signatures. Thus, as the majority recognizes, the text of former RCW 42.17A.005(4) is "at odds" and in "tension" with the initiative process in noncharter cities. Majority at 10.

III. The Majority Impermissibly Relies on Legislative History To Interpret Former RCW 42.17A.005(4)'s Plain Meaning

A. The Majority Relies on Former RCW 42.17A.005(4) 's Underlying History To Interpret the Statute

The majority resolves that tension by relying on the statute's underlying history. It compares the definition of "ballot proposition" as enacted by the voters in 1972 with the definition of "ballot proposition" as amended by the legislature in 1975.[4] The 1975 amendment made the following changes:

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[4] The legislature amended the definition of "ballot proposition" again in 2005 and 2010. But those amendments made technical, nonsubstantive changes only. Laws of 2005, ch. 445, § 6; LAWS OF 2010, ch. 204, § 101.

> "Ballot proposition" means any "measure" as defined by [RCW 29A.04.091], or any initiative, recall, or referendum proposition proposed to be submitted to the voters of ((~~any specific~~)) the state or any municipal corporation, political subdivision or other voting constituency ((~~which~~)) from and after the time when such proposition has been initially filed with the appropriate election officer of that constituency [before] its circulation for signatures.

Laws of 1975; 1st Ex. Sess., ch. 294, § 2(2).

The State argues-and the majority accepts-that because the 1972 "'definition already incorporated propositions as soon as they were filed and [because the 1972 definition] already incorporated signature gathering for state initiatives ... there was no need to add the phrase "[before] its circulation for signatures" unless the legislature intended to clarify that the definition also covers the signature-gathering period for local propositions."' Majority at 10-11 (quoting State of Washington's Suppl. Br. at 9). I agree.

B. Underlying History Is Legislative History, Not Context

I disagree, however, with the majority that that conclusion is plain. The majority characterizes the changes that the legislature makes to a statute from one session to the next as part of the statute's context. That information is not the sort of context that this court had in mind, however, when it

incorporated context into our plain-meaning analysis in *Campbell & Gwinn.*

In *Campbell & Gwinn,* we were concerned about a line of a cases that-in the name of plain meaning-had employed a method of interpretation that effectively isolated statutory text from its surrounding scheme. 146 Wn.2d at 9; *see also Habitat Watch v. Skagit County,* 155 Wn.2d 397, 417, 120 P.3d 56 (2005) (Chambers, J., concurring) ("[W]e ... often interpreted the plain meaning of the statute section by section, without appropriate consideration for the legislature's overall plan contained within the four comers of the act."). We disavowed that line of cases and held that text's meaning must be derived from its words as well as its context. *Campbell & Gwinn,* 146 Wn.2d at 11-12. Instead of scrutinizing a particular term in a vacuum, a court must consider "all that the Legislature has said in the statute and related statutes." *Id.* at 11.

The majority goes beyond that, however. It relies on historical information that is not even part of the FCPA as it existed in 2014 when the Foundation provided the free legal representation at issue here. Hence, no reader would have consulted it to figure out whether expenditures were reportable in this context.

Instead, an initiative proponent in 2014 would have read former RCW 42.17A.005(4) and found it ambiguous-even in context with the rest of the FCPA-with respect to initiatives not yet on the ballot in noncharter cities. A person could not be faulted for reading the latter portion of the statute that begins with "from and after the time [of filing]" and ends with "before its circulation for signatures" as

modifying and limiting the text "any municipal corporation, political subdivision, or other voting constituency." In fact, that is arguably the more grammatical reading. The statute's unambiguous application to statewide measures and initiatives in certain charter cities-places like Seattle and Tacoma-only reinforces its ambiguity as to initiatives not yet on the ballot in noncharter cities. That is so because the statute still has a purpose, even if one concludes that it does not apply to initiatives not yet on the ballot in noncharter cities. Indeed, the legislature might reasonably have intended the statute to apply in the pre-ballot stage only at the statewide level and in the big cities where the political stakes, moneyed interests, and potential for mischief might be considered greatest. A plausible reading is that the statute does not apply to noncharter cities like Sequim, Shelton, and Chelan. The liberal construction mandate of RCW 42.17.001(11) would not alter that reading.

Thus, the majority's interpretation of the "plain meaning" of former RCW 42.17A.005(4) is really based on a comparison with a prior, historical, version of the statute-the 1972 version that the 1975 legislature amended. But while the legislative history can help courts resolve ambiguity in a statute, it cannot make ambiguous language any less ambiguous to the reader. As applied to the circumstances of this case, former RCW 42.17A.005(4) is ambiguous.[5]

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[5] RCW 42.17A.005 has been amended 20 times since voters enacted it in 1972.

IV. Controlling Rules of Constitutional Law Bar This Court from Enforcing an Ambiguous Statute That Implicates Free Speech Rights

Under controlling decisions of this court and of the United States Supreme Court, an ambiguity is fatal to a statute implicating constitutional rights. "Under the Fourteenth Amendment, a statute may be void for vagueness 'if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Voters Educ. Comm.,* 161 Wn.2d at 484 (2007) (quoting *O'Day v. King County,* 109 Wn.2d 796, 810, 749 P.2d 142 (1988)); U.S. Const. amend. XIV. That standard is particularly strict when, as in this case, the First Amendment right to free speech is implicated. *Id.* at 485 ("[T]he Supreme Court has 'repeatedly emphasized that where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential.'" (quoting *O'Day,* 109 Wn.2d at 81 0)); *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 366, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (treating disclosure requirements as burdens on the First Amendment). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Nat'l Ass 'n for Advancement of Colored People v. Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (citing *Cantwell v. Connecticut,* 310 U.S. 296,311,60 S. Ct. 900,84 L. Ed. 1213 (1940)). "If the line drawn ... is an ambiguous one, [the court] will not presume" that the statute is constitutional. *Id.* at 432. Rather, an ambiguous statute bearing on such an important right must not be given effect. *Id.*

The majority states that the Foundation has the burden of proving that former RCW 42.17A.005(4) is unconstitutionally vague. Majority at 13, 15. The Court of Appeals took the same position in the unpublished portion of its opinion. *Evergreen Freedom Found.,* No. 50224-1-II, slip op. (unpublished portion) at 23, http://www.courts.wa.gov/opinions/pdf/D2%2050224-1-II%20Published%20Opinion.pdf. Like the Court of Appeals, the majority cites *Voters Education Committee* in support of its position. But *Voters Education Committee* says just the opposite. 161 Wn.2d at 481-82. The court in that case did recognize that a statute is ordinarily presumed constitutional. But it also noted that that presumption is not extended to statutes regulating speech. *Id.* at 482. That case, like this case, involved a constitutional vagueness challenge to the FCPA, and because the FCPA regulates speech, we placed the burden of demonstrating the statute's clarity *on the State. Id.* Thus, to the extent that a burden exists in this case, *Voters Education Committee* indicates that the State must bear it.

CONCLUSION

Because former RCW 42.17A.005(4) is ambiguous as applied to the circumstances of this case, the statute cannot be given effect in these circumstances. It is unconstitutionally vague as applied.[6]

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[6] Recognizing that former RCW 42.17A.005(4) is unconstitutionally vague as applied to the circumstances of this case does not conflict with the holdings of our previous cases addressing the FCPA. *See Utter,* 182 Wn.2d 398; *Voters Educ.*

I respectfully dissent.

/s/ J. Gordon McCloud

Comm., 161 Wn.2d 470. Nor does it conflict with the Ninth Circuit's holdings in *Brumsickle,* 624 F .3d 990. The questions in those cases, as well as their underlying facts, were all very different than the ones before the court today. The circumstances of this case-initiatives not yet on the ballot in noncharter cities-stand on their own, and the challenge-to former RCW 42.17A.005(4) in the aforementioned circumstances-is narrow.

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Appellant,

V.

EVERGREEN FREEDOM FOUNDATION,
d/b/a FREEDOM FOUNDATION,
Respondent.

No. 50224-I-II

PART PUBLISHED OPINION

Maxa, J. - The State of Washington appeals the CR 12(b)(6) dismissal of its regulatory enforcement action against the Evergreen Freedom Foundation (the Foundation). The State filed suit after learning from a citizen complaint that the Foundation had provided pro bono legal services in support of local initiatives in Sequim, Chelan, and Shelton without reporting the value of those services to the Public Disclosure Commission (PDC).

RCW 42.17A.255(2) requires a person to report to the PDC certain "independent expenditures," defined in RCW 42.17A.255(1) to include any expenditure made in support of a "ballot proposition." RCW 42.17A.005(4) defines "ballot proposition" to include any initiative proposed to be submitted to any state or local voting constituency "from and after the time when the proposition has

been initially filed with the appropriate election officer of that constituency before its circulation for signatures."

The language of RCW 42.17A.005(4) tracks the procedure for statewide initiatives, in which a proposition must be filed with election officials before any signatures are solicited. However, in many local jurisdictions - including in Sequim, Chelan, and Shelton - the initiative procedure requires that the appropriate number of signatures be obtained before a proposition is filed with election officials.

Here, the Foundation's pro bono legal services were provided after the Sequim, Chelan, and Shelton initiatives had been filed with local election officials but also after the initiatives had been circulated for signatures. The State argues that these initiatives were "ballot propositions" under the RCW 42.17A.005(4) definition. The Foundation argues, and the trial court ruled, that the initiatives were not "ballot propositions" when the legal services were provided because the initiatives already had been circulated for signatures. Under the Foundation's argument and the trial court's ruling, a local initiative filed in a Jurisdiction where signatures must be obtained before filing could never constitute a "ballot proposition."

We hold that (1) under the only reasonable interpretation of RCW 42.17A.005(4), the Sequim, Chelan, and Shelton initiatives qualified as "ballot propositions" because the Foundation provided services after the initiatives had been filed with the local election officials, regardless of the additional qualification that the proposition had to be filed before its circulation for signatures; and (2) the

disclosure requirement for independent expenditures under RCW 42.17A.255(2) does not violate the Foundation's First Amendment right to free speech. In the unpublished portion of this opinion, we reject the Foundation's additional arguments.

Accordingly, we reverse the trial court's dismissal of the State's regulatory enforcement action regarding the Sequim, Chelan, and Shelton initiatives, and we remand for further proceedings.

FACTS

Proposition Proposals

In 2014, groups of citizens in Sequim, Chelan, and Shelton prepared initiatives concerning collective bargaining between municipalities and the bargaining representatives of their employees, circulated the initiatives, and obtained signatures in their communities. The proponents then submitted the initiatives and signatures to all three cities. The Sequim city council failed to take any action. The Chelan city council directed its city attorney to file an action to determine the initiative's validity. The Shelton city commission declared the initiatives invalid and took no further action.

In response, the proponents of each initiative filed a lawsuit against their respective cities. The lawsuits requested that the initiatives be placed on the ballot to be voted on by city residents. In each case, the proponents were represented by attorney staff members of the Foundation. Apparently, attorneys representing various labor unions opposed each lawsuit. All three lawsuits were dismissed and none were appealed.

The State's Lawsuit

In October 2015, the State filed a complaint against the Foundation. The complaint alleged that RCW 42.17A.255 required the Foundation to report to the PDC the legal services provided by its staff in support of the initiatives. The State sought the imposition of a civil penalty as well as temporary and permanent injunctive relief.

The Foundation moved to dismiss under CR 12(b)(6) for failure to state a claim. The trial court granted the Foundation's motion and dismissed the State's complaint. The court reasoned that the applicable statutes were ambiguous and vague as to whether the Foundation was obligated to report its legal services. The State appeals the trial court's dismissal order.

ANALYSIS

A. STANDARD OF REVIEW

The Foundation filed its motion to dismiss the State's complaint under CR 12(b)(6), which provides that a complaint may be dismissed if it fails to state a claim upon which relief can be granted. We review a trial court's CR 12(b)(6) order dismissing a claim de novo. *JS. v. Vill. Voice Media Holdings, LLC,* 184 Wn.2d 95, 100, 359 P.3d 714 (2015). We accept as true all facts alleged in the plaintiffs complaint and all reasonable inferences from those facts. *Id.* Dismissal under CR 12(b)(6) is appropriate if the plaintiff cannot allege any set of facts that would justify recovery. *Id.*

B. STATUTORY BACKGROUND

1. Fair Campaign Practices Act Reporting Requirements

In 1972, Washington citizens passed Initiative 276, which established the PDC and formed the basis of Washington's campaign finance laws. *Voters Educ. Comm. v. Pub. Disclosure Comm'n,* 161 Wn.2d 470,479, 166 P.3d 1174 (2007). Initiative 276 is codified in portions of Chapter 42.17A RCW, which is known as the Fair Campaign Practices Act (FCPA). RCW 42.17A.001 sets forth the declaration of policy of the FCPA. The public policy of the state includes:

> (1) That *political campaign* and lobbying *contributions and expenditures be fully disclosed to the public* and that secrecy is to be avoided.
> . . . .
> (5) That public confidence in government *at all levels* is essential and must be promoted by all possible means.
> . . . .
> (10) That the *public* 's *right to know of the financing of political campaigns* and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.
> (11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be

> assured as a fundamental and necessary precondition to the sound governance of a free society.

RCW 42.17A.001 (emphasis added). In addition, RCW 42.17A.001 states that "[t]he provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying."

The FCPA requires candidates and political committees to report to the PDC all contributions received and expenditures made. RCW 42.17A.235(1). A "political committee" includes any organization receiving donations or making expenditures in support of or in opposition to a ballot proposition. RCW 42.17A.005(37).

A person who violates any provision in chapter 42.17A RCW may be subject to a civil penalty of not more than $10,000 for each violation. RCW 42.17A.750(1)(c). In addition, a court may compel the performance of any reporting requirement. RCW 42.17A.750(1)(h). The attorney general and local prosecuting authorities "may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17A.750." RCW 42.17A.765(1). The PDC also may refer certain violations for criminal prosecution. RCW 42.17A.750(2).

2. Statewide and Local Initiative Process

The requirements for reporting expenditures under chapter 42.17A RCW involve the processes for submitting ballot initiatives at the statewide and

local levels. The initiative processes at each level are established by state law and involve somewhat different requirements.

At the state level, chapter 29A.72 RCW governs the process for submitting initiatives to the voters. A person who desires to submit a "proposed initiative measure" to the people must file a copy of the proposed measure with the secretary of state. RCW 29A.72.010. After review by the office of the code reviser, the proponent must file the proposed measure along with a certificate of review with the secretary of state for assignment of a serial number. RCW 29A.72.020. The attorney general also formulates a ballot title for the proposed initiative. RCW 29A.72.060.

After the proposed initiative has been filed with the secretary of state and a ballot title has been prepared, the proponent can prepare petitions for signature. RCW 29A.72.100, .120. The proponent must obtain a certain number of signatures from legal voters, after which the petitions are "submitted to the secretary of state for filing." RCW 29A.72.150. The secretary of state then verifies the signatures. RCW 29A.72.230. If the petition is sufficient, the secretary of state places the proposed initiative on the ballot. RCW 29A.72.250.

At the local level, RCW 35.17.260 allows ordinances to be initiated by petition of a city's registered voters filed with the city commission. But the initiative must receive a certain number of signatures from registered voters before being filed. RCW 35.17.260. The city clerk ascertains whether the petition is signed by a sufficient number of registered voters. RCW 35.17.280. The commission must decide whether to pass the proposed ordinance

or submit the proposed ordinance to a vote of the people. RCW 35.17.260(1)-(2).

Chapter 35.17 RCW applies to cities incorporated under a commission form of government. *See* RCW 35.17.010. Although Sequim, Chelan, and Shelton are noncharter "code cities" subject to title 35A RCW,[1] RCW 35A.11.100 provides that, with a few exceptions, the initiative process set forth in chapter 35.17 RCW also applies to code cities.[2]

Under the statutes discussed above, the procedure for submitting statewide and local proposed initiatives is similar, but the first two preliminary steps are reversed. For a statewide initiative, the proponent must file the proposed measure and then circulate the measure for signatures. For a local initiative, the proponent must circulate the proposed measure for signatures and then file the measure.

C. REPORTING OF INDEPENDENT EXPENDITURES

The State argues that the trial court erred in dismissing its complaint for failure to state a claim

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[1] Sequim Municipal Code 1.16.010; Chelan Municipal Code 1.08.010; Shelton Municipal Code (SMC) 1.24.010. Shelton also operates under a commission form of government. SMC 1.24.020.

[2] First class cities that have adopted a charter may elect to follow a different process as provided in the charter. RCW 35.22.200. For example, the initiative process in Seattle mirrors the statewide requirement and requires an initial filing with the city clerk before signatures are collected. *See* SEATTLE CITY CHARTER art. IV,§ 1(B); Seattle Municipal Code 2.08.010.

because the Sequim, Chelan, and Shelton proposed initiatives qualified as "ballot propositions" under RCW 42.17A.005(4), and therefore the Foundation was required to report to the PDC its independent expenditures in support of the initiatives. We agree and hold that the local initiatives qualified as "ballot propositions" once they were filed with the appropriate election officials.

1. Statutory Interpretation Principles

Statutory interpretation is a matter of law that we review de novo. *Jametsky v. Olsen,* 179 Wn.2d 756,761,317 P.3d 1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. *Id.* at 762. To determine legislative intent, we first look to the plain language of the statute. *Id.* We consider the language of the provision in question, the context of the statute in which the provision is found, and related statutes. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.,* 182 Wn.2d 342, 350, 340 P.3d 849 (2015).

If the statute defines a term, we must apply the definition provided. *Nelson v. Duvall,* 197 Wn. App. 441, 452, 387 P.3d 1158 (2017). To discern the plain meaning of undefined statutory language, we give words their usual and ordinary meaning and interpret them in the context of the statute in which they appear. *AllianceOne Receivables Mgmt., Inc. v. Lewis,* 180 Wn.2d 389, 395, 325 P.3d 904 (2014). And "[r]elated statutory provisions must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statute."

Koenig v. City of Des Moines, 158 Wn.2d 173, 184, 142 P.3d 162 (2006).

If a statute is unambiguous, we apply the statute's plain meaning as an expression of legislative intent without considering other sources of such intent. *Jametsky,* 179 Wn.2d at 762. If the language of the statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. *Id.* We resolve ambiguity by considering other indications of legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Id.*

We generally assume that the legislature meant precisely what it said and intended to apply the statute as it was written. *HomeStreet, Inc. v. Dep 't of Revenue,* 166 Wn.2d 444, 452, 210 P.3d 297 (2009). When interpreting a statute, each word should be given meaning. *Id.* And when possible, statutes should be construed so that no clause, sentence, or word is made superfluous, void, or insignificant. *Id.* However, in special cases we can ignore statutory language that appears to be surplusage when necessary for a proper understanding of the provision. *Wash. Water Power Co. v. Graybar Elec. Co.,* 112 Wn.2d 847, 859, 774 P.2d 1199, 779 P.2d 697 (1989); *see also Am. Disc. Corp. v. Shepherd,* 160 Wn.2d 93, 103, 156 P.3d 858 (2007).

In addition, when construing two statutes, we assume that the legislature did not intend to create an inconsistency. *Fila Foods, LLC v. City of SeaTac,* 183 Wn.2d 770, 793, 357 P.3d 1040 (2015). Whenever possible, we read statutes together to create a harmonious statutory scheme that maintains each statute's integrity. *Id.* at 792.

Finally, we can avoid a literal reading of a statute if it leads to strained, unlikely, or absurd consequences. *Columbia Riverkeeper v. Port of Vancouver USA,* 188 Wn.2d 421, 443, 395 P.3d 1031 (2017). "We may resist a plain meaning interpretation that would lead to absurd results." *Univ. of Wash. v. City of Seattle,* 188 Wn.2d 823,834,399 P.3d 519 (2017); *see also Chelan Basin Conservancy v. GBI Holding Co.,* 188 Wn.2d 692, 705-08, 399 P.3d 493 (2017)(avoiding an absurd interpretation that would render a statute practically meaningless).

2. Statutory Language

RCW 42.17A.255(2) requires any person who makes an "independent expenditure" to file a report with the PDC if the expenditure by itself or added to all other such expenditures made during the same "election campaign" equals $100 or more. RCW 42.17A.255(1) defines the term "independent expenditure" as "any expenditure that is made in support of or in opposition to any candidate or *ballot proposition* and is not otherwise required to be reported" under other provisions, with certain exceptions. (Emphasis added).

RCW 42.17A.005(4) defines "ballot proposition" to mean

> any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision,

> or other voting constituency from and *after the time when the proposition has been initially filed* with the appropriate election officer of that constituency *before its circulation for signatures.*

(Emphasis added.) RCW 29A.04.091 defines "measure" to include "any proposition or question submitted to the voters."

RCW 42.17A.255(2) also refers to an "election campaign." RCW 42.17A.005(17) defines "election campaign" to include "any campaign in support of, or in opposition to ... , a ballot proposition."

3. Interpretation ofRCW 42.17A.005(4)

a. Two Prongs of "Ballot Proposition" Definition

Under RCW 42.17A.005(4), there are two separate prongs of the definition of "ballot proposition." First, a ballot proposition is a "measure," RCW 42.17A.005(4), which under RCW 29A.04.091 is "any proposition or question submitted to the voters." In other words, under this prong an initiative becomes a "ballot proposition" only after it is actually placed on the ballot. The parties agree that the first prong does not apply here because none of the initiatives at issue were submitted to the voters.

Second, a ballot proposition is a proposition that is "proposed to be submitted to the voters" of any state or local voting constituency, but only "from and after the time when the proposition [1] has been initially filed with the appropriate election officer of

that constituency [2] before its circulation for signatures." RCW 42.17A.005(4). The question here is whether this second prong applies to the Sequim, Chelan, and Shelton local initiatives.

b. Application to State Initiatives

For statewide initiatives, application of the second prong of the "ballot initiative" definition is straightforward and unambiguous. A state initiative must be submitted to the secretary of state both before signature collection can begin, RCW 29A.72.010, and again after the required number of signatures are collected. RCW 29A.72.150. Because there are two points at which "filing" must occur, the phrase "before its circulation for signatures" clarifies when an initiative becomes a "ballot proposition" - from and after the first filing, which is the one that occurs before circulation for signatures.

c. Application to Local Initiatives

For local initiatives, the second prong of the definition of "ballot initiative" is confusing. Unlike for statewide initiatives, in many local jurisdictions signatures must be gathered before any filing occurs. RCW 35.17.260. Therefore, for those local initiatives there can be no period that is both after filing but before circulation for signatures.

The Foundation argues that under the plain language of RCW 42.17A.005(4), the phrase "before circulation for signatures" means that the second prong of the "ballot initiative" definition can never apply to local initiatives in those jurisdictions - including in Sequim, Chelan, and Shelton - where

obtaining signatures is required before a proposition can be filed. Therefore, the Foundation asserts that only the first prong of the definition could possibly apply to the local initiatives here, and the first prong clearly is inapplicable.

The State argues that the phrase "before its circulation for signatures" in RCW 42.17A.005(4) applies only to statewide initiatives and does not limit the second prong of the definition for local initiatives where obtaining signatures is required before a proposition can be filed. According to the State, the second prong *at least* applies to a proposition that "has been initially filed with the appropriate election officer." RCW 42.17A.005(4). Otherwise, the second prong's express application to local jurisdictions would be meaningless.[3]

d. Analysis

On initial review, the second prong of RCW 42.17A.005(4) is ambiguous. However, we conclude that the only reasonable interpretation is the State's position that a local initiative becomes a "ballot proposition" once it is filed with the appropriate election official.

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[3] The State also proposes an interpretation under which the second prong would apply to the signature-gathering phase of a local initiative, even before the initiative has been filed with the appropriate election official. Under this interpretation, the second prong would apply completely different requirements for statewide initiatives (beginning after filing) and local initiatives (beginning before circulation for signatures). However, as the State concedes, we need not address this interpretation because here the local initiatives had been filed when the Foundation provided legal services.

As noted above, applying the phrase "before its circulation for signatures" in RCW 42.17A.005(4) literally would mean that the second prong of the definition of "ballot proposition" could never apply to initiatives in many local jurisdictions. But that result is inconsistent with other language of RCW 42.17A.005(4), which expressly applies the second prong to an initiative submitted not just to state voters, but also to the voters of *"any* municipal corporation, political subdivision, or other voting constituency." (Emphasis added.)

Further, the legislature amended RCW 42.17A.005(4) in 1975 to clarify that the second prong of the definition of "ballot proposition" applied to all jurisdictions, not just to statewide initiatives, and at the same time added the phrase "before its circulation for signatures." The language of Initiative 276 and the original language of RCW 42.17A.005(4) stated that the second prong applied to an initiative submitted to "any specific constituency which has been filed with the appropriate election officer ofthat constituency." LAWS OF 1973, ch. 1, § 2(2).

The 1975 amendment changed the language as follows:

> "Ballot proposition" means any "measure" as defined by RCW 29.01.110, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of ((~~any specific~~)) the state or any municipal corporation, political subdivision or other voting constituency ((~~which~~)) from and after the time when such proposition has been initially filed with the appropriate election

> officer of that constituency prior to its circulation for signatures.

LAWS OF 1975, 1st Ex. Sess., ch. 294, § 2(2).[4]

We avoid a literal interpretation of a statute that would lead to unlikely or absurd results. *Columbia Riverkeeper,* 188 Wn.2d at 443. The Foundation's interpretation of RCW 42.17A.005(4) would lead to an absurd result. It would make no sense for the legislature to expressly extend the second prong to *all* local initiatives while *at the same time* adopting a requirement that precluded the application of the second prong to local initiatives where signatures must be collected before filing.

The Foundation argues that we cannot adopt an interpretation of RCW 42.17A.005(4) that ignores the phrase "before its circulation for signatures" because we must give effect to all the statutory language. In general, we must adopt an interpretation of a statute that does not render certain language superfluous. *HomeStreet,* 166 Wn.2d at 452. But this principle does not require adoption of the Foundation's position.

First, the Foundation fails to acknowledge that its interpretation ignores the part of RCW 42.17A.005(4) stating that the second prong applies to an initiative submitted to the voters of "any municipal corporation, political subdivision, or other voting constituency." The Foundation's position- that the second prong can never apply to most local initiatives- would render this language completely superfluous. But under the State's interpretation, the phrase "before its circulation for signatures"

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[4] The phrasing "prior to its circulation" was later changed to "before its circulation." LAWS OF 2010, ch. 204, § 101(4).

applies to and provides clarification for statewide initiatives, even though it does not apply to local initiatives.

Second, we can and must ignore statutory language when necessary for a proper understanding of the provision. *Am. Disc.,* 160 Wn.2d at 103. Here, the only way we can apply the second prong of the definition of "ballot proposition" to all local initiatives - which the legislature clearly intended- is if we disregard the phrase "before its circulation for signatures" in the context of local initiatives where signatures must be obtained before filing.

Third, we must be mindful of the directive in RCW 42.17A.001 that the provision of the FCPA "be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns." And relevant here, RCW 42.17A.001(5) states that "public confidence in government *at all levels* is essential and must be promoted by all possible means." (Emphasis added.) As the State points out, adopting the Foundation's position would create a large loophole in the FCPA's reporting requirements. The public would be precluded from receiving information regarding the financing of local initiatives at the most critical time- when signatures in support of the initiatives are being collected. On the other hand, the State's position is consistent with the primary purpose of the FCP A -to fully disclose to the public political campaign contributions and expenditures. RCW 42.17A.001(1).

We hold that the only reasonable interpretation of RCW 42.17A.005(4) is that the second prong of the definition of "ballot proposition" applies after a local initiative has been filed with the appropriate election official even though signatures already have

been collected in support of that initiative. The phrase "before its circulation for signatures" applies only to statewide initiatives or to local jurisdictions that follow the statewide procedure.

4. Application of RCW 42.17A.005(4)

Here, the State's complaint alleged that the Foundation provided pro bono legal support for each of the Sequim, Chelan, and Shelton initiatives after those initiatives had been filed with the respective cities. The State further alleged that the Foundation failed to report that support as an independent expenditure in support of a ballot proposition. For purposes of CR 12(b)(6), we must assume that these allegations are true. *JS.,* 184 Wn.2d at 100.

Based on our interpretation above, each initiative qualified as a "ballot proposition" under RCW 42.17A.005(4) once it was filed with the cities. As a result, under RCW 42.17A.255(2) the Foundation was required to file a report disclosing any independent expenditure that, alone or in combination with all other independent expenditures, equaled $100 or more.[5] If the State demonstrates that the Foundation violated RCW 42.17A.255(2), the Foundation will be subject to a civil penalty under RCW 42.17A.750.

The Foundation argues that any reporting obligations in this case could not be triggered because RCW 42.17A.255(2) requires that an independent expenditure was made "during [an] election campaign." The Foundation claims that

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[5] The Foundation does not contest that its pro bono legal services constitute an "independent expenditure," as defined by RCW 42.17 A.255(1).

there was never an election campaign in this case because the initiatives were never submitted to the voters. But an "election campaign" is defined in RCW 42.17A.005(17) to include "any campaign in support of, or in opposition to, a ballot proposition." The Foundation's pro bono legal services were rendered in support of the local initiatives -to assist their placement on the ballot. Therefore, because we conclude that the initiatives at issue here qualified as "ballot propositions," the Foundation's support occurred during an "election campaign."

By alleging that the Foundation failed to report its legal support of the Sequim, Chelan, and Shelton initiatives, the State stated a claim upon which relief could be granted. Accordingly, we hold that the trial court erred in dismissing the State's claim under CR 12(b)(6).

D. FIRST AMENDMENT RIGHT TO FREE SPEECH

The Foundation argues that if we interpret RCW 42.17A.255 to require disclosure here, the statute would impermissibly infringe on the Foundation's right of free speech under the First Amendment to the United States Constitution. We disagree.

1. Legal Standard

Generally, a statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving it to be unconstitutional beyond a reasonable doubt. *Voters Educ. Comm.,* 161 Wn.2d at 481. However, in the First Amendment context the State typically has the burden to justify a restriction on speech. *Id.* at 482.

The applicable standard of review differs depending on whether a law limits speech outright or merely imposes disclosure requirements on the speaker. *Id.* Statutes that regulate speech based on its content must survive strict scrutiny. *Rickert* v. *Pub. Disclosure Comm'n*, 161 Wn.2d 843, 848, 168 P.3d 826 (2007). By contrast, disclosure requirements, although potentially a burden on the ability to speak, impose no ceiling on campaign-related activity and do not prevent speech. *Citizens United* v. *Fed. Election Comm'n,* 558 U.S. 310, 366, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

Therefore, laws that impose disclosure requirements must survive the less stringent " 'exacting scrutiny' "test, which requires disclosure requirements to have a" 'relevant correlation' or 'substantial relation'" to a governmental interest.[6] *Voters Educ. Comm.,* 161 Wn.2d at 482 (quoting *Buckley* v. *Valeo,* 424 U.S. 1, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)); *see also Citizens United,* 558 U.S. at 366. We must determine whether (1) the disclosure requirements promote a sufficiently important government interest and (2) there is a substantial relation between the disclosure requirements and that interest. *See Voters Educ. Comm.,* 161 Wn.2d at 482; *Citizens United,* 558 U.S. at 366.

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[6] The Foundation argues that strict scrutiny review applies. But as the Ninth Circuit recently explained in detail, exacting scrutiny is the appropriate standard of review for disclosure requirements. *See Human Life of Wash. Inc.* v. *Brumsickle,* 624 F.3d 990, 1004-05 (9th Cir. 2010).

2. Governmental Interest

Disclosure requirements can further multiple governmental interests, including providing information to the public, deterring corruption and the appearance of corruption, and gathering the data necessary to enforce substantive election restrictions. *McConnell v. Fed Election Comm'n,* 540 U.S. 93, 196, 124 S. Ct. 619, 690, 157 L. Ed. 2d 491 (2003), *overruled on other grounds by Citizens United,* 558 U.S. 310; *see also Voters Educ. Comm.,* 161 Wn.2d at 482. On that basis, courts that have addressed disclosure requirements and have consistently determined that they sufficiently further a governmental interest. And courts have done so when specifically addressing chapter 42.17A RCW.

For example, the Ninth Circuit in *Human Life of Washington Inc. v. Brumsickle* addressed the same "independent expenditure" disclosure requirement at issue here. 624 F.3d 990, 998 (9th Cir. 2010). The court stated that disclosure laws help shed light on contributors to and participants in public debate, providing voters with the facts necessary to evaluate the messages competing for their attention. *Id* at 1005. In the context of voter-decided ballot measures, the voters act as legislators, making it important that they know who is lobbying for their vote. *Id* at 1007. Therefore, the court concluded that finance disclosure requirements "advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas." *Id* at 1008.

Washington courts have reached the same conclusion. In *Voters Education Committee,* the Supreme Court noted as important the governmental interests in providing the electorate with information and deterring corruption. 161 Wn.2d at 482. The court acknowledged that the right to free speech held by organizations who engage in political speech includes a "fundamental counterpart" that is the public's right to receive information. *Id.* at 483 (quotation marks and citation omitted). The court explained that constitutional safeguards that protect the organization also apply to ensure that the public receives information, thereby encouraging uninhibited, robust, and wide-open political speech. *Id.*

Similarly, Division One of this court has determined that the state has a substantial interest in the disclosure of information to promote the integrity of its elections and prevent concealment that could mislead voters. *State ex rel. Pub. Disclosure Comm'n v. Permanent Offense,* 136 Wn. App. 277, 284, 150 P.3d 568 (2006).

The same governmental interests in those cases apply here. As the legislature expressly stated, chapter 42.17A adopted the policy of fully disclosing contributions and expenditures for political campaigns and lobbying. RCW 42.17A.001(1). The goal of disclosure was intended to improve public confidence in the fairness of elections and government processes and to protect the public interest. *See generally* RCW 42.17A.001(1)-(11). In addition to those express goals, the governmental interests in educating voters and preventing concealment noted by other courts apply with equal strength here.

3. Substantial Relationship

Under the second exacting scrutiny prong, our Supreme Court has stated that in most cases, disclosure requirements" 'appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption.'" *Voters Educ. Comm.,* 161 Wn.2d at 483 (quoting *Buckley,* 424 U.S. at 68). The United States Supreme Court in *Citizens United* emphasized that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." 558 U.S. at 369. Disclosure requirements operate by requiring organizations to reveal their identity to allow the public to identify the source of funding that influences elections without actually limiting that funding. *Voters Educ. Comm.,* 161 Wn.2d at 483.

The reports required under RCW 42.17A.255 are substantially related to the government's interest in disclosure. The reports themselves include only the name and address of the person who provided an independent expenditure, the name and address of the person who received the independent expenditure, the amount and date of the independent expenditure, its purpose, and the sum of all independent expenditures during the campaign. RCW 42.17A.255(5). This information is consistent with the government's interests in providing the public with information, preventing corruption, and collecting data. In addition, by emphasizing disclosure, the reporting requirement imposes significantly less of a burden than spending limitations. *Permanent Offense,* 136 Wn. App. at 285. As a result, the requirement's relationship to the

relevant governmental interests is sufficiently close to be valid.

The Foundation argues that the disclosure requirement is invalid because disclosure in this case violates the attorney-client privilege. For support, the Foundation cites RCW 5.60.060(2)(a), which privileges communication made by the client to an attorney or the attorney's advice given in the course of his or her professional employment. The privilege exists to allow a client to freely communicate with an attorney without a fear of compulsory discovery. *Dietz v. Doe,* 131 Wn.2d 835, 842, 935 P.2d 611 (1997). Generally, the privilege does not protect the name of a client because that information is not a confidential communication. *Id* at 846. A limited "legal advice" exception may privilege a client's identity where disclosure of the client's name would implicate the client in criminal activity. *Id*

But the Foundation has not shown that disclosure of pro bono legal services violates its attorney-client privilege. The fact that the Foundation provided pro bono legal services is not itself a confidential communication. Disclosing the value of those services also does not reveal any confidential information. And the Foundation does not argue that the legal advice exception applies.

The Foundation also argues that under *Citizens United,* disclosure and reporting requirements are valid only if they are limited to speech that is functionally equivalent to express political advocacy. But *Citizens United* holds the opposite. The Court noted that it had previously limited restrictions on independent expenditures to express advocacy. *Citizens United,* 558 U.S. at 368. It then expressly

"reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Id* at 369.

The disclosure requirement in RCW 42.17A.255(2) satisfies the exacting scrutiny standard and is not otherwise invalid as applied in this case. Accordingly, we hold that the Foundation has not shown that the FCPA violates the First Amendment either facially or as applied.

CONCLUSION

We reverse the trial court's dismissal of the State's regulatory enforcement action regarding the Sequim, Chelan, and Shelton initiatives, and we remand for further proceedings.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL ANALYSIS

In the unpublished portion of the opinion, we address the Foundation's arguments that (1) RCW 42.17A.25 5(2) is unenforceable because (a) the definition of "ballot proposition" is unconstitutionally vague and (b) the disclosure requirement improperly infringes on the judiciary's authority to regulate the practice of law, and (2) the State's complaint should be dismissed because the State failed to join certain unions also involved with the local initiatives as indispensable parties under CR 19.

A. VAGUENESS CHALLENGE

The Foundation argues that the statutes applicable here- the definition of "ballot proposition" in RCW 42.17A.005(4) and the reporting requirement in RCW 42.17A.255- are unconstitutionally vague and therefore cannot be enforced. We disagree.

Under the Fourteenth Amendment to the United States Constitution, a statute may be void for vagueness if it is framed in terms so vague that persons of common intelligence must guess at its meaning and cannot agree on its application. *Voters Educ. Comm.,* 161 Wn.2d at 484. The doctrine has two goals: to provide fair notice as to what conduct is prohibited and to protect against arbitrary enforcement. *Postema v. Pollution Control Hr'gs Bd,* 142 Wn.2d 68, 114, 11 P.3d 726 (2000).

To determine whether a statute is sufficiently definite, we look to the provision in question within the context of the enactment, giving language a sensible, meaningful, and practical interpretation. *Am. Legion Post No. 149 v. Dep 't of Health,* 164 Wn.2d 570, 613, 192 P.3d 306 (2008). A statute is not invalid simply because it could have been drafted with greater precision. *Id.* A statute's language is sufficiently clear when it provides explicit standards for those who apply them and provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Voters Educ. Comm.,* 161 Wn.2d at 488.

Statutes are presumed to be constitutional. *Id.* at 481. The party asserting that a statute is unconstitutionally vague must prove its vagueness

beyond a reasonable doubt. *Id.* In the First Amendment context, the asserting party may allege that a statute is either facially invalid or invalid as applied. *See Am. Legion Post No. 149,* 164 Wn.2d at 612. A facial challenge asserts that the statute cannot be properly applied in any context. *City of Spokane v. Douglass,* 115 Wn.2d 171, 182 n.7, 795 P.2d 693 (1990). In an as applied challenge, the statute must be considered in light of the facts of the specific case before the court. *Am. Legion Post No. 149,* 164 Wn.2d at 612.

Here, the Foundation argues that the definition of "ballot proposition" in RCW 42.17A.005(4) is impermissibly vague. The core of the Foundation's argument appears to be that the statute is inconsistent with the local initiative process, not that the statute itself or any of its terms are too vague.

But as our interpretation above establishes, RCW 42.17A.005(4) presents a single, clearly delineated definition for what constitutes a "ballot proposition." As we explained, the Foundation's argument that the definition cannot apply to local jurisdictions is not supported by the statute's express language or its statement that it is to be liberally construed in favor of disclosure. RCW 42.17A.001. The text also does not support the Foundation's suggestion that the statute imposes a reporting requirement only "before its circulation for signatures," which when applied to local jurisdictions creates a nonexistent reporting period. As a result, RCW 42.17A.005(4) applies to a clearly defined period, beginning "from and after the proposition has been initially filed."

That language is not unconstitutionally vague as applied to this case. Whether the Foundation reported its independent expenditures in support of the initiatives in Sequim, Chelan, and Shelton after those initiatives were initially filed is clearly identifiable as a matter of fact. Likewise, the language is not facially invalid because it establishes a clear course of conduct, requiring persons to report their independent expenditures. Therefore, the Foundation has not shown that there are no set of facts, including the ones here, in which the statute could not be constitutionally applied. *Douglass,* 115 Wn.2d at 182 n.7.

Accordingly, we hold that RCW 42.17A.005(4) and RCW 42.17A.255 are not void for being unconstitutionally vague.

B. INFRINGEMENT ON SEPARATION OF POWERS

The Foundation argues that requiring disclosure of the provision of legal services infringes on the judicial branch's authority to regulate the practice of law. We disagree.

Authority to regulate the practice of law in Washington lies within the inherent power of the Supreme Court. *Chism v. Tri-State Constr., Inc.,* 193 Wn. App. 818, 838, 374 P.3d 193, *review denied,* 186 Wn.2d 1013 (20 16). This regulatory authority includes the authority to regulate admission to the practice of law, to oversee conduct of attorneys as officers of the courts, and to control and supervise the practice of law as a general matter. *Wash. State Bar Ass'n v. State,* 125 Wn.2d 901, 908, 890 P.2d 1047 (1995). This power lies exclusively with the

judiciary. *Id.* at 909. The other branches of government cannot impair the judiciary's functioning or encroach on its power to administer its own affairs. *Id.* at 908-09.

But the judiciary's exclusive authority in overseeing the practice of law does not exempt attorneys from application of other laws. *See Short v. Demopolis,* 103 Wn.2d 52, 62-66, 691 P.2d 163 (1984); *Porter Law Ctr., LLC v. Dep't of Fin. Insts.,* 196 Wn. App. 1, 20, 385 P.3d 146 (20 16). A law that applies to attorneys in their legal practice does not violate separation of powers principles as long as it does not usurp the judiciary's authority.

In *Short,* the plaintiffs were attorneys who sought to recover legal fees allegedly owed by the defendant. 103 Wn.2d at 53-54. In a counterclaim, the defendant alleged among other things that the attorneys had violated the Consumer Protection Act (CPA). *Id.* at 54-55. The trial court dismissed the defendant's CPA claims, in part on the basis that regulation of the legal profession through the CPA would unconstitutionally infringe on the judiciary's authority to regulate the practice of law. *Id.* at 55.

The Supreme Court reversed, holding that application of the CPA did not violate separation of powers principles. *Id.* at 65-66. It stated that the judiciary's power over the legal profession included the exclusive authority to admit, enroll, discipline, and disbar attorneys. *Id.* at 62. But this authority does not create an impenetrable barrier against the legislature. *Id.* at 63. Instead, legislation is proper as long as it does not infringe on the court's power over the practice of law, specifically to admit, suspend, or disbar attorneys. *Id.* This authority was not encroached on by the CPA, which addressed public

concerns distinct from the judiciary's role in overseeing the practice of law. *Id.* at 64. The court concluded that the CPA could apply to the entrepreneurial aspects of legal practice, but not claims that an attorney had engaged in legal malpractice or otherwise acted negligently in his role as an attorney. *Id.* at 65-66.

The court in *Porter Law Center* reached the same conclusion in the context of the Mortgage Broker Practices Act (MBPA). 196 Wn. App. at 20. There, the Department of Financial Institutions claimed that an Ohio attorney had provided mortgage modification services to several Washington residents in violation of the MBPA. *Id.* at 5-7. The MBPA required persons who engage in certain mortgage-related services to first obtain a license, but contained an exemption for attorneys licensed in Washington. *Id.* at 14-15.

The defendant argued that the MBPA infringed on the Supreme Court's authority to regulate the practice of law. *Id.* at 20. The court disagreed, stating that "application of consumer protection laws such as the MBP A to attorneys 'does not trench upon the constitutional powers of the court to regulate the practice of law.' " *Id.* (quoting *Short,* 103 Wn.2d at 65).

Under *Short* and *Porter Law Center,* laws may apply to attorneys acting in the practice of law without violating separation of powers principles. The question is whether the law properly regulates the entrepreneurial aspects of legal practice or improperly infringes on the judiciary's exclusive right to oversee legal practice in areas like admission, suspension, or disbarment of attorneys.

Here, the disclosure requirements do not improperly regulate the practice of law. Their purpose is to encourage transparency in political campaign and lobbying contributions and expenditures. RCW 42.17A.001(1). To do this, they require persons, including attorneys, to disclose their independent expenditures made in the support or opposition to ballot propositions. RCW 42.17A.255(2). Following the distinction drawn by *Short,* these requirements regulate the entrepreneurial aspects of legal practice without imposing on the judiciary's oversight of the practice oflaw. 103 Wn.3d at 65-66.

Further, as a disclosure requirement instead of a substantive obligation, RCW 42.17A.255 does less to impose on the judiciary's role than the laws at issue in *Short* and *Porter Law Center*. Unlike with the CPA and MBPA, which establish limits on how attorneys are able to practice law, the requirements at issue here do not restrict the Foundation's legal practice. Instead, requiring disclosure obligates the Foundation, like any other person who makes an independent expenditure, to report its actions. Accordingly, we hold that application of RCW 42.17A.255(2) to the Foundation does not improperly violate separation of powers principles.

C. JOINDER UNDER CR 19

The Foundation argues that the State's complaint should have been dismissed because the State failed to join the unions that opposed the ballot initiatives. The Foundation claims that the unions

were indispensable parties under CR 19.[7] We disagree.

CR 19 concerns the joinder of persons needed for a just adjudication. Under CR 19(a), a person shall be joined in an action if

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

Under CR 19(b),

> If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

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[7] In the trial court, the Foundation moved to dismiss under CR 12(b)(7) for failure to join an indispensable party. The trial court stated that it did not need to reach that issue, but that it would have denied the Foundation's motion because the State's decision to bring a regulatory claim was a matter of discretion that should not be interfered with.

The rule provides four factors for the court to consider in making that determination.

A court reviewing a claim under CR 19 applies a three-step process. First, under CR 19(a), the court identifies whether absent persons are "necessary" to a just adjudication. *Lundgren v. Upper Skagit Indian Tribe,* 187 Wn.2d 857, 868, 389 P.3d 569 *(2017), petition for cert. filed,* No. 17-387 (U.S. Sept. 13, 2017). Second, if the person is necessary, the court determines whether it is feasible to order joinder of the absentees. *Id.* at 868-69. Third, if joinder is not feasible, the court must consider whether in equity and good conscience the action should proceed without the absent persons. *Id.* at 869.

The burden of persuasion is on the party seeking dismissal. *Auto. United Trades Org. v. State,* 175 Wn.2d 214, 222, 285 P.3d 52 (2012). Dismissal for failure to properly join a party, although allowed under CR 12(b)(7), is a drastic remedy. *Lundgren,* 187 Wn.2d at 869. Therefore, dismissal is appropriate only when the defect cannot be cured and the absent persons will face significant prejudice should the case continue. *Id.*

Here, the Foundation asserts that the unions are necessary parties for two reasons.[8] First, the Foundation argues under CR 19(a)(1) that in the

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[8] The Foundation also suggests that it was prejudiced by the unions' absence because the State is seeking attorney fees and costs, which the Foundation and the unions could have split. But it does not attempt to relate this argument to CR 19 or provide support showing that the cost of defending litigation makes an absent person a necessary party. Accordingly, we do not address this issue. RAP 10.3(a)(6); *Linth v. Gay,* 190 Wn. App. 331,339 n.5, 360 P.3d 844 (2015), *review denied,* 185 Wn.2d 1012 (2016).

absence of the unions, the trial court could not provide complete relief among persons who are already parties. The Foundation claims that any judgment in this action will necessarily affect the status of the unions. But the Foundation does not demonstrate how, in the unions' absence, the trial court will be unable to resolve whether the Foundation violated the RCW 42.17A.255(2) disclosure requirements. The unions' involvement opposing the Foundation's lawsuits is simply not relevant to the Foundation's obligation to report its independent expenditures. The unions are therefore not necessary parties under CR 19(a)(l).

Second, the Foundation argues under CR 19(a)(2)(B) that the State's decision to bring this lawsuit but not a similar one against the unions creates inconsistent obligations because the unions also did not comply with RCW 42.17A.255(2). But CR 19 does not address the risk that similar actions taken by different parties could result in different outcomes. Rather, as the Ninth Circuit explained regarding the federal rule,

> " '[i]nconsistent obligations' are not ... the same as inconsistent adjudications or results. Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. Inconsistent adjudications or results, by contrast, occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum."

Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 547 F.3d 962, 976 (9th Cir. 2008) (alterations in original) (quoting *Delgado v. Plaza Las Americas, Inc.,* 139 F.3d 1, 3 (1st Cir. 1998)).[9]

In addition, the Foundation's argument is not relevant here because CR 19(a)(2)(B) asks whether any person *already a party* to the lawsuit would be subject to inconsistent obligations. The rule looks to whether the Foundation itself would be subject to inconsistent obligations, not whether the obligations on the Foundation and the unions would be inconsistent.

The Foundation has not demonstrated that, in the unions' absence, the trial court could not afford complete relief under CR 19(a)(l) or that the Foundation would be subject to inconsistent obligations under CR 19(a)(2)(B). Accordingly, we hold that the unions are not necessary parties and that CR 19 does not require dismissal of the State's lawsuit.

CONCLUSION

We reverse the trial court's dismissal of the State's regulatory enforcement action regarding the Sequim, Chelan, and Shelton initiatives, and we remand for further proceedings.

/s/ MAXA, J
/s/ J. WORSWICK
/S/ C.J. BJORGEN

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[9] Because Washington's CR 19 is so similar to the federal rule, this court may look to federal cases for guidance. Auto. United Trades Org., 175 Wn.2d at 223.

The Honorable Gary Tabor
Hearing Date: May 13, 2016

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

EVEREGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,
Defendant.

NO. 15-2-01936-5

Order Granting Defendant's Motion to Dismiss

This matter came before the Court on May 13, 2016 on motion of Defendant Freedom Foundation for dismissal. The Court having considered the files and records herein and the briefing and argument of the parties, and the court having otherwise been fully advised in the premises and the Court having ruled so reflected in the attached transcript of the ruling, it is hereby ORDERED, ADJUDGED and DECREED that the Defendant's motion to Dismiss under CR12(b) is GRANTED.

Signed this 13th day of May, 2016

/s/
The Honorable Gary Tabor
Thurston County Superior Court Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON
Plaintiff,

vs.

EVERGREEN FREEDOM FOUNDATION,
Defendant.

SUPERIOR COURT NO. 15-2-01936-5

RULING OF THE COURT

BE IT REMEMBERED that on May 13, 2016, the above-entitled and numbered cause came on for hearing before JUDGE GARY R. TABOR, Thurston County Superior Court, Olympia, Washington.

THE COURT: All right, counsel. I am going to issue my ruling on the pleadings and the arguments I heard in this matter regarding whether or not this Court will allow this matter to go forward or whether I'm going to treat this as a 12(b){6) or 12(b)(7) motion or a summary judgment motion.

I've determined that 12(b)(6) appears to apply. I am going to grant Evergreen Freedom Foundation's motion to dismiss. My bases for doing so is I find the statutes here to be ambiguous and vague, and I had difficulty working through these and understanding the position of the parties' because there is not a

clearly stated policy regarding this kind of a situation which involves municipal courts. I do not find that the State has sufficiently established that this situation involved a ballot measure that gave them the opportunity to require that such be reported. And when I say "such," I'm talking about legal services that were provided on a pro bono basis before the matter ever went to any kind of vote.

I believe that campaign finance regulations are important. It is clear that there has been a great deal of litigation over the last years in regard to campaign finance. It's an important topic for the people of this state and this court, and others like it are often involved in litigation involving campaign financing regulations; nevertheless, I believe that unless there is clear and unamb1guous guidance in the statutes that people cannot be held to have violated those regulations. I'm simply not convinced that the statute means what the State says that it does in regard to this particular type of situation.

Now let me say several things that are dicta, and that is, because I've ruled in this regard we're not getting to the 12(b)(7) issue about whether or not the Court would have required other parties to be joined, but I'll tell you how I would have ruled on that. I would have denied that motion.

Perhaps the best analogy I can give is hearkening back to my almost 19 years as a deputy prosecutor. I believe that prosecuting attorneys or their offices as part of the executive branch have choices to make that a court in the judicial branch does not step in or interfere with; that is the type of charges that are filed, who is charged, there can be a situation involving several people in which they

choose to file against one person and not against others. While I understand the arguments that in this case, why treat some other folks differently, that's not really the issue in front of the Court. And so, as I said, I would have denied that.

I'll also tell you that while how another judge has ruled is always somewhat interesting to this Court, nothing that a superior court judge in another county does or for that matter in this county is binding on this Court. That's why we are independent as judges and we make determinations based on our best judgment. That might differ. Two judges with courtrooms side by side might rule differently in similar matters.

As far as precedent, this state makes clear that you may not cite a final decision as precedent unless there has been a reported decision. Some have complained about that but that's still the rule in this state. I do note that there is a move to have available unreported decisions by courts, that would be the court of appeals, available to the public and that's a different thing than whether or not they can be cited as precedent.

There was one other thing I was going to mention. I'm just trying to get to that. Excuse me for just a moment as I try to pull that back in.

That was the fact that I heard in argument that there may be a case with similar issues in another court in this jurisdiction. You've already heard, I think you were all here when I talked about the first case that I called today,]Ud1c1al economy. Th1s Court does have the right to consolidate matters on similar issues and we regularly do that to just use our time wisely. And so when different matters are

filed that may be similar, I would like to know that, and yet, I don't have any easy way of knowing that. I don't sit down and look at other judge's dockets on a regular basis to find out what's coming up. So if there is another similar case, I don't know whether the cases should have been consolidated or not. I'm not saying that they should or should not have been, but I would have liked the opportunity to know that and to see whether or not that was appropriate. Maybe it's already been decided, maybe it hasn't been decided yet, I don't know, but I guess that goes to what I told you earlier about what another judge does doesn't control what I do.

I've called this as I see it, my understanding of the issues. I understand that this type of situation may have consequences in other regards, and that is one other thing I did want to mention now that I've gotten to that point, and that is that while there may be consequences when this Court rules in any case, that's not always even appropriate for me to consider. Whether or not that opens the floodgates to activities that the State feels are going to weaken public disclosure matters in campaign issues, I don't know. Sometimes parties tell me, well, Your Honor, if you do this it's going to result in millions of dollars' worth of damage to a party or it's going to cost millions of dollars. Often that's not something that I have any idea of as to how many issues may arise.

In any event, the final thing I wanted to say in dicta is that I note that this action was started by the Public Disclosure Commission because of a complaint. I note that the defendant in this case is complaining about others. I don't know and I'm not asking you to tell me why a complaint was not filed as to those others by someone. That could have

happened, and again, that's dicta I guess. I'm not fishing for cases to be filed, but I think that bears everyone's thought.

So, Mr. Lamb, do you have a proposed order that would grant --

MR. LAMB: I do, Your Honor.

THE COURT: -- your dismissal as you requested and as I ordered?

MR. LAMB: I do, Your Honor.

THE COURT: Would you show that to the opposing party?

MR. LAMB: I will, Your Honor.

THE COURT: Obviously, I'm not asking that you agree with my decision, only if that order correctly sets forth what my decision was.

MS. DALTON: It's a little abbreviated.

THE COURT: Do you want some time to work on that?

MS. DALTON: I think so. I think we have to outline the files that the Court considered. It's not in here.

THE COURT: I do in a summary judgment motion. I've treated it as a 12(b)(6) and I'm not sure that's required but I don't object to that. Clearly, we have a file that has different pleadings and if you want to reference those, that's okay, but I don't think that's a requirement of the court rule.

MR. LAMB: I don't believe so either, Your Honor, but I have no objection to that.

THE COURT: So if you want to work on that, the only thing I want you to understand is I'm leaving Tuesday for three weeks, and I won't be here for three weeks, so you either need to get any proposed order to me before that time or it's going to be awhile.

MR. LAMB: I appreciate that, Your Honor. The only other than thing I would ask we would reserve the issue of fees under 42.17(a).

THE COURT: I've not addressed that at all so you can do as you choose to do in regard to requesting fees.

MR. LAMB: Thank you, Your Honor.

THE COURT: Anything else I need to address? Folks, I don't have a problem with writing in things, and so if the State wants to have what I've considered, you probably have those available to you.

MS. DALTON: I think what we might do is just get a copy of the transcript and attach the transcript would seem to go with this.

THE COURT: Okay. Whatever you choose.

MR. LAMB: Thank you, Your Honor.

THE COURT: Are there any other matters that I need to call on the calendar this morning? We'll be in recess then.

42.17A.255. Special reports — Independent expenditures.

(1) For the purposes of this section the term "independent expenditure" means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17A.220, 42.17A.235, and 42.17A.240. "Independent expenditure" does not include: An internal political communication primarily limited to the contributors to a political party organization or political action committee, or the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person.

(2) Within five days after the date of making an independent expenditure that by itself or when added to all other such independent expenditures made during the same election campaign by the same person equals one hundred dollars or more, or within five days after the date of making an independent expenditure for which no reasonable estimate of monetary value is practicable, whichever occurs first, the person who made the independent

expenditure shall file with the commission an initial report of all independent expenditures made during the campaign prior to and including such date.

(3) At the following intervals each person who is required to file an initial report pursuant to subsection (2) of this section shall file with the commission a further report of the independent expenditures made since the date of the last report:

(a) On the twenty-first day and the seventh day preceding the date on which the election is held; and

(b) On the tenth day of the first month after the election; and

(c) On the tenth day of each month in which no other reports are required to be filed pursuant to this section. However, the further reports required by this subsection (3) shall only be filed if the reporting person has made an independent expenditure since the date of the last previous report filed.

The report filed pursuant to paragraph (a) of this subsection (3) shall be the final report, and upon submitting such final report the duties of the reporting person shall cease, and there shall be no obligation to make any further reports.

(4) All reports filed pursuant to this section shall be certified as correct by the reporting person.

(5) Each report required by subsections (2) and (3) of this section shall disclose for the period beginning at the end of the period for the last previous report filed or, in the case of an initial report, beginning at the

time of the first independent expenditure, and ending not more than one business day before the date the report is due:

(a) The name and address of the person filing the report;

(b) The name and address of each person to whom an independent expenditure was made in the aggregate amount of more than fifty dollars, and the amount, date, and purpose of each such expenditure. If no reasonable estimate of the monetary value of a particular independent expenditure is practicable, it is sufficient to report instead a precise description of services, property, or rights furnished through the expenditure and where appropriate to attach a copy of the item produced or distributed by the expenditure;

(c) The total sum of all independent expenditures made during the campaign to date; and

(d) Such other information as shall be required by the commission by rule in conformance with the policies and purposes of this chapter.

42.17A.005. Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Actual malice" means to act with knowledge of falsity or with reckless disregard as to truth or falsity.

(2) "Actual violation" means a violation of this chapter that is not a remedial violation or technical correction.

(3) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(4) "Authorized committee" means the political committee authorized by a candidate, or by the public official against whom recall charges have been filed, to accept contributions or make expenditures on behalf of the candidate or public official.

(5) "Ballot proposition" means any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the

proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures.

(6) "Benefit" means a commercial, proprietary, financial, economic, or monetary advantage, or the avoidance of a commercial, proprietary, financial, economic, or monetary disadvantage.

(7) "Bona fide political party" means:

(a) An organization that has been recognized as a minor political party by the secretary of state;

(b) The governing body of the state organization of a major political party, as defined in RCW 29A.04.086, that is the body authorized by the charter or bylaws of the party to exercise authority on behalf of the state party; or

(c) The county central committee or legislative district committee of a major political party. There may be only one legislative district committee for each party in each legislative district.

(8) "Books of account" means:

(a) In the case of a campaign or political committee, a ledger or similar listing of contributions, expenditures, and debts, such as a campaign or committee is required to file regularly with the commission, current as of the most recent business day; or

(b) In the case of a commercial advertiser, details of political advertising or electioneering communications provided by the advertiser,

including the names and addresses of persons from whom it accepted political advertising or electioneering communications, the exact nature and extent of the services rendered and the total cost and the manner of payment for the services.

(9) "Candidate" means any individual who seeks nomination for election or election to public office. An individual seeks nomination or election when he or she first:

(a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote his or her candidacy for office;

(b) Announces publicly or files for office;

(c) Purchases commercial advertising space or broadcast time to promote his or her candidacy; or

(d) Gives his or her consent to another person to take on behalf of the individual any of the actions in (a) or (c) of this subsection.

(10) "Caucus political committee" means a political committee organized and maintained by the members of a major political party in the state senate or state house of representatives.

(11) "Commercial advertiser" means any person who sells the service of communicating messages or producing printed material for broadcast or distribution to the general public or segments of the general public whether through the use of newspapers, magazines, television and radio

stations, billboard companies, direct mail advertising companies, printing companies, or otherwise.

(12) "Commission" means the agency established under RCW 42.17A.100.

(13) "Committee" unless the context indicates otherwise, includes any candidate, ballot measure, recall, political, or continuing committee.

(14) "Compensation" unless the context requires a narrower meaning, includes payment in any form for real or personal property or services of any kind. For the purpose of compliance with RCW 42.17A.710, "compensation" does not include per diem allowances or other payments made by a governmental entity to reimburse a public official for expenses incurred while the official is engaged in the official business of the governmental entity.

(15) "Continuing political committee" means a political committee that is an organization of continuing existence not established in anticipation of any particular election campaign.

(16)

(a) "Contribution" includes:

(i) A loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds between political committees, or anything of value, including personal and professional services for less than full consideration;

(ii) An expenditure made by a person in cooperation, consultation, or concert with, or at the request or

suggestion of, a candidate, a political or incidental committee, the person or persons named on the candidate's or committee's registration form who direct expenditures on behalf of the candidate or committee, or their agents;

(iii) The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, or other form of political advertising or electioneering communication prepared by a candidate, a political or incidental committee, or its authorized agent;

(iv) Sums paid for tickets to fund-raising events such as dinners and parties, except for the actual cost of the consumables furnished at the event.

(b) "Contribution" does not include:

(i) Legally accrued interest on money deposited in a political or incidental committee's account;

(ii) Ordinary home hospitality;

(iii) A contribution received by a candidate or political or incidental committee that is returned to the contributor within ten business days of the date on which it is received by the candidate or political or incidental committee;

(iv) A news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political or incidental committee;

(v) An internal political communication primarily limited to the members of or contributors to a political party organization or political or incidental committee, or to the officers, management staff, or stockholders of a corporation or similar enterprise, or to the members of a labor organization or other membership organization;

(vi) The rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this subsection, means services or labor for which the individual is not compensated by any person;

(vii) Messages in the form of reader boards, banners, or yard or window signs displayed on a person's own property or property occupied by a person. However, a facility used for such political advertising for which a rental charge is normally made must be reported as an in-kind contribution and counts towards any applicable contribution limit of the person providing the facility;

(viii) Legal or accounting services rendered to or on behalf of:

(A) A political party or caucus political committee if the person paying for the services is the regular employer of the person rendering such services; or

(B) A candidate or an authorized committee if the person paying for the services is the regular

employer of the individual rendering the services and if the services are solely for the purpose of ensuring compliance with state election or public disclosure laws; or

(ix) The performance of ministerial functions by a person on behalf of two or more candidates or political or incidental committees either as volunteer services defined in (b)(vi) of this subsection or for payment by the candidate or political or incidental committee for whom the services are performed as long as:

(A) The person performs solely ministerial functions;

(B) A person who is paid by two or more candidates or political or incidental committees is identified by the candidates and political committees on whose behalf services are performed as part of their respective statements of organization under RCW 42.17A.205; and

(C) The person does not disclose, except as required by law, any information regarding a candidate's or committee's plans, projects, activities, or needs, or regarding a candidate's or committee's contributions or expenditures that is not already publicly available from campaign reports filed with the commission, or otherwise engage in activity that constitutes a contribution under (a)(ii) of this subsection.

A person who performs ministerial functions under this subsection (16)(b)(ix) is not considered an agent of the candidate or committee as long as he or she

has no authority to authorize expenditures or make decisions on behalf of the candidate or committee.

(c) Contributions other than money or its equivalent are deemed to have a monetary value equivalent to the fair market value of the contribution. Services or property or rights furnished at less than their fair market value for the purpose of assisting any candidate or political committee are deemed a contribution. Such a contribution must be reported as an in-kind contribution at its fair market value and counts towards any applicable contribution limit of the provider.

(17) "Depository" means a bank, mutual savings bank, savings and loan association, or credit union doing business in this state.

(18) "Elected official" means any person elected at a general or special election to any public office, and any person appointed to fill a vacancy in any such office.

(19) "Election" includes any primary, general, or special election for public office and any election in which a ballot proposition is submitted to the voters. An election in which the qualifications for voting include other than those requirements set forth in Article VI, section 1 (Amendment 63) of the Constitution of the state of Washington shall not be considered an election for purposes of this chapter.

(20) "Election campaign" means any campaign in support of or in opposition to a candidate for election

to public office and any campaign in support of, or in opposition to, a ballot proposition.

(21) "Election cycle" means the period beginning on the first day of January after the date of the last previous general election for the office that the candidate seeks and ending on December 31st after the next election for the office. In the case of a special election to fill a vacancy in an office, "election cycle" means the period beginning on the day the vacancy occurs and ending on December 31st after the special election.

(22)

(a) "Electioneering communication" means any broadcast, cable, or satellite television, radio transmission, digital communication, United States postal service mailing, billboard, newspaper, or periodical that:

(i) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name;

(ii) Is broadcast, transmitted electronically or by other means, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and

(iii) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the sixty days before an

election, has a fair market value of one thousand dollars or more.

(b) "Electioneering communication" does not include:

(i) Usual and customary advertising of a business owned by a candidate, even if the candidate is mentioned in the advertising when the candidate has been regularly mentioned in that advertising appearing at least twelve months preceding his or her becoming a candidate;

(ii) Advertising for candidate debates or forums when the advertising is paid for by or on behalf of the debate or forum sponsor, so long as two or more candidates for the same position have been invited to participate in the debate or forum;

(iii) A news item, feature, commentary, or editorial in a regularly scheduled news medium that is:

(A) Of primary interest to the general public;

(B) In a news medium controlled by a person whose business is that news medium; and

(C) Not a medium controlled by a candidate or a political or incidental committee;

(iv) Slate cards and sample ballots;

(v) Advertising for books, films, dissertations, or similar works (A) written by a candidate when the candidate entered into a contract for such publications or media at least twelve months before becoming a candidate, or (B) written about a candidate;

(vi) Public service announcements;

(vii) An internal political communication primarily limited to the members of or contributors to a political party organization or political or incidental committee, or to the officers, management staff, or stockholders of a corporation or similar enterprise, or to the members of a labor organization or other membership organization;

(viii) An expenditure by or contribution to the authorized committee of a candidate for state, local, or judicial office; or

(ix) Any other communication exempted by the commission through rule consistent with the intent of this chapter.

(23) "Expenditure" includes a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. "Expenditure" also includes a promise to pay, a payment, or a transfer of anything of value in exchange for goods, services, property, facilities, or anything of value for the purpose of assisting, benefiting, or honoring any public official or candidate, or assisting in furthering or opposing any election campaign. For the purposes of this chapter, agreements to make expenditures, contracts, and promises to pay may be reported as estimated obligations until actual payment is made. "Expenditure" shall not include the partial or complete repayment by a candidate or political or

incidental committee of the principal of a loan, the receipt of which loan has been properly reported.

(24) "Final report" means the report described as a final report in *RCW 42.17A.235(8).

(25) "General election" for the purposes of RCW 42.17A.405 means the election that results in the election of a person to a state or local office. It does not include a primary.

(26) "Gift" has the definition in RCW 42.52.010.

(27) "Immediate family" includes the spouse or domestic partner, dependent children, and other dependent relatives, if living in the household. For the purposes of the definition of "intermediary" in this section, "immediate family" means an individual's spouse or domestic partner, and child, stepchild, grandchild, parent, stepparent, grandparent, brother, half brother, sister, or half sister of the individual and the spouse or the domestic partner of any such person and a child, stepchild, grandchild, parent, stepparent, grandparent, brother, half brother, sister, or half sister of the individual's spouse or domestic partner and the spouse or the domestic partner of any such person.

(28) "Incidental committee" means any nonprofit organization not otherwise defined as a political committee but that may incidentally make a contribution or an expenditure in excess of the reporting thresholds in RCW 42.17A.235, directly or through a political committee. Any nonprofit

organization is not an incidental committee if it is only remitting payments through the nonprofit organization in an aggregated form and the nonprofit organization is not required to report those payments in accordance with this chapter.

(29) "Incumbent" means a person who is in present possession of an elected office.

(30)

(a) "Independent expenditure" means an expenditure that has each of the following elements:

(i) It is made in support of or in opposition to a candidate for office by a person who is not:

(A) A candidate for that office;

(B) An authorized committee of that candidate for that office; and

(C) A person who has received the candidate's encouragement or approval to make the expenditure, if the expenditure pays in whole or in part for political advertising supporting that candidate or promoting the defeat of any other candidate or candidates for that office;

(ii) It is made in support of or in opposition to a candidate for office by a person with whom the candidate has not collaborated for the purpose of making the expenditure, if the expenditure pays in whole or in part for political advertising supporting that candidate or promoting the defeat of any other candidate or candidates for that office;

(iii) The expenditure pays in whole or in part for political advertising that either specifically names the candidate supported or opposed, or clearly and beyond any doubt identifies the candidate without using the candidate's name; and

(iv) The expenditure, alone or in conjunction with another expenditure or other expenditures of the same person in support of or opposition to that candidate, has a value of one-half the contribution limit from an individual per election or more. A series of expenditures, each of which is under one-half the contribution limit from an individual per election, constitutes one independent expenditure if their cumulative value is one-half the contribution limit from an individual per election or more.

(b) "Independent expenditure" does not include: Ordinary home hospitality; communications with journalists or editorial staff designed to elicit a news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, controlled by a person whose business is that news medium, and not controlled by a candidate or a political committee; participation in the creation of a publicly funded voters pamphlet statement in written or video form; an internal political communication primarily limited to contributors to a political party organization or political action committee, the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by

volunteer campaign workers or incidental expenses personally incurred by volunteer campaign workers not in excess of two hundred fifty dollars personally paid for by the worker.

(31)

(a) "Intermediary" means an individual who transmits a contribution to a candidate or committee from another person unless the contribution is from the individual's employer, immediate family, or an association to which the individual belongs.

(b) A treasurer or a candidate is not an intermediary for purposes of the committee that the treasurer or candidate serves.

(c) A professional fund-raiser is not an intermediary if the fund-raiser is compensated for fund-raising services at the usual and customary rate.

(d) A volunteer hosting a fund-raising event at the individual's home is not an intermediary for purposes of that event.

(32) "Legislation" means bills, resolutions, motions, amendments, nominations, and other matters pending or proposed in either house of the state legislature, and includes any other matter that may be the subject of action by either house or any committee of the legislature and all bills and resolutions that, having passed both houses, are pending approval by the governor.

(33) "Legislative office" means the office of a member of the state house of representatives or the office of a member of the state senate.

(34) "Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington, or the adoption or rejection of any rule, standard, rate, or other legislative enactment of any state agency under the state administrative procedure act, chapter 34.05 RCW. Neither "lobby" nor "lobbying" includes an association's or other organization's act of communicating with the members of that association or organization.

(35) "Lobbyist" includes any person who lobbies either in his or her own or another's behalf.

(36) "Lobbyist's employer" means the person or persons by whom a lobbyist is employed and all persons by whom he or she is compensated for acting as a lobbyist.

(37) "Ministerial functions" means an act or duty carried out as part of the duties of an administrative office without exercise of personal judgment or discretion.

(38) "Participate" means that, with respect to a particular election, an entity:

(a) Makes either a monetary or in-kind contribution to a candidate;

(b) Makes an independent expenditure or electioneering communication in support of or opposition to a candidate;

(c) Endorses a candidate before contributions are made by a subsidiary corporation or local unit with respect to that candidate or that candidate's opponent;

(d) Makes a recommendation regarding whether a candidate should be supported or opposed before a contribution is made by a subsidiary corporation or local unit with respect to that candidate or that candidate's opponent; or

(e) Directly or indirectly collaborates or consults with a subsidiary corporation or local unit on matters relating to the support of or opposition to a candidate, including, but not limited to, the amount of a contribution, when a contribution should be given, and what assistance, services or independent expenditures, or electioneering communications, if any, will be made or should be made in support of or opposition to a candidate.

(39) "Person" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.

(40) "Political advertising" includes any advertising displays, newspaper ads, billboards, signs,

brochures, articles, tabloids, flyers, letters, radio or television presentations, digital communication, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.

(41) "Political committee" means 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.

(42) "Primary" for the purposes of RCW 42.17A.405 means the procedure for nominating a candidate to state or local office under chapter 29A.52 RCW or any other primary for an election that uses, in large measure, the procedures established in chapter 29A.52 RCW.

(43) "Public office" means any federal, state, judicial, county, city, town, school district, port district, special district, or other state political subdivision elective office.

(44) "Public record" has the definition in RCW 42.56.010.

(45) "Recall campaign" means the period of time beginning on the date of the filing of recall charges under RCW 29A.56.120 and ending thirty days after the recall election.

(46) "Remedial violation" means any violation of this chapter that:

(a) Involved expenditures totaling no more than the contribution limits set out under RCW 42.17A.405(2) per election, or one thousand dollars if there is no statutory limit;

(b) Occurred:

(i) More than thirty days before an election, where the commission entered into an agreement to resolve the matter; or

(ii) At any time where the violation did not constitute a material violation because it was inadvertent and minor or otherwise has been cured and, after consideration of all the circumstances, further proceedings would not serve the purposes of this chapter;

(c) Does not materially affect the public interest, beyond the harm to the policy of this chapter inherent in any violation; and

(d) Involved:

(i) A person who:

(A) Took corrective action within five business days after the commission first notified the person of noncompliance, or where the commission did not provide notice and filed a required report within twenty-one days after the report was due to be filed; and

(B) Substantially met the filing deadline for all other required reports within the immediately preceding twelve-month period; or

(ii) A candidate who:

(A) Lost the election in question; and

(B) Did not receive contributions over one hundred times the contribution limit in aggregate per election during the campaign in question.

(47)

(a) "Sponsor" for purposes of an electioneering communications, independent expenditures, or political advertising means the person paying for the electioneering communication, independent expenditure, or political advertising. If a person acts as an agent for another or is reimbursed by another for the payment, the original source of the payment is the sponsor.

(b) "Sponsor," for purposes of a political or incidental committee, means any person, except an authorized committee, to whom any of the following applies:

(i) The committee receives eighty percent or more of its contributions either from the person or from the person's members, officers, employees, or shareholders;

(ii) The person collects contributions for the committee by use of payroll deductions or dues from its members, officers, or employees.

(48) "Sponsored committee" means a committee, other than an authorized committee, that has one or more sponsors.

(49) "State office" means state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer.

(50) "State official" means a person who holds a state office.

(51) "Surplus funds" mean, in the case of a political committee or candidate, the balance of contributions that remain in the possession or control of that committee or candidate subsequent to the election for which the contributions were received, and that are in excess of the amount necessary to pay remaining debts incurred by the committee or candidate with respect to that election. In the case of a continuing political committee, "surplus funds" mean those contributions remaining in the possession or control of the committee that are in excess of the amount necessary to pay all remaining debts when it makes its final report under RCW 42.17A.255.

(52) "Technical correction" means a minor or ministerial error in a required report that does not materially impact the public interest and needs to be corrected for the report to be in full compliance with the requirements of this chapter.

(53) "Treasurer" and "deputy treasurer" mean the individuals appointed by a candidate or political or incidental committee, pursuant to RCW 42.17A.210, to perform the duties specified in that section.

Transcript of Oral Argument before the Washington State Supreme Court on June 28, 2018

- And.
- 00:27
  First natural state of Washington versus evergreen Freedom Foundation.
- 00:33
  My plan will have the opening for fifteen minutes reserving five for rebuttal if I think twenty minutes had a response Mr Lamb.
- 00:45
  I think Your Honor.
- 00:48
  These the court My name is Mark Lam I represent the appellate giver great Freedom Foundation I counsel people is critical or there's a general thing about the.
- 00:57
  Issue before the court you simple worse open the legal services provided three small cities independent campaign expenditures even though no campaign or election ever occurred against your lies with the charges why were the issues filed with the election officials in these three small cities who under the law.
- 01:21
  What was the point of the petition being filed filing the election resolutions were whatever you want to call them with the city's Thank you Your Honor so if small municipalities in don't first class cities and counties citizens have the opportunity to petition their local government to do one of two things either the local government the city council has the opportunity to pass through the ordinance directly or

it has the opportunity to place it before the voters but the citizens in those three miss about how these did was to gather signatures and submit them to the city with the purpose of either having the City Council adopted directly place it before the voters so your your position is that you don't want at that point you don't want the citizens to know who the press on us of the issues are.

- 02:11
  That is not our position here on.
- 02:14
  The citizens in this case gathered signatures and submitted them to the city council the case that was litigated following guys involved in the public notice of appearance by counsel for the Freedom Foundation the public was not deprived of knowing I did with the council was or who the citizens were petition it so that's not our position but do they know who the lawyers were that good the legal or the pro bono legal work indeed they do Your Honor because they haven't filed a public notice of appearance and appeared in court and opposite them were lawyers for the Teamsters Union arguing in the exact same case the opposite proposition those lawyers are not here today because the state elected to prosecute only the frame Freedom Foundation but not the attorneys who engaged in identical conduct in the same case.
- 03:00
  Through a camera were there any pre-filing expenditures in this case.
- 03:07
  Well that's a great question Your Honor the it and I think it lends to why small municipalities are treated differently than large municipalities I think

one of the errors that was made in the Division two case is that first class cities and charter counties treat it as the state does in which the petition is first submitted to the government and then signatures are gathered in the instant case precludes just take for example the seducer land there were only three hundred signatures required to put it on the ballot so there would have been to minimalists there would have been a mimeograph in the pages to do that and de minimus cost are associated with that so I think that is consistent with a fair campaign practices act where smaller jurisdictions are exempted entirely indeed under under our C.W. I think it's forty two seventeen two hundred smaller jurisdictions of under five thousand are exempted entirely from the provisions of the fair campaign Practices Act So I think in this case there would have been to minimize expenditures of mimeograph in except for A but they wouldn't have been important and I think that's the policy balancing test that the legislation as written was made by the state legislature.

- 04:16
  Signature gathering could create a filing to be significant could it not the cost if you paid paid signature gathers for example well that's a great question Your Honor and I think when you look at the parade of horribles that was presented by the state it's illuminating because the examples they use were the city of Seattle if you the city of Seattle the expenditures could be significant because it's a large city and it's one that the fair campaign Practices Act contemplates regulating as such so under the city of Seattle King County still much County the city of Spokane and Tacoma in those directions under the statute as it's plainly written the pre-filing or the

signature gathering would be covered by the statute with the legislature has elected to do with the statute plainly it's written is in smaller jurisdictions.

- 05:03
  If they're not they're not required to go through the same process in this case we're dealing with three extremely small communities and as a justice it consolidates indicated with this question that the expenses associated with gathering three hundred signatures are extremely to minimalists and I would say that the fair campaign practices act indeed the Revised Code of Washington in the washing Constitution in numerous instances treats smaller actions.
- 05:29
  So differently than they do larger sections Well they specifically example certain loans and then they don't exempt others and and the others then become jurisdictions in which I guess signature gathering is not a.
- 05:43
  Part of the required.
- 05:46
  Reporting when signature gatherers are paid for in those communities that aren't exempted but you say I guess are not included.
- 05:56
  Under.
- 05:57
  Under.
- 05:59
  Zero zero five yet I think the issue you are is when you talk about for example paid signature gatherers I think that isn't the issue that we're that we're

discussing in this it has to do with the plain application of the statute to either a large jurisdiction or a small jurisdiction and I think what we're division to aerate of the state bears as they're saying if you read the statute plainly as it is written it wouldn't apply to anybody it would only apply to all municipalities would be exempt that's not the case as happens throughout the fair campaign Practices Act smaller jurisdictions are treated differently than a large jurisdiction might my question though goes to the state's position that that last seen before its circulation signatures is intended to capture the expenses or the expenditures that might go into the collection of signatures three filing with the needs whatever government election officer is required.

- 06:56
  To accept the filing I appreciate that now I think it's contradict them but from an after the time the proposition has been initially you filed with your pro-create election officer I think that that contradicts it and I think that gets us to the question that if the court is persuaded that there are two sort of reasonable interpretations of this statute the art of the.
- 07:16
  Test then becomes what this court said in voter's Education Committee that statutes are unforeseeable were persons of common intelligence differ in their application or must guess at their meaning and in this case we have to say you did these three defendants in this particular case would they have had to read this statute and guess at the meaning of whether the purpose of the program the legal services which are treated differently

throughout the law I mean throughout the history of our country the first of many cases where they have had to guess at whether or not.

- 07:46
  They had to file a patent expenditure report Can I pause in just because I'm hearing your argument I'm not sure if we're talking about size and jurisdiction and amendments if we're talking about whether something is a ballot proposition or isn't a ballot proposition or if we're talking about whether Pro Bowl winners services ever qualify as expenditures as in kind contributions that must be disclosed and I guess I thought the argument was about whether this is this and this step in the process was part of the ballot proposition not about the size of the expenditure with the pro bono is is or isn't in any kind contribution zero correct Your Honor so what does that have to do with anything with the pro bono if I mean if it's not an income contribution why is it ever in time contributions Well I think after a certain point of the legal services provided in the election or in a campaign could be would be a contribution because it's an election or a campaign is not because it's pro bono precisely because precisely your honor so if you provide it I mean I think the issue comes into play and I take your point I think when it's kind of what your argument is your argument about the size the money the pro bono the ballot measure I thought it was about the ballot measure the argument is that the statute is written Your Honor it does not apply to the conduct of my clients and I think if there is a fair debate as to the application of the statute going to I think voters educate is it not apply to the conduct of your clients because this wasn't a ballot proposition it is that it

was knocked over that's the reason that these are good bets That's correct yes and I think I mean the other arguments for the other arguments I think relate to that because it becomes if it if it is a matter of interpretation then I think it becomes an issue but if it's a ballot measure pro bono in kind contributions count.

- 09:23
  I would argue that if they would know it they would not because that I think that the statute affects race I think if you to if you take if you read it as written I think you would say that a person of ordinary intelligence situated as my clients her situation is the counsel for the international political person of ordinary intelligence trying to advance a local initiative in Seattle.
- 09:44
  I think it would be different because Seattle is a first class city so Seattle if you read the statute would say before now from and after the time when the proposition has been initially filed with the appropriate election officer in Seattle you go to the city of Seattle it's a first class city you go to them and you present the initiative there's an interface analogous to that at the state level where you have an interface with the city of turning a ballot title is given a valid number is given to that in the city of Seattle which is a first class city this fits perfectly with the statute is written it does not fit with the statute is written because in the arts in the community the issue still and the three communities issue that's not how the process works and that's consistent with smaller We're going again that's with smaller communities from saying that the small communities relates to that because it doesn't

apply to them with the statutes with the council if you if we agree with you DON'T WE what What meaning do we give to the language.

- 10:42
  To be submitted to the voters of the state or any Unisa Paladin Municipal Corporation political subdivision or other voting constituency what do we do with that language any means any Well I think it's Mark I think you think you are for the question I think it's modified by the last part of that partner and I think it's modified in a way that is consistent with a fair campaign Practices Act and that smaller cursed actions of non first class cities non-church not charter counties are treated differently so throughout our Constitution drop the Revised Code of Washington and also throughout the fair campaign practices act.
- 11:19
  They're treated differently again jurisdictions under five thousand that were completely exempted from the Kerry campaign rocks act so we have to construe any to mean only those which which me have that same process which have the same process and I think that that is the logical route I mean the divisions you said it was the only reasonable conclusion you could come to I would argue that that's not true when you look at the fair campaign Practices Act in its totality huge.
- 11:43
  It's a number of things defeats it the completely unregulated smoothness of all lobbying in all of these cases what the petitions were asking for was either for it to be placed on the ballot or for the city council to adopt it directly that is a form of municipal lobby which is totally unregulated at their

table and so our fourth case today involves a parallel situation and it was submitted to the legislature in the indirect initiative not a ballot measure why wouldn't that same argument apply at the state level because it's treated because it's treated differently under the law here or is treated differently in the state level it's first of all lobbying is regulated of the state level and secondly the state level like in Seattle like in Spokane like into coma like in King County in Stockholm is county the first go to the government to submit the petition request which triggers the language it's here and I think all of this is to say that you know again I consider everyone present to be of significantly above ordinary intelligence but the legal standard is if somebody of ordinary intelligence looks at this they have to be able to know we can't have to guess at whether or not it's required and the truth of the matter is both my client and this and identically situated counsel for the International Brotherhood of Teamsters both came to the conclusion that they did not have to report this as an independent campaign expenditure with no campaign or election ever occurred Moreover the trial court judge agreed with that I think it's important also to understand in the context of campaign finance regulation Buckley's worse the way oh articulate step all of these regulations have intrusion upon a privacy interest an association all interests they're important and they're significant when there is an election when there is an electorate when there are voters to be informed that same interest is not present there is no election when there you go voters to vote for the legislature has made a balancing decision is consistent with others that they have made and that your campaign

practices act to treat smaller municipalities differently treat largeness politics.

- 13:43
  That's in the statute is written because you question so which this is getting away from the specific statutory framework here and to the constitutional Yes your argument that you can send I want to ask your due process your vagueness argument and whether you are making that as a facial or an as applied challenge and what you see is the difference if it's an as applied to I think it's a it isn't as applied in this case because I think the court has applied challenge to court needs to put itself into the specific role of these three of this defendant and these three municipalities and say it looking at these three different these this defended acting in these three minutes of how these looking at this code would a person of ordinary intelligence be able to discern the meeting or what they have to do with a different their application I think here you have people who ordinary intelligence differing of the application and they're having to guess at the meaning that violates the due process rights of my carnet that because it's unconstitutionally vague I think that is sort of highlighted in the underlined the fact that International Brotherhood of Teamsters engaged in identical contact in the exact same case the state elected not to prosecute them my clients are standing here defending this they had the exact same interpretation of this law that it didn't apply to them so I think the board.
- 15:05
  Would have to conclude is that people of common intelligence the trial court judge the counsel for the International Brotherhood of Teamsters and my

client all came to the same conclusion that because there was no campaign because there was no election and because the plain language of the statute didn't apply to their conduct that it wasn't good it didn't apply and it's and it wasn't required to file a c six independent expenditure reform one that I might add that has a line that says what is the ballot number there was no ballot number to the Senate with what we may and I want to pursue this little because I didn't understand it from the briefing as your argument it feels a lot like a facial challenge and I'm not.

- 15:43
  I understand why you're characterizing it as an as applied challenge unless you're looking for a more limited remedy Well he'll I mean the ordinary intelligence person you know that you just yeah I was very what I would say is that different get a different defendant image for example in a different jurisdiction might be similarly might have a different people or I'm not sure why you're someone I thought was a person here in Georgia different I think for example a defendant from the city of Seattle the lawyer would not have the same or even a defendant from a different county might not have the same argument I think especially with that doesn't apply to my to my client can I ask you you make the point and you've made it in your briefing in here and I wasn't sure of my time has expired but when I get to ask you I know I know and I you know I'm happy.
- 16:27
  Your are you argue are seen to be arguing that it was necessary that this actually go forward to an election that it actually be placed on the ballot that

there be an election before you if assuming that this applied to you to your client would be required to make any kind of a of a disclosure but so I guess my question is if you were not representing.

- 16:52
  Or if you if you this had happened in a class in city York this would happen with the state initiative would you be making that same argument that you could not be required to disclose your contribution.
- 17:04
  If it if this did not get onto the ballot no I would not nor because the statute is written would apply to a classic city so I would not be making are you right.
- 17:13
  Thank you honestly chief justice fair her to me it cleans the court knowing and initiatives earliest support ours and what they have been vast and reveals who stands to gain the most from a local initiative but the freedom Foundation's reading of the campaign disclosure laws creates a large loophole.
- 17:41
  Almost all expenditure supporting or opposing a local ballot proposition before it's placed on the ballot would go unreported so much from the argument that I just heard that the freedom of movement is making the selective prosecution he's not part of this cage I agree with you about this flavor of their argument is a selective prosecution argument but that ignores the fact that the state could still bring charges against any.
- 18:13
  And it's here within the five year statute of limitations which has not expired and will not expire for another year it also ignores the fact that the

system is a complaint driven system and this court has verified and framed factual and state believe that a complaint driven system is does not violate the selective prosecution doctrine what does is disparate treatment that's based on an improper motivation something like racial animus or animus right against someone based on a suspect classification which of course did not occur here and he and there are still Graham within the statute of limitations for the state to bring charges should Freedom Foundation or any other and decide to file a complaint within the statute of limitations.

- 19:08
  You know it's well I take it that your argument is based primarily on the policies behind the enactment of this statute which you've just begun to list and I take it that.
- 19:21
  Your opponent's argument is linked to the plain language of the statute which concludes or concluded prior to its circulation for signatures maybe now it's before it's circulation for signatures Isn't there some tension between the policies which I think you validly enunciated and the plain language which I think he validly cites to we are also relying on the plain language in the same way that just as Matson pointed out in the definition of ballot proposition there are two prongs and we're working with the second prong and in the first language and that second prong that statute refers to you and me and Michigan per posed to be submitted to the voters of the state or any municipal corporation political subdivision or other voting constituency and what the Court of Appeals crackly side was that the only reasonable interpretation of that is that the

legislature when it added language in one nine hundred seventy five was intending to clarify broad application to local governments so it would be with your answer about the policies and the probable reason behind the addition of that language but when you read that language it's at the end of the sentence it's clearly limiting language and as textual matter it must modify something it must mean something so I disagree that it's clearly labeled limiting language in that context because it's as the Court of Appeals said it doesn't make sense for the legislature to have written those broad words and he initiative and a municipal corporation or political subdivision and then have added and what a way that freedom foundations.

- 21:08
  Size is limited in language that would essentially got the rest of the definition of ballot proposition under about problems with their And legislature are the people included in a liberal construction clause that guides us in interpretation of the plain language as well as a very strong purpose section that under G.P.L. It is also part of the plain language so applying those rules what does the language prior to it prior to its circulation for signatures apply to that applies in this state wide circumstance so under the state's interpretation of the statute that language does work in this state wide circumstances for before certain before it circulation first signature was added in one nine hundred seventy five at the same time that the legislature was adding the very explicit reference to the local initiatives and so that language is doing its work in the context of low poll of initiatives and not consistent with the liberal construction and the purpose which is to make sure

that expenditures are fully disclosed to the public and it satisfies the public's right to know about the financing of political campaigns just prior to its circulation signatures also apply to the closely cities as well as the Stude it would apply to any city whose charters say that they are going to follow the state wide system and do you see any of the things in the paragraph that we're trying to construe.

- 22:48
  I'm not sure I understand your question the limitation of that last clause to state what an issue tubes are class cities cities.
- 22:57
  Perhaps I am but perhaps I.
- 23:00
  Communicated my last answer I think what I was trying to indicate was that the Brahman after the time when there proposition has been initially filed that that certainly covers that state wide circumstance and you're right it won't cover any circumstance where a city charter provides for.
- 23:23
  Parallel or parallels the state wide system but that before its circulation from signatures was added at the same time that the legislature added the specific reference to the local propositions and so we can tell from our legislative history if you see any ambiguity in the statute which you know we've had multiple interpretations proposed.
- 23:48
  You can see from our legislative history that what the legislature was doing was making it very clear that local that signature gathering at the local level is covered.

- 24:01
  So the word before which is now the word rather than prior but maybe there's not a big difference in those two words but.
- 24:12
  You think that the word is more more about timing or scope.
- 24:19
  I think that it is about ensuring at the very least that signature gathering is covered under the local system and so into that and not stance it's about SCO if you're concerned about the concept of before I think it makes sense to read that in the context of the entire definition of ballot proposition and so there are there are backstops to that where right you would have to have a proposition so that's a concrete proposal you'd have to have a proponent and you'd have to have a constituency to whom the proposal is going to be made and those are very concrete concepts so I can imagine for example someone making an independent expenditure to get petitions printed that would be before signature gathering starts if it crosses the hundred dollars threshold then not expenditure that's an independent expenditure would be nice would be reportable In contrast if there are services that are happening as something is being drafted and there is not yet a concrete proposal I can imagine us a court or the public disclosure commission is applying the facts in a particular situation without a concrete ballot proposition at that point that would not trigger by definition.
- 25:58
  Counsel What if I think that your interpretation of the statute is plausible but I also think that your

opponent's interpretation of that last clause of the statute is plausible his argument is it's me and it's unconstitutional which here argument well it's it's not it's not vague looking at the plain language as I've described it with any that make a very broad application and faking this analysis just like the statutory interpretation and Alice's incorporates the full context of the statute including the liberal interpretation clause and the strong purpose statement so.

- 26:48
  Our position of course is that good does not create a vagueness problem and voters education committee this court analyzed the vainest question in the context of a disclosure profession and the fact that it was disclosed it was a disclosure requirement rather than a cap or a limitation on speech made a difference and finally and human life of Washington there is which is the Ninth Circuit case so it's persuasive but not binding on this the ninth circuit by vagueness analysis to the fair campaign practices act not to this specific definition and one of the things the court pointed out was that.
- 27:37
  And a facial challenge speculation about other circumstances won't support a facial attack when the application is valid in the vast majority of intended applications and Mr of conceded that they are making as applied vagueness challenge so at the very least they their program on a legal services happened after the initiative was filed in this case the Court of Appeals point that's in was if I think that there is too plausible interpretations meaning it's ambiguous.

- 28:17
  Then weren't great wealth and ambiguous and vagueness aren't the same thing but of course if there are two interpretations that are possible then you look to the liberal construction clause first which is the legislatures an indication to you of how its high breaker should go if you see two possible interpretations you also look to have a strong purpose section which tells you that the legislature and handed expenditures to be fully disclosed to the public to satisfy the people's right to know and so all of those tiebreakers break and the state's Famer then if you move past plain language analysis into the legislative history as I've explained we have indications of what the legislature was doing with its one nine hundred seventy five amendments that's and other type or another factor that that breaks in favor of the states and term for T. shirt and so I I disagree with Mr Lamb all of the high brain purpose to this case and the states favor.
- 29:30
  Turning I just wanted to cue in.
- 29:36
  Before you switch gears to answer just discord McCloud you were saying that this.
- 29:42
  That the Freedom Foundation would conduct happened after the filing of the initiative but my understanding of their argument is it doesn't matter that this just doesn't apply to them period so I guess I'd like you to walk me through the vagueness challenge with that in mind as their argument they are making an argument that seems separate and apart from that's our financial Impala proposition that's focused on the concept of campaign or election

campaign and they seem to be arguing that and last there is a campaign and in their minds meaning there is actually something on the ballot and there's communication with voters and they're in their briefing they talk about electioneering and communications with voters unless that is happening under their theory then no reporting is required and it's important to recognize that that argument is very broad and if this court adopts said it would impact.

- 30:45
  Quite a bit.
- 30:48
  Of reporting activity under the fair campaign practices act that goes way beyond to this case the definition of election campaign includes any campaign and support or opposition to a ballot proposition so that definition incorporates the idea of a campaign but it doesn't limited and it incorporates the definition a ballot proposition which expressly incorporates something that's proposed to be submitted to the voters not just something that is on the ballot for sure and you can imagine how that that's up mission of election campaign applies both to about right.
- 31:29
  Positions and to candidates you can imagine how I interpret ing that definition in the way that they're suggesting would mean that any candidate that has announced their candidacy but hasn't yet filed with either the secretary of state or the county auditor none of that activity that they're doing ahead of that filing would be a report of all and.
- 31:51

Under their theory and that's not how that's been interpreted obviously and again not plain language in the ballot proposition shows us for for ballot propositions the the people in the legislature and tended to grasp propositions that are proposed to be submitted to voters.

- 32:14
  And that's that you asked about vagueness and it does the plain language of the definition of ballot proposition and it's incorporation and initiatives that are proposed to be submitted to voters makes that plain So there is no vagueness problem in that circumstance.
- 32:35
  If there are no further questions this court should at the very least of time but it should also state clearly that the Act covers the signature gathering phase at the local level you have just over three and a half minutes Mr Quinn I think you are.
- 33:04
  Trying for a moment to the vagueness argument.
- 33:07
  Liberal can the liberal construction provisions of the fair campaign Practices Act does not trump the First Amendment to the United States Constitution and a First Amendment case the line must be clear and a tie goes to the speaker not the State Council that there is real disagreement about whether this is actually.
- 33:25
  A constitutional right in the same way that that the expenditure of money he's.
- 33:32
  Going to get the campaign contributions would be this is merely a disclosure of the information about

those making that contribution and the court has said that you the United States Supreme Court has said that that does not offend the First Amendment so Your Honor with respectfully they said that it implicates the First Amendment there is judge and there is and there's a different standard of review that the standard of review is exacting scrutiny I would argue in the pro provision of a program of legal services and disclosure if you look at the several disclosure case on pro bono legal services is in the police E.P.A. versus Alabama which is a case where the state of Alabama was seeking to elicit from the end of the C.P. a list of their membership a list of their donors before they would qualify them to do business in the state of Alabama their views were to set a goal to bend dominant leadership of the state of Alabama that case involved pro bono legal services and the provision of them I think if you look at how pretty this goes to the question was asked.

- 34:31
  Earlier by.
- 34:36
  A legal services have a unique place in constitutional law and they are given a robust protections it is not it we're not saying that this is a an outright prohibition on the provision of probably answer is but justice and the police the people should Alabama disclosure can have a chilling effect and in this case the plain language of the statute does not apply to the conduct issue if the default his well there are two reasonable interpretations of the plain language a tie does not go to the state Tycho's to the speaker under under a First Amendment Yes there is a liberal construction provision but if you have to strain it back to nine hundred seventy five into the

legislative history that is not what a person of common intelligence would differ in their application or have to guess at their meaning when they're looking at that statute and I don't think I don't think that counsel is suggesting that in a plain language reading that you have to back to the legislative history she's saying that the liberal construction is part of the statute itself and that in our construction of the meaning of a statute that we look at all parts of that statute.

- 35:46
  Those provisions that relate to that provision that we're trying to interpret and I remember especially your I think when you're looking at this statute I think the plain language supports the position of the appellate The plainly saying you know before the circulation of signatures I think the best case scenario for the state is that you would say there are two competing interpretations of the plain language of that and then you would go to the.
- 36:09
  Then you would go back to the legislative history etc I think the problem with that is then it implicates in the First Amendment context in all of the cases cited on by the state did not touch on First Amendment issues then you go back to the vagueness issue where you're saying you have two reasonable interpretations that's directly what this court said in voters' education committees that people shouldn't have to guess at the meaning the teachers union lawyer and the Freedom Foundation came to the exact same conclusion that this statute did not apply to them thank you Your Honors thank you counterpart will be in recess for ten minutes.

SUPERIOR COURT OF WASHINGTON

FOR CHELAN COUNTY

D. EDSON CLARK, JERRY ISENHART, CHARLES KEATON and AL LORENZ, taxpayers of the City of Chelan, Plaintiff, v. CITY OF CHELAN, by and through its CITY COUNCIL, and SKIP MOORE, in his capacity as CHELAN COUNTY AUDITOR, Defendants and LOCAL UNION-CC OF THE WASHINGTON STATE COUNCIL OF CONTY AND CITY EMPLOYEES (AFSCME), AFL-CIO Intervener/Defendant	No. 14-2-01095-2 ORDERS ON MOTIONS FOR SUMMARY JUDGMENT REGARDING PROPOSITIONS ON COLLECTIVE BARGAINING

This matter came before the Court on February 26, 2015 on cross motions for summary judgment by the Plaintiffs, the City of Chelan and the Intervener Washington State Council of County and City Employees. The Court heard oral argument from the moving parties and considered the following documents and pleadings:

Davis, Arneil Law Firm, LLP
617 Washington Street
Wenatchee, WA 98801
662-3551

1. Complaints, Answers and Counterclaims:

a. Amended Complaint for Writ of Mandamus and Declaratory Judgment;

b. City of Chelan's Answer, Counterclaims and Affirmative Defenses;

c. Answer of Intervener Washington State Council of County and City Employees to Plaintiffs' Amended "Complaint for Wirt of Mandamus and Declaratory Judgment", Counterclaim, and Affirmative Defenses.

1). Washington State Council of County and City Employees' Motion to Intervene;

2) Declaration of Tom Cash in Support of Washington State Council of County and City Employee' Motion to Intervene;

3) Plaintiffs' Response in Opposition to Washington State Council of County and City Employees' Motion to Intervene;

4) Washington State Council of County and City Employees' Reply to Plaintiffs' Opposition to Washington State Council of County and City Employees' Motion to Intervene; and

5) Order Granting Washington State Council of County and City Employees'' Motion to Intervene;

d. Plaintiffs' Answer to Counterclaim of Defendant City of Chelan;

e. Plaintiffs' Answer to Counterclaim of Defendant Washington State Council of County and City Employees, Local Union 846-CC;

2. Motions for Summary Judgment and supporting declarations:

a. Amended Motion and Memorandum of Summary Judgment on Mandamus and Declaratory Judgment;

1) Declaration of Al Lorenz.

b. Motion for Summary Judgment by the City of Chelan;

1) Declaration of Allan Galbraith;

2) Declaration of Craig A. Ritchie;

3) Declaration of Kathleen J. Haggard;

4) Declaration of Peri Gallucci, Chelan City Clerk;

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c. Washington State Council of County and City Employees' Motion for Summary Judgment;

3. Memorandums of Legal Authority:

a. City of Chelan's Memorandum of Authority: (1) Responding to Summary Judgment by the Freedom Foundation, (2) Supporting Summary Judgment by Chelan;

b. Plaintiffs' Response to Defendant City of Chelan's Motion for Summary Judgment and Reply to Defendant City's Response to Plaintiffs' Motion for Summary Judgment;

c. Plaintiffs' Response to Defendant-Intervener Union's Motion for Summary Judgment;

d. City of Chelan's Memorandum of Authority in Reply to the Freedom Foundation;

e. Washington State Council of County and City Employees' Opposition to Plaintiffs' Motion for Summary Judgment;

f. Washington State Council of County and City Employees' Reply to Plaintiffs' Opposition to Union's Motion for Summary Judgment; and

g. Plaintiffs' Surreply to Defendant's Reply on Motions for Summary Judgment;

The Parties contend, and the Court agrees, there are no questions of material fact. The Court FINDS the following material facts:

1. The Propositions propose ordinances to be enacted under the municipal initiative power in Chelan under RCW 35A.11.080-.110 and CMC 2.48; and

2. The Propositions relate to "collective bargaining" as defined in RCW 41.56.030(4).

Because the City of Chelan and Intervener Washington State Council of County and City Employees contend the Propositions are not proper subjects of the municipal initiative power in the City of Chelan, the Court CONCLUDES:

1. The Court is authorized to review the Propositions prior to an election on them, to determine whether they are proper subjects of the municipal initiative power in Chelan;

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2. Under RCW 35A.11.020 the City Council of the City of Chelan has been delegated the exclusive legislative power to "define the functions, powers, and duties of its officers and employees"; to "fix the compensation and working conditions of such officers and employees"; and in "all aspects of collective bargaining as provided for and subject to the provisions of RCW 41.56" within the City of Chelan;

3. Because the Propositions attempt to legislate matters that relate to "collective bargaining" as defined in RCW 41.56, they are not proper subjects of the municipal initiative power in the City of Chelan; and

4. All other contentions raised by the Parties are moot.

The Court therefore ORDERS:

1. The Plaintiffs' motion for summary judgment is DENIED;

2. The City of Chelan's motion for summary judgment is GRANTED;

Lesley A. Allan, Judge
March 11, 2015

Submitted by:

DAVIS, ARNEIL LAW FIRM, LLP
Attorneys for the City of Chelan

Allan Galbraith, WSBA #11351
City Attorney
March 10, 2015

//

Approved as to form and Notice of Presentment waived:

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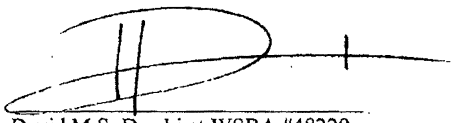

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Freedom Foundation
Attorneys for Plaintiffs
March 9, 2015

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Attorneys for Local Union 846

See attached
Thomas A. Leahy, WSBA #26365
March ___, 2015

CHELAN COUNTY PROSECUTING ATTORNEY
Attorney for Skip Moore, in his capacity
as Chelan County Auditor

See Attached
Susan E. Hinkle WSBA #18276
Deputy Prosecuting Attorney
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SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

SUSAN BRAUTIGAM,
Plaintiff,
and
CITY OF SEQUIM, by and through its CITY COUNCIL,
Defendant,
and
TEAMSTERS LOCAL 589.
Intervenor-Defendant.

NO. 14-2-00771-2

DECLARATION OF MAILING

DCLRM

I, the undersigned, do certify the following:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled proceeding and competent to be a witness therein.

This day I placed in the U.S. Mail copies of the **MEMORANDUM OPINION, ORDER GRANTING CITY OF SEQUIM'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF BRAUTIGAM'S MOTION FOR SUMMARY JUDGMENT, and DECLARATION OF MAILING**, 1st Class Postage affixed, and addressed to:

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ERIK ROHRER
JUDGE
Clallam County Superior Court
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Wenatchee, WA 98807

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed and dated this 2nd day of December, 2014, at Port Angeles, Washington.

Lindy Clevenger/Margaret Strohmeyer/Lacey Fors

ERIK ROHRER
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

SUSAN BRAUTIGAM,

Plaintiff,

v.

CITY OF SEQUIM, by and through its CITY COUNCIL,

Defendants,

and

TEAMSTERS LOCAL 589,

Intervenor-Defendant.

No. 14-2-00771-2

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On November 12, 2014, the court heard summary judgment motions filed by Susan Brautigam, the City of Sequim and Teamsters Local 589. Ms. Brautigam was represented by Shawn Timothy Newman, Attorney at Law; the City of Sequim was represented by Craig A. Ritchie, Attorney at Law; and Teamsters Local 589 was represented by Thomas A. Leahy, Attorney at Law. The court took the matter under advisement and now issues this Memorandum Opinion.

ERIK ROHRER
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

2. ISSUE

Whether there is a basis to grant any of the three motions for summary judgment currently before the court?

3. ANALYSIS

As stated by the Washington Supreme Court in *City of Port Angeles v. Our Waster-Our Choice*, 170 Wn.2d 1, 7-8, 170 P.3d 589 (2010):

> With Amendment 7 to the Washington Constitution, the people secured for themselves the right to legislate directly. Wash. Const. art. II, § 1; *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973). However, Amendment 7 does not apply to municipal governments, which under our constitution are not fully sovereign. Wash. Const. art. II, § 1; *1000 Friends*, 159 Wn.2d at 167, 149 P.3d 616; *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 554, 304 P.2d 656 (1956) ("A municipal corporation is a body politic established by law as an agency of the state—partly to assist in the civil government of the county, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district" (citing *Columbia Irrigation Dist. v. Benton County*, 149 Wash. 234, 235, 270 P. 813 (1928))). While our constitution does not extend the initiative and referendum power to cities, our legislature has authorized, but has not required, noncharter code cities like Port Angeles to enact enabling legislation authorizing referendums and initiatives. RCW 35A.11.080. But neither article II, section 1 nor RCW 35A.11.080 encompasses the power to administer the law, and administrative matters, particularly local administrative matters, are not subject to initiative or referendum. *Ruano*, 81 Wn.2d at 823, 505 P.2d 447 (citing *Ford v. Logan*, 79 Wn.2d 147, 154, 483 P.2d 1247 (1971)).

While the courts generally refrain from pre-election reviews of the validity of initiatives, it is well established that a pre-election challenge to the scope of the initiative power is both permissible and appropriate. *City of Longview v. Wallin*, 174 Wn.App. 763, 777, 301 P.3d 45 (2013); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn.App. 427, 432, 260 P.3d 245 (2011); *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 260,138 P.3d 943 (2006); *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005).

ERIK ROHRER
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself. *Malkasian*, 157 Wn.2d at 261.

The authority for private union negotiations and all aspects of collective bargaining are powers granted to the governing or legislative body, in this case the city council. RCW 42.30.140(4); RCW 35A.11.010; RCW 35A.11.010.

The court, in sum, agrees with the arguments forwarded by the City of Sequim and Teamsters Local 589, and finds that the proposed ordinances (1) involve powers granted by the legislature to the city council; (2) contain provisions that are administrative in nature and are not the proper subject for initiatives; and (3) contain provisions that conflict with existing state law.

Accordingly, the court finds that the proposed ordinances are beyond the scope of the initiative power.

4. CONCLUSION

The court grants the City of Sequim's and Teamsters Local 589's motions for summary judgment and denies Ms. Brautigam's motion for summary judgment. The court has signed a separate Order Granting City of Sequim's Motion for Summary Judgment and Denying Plaintiff Brautigam's Motion for Summary Judgment.

DATED this 26th day of November, 2014.

ERIK ROHRER
JUDGE

ERIK ROHRER
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

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SCANNED - 4

The Hon. Erik Rohrer

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

SUSAN BRAUTIGAM, Plaintiff, v. CITY OF SEQUIM, by and through its CITY COUNCIL, Defendant; and TEAMSTERS LOCAL 589, Intervenor-Defendant.	)	No. 14-2-00771-2
	)	**ORDER GRANTING CITY OF SEQUIM'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF BRAUTIGAM'S MOTION FOR SUMMARY JUDGMENT**
	)	[redacted]

THIS MATTER came before the undersigned judge of the above-entitled court on the Plaintiff's Motion for Summary Judgment on Mandamus and Declaratory Judgment and on the Defendant City of Sequim's Motion for Summary Judgment.

The Court reviewed the pleadings and papers on file herein, including but not limited to the following documents:

1) Complaint for Writ of Mandamus and/or Declaratory Relief

2) Motion and Memorandum for Declaratory Judgment or Mandamus

3) Answer to Plaintiff's Complaint

4) Trial Brief of Defendant in Opposition to Motion for Declaratory Judgment or Mandamus

Record Certification: I Certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control.
Clallam County Clerk by [redacted] Deputy # pages: 4

City Attorney for the City of Sequim
Craig A. Ritchie WSBA#4818
PO Box 1087 / 226 N. Sequim Ave., Sequim WA 98382
360-681-6611 Fax: 360-681-2380

5) Declaration of Jack Holland in Support of Teamsters Local 589's Motion to Intervene

6) Declaration Pursuant to GR 17

7) Teamsters' Motion to Intervene

8) Declaration Pursuant to GR 17

9) Teamsters' Motion to Shorten Time

10) Declaration Pursuant to GR 17

11) Declaration of Jack Holland in Support of Teamster's Motion to Shorten Time

12) Reply of Plaintiff Brautigam to Defendant's Counterclaims

13) Plaintiff's Response/Reply in Opposition to Defendant's Motion for DJ or Mandamus

14) Teamsters Memorandum Opposing Plaintiff's Complaint/Motion for DJ or Mandamus

15) Reply of Plaintiff Brautigam to Teamsters Motion to Intervene

16) Teamsters Reply to Plaintiff's Opposition to Teamsters Motion to Intervene

17) Declaration of Scott Roberts re Public Records on Schedule Related to Ballot Printing

18) Memorandum of Law in Support of the City of Blaine's Motion to Intervene

19) Amended Answer of Defendant City of Sequim

20) Answer of Intervenor Teamsters

21) Intervenor Teamsters Motion for Summary Judgment

22) Declaration of Dan Taylor in Support of Teamsters Motion for Summary Judgment

23) Brief of Amicus Curiae

City Attorney for the City of Sequim
Craig A. Ritchie WSBA#4818
PO Box 1087 / 226 N. Sequim Ave., Sequim WA 98382
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24) Defendant City of Sequim's Motion for Summary Judgment

25) Statement of Craig A. Ritchie in Support of City's Motion for Summary Judgment

26) Memorandum in Support of Defendant City's Motion for Summary Judgment.

* see Addendum

Having reviewed the records and files herein, and having considered oral argument of the parties, and Amicus, Now, therefore,

IT IS HEREBY ORDERED AS FOLLOWS:

1) Plaintiff's Motion for Declaratory Judgment or Mandamus is DENIED.

2) Defendant City of Sequim's Motion for Summary Judgment is GRANTED.

The Court also finds that the Orders on Summary Judgment effectively act as a final judgment in the case.

DATED this 26th day of November, 2014.

THE HON. ERIK ROHRER

Presented by:

CRAIG A. RITCHIE WSBA#4818
Sequim City Attorney

Copy received; Notice of Presentation Waived;
Approved for Entry:

SHAWN T. NEWMAN WSBA#14193
Attorney for Plaintiff Brautigam

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WILLIAM B. PAYNE, Clallam County Prosecutor

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THOMAS A. LEAHY/JACK HOLLAND
Attorneys for Teamsters Local 589

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REBECCA R. GLASGOW, Deputy Solicitor General

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JONATHAN K. SITKIN
Blaine City Attorney

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Shelton City Attorney

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Chelan City Attorney

City Attorney for the City of Sequim
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ADDENDUM TO ORDER GRANTING CITY OF SEQUIM'S MOTION FOR SUMMARY JUDGEMENT AND DENYING PLAINTIFF BRAUTIGAM'S MOTION FOR SUMMARY JUDGMENT
BRAUTIGAM v. SEQUIM AND TEAMSTERS LOCAL 589
No. 14-2-00771-2

In addition to the pleadings referenced on pages 1-3 of this order, the court's review included, but was not limited to, the following documents:

27. Plaintiff's Response to Motions for Summary Judgment

28. Plaintiff's Motion and Memorandum for Summary Judgment on Mandamus and Declaratory Judgment

29. Plaintiff's Reply to Responses to Motions for Summary Judgment

30. Plaintiff's Reply to Intervenor Teamsters Local 589 to Plaintiff's Complaint for Writ of Mandamus and, in the Alternative, Declaratory Relief and Counterclaim

31. Reply of Plaintiff Susan Brautigam to Defendant's Amended Answer

32. Intervenor Teamsters Local 589's Response to Plaintiff's Motion for Summary Judgment

33. City's Response Memorandum to Plaintiff's Motion for Summary Judgment

34. Sequim's Reply to Plaintiff's Response to Motions for Summary Judgment

35. Intervenor Teamsters Local 589's Reply to Plaintiff's Response

The Honorable Amber Finlay

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

DIANE GOOD, Plaintiff, v. CITY OF SHELTON, by and through its CITY COMMISSION, and KAREN HERR, in her capacity as MASON COUNTY AUDITOR, Defendants, INTERNATIONAL ASSOCIATION OF WOODWORKERS AND AEROSPACE WORKERS LOCAL LODGE W-38, Intervenor.	NO. 14-2-00555-9 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on cross motions for summary judgment filed by Plaintiff Diane Good and Defendant City of Shelton. The Court heard oral argument of the following parties: Plaintiff Good, Defendant City, and Intervenor International Association of Woodworkers and Aerospace Workers Local Lodge W-38. The Court considered the following documents and pleadings submitted by the parties:

PORTER FOSTER RORICK
800 Two Union Square | 601 Union Street
Seattle, Washington 98101
(206) 622-0203 [illegible]

1. Plaintiff's Motion for Summary Judgment;
2. City's Motion for Summary Judgment;
3. Declaration of Vicki Look, Shelton City Clerk;
4. Plaintiff's Response to City's Motion;
5. City's Response to Plaintiff's Motion;
6. Intervenor's Response to Plaintiff's Motion;
7. Declaration of Wayne Thompson;
8. Plaintiff's Reply to City's Response;
9. City's Reply to Plaintiff's Response;
10. City's Notice of Supplemental Authorities.

The Court hereby finds as follows:

The Court is authorized to engage in pre-election review of whether the proposed initiatives, Proposition 1 (The "Collective Bargaining Transparency Act") and Proposition 2 (The "Collective Bargaining Protections Act"), are proper subjects of initiative.

Proposition 2 is not a proper subject of initiative because it is administrative in nature. In addition, it conflicts with state law by prohibiting the negotiation of union security clauses, which are a mandatory subject of bargaining. Finally, Proposition 2 creates a misdemeanor; the state legislature delegated the power to create a misdemeanor to the City Commission.

Proposition 1 is legislative rather than administrative in nature, and RCW 35A.11.020 does not prohibit citizens' initiatives on collective bargaining. Therefore, under the two-prong validity inquiry, Proposition 1 involves subject matter that is appropriate for direct legislation through the local initiative power. However, Proposition 1 conflicts with state laws concerning open public meetings and collective bargaining, and therefore is not a proper subject of initiative.

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Based on the foregoing, the Court denies the Plaintiff's motion and grants the City's motion. Propositions 1 and 2 must not be enacted by the City of Shelton or placed on the ballot.

Signed this 2nd day of ~~December, 2014~~ January 2015.

AMBER L. FINLAY

The Honorable Amber Finlay
Mason County Superior Court

Presented by:

PORTER FOSTER RORICK LLP

By: Kathleen J. Haggard, WSBA #29305
Andrea L. Bradford, WSBA #45748
Attorneys for City of Shelton

Approved for entry,
Notice of presentation waived:

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See next page

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Jack Holland, WSBA #46717
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Tel: (206) 285-3610

via email authorization

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Based on the foregoing, the Court denies the Plaintiff's motion and grants the City's motion. Propositions 1 and 2 must not be enacted by the City of Shelton or placed on the ballot.

Signed this _____ day of December, 2014.

_____
The Honorable Amber Finlay
Mason County Superior Court

Presented by:

PORTER FOSTER RORICK LLP

By: _____
Kathleen J. Haggard, WSBA #29305
Andrea L. Bradford, WSBA #45748
Attorneys for City of Shelton

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