

August 28, 2019

Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504

Public Disclosure Commission Staff,

In accordance with RCW 42.17A.755(1), I would like to bring to your attention violations of the Fair Campaign Practices Act (“FCPA”), Chapter 42.17A RCW, by the International Association of Machinists Lodge W38 (“Lodge W38”).¹

In short, Lodge W38 paid a private law firm thousands of dollars to oppose efforts to place two ballot propositions before voters in the City of Shelton in 2014 without disclosing the payments on Forms C6 as independent expenditures, in violation of RCW 42.17A.255.

While the Attorney General has already initiated enforcement action against the Freedom Foundation for not disclosing legal services provided in support of the same ballot propositions, no enforcement action has yet been taken against Lodge W38 for failing to disclose its legal expenses in *opposition* to the ballot propositions.

Factual background

In the summer of 2014, citizen activists in Shelton collected signatures to qualify two ballot measures, Propositions 1 and 2, for the city ballot. They submitted signatures to the city on August 7, 2014. **See Appendix pages 2-19**, a complaint filed against Shelton by taxpayer Diane Good. Then-Mason County Auditor Karen Herr certified the sufficiency of the signatures on August 22, 2014. **See App. 15, 18.**

At the time, RCW 35.17.260 dictated that, if an initiative petition gathered sufficient signatures, the city must either pass the initiative as written or place it on the ballot:

“Ordinances may be initiated by petition of registered voters of the city filed with the commission. If the petition accompanying the proposed ordinance is signed by the registered voters in the city equal in number to twenty-five percent of the votes cast for all candidates for mayor at the last preceding city election, and if it contains a request that, unless passed by the commission, the ordinance be submitted to a vote of the registered voters of the city, the commission shall either: (1) Pass the proposed ordinance without alteration within twenty days after the county auditor’s certificate of sufficiency has been

¹ Mailing address: P.O. Box 98, Shelton, WA, 98584. Phone: (360) 426-5541. Email: localw38@gmail.com. President: Rick Simpson.

received by the commission; or (2) Immediately after the county auditor's certificate of sufficiency for the petition is received, cause to be called a special election to be held on the next election date, as provided in RCW 29.13.020, that occurs not less than forty-five days thereafter, for submission of the proposed ordinance without alteration, to a vote of the people unless a general election will occur within ninety days, in which event submission must be made on the general election ballot."

Despite collecting the requisite number of signatures and receiving a certificate of sufficiency from the county auditor, the Shelton City Commission on September 8, 2014 voted against taking either of the two actions required by then-RCW 35.17.260, choosing instead to simply ignore the initiatives.

Accordingly, Shelton taxpayer Diane Good filed suit against the city commission on October 6, 2014 in Mason County Superior Court under RCW 35.17.290, which provides:

"If the clerk finds the petition insufficient or if the commission refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient."

See App. 2-19.

However, on December 10, 2014, Judge Amber Finlay dismissed the litigation.² Ms. Good did not appeal, and the measures never appeared on the ballot. Upon information and belief, Lodge W38 intervened in the litigation as defendants alongside Shelton and was represented throughout the litigation by private attorneys Thomas Leahy, Esq. and Jack Holland, Esq., of the Seattle-based firm of Reid, McCarthy, Ballew & Leahy, LLP.

On February 17, 2017, the Committee for Transparency in Elections filed a complaint with the Washington Attorney General alleging the Freedom Foundation had committed various violations of the FCPA. *See App. 20-29*, a copy of the complaint. The Attorney General ultimately determined that two of the three allegations were unfounded but concluded that the Freedom Foundation "did not report its staff time and resources used to provide legal services to ballot measure proponents [in Shelton and elsewhere] to support the placement of propositions on local ballots." *See App. 30-31*, the Attorney General's decision regarding the complaint.

Accordingly, on October 14, 2015, the Attorney General filed litigation against the Freedom Foundation in Thurston County Superior Court alleging it failed to disclose the legal services provided to Ms. Good in support of Shelton Propositions 1 and 2 as independent expenditures on C6 forms. *See App. 32-37*, a copy of the lawsuit.

On May 13, 2016, Thurston County Superior Court Judge Gary Tabor dismissed the Attorney

² Freedom Foundation. "Another Judge Denies City Residents the Right to Consider Labor-Reform Initiatives." December 11, 2014. <https://www.freedomfoundation.com/press-release/another-judge-denies-city-residents-the-right-to-consider-labor-reform-initiatives/>

General's lawsuit against the Freedom Foundation for failure to state a claim. The Attorney General appealed the decision and, on November 7, 2017, the Court of Appeals reversed the Superior Court's ruling. *See App. 38-67*, a copy of the Court of Appeals' ruling. Accordingly, the Freedom Foundation appealed to the Washington State Supreme Court. On January 10, 2019, the Washington State Supreme Court ruled in a 5-4 decision that the Freedom Foundation should have disclosed its *pro bono* legal services provided to citizen sponsors of several local ballot measures, including Propositions 1 and 2 in Shelton, as independent expenditures, and remanded the case back to the Superior Court for resolution. *See App. 68-102*, a copy of the Supreme Court's decision.

The Freedom Foundation subsequently filed a Form C6 on July 2, 2019, disclosing \$14,296.26 in legal services, including \$1,730.76 in support of Propositions 1 and 2 in Shelton. *See App. 103-104*, the Form C6 filed by the Freedom Foundation.

The Attorney General's litigation against the Freedom Foundation is ongoing and penalties have not yet been determined.

Applicable Statutes

RCW 42.17A.255 provides:

“(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...

(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.” (emphasis added).

RCW 42.17A.005 defines “ballot proposition” as:

“...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.”³

Allegation: Failure to disclose legal services purchased to oppose ballot propositions as independent expenditures on C6 forms.

Lodge W38 has violated RCW 42.17A.255 by failing to disclose the thousands of dollars in legal services it purchased to prevent Shelton voters from having an opportunity to approve Propositions 1 and 2 in 2014. Lodge W38 does not maintain a political committee and, as such, has not disclosed the expenditures under RCW 42.17A.220, 42.17A.235, or 42.17A.240. Further, the union has filed no C6 forms with the PDC reporting independent expenditures under RCW 42.17A.255 since 2014.

While the amount of payments to Reid, McCarthy, Ballew & Leahy, LLP by Lodge W38 cannot be ascertained by the Foundation at this time, it certainly exceeded the \$100 threshold for disclosure in RCW 42.17A.255.

As the Washington Supreme Court concluded in *State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 798, 432 P.3d 805 (2019), “...a local initiative becomes a ballot proposition when it is filed with local elections officials...” After that point, “[a]ny nonexempt independent expenditures in support of a ballot proposition must be reported under RCW 42.17A.255.”

In this case, there is no disputing that Lodge W38’s legal expenses were incurred after Propositions 1 and 2 were “filed with local elections officials.” As such, they should have been disclosed under RCW 42.17A.255.

Since the *Evergreen* decision, state courts have specifically applied RCW 42.17A.255 to legal services in opposition to local ballot propositions. In *State v. Economic Development Board for*

³ This definition is currently found in RCW 42.17A.005(5), though it was previously located in RCW 42.17A.005(4). The definition itself has not changed at any time relevant to this complaint.

Tacoma-Pierce County, 441 P.3d 1269, 1277 (2019), the Court of Appeals held,

“Litigation expenses incurred to seek a judicial directive regarding whether measures may be placed on the ballot are reportable under RCW 42.17A.255. *See Evergreen*, 192 Wn.2d at 787. And RCW 42.17A.255 unambiguously defines ‘in opposition to’ to include pre-election litigation expenditures on legal services to block an initiative. Thus, expenditures on legal services to block an initiative are necessarily independent expenditures subject to the statute’s reporting requirements.” (emphasis added).

See **App. 105-128**, a copy of the Court of Appeals’ decision.

It is clear from these decisions that Lodge W38 should have disclosed its legal expenses in opposition to Shelton Propositions 1 and 2 in 2014 on C6 forms submitted to the PDC, in accordance with RCW 42.17A.255. As of the filing of this complaint, such disclosures are more than four years late.

Conclusion

The Freedom Foundation has previously argued that RCW 42.17A.255 was ambiguous and, in any event, did not apply to expenses incurred when litigating whether local ballot measures may appear on the ballot. At this point, however, now that state courts have held that the statute does apply to such expenses, the law must be applied equally to all parties involved in the Shelton ballot proposition dispute. The Freedom Foundation has already been subject to extensive litigation by the Attorney General and will ultimately incur penalties as a result of that litigation. Basic notions of fairness and equal application of the law demand that the PDC exercise its authority to hold the parties involved in opposition these ballot propositions, including Lodge 38, to the same standard.

As the Attorney General’s Office is already familiar with the facts and the parties involved in this complaint and is actively engaged in litigation against the Freedom Foundation for similar violations, this complaint is appropriate for referral to the Attorney General by the PDC under RCW 42.17A.755(1)(c). Alternatively, the amount of independent expenditures not disclosed warrants a formal investigation and enforcement proceeding under RCW 42.17A.755(1)(b). If the PDC elects to proceed with its own enforcement action, it should remain in communication with the Attorney General to ensure any penalties levied on Lodge W38 are proportionate to any penalties imposed on the Freedom Foundation.

Please do not hesitate to contact us for any needed clarification. Thank you in advance for your attention to this matter.

Sincerely,



Maxford Nelsen
Director of Labor Policy

Freedom Foundation
P.O. Box 552, Olympia, WA 98507
(360) 956-3482
MNelsen@FreedomFoundation.com

PDC Complaint – IAM Lodge W38 – Appendix



IN THE SUPERIOR COURT FOR 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.

14 2 00555 9
NO. 14 2 00555 9
SUMMONS (20 days)

TO THE DEFENDANTS: A lawsuit has been started against you in the
above entitled court by the plaintiff. Plaintiff's claim is stated in the written
complaint, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the
complaint by stating your defense in writing, and by serving a copy upon the
person signing this summons within 20 days after the service of this summons,
excluding the day of service, or a default judgment may be entered against you

SUMMONS

SHAWN TIMOTHY NEWMAN
Attorney at Law, Inc., P.S. #14193
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
FAX: 1.866.800.9941

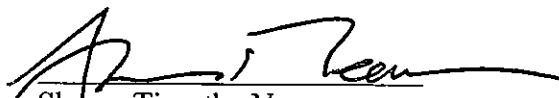
1 without notice. A default judgment is one where plaintiff is entitled to what he
2 asks for because you have not responded. If you serve a notice of appearance
3 on the undersigned person, you are entitled to notice before a default judgment
4 may be entered.
5

6 You may demand that the plaintiff file this lawsuit with the court. If
7 you do so, the demand must be in writing and must be served upon the person
8 signing this summons. Within 14 days after you serve the demand, the plaintiff
9 must file this lawsuit with the court, or the service on you of this summons and
10 complaint will be void.
11

12 If you wish to seek the advice of an attorney in this matter, you should
13 do so promptly so that your written response, if any, may be served on time.
14

15 This summons is issued pursuant to rule 4 of the Superior Court Civil
16 Rules of the State of Washington.
17

18 Date: 10/6/14
19

20 
21 Shawn Timothy Newman
22 Washington State Director of the
23 Initiative & Referendum Institute
24 Attorney for Plaintiff #14193
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27
28
29

SUMMONS

SHAWN TIMOTHY NEWMAN
Attorney at Law, Inc., P.S. #14193
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
FAX: 1.866.800.9941



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

DIANE GOOD, an individual

Plaintiff,

V.

**CITY OF SHELTON, by and through its
CITY COMMISSION,**

and

**KAREN HERR, in her capacity as
MASON COUNTY AUDITOR,**

Defendants.

NO. 14 2 00555 9

**COMPLAINT
FOR WRIT OF MANDAMUS AND
DECLARATORY JUDGMENT**

I. SUMMARY

This action is brought pursuant to RCW 35.17.290 by Plaintiff, taxpayer and resident of Shelton, for a writ ordering that two proposed initiatives [Propositions 1 and 2] be placed on the ballot pursuant to RCW 35.17.260(2), specifically the February 2015 ballot or some other appropriate ballot. Additionally, Plaintiff seeks declaratory judgment, pursuant to RCW 7.24.010, that the Shelton City Commission broke the law by failing to perform its statutory duties prescribed in 35.17.260.

COMPLAINT FOR WRIT OF MANDAMUS
OR, ALTERNATIVELY, DECLARATORY RELIEF - 1

SHAWN TIMOTHY NEWMAN
Attorney at Law, Inc. P.S. #14193
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
FAX: 1.866.800.9941

II. JURISDICTION & PARTIES

2.1 The Superior Court has subject matter jurisdiction over this action pursuant to RCW 2.08.010, RCW 7.24.010 et seq., and RCW 35.17.290. RCW 25.17.290 confers standing on Plaintiff taxpayer and Defendant City Commission only.

2.2 Plaintiff is an individual taxpayer and resident of Shelton.

2.3 Defendant, the City of Shelton, is a Municipal Corporation of the State of Washington that has retained the commission form of government. Shelton Municipal Code §1.24.020.

2.4 Defendant, Karen Herr in her capacity as Mason County Auditor, is included for complete relief to be had. Including the Mason County Auditor in any court order would cover any incidental role the Auditor plays in placing the Propositions on the ballot.

2.5 A city that has the commission form of government automatically has the powers of initiative and referendum. RCW 35.17.220-360.

III. GOVERNING LAW

RCW 35.17.260: Legislative — Ordinances by initiative petition.

Ordinances may be initiated by petition of registered voters of the city filed with the commission. If the petition accompanying the proposed ordinance is signed by the registered voters in the city equal in number to twenty-five percent of the votes cast for all candidates for mayor at the last preceding city election, and if it contains a request that, unless passed by the commission, the ordinance be submitted to a vote of the registered voters of the city, the commission shall either:

(1) Pass the proposed ordinance without alteration within twenty days after the county auditor's certificate of sufficiency has been received by the commission; or

(2) Immediately after the county auditor's certificate of sufficiency for the petition is received, cause to be called a special election to be held on the next

election date, as provided in *RCW 29.13.020, that occurs not less than forty-five days thereafter, for submission of the proposed ordinance without alteration, to a vote of the people unless a general election will occur within ninety days, in which event submission must be made on the general election ballot.

RCW 35.17.290: Legislative — Initiative petition — Appeal to court.

If the clerk finds the petition insufficient or if the commission refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient.

RCW 7.24.010: Declaratory Judgments.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

IV. FACTS

4.1 On August 7, 2014, petitions on Propositions 1 and 2 were submitted to the City. Exhibits 1 and 2.

4.2 On August 22, 2014, the Mason County Auditor, Karen Herr, acting as *ex officio* supervisor of elections, certified the sufficiency of the petitions accompanying Propositions 1 and 2. Exhibits 3 and 4.

4.3 On September 8, 2014, the City Commission unanimously voted that the Propositions are invalid and that it would not pass the Propositions or put them on the November 4, 2014 ballot.

4.4 As of September 24 (and to date), more than 32 days following the certification of sufficiency, the Shelton City Commission has neither passed the initiative proposed

1 ordinances without alteration, nor immediately caused the initiative proposed ordinances to be
2 submitted without alteration to a vote of the people on the November 4, 2014 general election
3 ballot.
4

5 4.5 Shelton City Administrator Dave O'Leary said that the recommendation to
6 declare both Propositions invalid may be overturned when and if a court determines the City's
7 actions are not valid.
8

9 V. REQUEST FOR RELIEF

10 5.1 Plaintiff seeks a writ ordering that Defendants place the proposed ordinances on
11 the ballot as required by RCW 35.17.260(2). Given the deadlines for ballot issuance, the
12 plaintiff seeks to have the propositions placed on the February 2015 ballot or some other
13 appropriate ballot.
14

15 5.2 Plaintiff seeks declaratory judgment, pursuant to RCW 7.24.010, that the Shelton
16 City Commission broke the law by failing to perform its statutory duties prescribed in
17 35.17.260.
18

19 5.3 Plaintiff seeks declaratory relief and such other and further relief as may be
20 necessary and proper pursuant to RCW 7.24 *et seq.*, including compensatory and coercive
21 remedies, such as damages and attorney's fees, as a result of Defendant's failure to comply
22 with RCW 35.17.260.
23

24 Date: 10/6/14
25

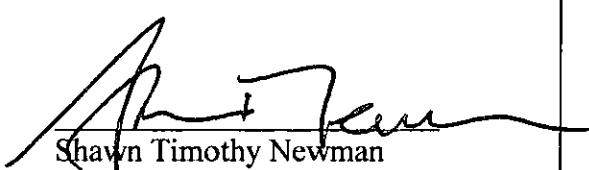

Shawn Timothy Newman
Washington State Director of the
Initiative & Referendum Institute
Attorney for Plaintiff #14193
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EXHIBIT 1

[illegible]

Complete Text of Proposition 1

Collective Bargaining Transparency Act

Collective Bargaining — Purpose

This chapter sets forth the policies and provisions that shall govern the process of collective bargaining, as defined in RCW 41.56.030, in the City of Shelton. The intent of this chapter is to provide an open and transparent process, to protect the rights of individual City employees, and to maintain high quality public service.

Collective Bargaining — Notice to employees in the bargaining unit

The City of Shelton shall make a good faith effort to notify all members of a bargaining unit prior to any meeting between any representative of the City and the bargaining unit's bargaining representative held for purposes related to collective bargaining. The City shall notify members of the bargaining unit at least 24-hours prior to such a meeting. Each notice must include the date, time, location, and purposes of the meeting.

Collective Bargaining — Public notice

The City of Shelton shall make a good faith effort to notify the public prior to any meeting between any representative of the City and a bargaining representative held for purposes related to collective bargaining. The City shall deliver, by electronic or comparable means, to each local newspaper of general circulation and local radio or television station that has on file with the City a written request to be notified of public meetings and shall post a notice of the meeting on the City's website and at the meeting location.

Collective Bargaining — Open meetings

All meeting between any representative of the City of Shelton and a bargaining representative held for purposes related to collective bargaining must be open to the public. A member of the public shall not be required, as a condition to attendance, to register his or her name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

Severability

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

EXHIBIT 2

[illegible]

Complete Text of Proposition 2

Collective Bargaining Protections Act

Collective Bargaining — Purpose

This chapter pertains to collective bargaining, as defined in RCW 41.56.030, in the City of Shelton. The intent of this chapter is to instruct and govern representatives of the City in collective bargaining.

Collective Bargaining — Free Association

No representative of the City of Shelton shall agree to any collective bargaining agreement containing a "union security" provision or other provision which would require any public employee to associate with or make payment to any private organization as a condition of gaining or retaining public employment.

Collective Bargaining — Public Funds

No representative of the City of Shelton shall agree to any collective bargaining agreement which designates or allows the expenditure of public funds for the purpose of union operations.

Collective Bargaining — Interruptions of public services

No representative of the City of Shelton shall agree to any collective bargaining agreement which fails to prohibit work stoppages and strikes and to set forth remedies and penalties for the same.

Collective Bargaining — Violations

- (1) Any representative of the City of Shelton who violates the provisions of this chapter shall immediately cease to represent the City in collective bargaining and shall be prohibited from representing the City in collective bargaining for not less than one year. Any agreement negotiated by a representative in violation of the provisions of this chapter shall be considered ultra vires.
- (2) Any official of the City of Shelton who knowingly violates the provisions of this chapter is guilty of a misdemeanor, and such conviction shall be sufficient cause for removal from office.

Severability

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

EXHIBIT 3



Karen Herr
Mason County
Auditor

P.O. Box 400
411 N. 5th Street
Shelton, WA 98584
Phone (360) 427-9670
Fax (360) 427-1753
<http://auditor.co.mason.wa.us>

Certificate of Sufficiency

State of Washington) SS
County of Mason)

This is to certify that I have examined the signatures on the attached initiative petition entitled "Proposition 1: Collective Bargaining Transparency Act" submitted by the City of Shelton.

I further certify that the total number of qualified electors who signed the petition exceeds the required 25% percent of the total votes cast for all candidates for Mayor at the last preceding city election.

- Total votes cast in 2011 Mayor's race (including write-in votes): **1926**
- Twenty-five percent of 1926 = **482**
- Valid signatures (registered voters in the City of Shelton) **551**

I hereby witness my hand and seal this 22nd of August, 2014.

Karel Hen

Karen Herr
Mason County Auditor



Petition Result Breakdown

City of Shelton - Prop 1

Prop 1 - Collective Bargaining Transparency act

Signatures Required	482		
Raw Count	654		
Sample Size	654		
Sigs Checked	653	Percent of Sigs Checked	Percent of Sample Size
Sigs Not Checked	1		0.2 %
Sigs Valid	551	84.4 %	84.3 %
Sigs Invalid	102	15.6 %	15.6 %
Duplicated	4	1.0 %	0.6 %
Non-duplicate Invalids	98	15.0 %	15.0 %

RESULT ABBR	RESULT DESCRIPTION		
Approved	Approved	551	84.4 %
NotReg	Not Registered	61	9.3 %
OutOfDist	Out of District	34	5.2 %
Duplicate	Signed more than once	4	0.6 %
SigNoMatch	Signatures Don't Match	3	0.5 %

EXHIBIT 4



Karen Herr
Mason County
Auditor

P.O. Box 400
411 N. 5th Street
Shelton, WA 98584
Phone (360) 427-9670
Fax (360) 427-1753
<http://auditor.co.mason.wa.us>

Certificate of Sufficiency

State of Washington) SS
County of Mason)

This is to certify that I have examined the signatures on the attached initiative petition entitled "Proposition 2: Collective Bargaining Protections Act" submitted by the City of Shelton.

I further certify that the total number of qualified electors who signed the petition exceeds the required 25% percent of the total votes cast for all candidates for Mayor at the last preceding city election.

- Total votes cast in 2011 Mayor's race (including write-in votes): **1926**
- Twenty-five percent of 1926 = **482**
- Valid signatures (registered voters in the City of Shelton) **483**

I hereby witness my hand and seal this 22nd of August, 2014.

Harold

Karen Herr
Mason County Auditor

Petition Result Breakdown

City of Shelton - Prop 2

Collective Bargaining Protections Act

Signatures Required	482		
Raw Count	566		
Sample Size	566	Percent of	Percent of
Sigs Checked	565	Sigs Checked	Sample Size
Sigs Not Checked	1		0.2 %
Sigs Valid	483	85.5 %	85.3 %
Sigs Invalid	82	14.5 %	14.5 %
Duplicated	2	0.0 %	0.4 %
Non-duplicate Invalids	80	14.0 %	14.1 %

RESULT ABBR	RESULT DESCRIPTION		
Approved	Approved	483	85.5 %
NotReg	Not Registered	51	9.0 %
OutOfDist	Out of District	28	5.0 %
Duplicate	Signed more than once	2	0.4 %
SigNoMatch	Signatures Don't Match	1	0.2 %



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Administration Division

PO Box 40100 • Olympia WA 98504-0100 • (360) 753-6200

March 4, 2015

Sent via U.S. Mail and email

Tom McCabe, CEO
The Freedom Foundation
PO Box 522
Olympia, WA 98507

Re: 45 Day Citizen Action Notice against Freedom Foundation

Dear Mr. McCabe:

This is to advise you that, on February 18, 2015, the Attorney General's Office received a complaint against the Freedom Foundation filed pursuant to RCW 42.17A.765. The complaint alleges violations of RCW 42.17A including failing to file independent expenditure reports and failing to register and report as a political committee. The complaint is enclosed for your records. The attachments to the complaint are included with the copy of this letter sent to you via U.S. mail. Please note that the complainant may commence an enforcement action in superior court if the State fails to take action within the statutorily prescribed timeframe.

The Attorney General's Office has reviewed the allegations and will be investigating them. The investigator assigned to this matter is Chad Crummer. Mr. Crummer shall be contacting your office shortly to schedule interviews and obtain records. In the meantime, you are requested to provide an initial response to the complaint no later than Friday, March 13, 2015, directed to Mr. Crummer at 800 Fifth Avenue, Suite 2000, Seattle, WA 98104.

Additionally, I am asking the Freedom Foundation to preserve and retain any and all records that could reasonably be considered to be relevant to the matters alleged until this matter is concluded. This would include any records related to the matters referenced in the notice, including documents (draft or final), written communications, invoices, billing or finance records, emails, faxes, electronic submissions, and any writing.

ATTORNEY GENERAL OF WASHINGTON

Mr. Tom McCabe
March 4, 2015
Page 2

If you have any questions, they may be directed to Mr. Crummer at 206-464-6336.

Sincerely,

A handwritten signature in cursive script that reads "Christina Beusch".

CHRISTINA BEUSCH
Deputy Attorney General

CB:kw:
Enclosure

cc: Chad Crummer, Investigations Manager

Schwerin Campbell Barnard Iglitzin & Lavitt LLP

ATTORNEYS AT LAW

Of Counsel Lawrence Schwerin
James D. OswaldDMITRI IGLITZIN
iglitzin@workerlaw.com*Original via UPS Overnight Delivery*

February 17, 2015

Bob Ferguson
Attorney General, State of Washington
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100Jon Tunheim
Thurston County Prosecuting Attorney
2000 Lakeridge Dr S.W., Building 2
Olympia, WA 98502RECEIVED
FILE
2015 FEB 18 PM 12:48
ATTORNEY GENERAL
OF WASHINGTONRe: Notice of Violations of RCW 42.17A
SCBIL File No. 2960-020


Dear Mr. Ferguson and Mr. Tunheim:

My firm is writing to you on behalf of the Committee for Transparency in Elections to bring to your attention the fact that Evergreen Freedom Foundation, d/b/a Freedom Foundation ("Freedom Foundation"), appears to have violated, and appears to be continuing to violate, several provisions of RCW 42.17A. Please consider this letter our 45-day notice pursuant to RCW 42.17A.765(4).

Summary of Notification

First, Freedom Foundation has failed to comply with the reporting requirements called for under RCW 42.17A.255 and WAC 390-16-063(1), among other laws and provisions, applicable to entities that are not political committees that make independent expenditures in support of or in opposition to any candidate or ballot proposition, specifically (but not limited to) the requirement that it file C-6 reports in relation to the in-kind support expended by it of a value of \$100 or more in support of ballot initiatives in various Washington cities.

Second, Freedom Foundation appears to have failed to fulfill its reporting requirements under those same statutes and regulations for its expenditure of resources in favor of or in opposition to certain statewide initiatives.

18 West Mercer St, Ste 400	(206) 285.2828	TEL
Seattle, Washington 98119	(800) 238.4231	TEL
 workerlaw.com	(206) 378.4132	FAX

Bob Ferguson
 Jon Tunheim
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Finally, Freedom Foundation has and/or has had the expectation of receiving contributions or making expenditures in support of ballot propositions. Despite this, it has failed to comply with the requirements of RCW 42.17A.205 to register as a political committee and has failed to comply with all of the requirements that would have applied to it had it so registered, including but not limited to the reporting requirements set forth in RCW 42.17A.225 *et seq.*

As outlined herein, there is sufficient evidence to support these allegations. If your office does not commence an action concerning this issue within forty-five days of the date of this letter, our clients intend to commence a citizen action as authorized under 42.17A.765(4).

Failure to File C-6 Reports Regarding Independent Expenditures In Support of Local Ballot Propositions As Required By RCW 42.17A.255 and WAC 390-16-063(1)

Overview

Through the substantial and continuing in-kind contribution of its staff and in-house counsel's time, Freedom Foundation appears to have made and to be making expenditures in support of four pairs of ballot propositions in the state of Washington, as outlined below. These expenditures, which clearly had a value of \$100 or more, should have been reported to the PDC on a C-6 as independent expenditures, as they were not "contributions to a registered political committee," and were not made in coordination with such a committee. *See generally* RCW 42.17A.255 and WAC 390-16-063(1).

Freedom Foundation has made its role in recent pushes for citizens' initiatives very clear. These initiatives, presented in Blaine, Chelan, Sequim, and Shelton, are heavily touted on the group's website. Freedom Foundation boasts that "groups around the state have taken two ideas written by Freedom Foundation and introduced them as local initiatives." *See* Exhibit A. These "ideas" were written by Freedom Foundation employees as model ordinances. *See* Exhibit B (<http://kioradio.com/listen/9976798/>, September 11, 2014). At around the four-minute mark of this interview, Freedom Foundation's Citizen Action Network Director Scott Roberts¹ states that Freedom Foundation's role in "supporting these citizens" has been writing "these ideas as model ordinances" and outlining the process so others can attempt to get the ordinances on the ballot. He goes on to state that Freedom Foundation's "biggest role ... is to wage a public awareness campaign."

Writing model ordinances and encouraging like-minded Washington citizens to file them is not necessarily an expenditure in support of a ballot proposition. Such an expenditure would customarily occur only after a proposition is filed with the appropriate election officer before its circulation for signatures. RCW 42.17A.005(4). But, as outlined herein, Freedom Foundation's work in support of these four pairs of initiatives goes well beyond pre-filing work and into the specific types of in-kind expenditures of staff and employee resources that require reporting under RCW 42.17A.

¹ *See* <http://www.myfreedomfoundation.com/users/sroberts>.

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Support for Initiatives, Generally

Freedom Foundation's own communications outline their expenditures made to place a measure on the ballot or to require that a government agency place a measure on the ballot.

On January 6, 2015, Tom McCabe, Freedom Foundation CEO,² stated that as part of its larger plan, in 2014, Freedom Foundation "decided that we would put some initiatives on the ballot to bring Right to Work to cities." *See* Exhibit C at 34:37 (Free WA Tour, Shelton, WA, January 6, 2015). Mr. Roberts subsequently explained in more detail how this strategy worked, stating that "We [Freedom Foundation] **ran** eight initiatives – two initiatives in four cities, for a total of eight initiatives, this last year, way up in Sequim, Blaine, Shelton, and Chelan." *See* Exhibit D at 10:50 (Freedom Foundation presentation to Yakima Republicans Liberty Caucus Yakima, January 20, 2015) (emphasis added). As Matt Hayward, Freedom Foundation Grassroots Coordinator,³ has stated, "The four places that we really focused were Blaine, Sequim, Chelan, and Shelton, and in those areas, none of them accepted the ordinances, so we moved forward to helping the activists and local grassroots folks with the initiative process, said, fine, if your elected officials won't do it, the people can do it by initiative." *See* Exhibit E at 28:45 (Free WA Tour, Bellingham, WA, January 6, 2015).

Similarly, on August 27, 2014, Jeff Rhodes, Freedom Foundation's Managing Editor,⁴ conceded that "The Freedom Foundation helped grassroots activists run a pair of local initiatives." *See* Exhibit F at 2:10 (Freedom Daily Radio Show, August 27, 2014). Freedom Foundation has gone further, boasting outright that "Freedom Foundation activists in four cities [] gathered enough signatures to put a pair of labor-reform initiatives on the November [2014] ballot." *See* Exhibit G at pg. 2.

Mr. Roberts himself provided in-kind support for these initiatives. *See* Exhibit D at 17:41 ("I love going out and doorbelling on these sorts of initiative. **I did it, I volunteered my time on a number of days**, all around the state, doing these...") (emphasis added).⁵ So did Ron Valencia, Advancement Associate at the Freedom Foundation,⁶ who stated, "So it took four months to gather 600 signatures...I came out one day and doorbelled with Susan for about four hours and I got 10 signatures." *See* Exhibit H at 21:00 (Free WA Tour, Sequim, WA, January 8, 2015).

As Mr. Rhodes subsequently explained, "There are people in those communities who took up these initiatives and wanted to put them on the ballot in those communities because they wanted transparency and freedom of choice. Surprise. They asked the Freedom Foundation for help because

² *See* <http://www.myfreedomfoundation.com/users/tmccabe>.

³ *See* <http://www.myfreedomfoundation.com/users/mhayward>.

⁴ *See* <http://www.myfreedomfoundation.com/users/jrhodes>.

⁵ It is clear from the context of this statement that Mr. Roberts meant that Freedom Foundation donated his time to initiative efforts, which is an in-kind expenditure by Freedom Foundation in support of those efforts, not that he doorbelled on his personal time, separate and apart from the duties he performed for Freedom Foundation, his employer.

⁶ *See* <http://www.myfreedomfoundation.com/users/rvalencia>.

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that's what we do. That's what we have some authority on, have some expertise in, so we helped them." See Exhibit I at 7:25 (Freedom Daily Radio Show, September 29, 2014).

In one letter seeking contributions, Tom McCabe, Freedom Foundation CEO,⁷ outlines the fact that Freedom Foundation sent representatives to a City Council meeting in Chelan "as part of our work to stop the unions" – and in support of the initiatives. See Exhibit J at pg. 6. It goes on to admit the same approach for the City Commissioners meeting in Shelton. *Id.* at pg. 7.

All of these efforts by Freedom Foundation, seeking to place measures on the ballot, post-filing, are clearly work—through in-kind staff time—in support of an initiative. This triggered the duty to report such expenditures. Yet no C-6 was ever filed for the above-described work. Freedom Foundation has turned its back on its reporting obligations under RCW 42.17A.

In-Kind Expenditures For Work and Legal Support

There are other specific examples of Freedom Foundation's unreported work in support of initiatives presented in each of the four cities mentioned above. These examples show both staff time used in support of initiatives getting on a ballot—through, for example, signature gathering efforts—as well as legal support in lawsuits to overturn city decisions to leave the Freedom Foundation-sponsored initiatives off the ballots.

In short, there is clear evidence that Freedom Foundation has provided legal support for getting initiatives on the ballot in Blaine, Chelan, Sequim, and Shelton. Freedom Foundation's in-house litigation counsel, David Dewhirst,⁸ has stated openly, "We have litigated now, we have helped litigate, for plaintiffs in Sequim and Shelton." Exhibit K at 23:30 (Freedom Daily Radio Show, January 23, 2015).

The City of Shelton

In Shelton, initiatives were submitted "from a group of citizens supported by the Freedom Foundation. **The Foundation collected the required amount of signatures** - 25% of the votes cast for all candidates for mayor in the last general election." See Exhibit L (emphasis added). When the initiatives were presented to the City Commission, the City's legal counsel determined the initiatives were legally invalid, and advised the Commission to decline passing a resolution making the initiatives law, and to decline placing them on the November ballot.

In early October, Dian Good filed a lawsuit over the City Commission's decision to decline placement of the Freedom Foundation-inspired initiatives on the ballot. While the Shelton lawsuit was initially filed by attorney Shawn Newman, Freedom Foundation's in-house litigation counsel David Dewhirst filed a notice of appearance on November 5, 2014, to appear

⁷ See <http://www.myfreedomfoundation.com/users/tmccabe>.

⁸ See <http://www.myfreedomfoundation.com/user/32/david-dewhirst>.

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as co-counsel in support of the plaintiff. *See* Exhibit M. Every filing on behalf of the plaintiff after November 5, 2014, bears the Freedom Foundation's contact information in the footer of each page, and bears Mr. Dewhirst's signature. *See, e.g.*, Exhibit N.

The City of Sequim

A lawsuit was filed in Sequim on July 28, 2014, over the City's determination that the initiatives were legally invalid, and the City's decision to decline passing a resolution making the initiatives law, and to decline placing them on the November ballot a similar decision by the City.

While that lawsuit was not spearheaded by Freedom Foundation's in-house counsel, Freedom Foundation still assisted in the lawsuit. Upon rejection of the initiative by the City, Freedom Foundation declared that it "will now take a legal battle for the initiative to even be voted on, and the Freedom Foundation is leading the charge to make that happen." *See* Exhibit O, pg. 2. Furthermore, one of the declarations submitted to the court in support of the Plaintiff's arguments was from Mr. Roberts, Freedom Foundation's "Citizen Action Network Director." *See* Exhibit P.

The City of Blaine

The City of Blaine similarly rejected the pair of initiatives filed this year. *See* Exhibit Q and Exhibit R. While there is no lawsuit as of yet, there is still evidence of Freedom Foundation's involvement in supporting the initiative—involvement that has not been reported to the PDC. For example, Mr. Dewhirst published a blog post outlining Freedom Foundation's legal strategy in support of the initiatives in Sequim, Shelton, Chelan, and Blaine. "...Sequim[']s lawsuit] is just the beginning of the Freedom Foundation's offensive." *See* Exhibit S, pg. 2. It further outlines Freedom Foundation's plan to provide continuing support for these initiatives, and any others that may be filed, claiming that "[f]ed-up residents all across Washington are uniting with the Freedom Foundation to go on the offensive against the union goliath. **With a new legal team now in place**, the Freedom Foundation offers citizens a reliable ally to champion their will over the special interests of greedy union bosses and their paid-for politicians." *Id.* at pg. 3. It ends its appeal for donations by stating that "We at the Freedom Foundation will not only continue to hold politicians accountable, we will take the fight directly to the unions." *Id.*

The City of Chelan

Freedom Foundation, along with Shawn Newman, filed a lawsuit in Chelan on behalf of Edson Clark and Al Lorenz on November 21, 2014, concerning the City's decision to neither adopt the pair of proposed initiatives nor cause them to be acted upon. *See* Exhibit T. Mr. Dewhirst and Mr. Newman continued as co-counsel through at least their request to change the judge assigned to the case on December 8, 2014. *See* Exhibit U. But just a few days later, Mr. Newman disappeared from pleadings entirely, to be replaced by the Freedom Foundation logo in

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the footer of the pleadings, with Mr. Dewhirst identifying himself as the sole attorney for the plaintiffs. *See, e.g.*, Exhibit V.

Under Washington law, there is no rule that says legal expenses related to an initiative are separate from, and are not to be considered, either a contribution or an independent expenditure in support of or in opposition to such a measure. Instead, there are very clear and specific rules. For example, legal fees expended in support of an effort to place a measure on a ballot are campaign expenditures and therefore reportable under RCW 42.17A:

Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot

Statement #1

Expenditures made by a person or political committee to place a measure on a ballot, to influence the wording of a ballot title or to require that a government agency place a measure on the ballot are campaign expenditures reportable under RCW 42.17.

Discussion: The proponents of a proposed ballot measure are clearly acting to support or advance that measure when they take an action to require that it be placed before the voters. ...

PDC Interpretation No. 91-02.⁹

As outlined above, Freedom Foundation is making (or at least has made) independent expenditures through the in-kind contribution of its staff and in-house counsel's time in support of four pairs of ballot measures in the state of Washington. These expenditures should have been reported on a C-6, because they were not "contributions to a registered political committee," and were not done in coordination with such a committee.

Failure to File C-6 Reports Regarding Independent Expenditures In Support of or in Opposition to Statewide Ballot Propositions

The evidence also indicates that Freedom Foundation has engaged in independent expenditures in support of, and in opposition to, various statewide initiatives, and has not filed any C-6 reports to document those expenditures.

For example, there have been no C-6 reports filed to document Freedom Foundation's expenditures in opposition to I-1351. Freedom Foundation's own blog posts explain its opposition to the measure. *See, e.g.*, Exhibit W. These sentiments, along with Freedom Foundation's actual involvement in the anti-1351 campaign, were further expressed to The

⁹ See "Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot," <http://www.pdc.wa.gov/archive/guide/pdf/019.html>.

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Columbian. Jami Lund,¹⁰ Senior Policy Analyst at the Freedom Foundation, told the paper that there were “a lot of very influential, very smart people who have come out and opposed [I-1351],” and that the Freedom Foundation “is behind a grass-roots effort to defeat the measure.” *See* Exhibit X. No C-6 report has been filed for these efforts.

The Freedom Foundation also published and distributed what it called its “Informed Voter Guide,” where every word written about I-517 (the measure to extend the time available for the initiative process) was *positive*, and every word about I-522 (the measure to label “genetically modified” food) is *negative*. *See* Exhibit Y. There have been no C-6 reports filed on this or any other Freedom Foundation independent expenditure in support of or in opposition to statewide ballot propositions.

Failure to Register As Political Committee In Violation of RCW 42.17A.205

Under RCW 42.17A.005, a “political committee” means any person “having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” Any such individual or group must file a “statement of organization” with the PDC, pursuant to RCW 42.17A.205. In addition, any such committee must fulfill the filing and reporting requirements of RCW 42.17A.225.

Freedom Foundation has broadcasted its clear and undeniable expectation of receiving contributions in support of its electoral political activity and therefore should have registered as a political committee. However, it has not filed a C-1pc, nor has it reported *any* of its expenditures and income.

There are numerous examples of fundraising pitches through which Freedom Foundation has solicited money specifically to support its work in support of or in opposition to ballot propositions in the state of Washington, and in particular to support its efforts to further the municipal ballot measures discussed above.

For example, one mass email sent from Mr. McCabe to mailing list recipients around August 15, 2014, outlines this call for financial support to pursue legislative efforts to fight unions in Washington State. *See* Exhibit G. This particular email requested that recipients “donate now so we can do in Washington State what Scott Walker and my friend [who works for Walker] did in Wisconsin [through “Gov. Walker’s reforms”]. *Id.* This email explained to recipients that “**Freedom Foundation activists in four cities have gathered enough signatures** to put a pair of labor-reform initiatives on the November [2014] ballot.” *Id.* (emphasis added). It ends with a reiteration of the request for donations by pleading “I need your financial support to continue taking the battle to the labor unions.” *Id.* The words “financial support” contain a hyperlink that leads recipients directly to the Freedom Foundation’s electronic donations page.

Other communications to Washington residents express this same message. In a mailer

¹⁰ *See* <http://www.myfreedomfoundation.com/users/jlund>.

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dated October 14, 2014, the Freedom Foundation informed recipients that with their financial “help, the Freedom Foundation can throw the knockout punch!” in turning Washington into a right-to-work state. *See* Exhibit Z. It goes on to summarize its approach in achieving this end: “Our strategy can be summed up in just four words: Educate. Activate. Legislate. Litigate. ... [W]e are building coalitions of patriots across Washington and right here in Thurston County to enact common-sense reforms at the state and local level....” *Id.* (emphasis in original). In requesting financial support, the letter emphasizes that this support “will do so much to put us in the position of strength needed to sustain this campaign. **We are indeed turning Washington into a right-to-work state, one city at a time.**” *Id.* (emphasis added).


Perhaps the strongest evidence of the Freedom Foundation’s expectation of receiving contributions in support of its electoral political activity comes from a fundraising appeal allegedly “From the desk of John Koster.”¹¹ *See* Exhibit O. This letter, dated October 11, 2014, describes the Freedom Foundation citizen initiative strategy in detail, noting that there are “63 jurisdictions across our state that allow citizen initiatives, and they’re working with activists in more than a dozen of them to enact right-to-work policies....” *Id.*

This particular letter goes on to discuss the citizen initiative presented to the Sequim City Council, discussed above, which was not passed or placed on a ballot. The letter states that “[i]t will now take a legal battle for the initiative to even be voted on, and the Freedom Foundation is leading the charge to make that happen. This fight is so critical because a victory in Sequim will make it that much easier to win in other communities across the state....” *Id.* It ends the summary with a request for the reader to stand with the Freedom Foundation “to support them in taking on the union machine.” *Id.*

The fundraising requests outlined above, along with countless others made by Freedom Foundation, show that this group has solicited money in order specifically to support its work in support of, or in opposition to, ballot propositions in the state of Washington. These clear and undeniable expectations of receiving contributions in support of its electoral political activity have triggered Freedom Foundation’s obligation to register and report its activity under the laws of the state of Washington.

If you have any questions, or if there is anything we can do to assist you in complying with our request, please do not hesitate to contact us. We look forward to hearing from you.

Sincerely,



Dmitri Iglitzin
Laura Ewan

Enclosures

¹¹ It is important to note that this letter was not written by then-Snohomish County Ombudsman John Koster—rather, it was primarily written by Freedom Foundation CEO Tom McCabe. *See* Exhibit AA.



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Government Compliance & Enforcement Division
 PO Box 40100 • Olympia, WA 98504-0100 • (360) 664-9006

October 14, 2015

Dmitri Iglitzin
 Schwerin Campbell Barnard Iglitzin & Lavitt LLP
 18 W Mercer St, Suite 400
 Seattle, WA 98119

Mark Lamb
 The North Creek Law Firm
 12900 NE 180th St, Suite 235
 Bothell, WA 98011-5773

Re: Citizen Action Notice against Freedom Foundation

Dear Counsel:

I am writing to advise you of the Attorney General's Office decision regarding the Committee for Transparency in Election's (CFTE) allegations that the Freedom Foundation violated certain campaign finance laws. The AGO conducted an investigation, which included a review of records and interviews with the ballot measure proponents and numerous Freedom Foundation staff. The investigation report is enclosed.

The CFTE's Citizen Action Notice alleged that the Freedom Foundation violated state campaign finance laws by (1) failing to report independent expenditures (the value of legal services) it made to support ballot propositions in the cities of Sequim, Shelton, and Chelan; 2) failing to report expenditures made to support Initiatives 1351, 517, and 522; and 3) failing to register and report as a political committee based on its solicitation of contributions.

As to Allegation 1, the evidence supports filing a court action that the Freedom Foundation did not report its staff time and resources used to provide legal services to ballot measure proponents to support the placement of propositions on local ballots. As a result, the State has filed a complaint against the Freedom Foundation. A copy is enclosed.

With respect to Allegation 2, the evidence confirms that the Freedom Foundation did not make any monetary contributions to the identified state-wide initiatives. The investigation also reviewed the Freedom Foundation Informed Voter Guide 2013. The AGO engaged a review by

ATTORNEY GENERAL OF WASHINGTON

Dmitri Iglitzin
Mark Lamb
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Page 2

the Public Disclosure Commission staff of the guide. As you both know, the PDC staff routinely review proposed voter guides to provide feedback about whether a guide is objective as opposed to an advocacy piece. In that review, the staff concluded that the language identified in the Citizen Action Notice as "positive" or "negative" about the two state-wide initiatives (I-517 and I-522) was objective and did not trigger an independent expenditure reporting responsibility for the Freedom Foundation. We agree with the Commission staff.

Finally, with respect to Allegation 3, the evidence confirmed that the Freedom Foundation's fundraising activities were not targeted to support its legal work on behalf of the ballot propositions identified above. They did not constitute a solicitation for contributions in support of or in opposition to a ballot proposition. Consequently, they did not create a registration and reporting responsibility for the Freedom Foundation.

With these decisions, the Attorney General's Office on behalf of the State of Washington has acted on CFTE's allegations. If you have any questions, please do not hesitate to call me.

Sincerely,



LINDA A. DALTON
Senior Assistant Attorney General

LAD/jf
Enclosure

cc: Bob Ferguson, Attorney General, w/o enclosure
David Horn, Chief Deputy Attorney General w/o enclosure
Christina Beusch, Deputy Attorney General w/o enclosure
Jon Tunheim, Thurston County Prosecuting Attorney w/enclosure
Evelyn Lopez, Executive Director – Public Disclosure Commission w/enclosure

FILED

OCT 14 2015

Superior Court
Linda Myhre Enlow
Thurston County Clerk**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

Plaintiff,

v.

EVERGREEN FREEDOM
FOUNDATION d/b/a FREEDOM
FOUNDATION,

Defendant.

NO. 15-2-01936-5

COMPLAINT FOR CIVIL
PENALTIES AND FOR
INJUNCTIVE RELIEF FOR
VIOLATIONS OF RCW 42.17A**I. NATURE OF ACTION**

The State of Washington ("State") brings this action to enforce the state's campaign finance disclosure law, RCW 42.17A. The State alleges that Defendant, EVERGREEN FREEDOM FOUNDATION d/b/a FREEDOM FOUNDATION ("Freedom Foundation"), violated provisions of RCW 42.17A by failing to properly report independent expenditures made in support of certain local ballot propositions. The State seeks relief under RCW 42.17A.750 and .765, including penalties, costs and fees, and injunctive relief.

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II. PARTIES

1.1 Plaintiff is the State of Washington. Acting through the Washington State Public Disclosure Commission, Attorney General, or local prosecuting attorney, the State enforces the state campaign finance disclosure laws contained in RCW 42.17A.

1.2 Defendant, Freedom Foundation, is an active nonprofit corporation with a primary place of business in Thurston County, Washington.

III. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over the Freedom Foundation in accordance with RCW 42.17A. The Attorney General has authority to bring this action pursuant to RCW 42.17A.765.

2.2 The Freedom Foundation's actions which form the basis for the violations alleged below occurred in whole or in part, in Thurston County, Washington.

2.3 Venue is proper in this Court pursuant to RCW 4.12.

IV. FACTUAL ALLEGATIONS

3.1 RCW 42.17A.005(4) defines a "ballot proposition" to include any initiative, proposed to be submitted to the voters of any municipal corporation, from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency.

3.2 RCW 42.17A.255 defines the term "independent expenditure" to include any expenditure that is made in support of or in opposition to any ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17A.220, RCW 42.17A.235, and RCW 42.17A.240. The report is entitled in relevant part, "Reporting Form for: Independent Expenditures" and is designated by the Commission as form C-6, pursuant to WAC 390-16-060.

3.3 In approximately February 2014, an employee of the Freedom Foundation created a set of sample ordinances/ballot propositions designed to be used by residents of

1 Washington to change local laws related to collective bargaining between municipalities
2 and their employee bargaining representatives. Information about these sample
3 ordinances/ballot propositions was disseminated to Freedom Foundation members and
4 made publicly available on the Freedom Foundation's website.

5 3.4 The sample ordinance/ballot propositions addressed two issues: 1) a
6 prohibition of union security clauses, public work stoppages, and gifting of public funds to
7 benefit unions; and 2) a requirement that collective bargaining sessions to negotiate a
8 contract between a local jurisdiction and a bargaining unit representative of the
9 jurisdiction's employees be open to the public.

10 3.5 Four groups of local community activists obtained the documents from the
11 Freedom Foundation website. These activists then circulated the petitions and obtained
12 signatures from citizens in their communities. The communities involved included the
13 cities of Sequim, Shelton, and Chelan.

14 3.6 Sequim: On or about July 28, 2014, Sequim resident Susan Brautigam filed
15 her ballot propositions and the corresponding signatures she gathered with the Clallam
16 County Auditor's Office. On September 8, 2014, the Sequim City Council discussed her
17 ballot propositions. The Sequim City Council did not take action on Ms. Brautigam's
18 submissions.

19 3.7 On or about September 3, 2014, a lawsuit was filed in Clallam County
20 Superior Court on Ms. Brautigam's behalf: *Susan Brautigam v. City of Sequim, et al.*,
21 Case No. 14-2-00771-2. The lawsuit requested that the court order the propositions be
22 placed on the ballot.

23 3.8 Freedom Foundation staff member David Dewhirst appeared as counsel for
24 Ms. Brautigam. During all times relevant to that lawsuit Mr. Dewhirst represented Ms.
25 Brautigam in her effort to compel the two ballot propositions to be placed on the ballot for
26 a vote by the citizens of Sequim. During all times relevant to that lawsuit the Freedom

1 Foundation paid Mr. Dewhirst his normal salary to pursue this litigation. Tom McCabe,
 2 in his capacity as Chief Executive Officer for the Freedom Foundation, authorized Mr.
 3 Dewhirst to participate in these litigation efforts. Ms. Brautigam did not pay for Mr.
 4 Dewhirst's legal services.

5 3.9 Chelan: On or about September 10, 2014, Chelan residents Edson Clark
 6 and Al Lorenz filed their ballot propositions and the corresponding signatures they
 7 gathered with the Chelan County Clerk's Office. On September 25, 2014, the Chelan City
 8 Council discussed the submitted ballot propositions. The Chelan City Council then
 9 directed its city attorney to file an action to determine the validity of the ordinance/ballot
 10 proposition.

11 3.10 On or about November 21, 2014, a lawsuit was filed in Chelan County
 12 Superior Court on Messrs. Clark and Lorenz behalf: *Edson Clark and Al Lorenz v. City of*
 13 *Chelan*, et al., Case No. 14-2-01095-2. The lawsuit requested that the court order the
 14 propositions be placed on the ballot.

15 3.11 Freedom Foundation staff member David Dewhirst appeared as counsel for
 16 Messrs. Clark and Lorenz. During all times relevant to that lawsuit Mr. Dewhirst
 17 represented them in their efforts to compel the two ballot propositions to be placed on the
 18 ballot for a vote by the citizens of Chelan. During all times relevant to that lawsuit the
 19 Freedom Foundation paid Mr. Dewhirst his normal salary to pursue this litigation. Tom
 20 McCabe, in his capacity as Chief Executive Officer for the Freedom Foundation,
 21 authorized Mr. Dewhirst to participate in these litigation efforts. Neither Mr. Clark nor
 22 Mr. Lorenz paid Mr. Dewhirst for his legal services.

23 3.12 Shelton: On or about August 7, 2014, Shelton resident Diane Good filed
 24 her ballot propositions and the corresponding signatures she gathered with the Shelton
 25 City Clerk's Office. On September 8, 2014, the Shelton City Council discussed the
 26

1 submitted ballot propositions. The City Council declared the ordinance/ballot proposition
2 invalid and took no further action.

3 3.13 On or about October 6, 2014, a lawsuit was filed in Mason County Superior
4 Court on Ms. Good's behalf: *Diane Good v. City of Shelton, et al.*, Case
5 No. 14-2-00555-9. The lawsuit requested that the court order the propositions be placed
6 on the ballot.

7 3.14 Freedom Foundation staff member David Dewhirst appeared as counsel for
8 Ms. Good. During all times relevant to that lawsuit Mr. Dewhirst represented her in her
9 efforts to compel the two ballot propositions to be placed on the ballot for a vote by the
10 citizens of Shelton. During all times relevant to that lawsuit the Freedom Foundation paid
11 Mr. Dewhirst his normal salary to pursue this litigation. Tom McCabe, in his capacity as
12 Chief Executive Officer for the Freedom Foundation, authorized Mr. Dewhirst to
13 participate in these litigation efforts. Ms. Good did not pay Mr. Dewhirst for his legal
14 services.

15 3.15 In each of the aforementioned lawsuits, the plaintiffs requested that the
16 superior court order the municipality in question to put their ballot proposition(s) to a vote
17 of the residents of their respective cities. Between approximately December and March
18 2015, each superior court refused to so order, and dismissed the cases. No appeals were
19 taken from each case.

20 3.16 Freedom Foundation should have reported, as independent expenditures, its
21 resources, including the value of the services provided by its staff to the plaintiffs in
22 support of the respective ballot proposition(s).

23 V. CLAIM

24 The State re-alleges and incorporates by reference all the factual allegations
25 contained in the preceding paragraphs, and based on those allegations, makes the
26 following claim:

1 4.1 First Claim: The State reasserts the factual allegations made above and
 2 further asserts that the Freedom Foundation, in violation of RCW 42.17A.255, failed to
 3 properly and timely file reports with the state Public Disclosure Commission of its
 4 independent expenditures made in support of ballot propositions filed in the cities of
 5 Sequim, Chelan, and Shelton, to include the disclosure of the value of legal services
 6 provided to the ballot propositions proponents in relation to the lawsuits described above.

7 **VI. REQUEST FOR RELIEF**

8 WHEREFORE, the State requests the following relief as provided by statute:

9 5.1 For such remedies as the court may deem appropriate under RCW
 10 42.17A.750, including but not limited to imposition of a civil penalty, all to be
 11 determined at trial;


12 5.2 For all costs of investigation and trial, including reasonable attorneys'
 13 fees, as authorized by RCW 42.17A.765(5);

14 5.3 For temporary and permanent injunctive relief, as authorized by RCW
 15 42.17A.750(1)(h); and

16 5.4 For such other legal and equitable relief as this Court deems appropriate.

17 DATED this 14 day of October, 2015.

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 19 Attorney General

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Filed
Washington State
Court of Appeals
Division Two

November 7, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

No. 50224-1-II

Appellant,

v.

PART PUBLISHED OPINION

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

Respondent.

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.”

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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.

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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.

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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. *J.S. 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 plaintiff's 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:

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(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).

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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

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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 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

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.

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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.*

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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. *Filo 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

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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 of RCW 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.

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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.

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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.

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

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.

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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 of that 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.

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

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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” 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

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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 FCPA – 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. *J.S.*, 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

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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 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.

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

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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

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).

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relation between the disclosure requirements and that interest. *See Voters Educ. Comm.*, 161 Wn.2d at 482; *Citizens United*, 558 U.S. at 366.

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.

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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

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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

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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.

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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.255(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

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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

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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 (2016). 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

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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 (2016). 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

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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 MBPA 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

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entrepreneurial aspects of legal practice without imposing on the judiciary's oversight of the practice of law. 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.

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.

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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.

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 absence of the unions, the trial court could

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).

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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)(1).

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

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.

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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)(1) 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

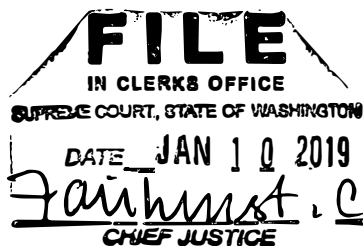
We reverse the trial court's dismissal of the State's regulatory enforcement action regarding the Sequim, Chelan, and Shelton initiatives, and we remand for further proceedings.

MAXA, J.

We concur:

WORSWICK, J.

BJORGEN, C.J.



This opinion was filed for record

at 8 a.m. on Jan 10, 2019

Susan L. Carlson
SUSAN L. CARLSON
SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,

Petitioner.

No. 95281-7

En Banc

Filed JAN 10 2019

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 local initiatives. For the reasons explained below, we hold

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).

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

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 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

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 statute 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.)

⁴The 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.

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

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 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

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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.2d 421, 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.3d 4 (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 of the 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:

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.

“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 (((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 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

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, § 1001(4).

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.* § 1(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 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.

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).

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 *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 *Filo 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).

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).

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 hold. *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.255(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 FCPA 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); *Filo Foods, LLC v. City of SeaTac*, 179 Wn. App. 401, 403, 319 P.3d 817 (2014) (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 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.

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.

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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, 388, 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

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predict with complete certainty the exact point at which [that person's] actions would be classified as prohibited conduct.”” *Schoessler*, 140 Wn.2d at 389 (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 *Brumstick*, 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 United v. 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*, 558 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'l 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 of RCW 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 hold.

CONCLUSION

We affirm the Court of Appeals' reversal of the 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.

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Madsen, J.

WE CONCUR:

Fairhurst, C.J. Wiggan, J.

Chen, J. Ju, J.

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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

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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).

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

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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 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, 2018), 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=2018061095>.

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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 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 chapter 29A.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

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).

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CHARTER art. IV, § 1.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

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)

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.

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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)).

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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 RCW

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42.17A.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:

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.

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“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*.

For the current opinion, go to <https://www.lexisnexis.com/clients/wareports/>.

State v. Evergreen Freedom Found., No. 95281-7
(Gordon McCloud, J., dissenting)

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 corners 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

For the current opinion, go to <https://www.lexisnexis.com/clients/wareports/>.

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(Gordon McCloud, J., dissenting)

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

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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

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 810)); *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

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

For the current opinion, go to <https://www.lexisnexis.com/clients/wareports/>.

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(Gordon McCloud, J., dissenting)

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

For the current opinion, go to <https://www.lexisnexis.com/clients/wareports/>.

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(Gordon McCloud, J., dissenting)

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

I respectfully dissent.

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. 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.

For the current opinion, go to <https://www.lexisnexis.com/clients/wareports/>.

State v. Evergreen Freedom Found., No. 95281-7

(Gordon McCloud, J., dissenting)

Gordon McCloud, J.
Honorable
Gonzalez Jr.
Stephan G.

PUBLIC DISCLOSURE COMMISSION

711 CAPITOL WAY RM 206
PO BOX 40908
OLYMPIA WA 98504-0908
(360) 753-1111
TOLL FREE 1-877-601-2828



Form

C6

1/12

DATE FILED PDC**JUL 02 2019**

Reporting Form for: (check one)

Instructions on Page 3

- ☒ **INDEPENDENT EXPENDITURES** (Occurring at any time) — **\$100 or more**
☐ **INDEPENDENT EXPENDITURE ADS** (Appearing within 21 days of an election) — **\$1,000 or more**
☐ **ELECTIONEERING COMMUNICATIONS, Except Contributions** (Appearing within 60 days of an election) — **\$1,000 or more**

1. Name and complete postal mailing address of sponsor:

Freedom Foundation
P.O. Box 552
Olympia, WA 98507

E-mail

mnelson@freedomfoundation.com

Telephone

(360) 956-3482

2. Itemize expenditures of more than \$100 associated with the independent expenditure or electioneering communication.

Date Made	Date First Presented/ Mailed	Name and Address of Vendor or Recipient	Description of Expenditure (e.g., direct mail or newspaper, TV or radio ad)	Amount or Value (*See Below)
August 2014-February 2015	N/A	Freedom Foundation P.O. Box 552, Olympia, WA, 98507	In-house attorney staff time related to Shelton Props. 1 and 2.	\$1,730.76
August 2014-February 2015	N/A	Freedom Foundation P.O. Box 552, Olympia, WA, 98507	In-house attorney staff time related to Sequim Props. 1 and 2.	\$6,322.40
August 2014-February 2015	N/A	Freedom Foundation P.O. Box 552, Olympia, WA, 98507	In-house attorney staff time related to Chelan Props. 1 and 2.	\$6,243.10

Expenditures \$100 or less not itemized above \$

Total this report \$ 14,296.26

Amount or Value

If no reasonable estimate can be made of value, describe activity, services, property or right furnished precisely and attach copy of item produced or distributed.

Total independent expenditures and electioneering communications made during this election campaign. Include amounts shown in this report and previously submitted C-6 reports.

\$ 14,296.26

3. List of candidate(s) or ballot proposition(s) identified in the advertising:

Candidate/Proposition	Office/District/ Proposition No.	Party	Check Support or Oppose	Show portion of current expense attributable to each candidate or proposition	Show total C-6 expenses related to each candidate/ proposition during election campaign
Shelton Proposition	1		<input checked="" type="checkbox"/> <input type="checkbox"/>	\$ 865.38	\$ 865.38
Shelton Proposition	2		<input checked="" type="checkbox"/> <input type="checkbox"/>	\$ 865.38	\$ 865.38
Sequim Proposition	1		<input checked="" type="checkbox"/> <input type="checkbox"/>	\$ 3,161.20	\$ 3,161.20
Sequim Proposition	2		<input checked="" type="checkbox"/> <input type="checkbox"/>	\$ 3,161.20	\$ 3,161.20
Chelan Proposition	1		<input checked="" type="checkbox"/> <input type="checkbox"/>	\$ 3,121.55	\$ 3,121.55
Chelan Proposition	2		Continued on attached sheet <input type="checkbox"/> X	\$ 3,121.55	\$ 3,121.55

Filer Name: Freedom Foundation

4. If reporting an Electioneering Communication, it is necessary to disclose information concerning the source of funding for the communication. Select the description that applies:

- a) ☐ An individual using only personal funds.
 b) ☐ An individual using personal funds and/or funds received from others.
 c) ☐ A business, union, group, association, organization, or other person using only general treasury funds.
 d) ☐ A business, union, group, association, organization, or other person using general treasury funds and/or funds received from others.
 e) ☐ A political committee filing C-3 and C-4 reports. (RCW 42.17A.205 - .240)
 f) ☐ A political committee filing C-5 reports. (RCW 42.17A.250)
 g) ☐ Other

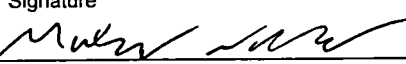
If (b), (d), (f), or (g) applies, complete section 5 below. If (e) applies, also complete section 5 if the committee received funds that were requested or designated for the communication.

5. Sources giving in excess of \$250 for the electioneering communication:

Date Received	Source's Name, Address, City, State, Zip	For individuals, Employer's Name, City and State	Amount
			\$
		Occupation	
			\$
		Occupation	
			\$
		Occupation	
			\$
		Occupation	
			\$
		Occupation	
			\$
		Occupation	
		Sub-Total	\$
	Continued on attached sheet <input type="checkbox"/>	Amount from attached pages	\$
		TOTAL FUNDS RECEIVED	\$

Sponsor of Independent Expenditure or Electioneering Communication

I certify (or declare) under penalty of perjury under the laws of the State of Washington that this expenditure was not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or an agent of a candidate nor does it otherwise constitute a contribution under RCW 42.17A.005. I further certify that the above information is true, complete, and correct to the best of my knowledge.

Signature 	Printed Name Maxford Nelsen
Street address P.O. Box 552	
City/State/Zip Olympia, WA 98507	
Date Signed 7/2/19	Place Signed (city and county) Olympia, Thurston
*RCW9A.72.040 provides that "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a misdemeanor."	

NOTICE: SLIP OPINION
(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: <https://www.lexisnexis.com/clients/wareports>.

For more information about precedential (published) opinions, nonprecedential (unpublished) opinions, slip opinions, and the official reports, see <https://www.courts.wa.gov/opinions> and the information that is linked there.

For the current opinion, go to <https://www.lexisnexis.com/clients/wareports/>.

Filed
Washington State
Court of Appeals
Division Two

July 25, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 49892-8-II

Appellant,

v.

ECONOMIC DEVELOPMENT BOARD FOR
TACOMA-PIERCE COUNTY, TACOMA-
PIERCE COUNTY CHAMBER, JOHN
WOLFE, in his official capacity as Chief
Executive Officer for the PORT OF TACOMA,
and CONNIE BACON, DON JOHNSON,
DICK MARZANO, DON MEYER, and
CLARE PETRICH, in their official capacities
as Commissioners for the PORT OF TACOMA,

ORDER GRANTING MOTION FOR
RECONSIDERATION AND AMENDING
PUBLISHED OPINION IN PART

Respondents.

Respondents JOHN WOLFE, in his official capacity as Chief Executive Officer for the PORT OF TACOMA, and CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, and CLARE PETRICH, in their official capacities as Commissioners for the PORT OF TACOMA, (collectively the “Port”) filed a motion for reconsideration of the published opinion in this case filed on May 21, 2019. After consideration, we grant the respondent’s motion and amend the opinion in part as follows.

On page 1, paragraph 1, lines 4 and 5, we remove **“The State alleged that the EDB, the Chamber, and the Port (collectively, “defendants”) failed to report”** We replace it with **“The State alleged that the EDB and the Chamber failed to report”**

For the current opinion, go to <https://www.lexisnexis.com/clients/wareports/>.

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On page 1, paragraph 2, line 1, we remove **“The State argues that the defendants’ legal expenditures”** We replace it with **“The State argues that the EDB’s and the Chamber’s legal expenditures”**

On page 2, lines 2 and 3, we remove **“. . . costs to defendants.”** We replace it with **“. . . costs to the EDB, the Chamber, and the Port (collectively, “defendants”).”**

On page 2, paragraph 2, line 1 we amend the sentence to read **“We hold that the EDB and the Chamber made independent expenditures”**


On page 3, paragraph 3, line 3 we remove **“The State alleged that the defendants”** We replace it with **“The State alleged that the EDB and the Chamber”**

We do not amend any other portion of the opinion or the result. Accordingly, it is

SO ORDERED.


Worswick, P.J.

We concur:


Sutton, J.


Evans, J.P.T.

May 21, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**DIVISION II**

STATE OF WASHINGTON,

No. 49892-8-II

Appellant,

v.

ECONOMIC DEVELOPMENT BOARD FOR
TACOMA-PIERCE COUNTY, TACOMA-
PIERCE COUNTY CHAMBER, JOHN
WOLFE, in his official capacity as Chief
Executive Officer for the PORT OF TACOMA,
and CONNIE BACON, DON JOHNSON,
DICK MARZANO, DON MEYER, and
CLARE PETRICH, in their official capacities
as Commissioners for the PORT OF TACOMA,

PUBLISHED OPINION

Respondents.

WORSWICK, J. — The State appeals the summary judgment dismissal of its regulatory enforcement action against the Economic Development Board for Tacoma-Pierce County (EDB), Tacoma-Pierce County Chamber (Chamber), and the Port of Tacoma through its individual officers (Port). The State alleged that the EDB, the Chamber, and the Port (collectively, “defendants”) failed to report independent expenditures as required by the Fair Campaign Practices Act (FCPA),¹ and that the Port used public funds to oppose ballot propositions.

The State argues that the defendants’ legal expenditures spent to block the Save Tacoma Water (STW) ballot propositions were “independent expenditures” as defined in RCW

¹ Chapter 42.17A RCW. As relevant here, the FCPA requires that political campaign contributions and expenditures be fully disclosed to the public.

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42.17A.255, that the Port improperly used public funds to oppose the STW ballot proposition under RCW 42.17A.555,² and that the trial court improperly awarded fees and costs to the defendants.

The defendants argue that the State’s interpretation of RCW 42.17A.255 is erroneous and that it violates the First Amendment and renders the statute void for vagueness. The Port additionally argues that it did not improperly use public funds because its actions fall within two exceptions to the prohibition against the use of public facilities to oppose ballot propositions in RCW 42.17A.555.

We hold that the defendants made independent expenditures that required disclosure under RCW 42.17A.255, that RCW 42.17A.255 does not violate the First Amendment and is not void for vagueness, and that the Port used public facilities without meeting either cited exception in RCW 42.17A.555. Accordingly, we reverse the trial court’s order of dismissal, and we remand for further proceedings.³

FACTS

I. SAVE TACOMA WATER BALLOT PROPOSITION PROCEEDINGS

STW’s Charter Initiative 5 and Code Initiative 6 became local ballot propositions when citizens filed the initiatives with the Tacoma City Clerk before circulation for signatures. These

² RCW 42.17A.555 prohibits the use of public facilities to support “a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition.”

³ The defendants also seek attorney fees and costs. Because we reverse, we do not address these arguments.

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two ballot propositions aimed to require any land use proposal in the City of Tacoma requesting a daily consumption of at least one million gallons of water be submitted to a public vote.

The defendants filed a declaratory judgment action against the STW ballot propositions, seeking a judicial directive preventing the STW ballot propositions from being placed on the local ballot. The defendants argued that the STW ballot propositions were beyond the scope of the City's initiative power. Prior to filing the petition, the Port's commissioners, at a public meeting, voted to ratify the Port's decision to file a declaratory judgment action. Ultimately, the declaratory judgment action successfully blocked the provisions from being placed on the ballot. *Port of Tacoma v. Save Tacoma Water*, 4 Wn. App.2d 562, 579, 422 P.3d 917 (2018), *review denied*, 192 Wn.2d 1026 (2019).

II. FAIR CAMPAIGN PRACTICES ACT PROCEEDINGS

A citizen later filed a complaint with the attorney general, seeking information regarding the defendants' use of funds to challenge the STW ballot propositions. At the request of the attorney general, the Public Disclosure Commission (PDC) staff reviewed the complaint against the defendants. PDC staff concluded that the EDB and the Chamber made independent expenditures as defined in RCW 42.17A.255. PDC staff also concluded that the Port did not violate RCW 42.17A.555. The PDC returned the matter to the attorney general with "no recommendation for legal action." Clerk's Papers (CP) at 451. The PDC mentioned the need for additional rulemaking to provide greater clarity regarding these provisions.

Despite the PDC making no recommendation, the State, through the attorney general, filed this action against the defendants, seeking civil penalties and injunctive relief under the FCPA, chapter 42.17A RCW. The State alleged that the defendants failed to properly report

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independent expenditures made in opposition to the STW ballot propositions in violation of RCW 42.17A.255. Additionally, the State alleged that the Port, through its chief executive officer and its commissioners, impermissibly used public facilities to oppose the STW ballot propositions in violation of RCW 42.17A.555.

The defendants filed summary judgment motions to dismiss. The trial court granted the motions, dismissed the action, and awarded attorney fees and costs to the defendants. The State appeals.

ANALYSIS

I. LEGAL PRINCIPLES

A. *Standard of Review*

We review motions for summary judgment *de novo*. *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Here, there are no issues of material fact. Rather, the parties disagree on the FCPA's statutory scheme and constitutionality.

We review *de novo* issues of statutory construction and constitutionality. *State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 789, 432 P.3d 805 (2019). When engaging in statutory interpretation, we endeavor to determine and give effect to the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014).

In determining the legislature's intent, we must first examine the statute's plain language and ordinary meaning. *Jametsky*, 179 Wn.2d at 762. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition, we give the term its plain and

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ordinary meaning as defined in the dictionary. *Lockner v. Pierce County*, 190 Wn.2d 526, 537, 415 P.3d 246 (2018); *American Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). In addition, we consider the specific text of the relevant provision, the context of the entire statute, related provisions, and the statutory scheme as a whole when analyzing a statute's plain language. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012).

If there is more than one reasonable interpretation of the plain language, the statute is ambiguous. *Evergreen*, 192 Wn.2d at 789. When a statute is ambiguous, we resolve this ambiguity by engaging in statutory construction and considering other indications of legislative intent. *Evergreen*, 192 Wn.2d at 789-90. However, if the statute is unambiguous, we apply the statute's plain meaning as an expression of legislative intent without considering other sources. *Evergreen*, 192 Wn.2d at 789.

B. *Scope of Challenges to Local Ballot Propositions*

Washington courts conduct pre-election review of local initiatives for only two types of challenges. *Coppernoll v. Reed*, 155 Wn.2d 290, 298-99, 119 P.2d 318 (2005); *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010). Courts review challenges claiming either that a ballot measure does not comply with procedural requirements or that a ballot measure exceeds the direct legislative power of the initiative. *Coppernoll*, 155 Wn.2d at 298-99.

A litigant may challenge an initiative through a declaratory judgment action. *See, e.g., Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 101, 369 P.3d 140 (2016). To invoke the Uniform Declaratory Judgments Act, chapter 7.24 RCW a plaintiff must establish the four elements of a justiciable controversy:

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“(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and *opposing interests*, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.”

Coppernoll, 155 Wn.2d at 300 (emphasis added) (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). A party has standing to challenge a proposed initiative when its interest is within the zone of interests to be regulated or protected by the proposed law and the party will suffer an injury in fact. *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 103.

C. FCPA

The FCPA is 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.”

Evergreen, 192 Wn.2d at 790. The FCPA contains several policy statements. RCW 42.17A.001. Notably, the statute states that “political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided,” that “the public’s right to know of the financing of political campaigns and lobbying . . . far outweighs any right that these matters remain secret and private,” and that “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 (1), (10), (11).

Further, chapter 42.17A RCW

shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.

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RCW 42.17A.001(11).

RCW 42.17A.255(1) states, in part, that, “‘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.” The statute then states the reporting requirements for independent expenditures. RCW 42.17A.255(2)-(5).

RCW 42.17A.555 contains prohibitions on the use of public facilities to support “a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition.” However, the statute has exceptions to this prohibition, including: “[a]ction[s] taken at an open public meeting” and “normal and regular conduct” of the entity. RCW 42.17A.555(1), (3).

II. RCW 42.17A.255: INDEPENDENT EXPENDITURES

The State argues that “independent expenditure” includes the expenditures on legal services incurred here by the defendants when challenging the STW ballot propositions. Br. of Appellant at 17. We agree, and hold that “independent expenditure” includes the expenditures at issue here.

After the parties completed briefing in this case, our Supreme Court decided *State v. Evergreen Freedom Foundation*, 192 Wn.2d at 782. In that case, Evergreen Freedom Foundation (EFF) created sample municipal ordinances and ballot propositions for individuals to advance their cause in local municipalities. *Evergreen*, 192 Wn.2d at 786. Citizens in multiple cities used the samples to request that local government either pass the measures, or place them on the ballot for a vote. *Evergreen*, 192 Wn.2d at 786. When the municipalities neither passed

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the proposals nor placed them on the ballot, EFF brought three lawsuits in three municipalities seeking “a judicial directive to the respective city to put each measure on the local ballot.”

Evergreen, 192 Wn.2d at 787.

EFF did not file campaign disclosure reports for the value of the legal services, so the State brought a civil regulatory enforcement action against EFF. *Evergreen*, 192 Wn.2d at 787. The State alleged that “EFF failed to report independent expenditures it made in support of the noted local ballot propositions.” *Evergreen*, 192 Wn.2d at 787. Relevant here, our Supreme Court held that the value of legal services in support of a ballot proposition are independent expenditures under RCW 42.17A.255 and that the reporting requirements of RCW 42.17A.255 do not violate the First Amendment. *Evergreen*, 192 Wn.2d at 795-96, 801.

A. *The Plain Meaning of “Opposition to Any . . . Ballot Proposition” Includes Expenditures on Legal Services Aimed at Blocking a Ballot Proposition*

The State argues that independent expenditures “in opposition to” a ballot proposition include the defendants’ legal expenditures to prevent the STW ballot proposition from reaching the ballot. Br. of Appellant at 17. We agree.

Independent expenditures are defined as expenditures “made in support of or in opposition to any . . . ballot proposition.” RCW 42.17A.255. In *Evergreen*, our Supreme Court made clear that pre-election litigation expenditures can fall within the purview of the FCPA. *Evergreen*, 192 Wn.2d at 795-96. The Court emphasized FCPA’s stated policy and express directives of liberal construction and complete disclosure of all information respecting the financing of political campaigns. *Evergreen*, 192 Wn.2d at 795. It further stated:

[RCW 42.17A.255(1) and RCW 42.17A.005(4)] broadly impose reporting requirements concerning “any expenditure that is made in support of or in

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opposition to *any* candidate or *ballot proposition*,” RCW 42.17A.255(1) . . . , with “ballot proposition” defined to include “*any initiative* . . . proposed to be submitted to the voters.” RCW 42.17A.005(4) 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 FCPA in the context of modern politics.

Evergreen, 192 Wn.2d at 795.

Evergreen clarifies that pre-election litigation expenditures for legal services used to support a ballot proposition are expenditures within the definition of RCW 42.17A.255 because the language of the statute is not restricted to electioneering. *Evergreen*, 192 Wn.2d at 795. The Court, through a plain meaning analysis, held that “any expenditure” was unambiguous and included litigation expenditures for legal services incurred before the election. *Evergreen*, 192 Wn.2d at 795-96.

Turning to the argument here, the phrase “in opposition to” is also unambiguous. Chapter 42.17A RCW lacks a definition of “in opposition to.” However, looking to the dictionary definition, “opposition” is defined as “hostile or contrary action or condition: action designed to constitute a barrier or check.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1583 (2002).

Here, the defendants brought a declaratory action seeking to enjoin the initiatives from being placed on the ballot or adopted by the City of Tacoma. The defendants’ actions opposed the propositions insofar as they intended to prevent ballot propositions from reaching the ballot or becoming law. *See Evergreen*, 192 Wn.2d at 795. As a result, the statutory language “any

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expenditure that is made . . . in opposition to . . . a ballot proposition,” includes pre-election expenditures for legal services to block a ballot proposition from reaching the voters. Not only did the defendants challenge the STW ballot propositions as beyond the scope of the initiative power, but they succeeded in blocking the STW ballot propositions from reaching the voters. *See Save Tacoma Water*, 4 Wn. App. 562. The declaratory judgment action was clearly “in opposition to” the ballot proposals.

Litigation expenses incurred to seek a judicial directive regarding whether measures may be placed on the ballot are reportable under RCW 42.17A.255. *See Evergreen*, 192 Wn.2d at 787. And RCW 42.17A.255 unambiguously defines “in opposition to” to include pre-election litigation expenditures on legal services to block an initiative. Thus, expenditures on legal services to block an initiative are necessarily independent expenditures subject to the statute’s reporting requirements.

B. *As Interpreted, RCW 42.17A.255 Is Constitutional*

The defendants argue that requiring disclosure of their legal expenditures under RCW 42.17A.255 violates their First Amendment rights and that including their legal expenditures in the definition of “in opposition to” renders the statute unconstitutionally vague. We disagree.

1. *First Amendment*

Our Supreme Court in *Evergreen* held that RCW 42.17A.255 does not violate the First Amendment. *Evergreen*, 192 Wn.2d at 801. The Court stated:

Given the State’s important governmental interest in informing the public about the influence and money behind ballot measures, as noted above, and the FCPA’s vital role (via application of RCW 42.17A.255 and RCW 42.17A.005(4)) in advancing that interest, the disclosure requirement that operates under these statutes satisfies

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the exacting scrutiny standard. Accordingly, there is no impermissible infringement of EFF's First Amendment rights, and we so hold.

Evergreen, 192 Wn.2d at 801. Accordingly, we follow *Evergreen* and hold that RCW 42.17A.255 does not violate the First Amendment.

2. *Vagueness*

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 proscribed and to protect against arbitrary enforcement. *Evergreen*, 432 P.3d at 813.

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. *Am. Legion*, 164 Wn.2d at 613. 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. *See Voters Educ. Comm.*, 161 Wn.2d at 488.

Statutes are presumed to be constitutional. *Voters Educ. Comm.*, 161 Wn.2d at 481. 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. The asserting party may allege that a statute is either facially invalid or invalid as applied. *See Am. Legion*, 164 Wn.2d at 612. In an as

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applied challenge, the statute must be considered in light of the facts of the specific case before the court. *Evergreen*, 192 Wn.2d at 796.

Here, the defendants have not shown RCW 42.17A.255 is unconstitutionally vague as applied. The defendants argue only that, because the PDC stated the statute needed greater clarity, it must be vague. However, the defendants must prove vagueness beyond a reasonable doubt and statutes are not vague merely because they could have been drafted more precisely. *See Voters Educ. Comm.*, 161 Wn.2d at 481; *Am. Legion*, 164 Wn.2d at 613.

RCW 42.17A.255 gives a person of common intelligence fair notice to report their expenditures. A person must report any nonexempt independent expenditure in opposition to a ballot proposition. In opposition to, as defined above, includes legal expenditures to block an initiative from being placed on a ballot. The statute clearly required the defendants to report their nonexempt independent expenditures incurred when opposing the ballot initiatives in court. An ordinary person would believe that, when the defendants acted to prevent a ballot proposition from reaching the voters, their actions were in opposition to that ballot proposition.

RCW 42.17A.255 does not violate the First Amendment and is not void for vagueness as applied to the defendants. Accordingly, the defendants' constitutional arguments fail.

III. RCW 42.17A.555: THE PORT'S USE OF PUBLIC FACILITIES

The State argues that RCW 42.17A.555 prohibited the Port from filing a lawsuit to oppose STW ballot propositions. The Port argues that it acted lawfully under two statutory exceptions. We hold that the Port's conduct does not fall within either exception.

When declarations of policy require liberal construction, exceptions to the liberal policy are narrowly confined. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

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Because FCPA policy mandates that we must liberally construe its provisions, we construe the FCPA's exceptions narrowly. RCW 42.17A.001; *see Utter v. Bldg. Indus. Ass'n*, 182 Wn.2d 398, 406, 341 P.3d 953 (2015). The party claiming an exception under RCW 42.17A.555 bears the burden of proving it meets an exception. *See Herbert v. Pub. Disclosure Comm'n*, 136 Wn. App. 249, 256, 148 P.3d 1102 (2006).⁴

RCW 42.17A.555 states:

No elective official . . . nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. . . . However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of . . . port districts . . . to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

. . . .

(3) Activities which are part of the normal and regular conduct of the office or agency.

This statute “was enacted to ensure that public resources are not used to provide advantages [or disadvantages] to a particular candidate or ballot measure.” *Herbert*, 136 Wn. App. at 264.

⁴ *Herbert* addresses RCW 42.17A.555's predecessor, former RCW 42.17.130 (2006), but the current statute and the accompanying WAC contain the same relevant language. *Herbert*, 136 Wn. App. at 256.

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Although “normal and regular conduct” is not defined in the statute, WAC 390-05-273 defines normal and regular conduct as:

Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17A.555, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate’s campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

WAC 390-05-273.⁵

A. *RCW 42.17A.555 Applies to the Port’s Use of Financial Resources To File Suit against the STW Ballot Propositions*

The parties do not dispute that the Port utilized public facilities. Rather, the Port argues that it meets two exceptions to RCW 42.17A.555. We disagree.

“No elective official . . . nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly . . . for the promotion of or *opposition to any ballot proposition*.” RCW 42.17A.555 (emphasis added).

Here, as discussed above in part II.A of this opinion, the Port made expenditures for legal services in opposition to the STW ballot propositions.⁶ Accordingly, the Port’s use of its

⁵ The Port, for the first time at oral argument, argued that the last sentence of the WAC was improper because it modified a statute. We do not consider this argument. RAP 12.1(a).

⁶ The Port does not argue that the phrase “in opposition to any ballot proposition” as used in RCW 42.17A.555, should have a meaning different than the phrase “in opposition to any . . . ballot proposition” as used in RCW 42.17A.255.

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financial resources to oppose the STW ballot propositions falls within the conduct regulated by RCW 42.17A.555. The only question then, is whether an exception applies.

B. *RCW 42.17A.555's Exceptions Do Not Apply to the Port's Conduct*

1. *Normal and Regular Conduct*

The Port argues that the declaratory judgment action to invalidate the STW initiatives was within the RCW 42.17A.555 “normal and regular conduct” exception. Br. of Resp’t (Port) at 12. We disagree.

A public office or agency may use public facilities to oppose a ballot proposition if that opposition is part of its “normal and regular conduct.” RCW 42.17A.555(3). Normal and regular conduct is defined in WAC 390-05-273. The WAC states that such conduct must be specifically authorized in an appropriate enactment and must be “usual,” that is not authorized by some extraordinary means or manner. The WAC clearly states, “No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate’s campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision *separately authorizing* such use.” WAC 390-05-273 (emphasis added).

Accordingly, the Port must have authorization, either express or necessarily implied, to oppose a ballot proposition in the usual course of its operations. Further, this authorization must arise from a constitutional, charter, or statutory provision separately authorizing the Port to oppose ballot propositions. *See Herbert*, 136 Wn. App. at 256.

Division One of this court discussed normal and regular conduct in *Herbert*. There, a teacher used school mailbox and e-mail systems to distribute ballot initiative materials, arguing that his actions were lawful because e-mail was part of the “normal and regular” conduct of the

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school. *Herbert*, 136 Wn. App. at 253, 256. In holding that sending ballot proposition related mail and e-mails was not “normal and regular conduct,” Division One determined that the language of the statute and the WAC controlled. *Herbert*, 136 Wn. App. at 256-57. The court noted that the teacher did not cite any constitutional, charter, or statutory provision that separately authorized the use of school mail systems to promote ballot measures. *Herbert*, 136 Wn. App. at 256-57. Further, because these actions were prohibited by the school district’s policies, and because the school was not customarily engaged in distributing political materials, Division One held that the teacher’s actions were not normal and regular conduct. *Herbert*, 136 Wn. App. at 256-57.

Here, the Port contends that it is vested with an implied power to prevent antidevelopment and unconstitutional legislation, citing 53.08 RCW generally, RCW 53.08.047 and RCW 59.57.030 specifically. The Port argues that because it is often involved in litigation, this litigation contesting the STW ballot propositions was within its normal and regular conduct. The Port supports its broad interpretation of the exception by listing a number of initiative challenge cases with municipalities as parties.⁷

However, the “normal and regular conduct” exception is not so broad as to encompass any type of a party’s litigation simply because that party has been involved in litigation in the past. In *Herbert*, the court did not consider whether teachers generally e-mailed each other, but instead considered whether school e-mail was regularly used in the distribution of political

⁷ The Port also appears to argue that because it had standing, it was authorized to sue under the “normal and regular conduct” exception. But, standing is not determinative as to whether the Port was authorized to expend public funds to oppose a ballot initiative under RCW 42.17A.555.

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materials. *Herbert*, 136 Wn. App. at 256-57. Here, then, our focus is not whether the Port has generally engaged in litigation. Rather, we consider whether the Port through its “normal and regular conduct” litigates the scope of the initiative power for ballot propositions.

The Port is authorized by statute to manage the port, its lands, and its employees, and to engage in economic endeavors. *See* RCW 53.08.047; RCW 53.57.030; *see generally* chapter 53.08 RCW. However, the Port does not point to any statute separately authorizing it to oppose ballot propositions as required by WAC 390-05-273.

The Port also cites to cases where municipalities have challenged the scope of ballot propositions or sought a declaratory judgment to determine the legality of some governmental action.⁸ Those cases are distinguishable. None of those cases involved an interpretation of RCW 42.17A.555. Instead, they were concerned with justiciability of the claims.⁹

We can find no evidence that the Port’s opposition to the STW ballot propositions was either usual or specifically authorized in an appropriate enactment. Accordingly, we hold that

⁸ The Port lists: *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 101-05; *Our Water-Our Choice!*, 170 Wn.2d at 6-7; *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259-60, 138 P.3d 943 (2006); *King County v. Taxpayers of King County*, 133 Wn.2d 584, 592, 949 P.2d 1260 (1997); *Whatcom County v. Brisbane*, 125 Wn.2d 345, 346, 884 P.2d 1326 (1994); *Snohomish County v. Anderson*, 124 Wn.2d 834, 836, 881 P.2d 240 (1994); *City of Spokane v. Taxpayers of Spokane*, 111 Wn.2d 91, 94, 758 P.2d 480 (1988); *Municipality of Metro. Seattle v. City of Seattle*, 57 Wn.2d 446, 448, 357 P.2d 863 (1960); *City of Longview v. Wallin*, 174 Wn. App. 763, 783, 301 P.3d 45 (2013); *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 387, 93 P.3d 176 (2004); *Pierce County v. Keehn*, 34 Wn. App. 309, 311, 661 P.2d 594 (1983) and two unpublished cases decided before March 1, 2013.

⁹ The Port points specifically to *Yes for Seattle*, 122 Wn. App. 382, where the Port of Seattle was a named party to a suit challenging an initiative. However, that case did not mention RCW 42.17A.555 or “normal and regular conduct.” Accordingly, *Yes for Seattle* has no bearing on this case.

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the Port was not acting within the “normal and regular conduct” exception to RCW 42.17A.555 when it opposed the STW ballot propositions.

2. Action Taken at an Open Public Meeting

The Port also argues that its litigation expenditures were proper action according to a vote taken at an open public meeting. We disagree with the Port’s interpretation of the statutory exception.

RCW 42.17A.555(1) lists an exception to using public funds to oppose a ballot proposition:

Action taken at an open public meeting by members of . . . port districts . . . to express a collective decision, or to actually vote . . . to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members . . . or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view.

The Port argues that because it took a vote to “ratify the Port’s action of filing a Declaratory Judgment and Injunctive challenge of . . . Charter Amendment 5 and Code Initiative 6,” the actual filing and prosecution of the declaratory judgment action fell within the statutory exception. Br. of Resp’t (Port) at 23-24 (quoting CP at 269). But by the statute’s plain language, this exception permits Port commissioners to vote to oppose a ballot proposition at a public meeting, assuming the notice and opportunity to be heard requirements are met. This provision authorizes the use of public facilities to “express a collective decision” or to “actually vote” on an expression of support or opposition to a ballot proposition. The exception does not go so far as to authorize the Port to bring litigation in furtherance of its opposition to a ballot proposition.

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Accordingly, we hold that this exception did not permit the Port to expend public funds to oppose the STW ballot propositions.

C. *The Port's Remaining Arguments Are Unpersuasive*

Finally, the Port argues that the State impermissibly ignored the PDC's recommendation, that the Port was protecting the integrity of our elections by keeping an invalid initiative off the ballot, and that different rules govern local and state initiatives. We hold that none of these arguments have merit.

First, when the attorney general brought this enforcement action in 2016, the PDC's recommendation was not binding on the State. Former RCW 41.17A.765(1) (2010). The State, through the attorney general, had independent authority to bring this enforcement action. Former RCW 42.17A.765(1). Second, the Port is not charged with protecting the integrity of elections. The Port's duties are explained in chapter 53.08 RCW and do not include an electoral gatekeeping function. Third, although state and local initiative processes may vary in certain circumstances, the Port fails to address how that difference is dispositive here. Neither RCW 42.17A.255 nor RCW 42.17A.555 address differing standards for independent expenditures or public facilities for local as opposed to state initiatives.

The Port's lawsuit in opposition to the STW ballot propositions was neither "normal and regular conduct" of the Port, nor merely a vote to express collective disapproval of the ballot propositions. As a result, the trial court erred by summarily dismissing the State's complaint regarding the Port's use of public funds to oppose the ballot propositions.

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ATTORNEY FEES

The State requests attorney fees and costs on appeal under former RCW 42.17A.765(5). Although the State is entitled to costs subject to filing a cost bill, RAP 14.4, we do not rule on the State's request for attorney fees.

A party may recover attorney fees only when authorized by private contract, statute, or equity. *State ex rel. Wash. Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 294, 150 P.3d 568 (2006). This court reviews de novo whether a statute authorizes an award of attorney fees. *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012).

After the parties completed briefing in this case, the legislature amended former RCW 42.17A.765. This amendment repealed and recodified former RCW 42.17A.765(5). The effect of this amendment was not briefed. And this decision reverses the trial court's order granting summary judgment dismissal, and remands the case for further proceedings. For these reasons, we remand the issue of attorney fees to the trial court to be determined at the conclusion of the trial court's proceedings.

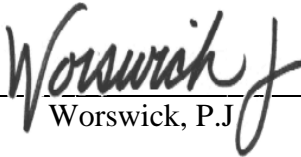
CONCLUSION

In conclusion, we hold that RCW 42.17A.255 required disclosure of the independent expenditures made here in opposition to ballot proposals, that RCW 42.17A.255 does not violate the First Amendment and is not void for vagueness, and the Port failed to show that its use of public facilities fell within exceptions to RCW 42.17A.555. Consequently, we reverse the trial

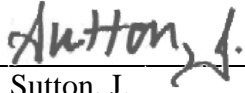
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court's summary judgment order dismissing the action and awarding the defendants' costs and attorney fees, we deny all requests for attorney fees on appeal, and we remand for further proceedings in accordance with this opinion.


Worswick, P.J.

We concur:


Sutton, J.


Evans, J.P.T.