

FILED  
Court of Appeals  
Division II  
State of Washington  
9/28/2023 4:13 PM  
CASE NO. 57043-2 II

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
9/28/2023  
BY ERIN L. LENNON  
CLERK

102430-4

---

THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

---

Armed Citizens' Legal Defense Network

v.

Office of Insurance Commissioner

---

PETITION FOR DISCRETIONARY REVIEW

---

Attorneys for Appellant

Spencer D. Freeman  
Freeman Law Firm, Inc.  
1107 ½ Tacoma Avenue South  
Tacoma, WA 98402

Dennis W. Polio  
Edward Wenger  
Holtzman Vogel  
2300 N. Street Northwest, Suite 643A  
Washington, D. C. 20037

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES.....iv

I. IDENTITY OF PETITIONER..... 1

II. COURT OF APPEALS DECISION..... 1

III. ISSUES PERTAINING TO ASSIGNMENTS OF  
ERROR..... 2

IV. STATEMENT OF THE  
CASE..... 3

A. PROCEDURAL HISTORY ..... 3

    i. PROCEEDINGS BEFORE THE WASHINGTON  
    OFFICE OF THE INSURANCE  
    COMMISSIONER..... 3

    ii. PROCEEDINGS BEFORE THE LEWIS COUNTY  
    SUPERIOR  
    COURT..... 5

    iii. PROCEEDINGS BEFORE THE COURT OF  
    APPEALS..... 7

B. FACTS.....	8
i. FORMATION OF THE NETWORK.....	8
ii. THE NETWORK’S MISSION.....	9
V. ARGUMENT.....	20
A. THE COURT OF APPEALS APPLICATION OF STATUTORY INTERPRETATION CONTRADICTS DECISIONS BY THE SUPREME COURT .....	21
B. THE COURT OF APPEALS DECISION CONTRADICTS SUPREME COURT DECISIONS REQUIRING TRUE RISK-SHIFTING AND RISK- DISTRIBUTION IN DEFINING INSURANCE.....	27
C. THE COURT OF APPEALS DECISION INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES.....	29
D. THERE IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THAT SHOULD BE DETERMINED BY THE SUPREME COURT.....	32

VI. CONCLUSION.....32

## TABLE OF AUTHORITIES

### Cases

<i>Amerco, Inc. v. Comm'r IRS</i> , 979 F.2d 162 (9th Cir. 1992).....	28
<i>Beech Aircraft Corp. v. United States</i> , 797 F.2d 920 (10 <sup>th</sup> Cir. 1986).....	28
<i>Connally v. General Constr. Co.</i> , 269 U.S. 385, 391 (1926).....	30, 31
<i>Helvering v. Le Gierse</i> , 312 U.S. 531 (1941).....	28
<i>In re Estate of Smiley</i> , 35 Wn.2d 863 (1950).....	22
<i>Murray v. Dep't of Labor &amp; Indus.</i> , 151 Wash. 95, 275 P. 66 (1929) .....	22

### Statutes

RCW § 48.01.040.....	21, 22, 24
RCW § 48.17.090(3).....	6

### Other Authorities

RAP 13.4(b).....	18
------------------	----

Merriam-Webster.com .....	22, 23
1 New Appleman on Insurance Law Library Edition	
§ 1.05[4] .....	26
Black's Law Dictionary (7th ed. 1999).....	25

## **I. IDENTITY OF PETITIONER**

Petitioner is the Armed Citizens Legal Defense Network (“The Network”), the Appellant in *Armed Citizens’ Legal Defense Network v. Office of Insurance Commissioner*, Court of Appeals Div. II Case Number 57043-2 II, and the Petitioner *In the Matter of Armed Citizens’ Legal Defense Network v. State of Washington, Office of the Insurance Commissioner*, Lewis County Superior Court Case No. 20-2-00723-21.

## **II. COURT OF APPEALS DECISION**

The Court of Appeals decision requested for review is *Armed Citizens’ Legal Defense Network v. Office of Insurance Commissioner*, Court of Appeals Div. II Case Number 57043-2 II, filed on August 29, 2023.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Court of Appeals decision interpreting the statutory definition of insurance and holding that memberships sold by the Network constitute insurance under Washington law contradicts decisions of the Supreme Court or Courts of Appeals regarding statutory construction.
2. Whether the Court of Appeals decision interpreting a novel definition of insurance under Washington law involves a significant question of Due Process under the United States Constitution.
3. Whether the Court of Appeals decision involves an issue of substantial public interest when the memberships provide self-defense education, connection with appropriate experts, and potential for financial assistance if wrongfully charged with a crime.



#### IV. STATEMENT OF THE CASE

##### A. Procedural History.

###### *i. Proceedings Before The Office Of The Insurance Commissioner.*

The Network operated without incident until April 2019, when it received a notice of investigation from the Commissioner’s Office. The notice stated, among other things, that the Office “has opened an investigation based on the allegation that [the Network] is insuring business in Washington without being authorized by a certificate of authority issued by the commissioner.” AR at 239. Two months later, the Office served the Network with a subpoena demanding, among other things, member identities and bank records. *Id.* at 206–07, 209-12. The Network complied.<sup>1</sup> Eight months later, the Office issued a Cease and Desist Order

---

<sup>1</sup> The subpoena remains a point of contention. Although not material to this appeal, the Network maintains that the Commissioner’s Office had no authority to issue the subpoena outside of litigation.

prohibiting the Network from selling memberships in Washington. AR at 130–34 (Order No. 20-0257). A Demand for Hearing Presided Over by Administrative Law Judge followed. AR at 139–43.<sup>2</sup> Roughly two months after that hearing, the Office issued an Order Imposing a \$200,000 Fine.

Faced with a colossal financial penalty, the Network responded with a Motion to Stay the Order to Cease and Desist pending the administrative hearing process. *Id.* at 196–207. The Network argued that fundamental notions of due process required, at minimum, notice and an opportunity to be heard before the Office fined it into financial oblivion. The presiding officer denied the motion, reasoning that she lacked authority to rule on federal constitutional issues. *Id.* at 351–70.

In August 2020, the parties cross-moved for summary judgment. *Id.* at 374–98, 527–42. The presiding officer granted

---

<sup>2</sup> To ensure an impartial audience, the Network filed a request to transfer the proceedings to an administrative law judge at the Office of Administrative Hearings. The presiding officer at the Commissioner’s Office denied the request.

the Office’s motion and denied the Network’s. She concluded that Network membership constituted a contract for insurance because, in her view, the Network “promised” to pay legal costs if a member acted in self-defense; that acting in self-defense constitutes a “determinable contingency”; and that a member engages in “risk shifting” or “risk distribution” of a member’s risk upon buying a membership. *Id.* at 100–13.

On October 5, 2020, the Network moved for reconsideration. *Id.* at 728–32. In early November, the presiding officer granted the motion in part, but only to redefine self-defense as both an intentional act and a “hybrid contingent act.” Although she reduced the fine to \$50,000, she refused to alter her conclusion that the Network sold insurance.

*ii. Lewis County Superior Court Proceedings.*

Having exhausted administrative remedies, the Network filed a Petition in Support of Judicial Review with the Lewis County Superior Court on March 23, 2022. The Network argued that it was not providing insurance because (1)

membership alone does not contractually obligate the Network to indemnify members, (2) risk never shifts from the members to the Network, (3) the Network retains absolute discretion over any decision to provide financial assistance to a member, and (4) acting in self-defense cannot be construed as a determinable contingency.

The Superior Court disagreed, and on May 25, 2022, it affirmed the order entered by the Commissioner's Office.<sup>3</sup> Court's Memorandum Decision Affirming Commissioner's Final Order (hereinafter, "Memo Decision"), *In the Matter of Armed Citizens' Legal Defense Network v. Office of the Insurance Comm'r*, at 3 (May 5, 2022) (No. 20-2-00723-21). Specifically, the Superior Court held that the Network sold

---

<sup>3</sup> To lawfully sell insurance in the state of Washington, a business is required to obtain an insurance producer license and the business must: pay appropriate fees, have a designated licensed insurance producer responsible for compliance with Washington insurance laws, and show that it has not committed any act that could be seen as grounds for disapproval as laid out in the statute. RCW § 48.17.090(3).

insurance contracts to its members because it accepted fees in exchange for, among other things, the payment of legal and bail expenses if a member faces prosecutorial action arising from a lawful use of-force incident. *Id.*

*iii. Court of Appeals Proceedings.*

The Network appealed to the Court of Appeals Division II, arguing that its member benefits were not insurance because (1) No insurance contract is formed when the Network retains absolute discretion over decisions to provide financial assistance to members; (2) When the Network elects to provide monetary support, such support constitutes neither indemnification nor an agreement to pay a specific amount; (3) The use of force in lawful self-defense is not a determinable contingency; (4) If Network membership constitutes insurance in Washington, the statutory definition of insurance is so vague as to violate due process; and (5) A new law, Substitute S.B. 5810 (S.S.B. 5810), LAWS OF 2023, ch. 3, § 1, applies to the Network's membership benefits exempting them from the

definition of insurance. The Court of Appeals disagreed, and on August 29, 2023, affirmed the lower court decision.

This appeal follows.

**B. Facts.**

*i. Formation of The Network.*

In 2008, Marty Hayes, a nationally recognized self-defense expert with decades of firearms-training experience, founded the Armed Citizens Legal Defense Network. *See* Administrative Record (“AR”) at 399, ¶ 2; 401, ¶ 11. Mr. Hayes molded the Network around the following premise: if gun owners (1) understand the law of self-defense and (2) remain proficient in the skills necessary to lawfully use force should the need arise, then tragedy will be avoided while public safety increases. The Network has helped its over 19,000 members keep themselves and their loved ones safe through this education.

Education remains the Network’s paramount objective, and its members are among the best trained and most

responsible armed civilians in the Nation. On the day they join, each member receives a 235-page self-defense book along with ten educational lectures on DVD. *See, e.g.*, AR at 258, 299, 403. Members also gain access to additional video lectures, interviews, and scores of journal articles that the Network updates monthly. *Id.*

*ii. The Network's Mission.*

The Network's educational mission extends beyond the primary task of ensuring that its members understand how to lawfully halt a reasonably perceived threat of death or grave bodily injury. The rule of law demands that the justice system adjudicate use-of-force incidents as either lawful or unlawful, which the Network's members understand. Naturally, they want the justice system to apply the law of self-defense correctly and fairly to the facts of every use-of-force incident. To ensure that the justice system reaches fair outcomes, judges and juries—many of whom lack experience with use-of-force incidents—

must develop an understanding of reasonable threat perception and the level of force required to negate serious threats.

The Network offers two solutions. The first is by acting as a conduit between its members and the professional self-defense legal community. By facilitating communication between the Network's legal cadre and members who need their services, the Network's members benefit from state-of-the-art developments in the law and science of use-of-force encounters, while gaining access to those best positioned to explain this law and science to judges and juries.

The second solution is the one implicated here. Entanglement with the criminal justice system is never cost-free, and using force in self-defense virtually guarantees the scrutiny of prosecutors. Accordingly, if a member uses force to protect herself from a reasonably perceived threat of grave injury or death, the Network *may*—not shall—provide some financial assistance to help with, among other things, bail, attorneys' fees, and expert witnesses.



Every person who contemplates joining the Network is immediately presented with the following disclaimer: “[W]e are NOT insurance! There is no insurance component in our member benefits.” AR at 407, ¶¶ 45–46; 443–47. The Network announces this information upfront to make crystal-clear to all prospective members that, unlike car insurance coverage for accidents, Network membership comes with no contractual right to financial assistance in the wake of a use-of-force incident.

Network membership results in neither a “membership agreement” nor a document signed by both member and Network. Before becoming a member, prospective members can review a Membership Application Brochure (“Brochure”). AR at 219, 530. To become a member, a prospective member must answer questions about their criminal history and pay a fee. *Id.* Once enrolled, members receive an Explanation of Membership Benefits (“Explanation”). *Id.*

Neither the language of the Brochure nor the Explanation forms a contract. Instead, the language highlights the discretionary nature of the assistance the Network may provide to its members. For example, the Brochure discusses what to expect before, during, and after a member engages in self-defense, describing the Network’s benefits using discretionary language.<sup>4</sup> AR at 262. The Explanation, which is received *after* the initial membership fee is paid, similarly describes Network benefits using discretionary language:

The member is *eligible* for Network benefits from the time their dues payment is received to the end of their membership term . . .

. . . .

---

<sup>4</sup> For example, a previous version of the Brochure read: “Immediate funding: When a member uses force in self-defense, the Network immediately sends up to \$25,000 to the member’s attorney and can provide up to \$25,000 in bail assistance.” AR at 262. The brochure was changed to remove the “up to \$25,000” language. This was done because the Network did not wish to make it appear that it limited potential financial assistance to a specific dollar figure. The “up to” language not only shows a discretionary—rather than contractual—process but also that the Network was able to alter the language of its Brochure on its own accord, unlike a contract.

The Network never assigns an attorney to a member, nor interferes with the member's attorney choice.

....

If a Network member who has been involved in a self-defense incident requests the Network's assistance, the Network will work with the member to identify a local attorney to provide representation. *The member retains final responsibility in the selection of the attorney representing him or her.*

....

Network assistance with legal fees is not limited to Network Affiliated Attorneys, so if your preferred attorney is not affiliated with the Network, that does not affect your eligibility to receive assistance with fees.

....

... your representative *should* call us at the Network office ... to *request* this assistance.

....

... *please* do not call [the emergency Network number] for any reason other than a *request* for legal assistance after a self-defense incident.

....

If criminal charges or other litigation results from the self-defense incident, the member and his or her attorney *can request* a grant of further financial

assistance from the Network to defray the cost of going to trial.

AR at 264–65 (emphases added). The Network’s webpage contains similar discretionary language.<sup>5</sup> *See, e.g.*, AR at 226. “Can,” “eligible,” “up to,” “should,” “request,” and similar language all exude discretion. For example, the phrase “up to” implies that the Network can decide to pay some or none of a member’s legal expenses. The word “can” implies the discretion to take no action in response to a member’s request. The word “should” does not imply a binding agreement, and “request” implies an ability to deny the request.

---

<sup>5</sup> A previous version of the Network’s FAQ webpage, which was altered prior to the instant legal action stated: “What does my membership fee buy me? An initial fee deposit of up to \$25,000 paid to the member’s attorney by the Network if the member has been involved in a self-defense incident. . . . The Network will pay a bail bond agent up to \$25,000 to post bail on behalf of a member who has used force in self defense.” Similar to the Brochure, this language was altered to remove the appearance that the Network capped its potential assistance. The “up to” language not only evokes a discretionary—rather than contractual—process; further, that the Network was able to revise the language of its own webpage also evidences that discretionary interpretation.

By laying out the procedure by which a member *might* receive defrayed legal expenses, the Network has demonstrated that any such decision remains solely in its discretion. If a member encounters legal action after she uses self-defense, she may contact the Network to ask for assistance. Requests are reviewed by at least one member of the Network's Advisory Board. The facts of the case and controlling law are then evaluated to determine whether the scenario meets the applicable standard: that the member reasonably perceived she was in imminent danger of bodily injury or death from a person who had the ability, opportunity, and intent to carry out the threat, and whether the member used appropriate force to end the threat.

If the Advisory Board determines that the member did not act justifiably in self-defense, that member receives no financial support, with no appeal. Throughout the Network's lifespan, no member has ever sued, or threatened to sue, to

force the Network to provide financial assistance despite the Network declining at least eight requests for assistance.

If, however, the Advisory Board concludes that the member acted lawfully, the Network *may*—in its sole discretion—provide some indeterminate amount of financial support for legal expenses.<sup>6</sup> Unlike car insurance, which contractually obligates the insurer to cover, within policy limits, the total cost of damage suffered in a collision, the Advisory Board’s conclusion that (1) a member justifiably acted in self-defense and (2) the Network will provide some financial support, does not obligate the Network to fund all attorneys’ fees or cover the full cost of an expert witness. The Network has never hinted that it will pay a criminal fine, an order of restitution, or a damages verdict imposed against one of its members, even one who has acted in justifiable self-defense.

---

<sup>6</sup> See, e.g., AR at 650, ¶ 5 (R. Hamilton Decl.) (“When I became a member, I was fully aware that [the Network] retain [sic] full discretion to provide a member access to and receive financial assistance from [the] Fund.”); accord AR at 684–705 (14 others).

The Network never promises assistance or that, should it assist, it will make a member financially whole. The Network does not indemnify its members in any sense of the word.

Further, the Network explains to its members how its financial-assistance regime works—*i.e.*, that the decision to extend financial assistance is always solely within the Network’s discretion. As demonstrated in testimony, the Network’s members understand how the Network’s discretionary financial-assistance program differs from insurance plans. *See, e.g.*, AR at 650, ¶ 5 (R. Hamilton Decl.) (“When I became a member, I was fully aware that [the Network] retain full discretion to provide a member access to and receive financial assistance from [the] Fund.”); *accord* AR at 684–705 (14 others). The Network has repeatedly discussed the differences between its policy and insurance plans in

messages to its members and the public,<sup>7</sup> with its president publicly stating that “we are not interested in combining our established and workable program to protect our members from criminal prosecution with any insurance product. . . . [and] I don’t want anything to do with [insurance].”<sup>8</sup> Over a dozen

---

<sup>7</sup> See, e.g., President’s Message, Armed Citizens Legal Defense Network, Inc., <https://armedcitizensnetwork.org/june-2015presidents-message> (June 2015); <https://armedcitizensnetwork.org/our-journal/archived-journals/286-may-2013#President> (May 2013); Editor’s Notebook, Armed Citizens Legal Defense Network, Inc., <https://armedcitizensnetwork.org/february-2018editorial> (Feb. 2018); <https://armedcitizensnetwork.org/september-2018-editorial>; <https://armedcitizensnetwork.org/march-2019-editorial>; <https://armedcitizensnetwork.org/july-2018-presidentsmessage>; <https://armedcitizensnetwork.org/december-2018presidents-message>; <https://armedcitizensnetwork.org/february2019-presidents-message>; <https://armedcitizensnetwork.org/august-2019-presidentsmessage>; <https://armedcitizensnetwork.org/2018-state-of-thenetwork>; <https://armedcitizensnetwork.org/july-2017-bookreview>; <https://armedcitizensnetwork.org/october-2017presidents-message>; <https://armedcitizensnetwork.org/1million-legal-defense-fund>.

<sup>8</sup> President’s Message, Armed Citizens Legal Defense Network, Inc., <https://armedcitizensnetwork.org/february-2018editorial><https://armedcitizensnetwork.org/our-journal/archivedjournals/286-may-2013#President> (Feb. 2018).



members submitted declarations in the proceedings below stating that they remain “fully aware” that the Network “retain[s] full discretion to provide a member access to and receive financial assistance,” and that “[a]t no time did” they “think or believe that [the Network] was providing me . . . insurance or contractual obligation to have access to” financial assistance. AR at 95, ¶ 29.

The financial resources comprising the Fund come from various sources—not merely membership dues. *Id.* 404–05, ¶ 29. Many Fund donations come from corporate entities or individuals who make direct financial contributions or donate products and services for auction, with the proceeds contributed to the Fund. *Id.* Other Fund donations come from bequests. *Id.* Since the Commissioner’s Office initiated this action, 220 individuals have donated over \$21,000 to the Network. Only 25% of Network membership dues are paid into the Fund, an amount that can unilaterally change at any time at the discretion of Network leadership. *Id.* Along with membership dues, the

Network provides additional donations to the Fund. *Id.*; AR at 404–05, ¶ 29.

## V. ARGUMENT

RAP 13.4(b) allows for discretionary review to be granted in four instances:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review pursuant to RAP 13.4(b)(1), (3), and (4) because (a) the decision of the Court of

Appeals interpreting the statutory definition of insurance contradicts longstanding rulings of the Supreme Court regarding statutory construction and interpretation; (b) there is a significant question of law under the Constitution of the United States; and (c) there is an issue of substantial public interest which should be determined by the Supreme Court.

**A. The Court of Appeals’ Statutory Interpretation Contradicts Decisions by the Supreme Court and Court of Appeals.**

Under RCW 48.01.040, an insurance contract requires that “one undertakes to indemnify another or pay a specified amount upon determinable contingencies.” Washington’s insurance code does not define “indemnify” nor “specified amount.”

In less than two pages of analysis, the Court of Appeals held that the Network “undertook to indemnify or pay a specified amount of its members’ legal and bail expenses” because (1) an outdated version of its website once stated that

the Network *might* pay “up to \$25,000” in attorney’s fees and/or bail assistance; (2) the Network indicated some services that funds might be provided for; and (3) the Network “protects its members from the costs of litigation.” Op. at 12-14. But the Network neither undertakes to indemnify nor pay a specific amount of any of its members’ legal expenses, and the Court of Appeals therefore erred in its analysis.

The “up to \$25,000” language the Court of Appeals wrongly considered dispositive was neither operative at the time the Insurance Commissioner initiated its enforcement action, nor does it constitute a specified amount. The word “specified” in RCW § 48.01.040 cannot be written out of the statute; it must be given some operative effect. *See Murray v. Dep’t of Labor & Indus.*, 151 Wash. 95, 275 P. 66, 69 (1929) (Washington courts adhere to the “cardinal rule of statutory construction” against surplusage that gives effect to “each word” when possible). “Specified,” in common parlance, means “to name or state explicitly or in detail.” *Specified*, Merriam-

*Webster.com*, <https://www.merriam-webster.com/dictionary/specified>, while “amount” means “the total number or quantity: AGGREGATE [or] the quantity at hand or under consideration,” *Amount, Merriam-Webster.com*, <https://www.merriam-webster.com/dictionary/amount>.

Therefore, an agreement to pay a “specified amount” means an agreement to provide an exact figure. The Network makes no representations as to the amount of help it may provide. For this reason, it does not agree to pay a “set amount.”

The Network’s discretionary provision of financial resources cannot be construed as an agreement to provide “a specified amount” in any sense of that phrase. Legal fees in self-defense cases can exceed hundreds of thousands of dollars. In the twenty-nine occasions since 2008 that the Network provided funds to one of its members, it never paid more than \$75,000.

The Court of Appeals disagreed because, at one time, the Network advertised that it may furnish “up to \$25,000.” In

typical insurance agreements, “up to” a set amount contractually obligates an insurance company to defray any cost *below* that amount (*e.g.*, if a car insurer agrees to pay “up to \$500,000” in property damage, it will foot the entire bill if a car accident results in \$300,000 in damage). But here, even though the Network once said it would pay “up to \$25,000,” it always had discretion to determine the amount it would pay, or to pay nothing at all.

The Court of Appeals similarly erred when it concluded that the Network’s advertisement to pay “legal expenses” “not tied to a dollar amount” but instead tied to categories of legal expenses, effectively constitutes an offer to pay a “specified amount.” The Court cited nothing to support this conclusion, for no supporting facts exist. Specified “amount” is not synonymous with specified “event” unless an event has a uniform cost associated with it, a condition that is clearly inapplicable in the use of force context. This is a clear error of law.

Moreover, the Court of Appeals paid only lip service to the indemnity prong of RCW 48.01.040 and twisted the definition of indemnity to its breaking point. Specifically, even though it provided scant analysis of the indemnity prong, the Court of Appeals indicated that it believed the Network indemnified its members because it “undertook to provide funding to its members, whether by making payments directly to its members or to a third party”, has stated it is “committed to the defense of its members”, and “provid[es] funding to its members throughout the various stages of litigation.” This is simply not indemnification.

Black’s Law Dictionary, in turn, defines “[i]ndemnification” as either (1) reimbursement for a loss suffered because of a third party’s act or default, (2) a promise to reimburse another for such a loss, or (3) to give another security against such a loss. Indemnification, *Black’s Law Dictionary* (7th ed. 1999). In other words, “[i]ndemnity” refers to the amount of compensation necessary to reimburse an

insured's loss. 1 *New Appleman on Insurance Law Library Edition* § 1.05[4].

The financial assistance the Network may choose to provide does not constitute indemnification. Indemnification is money paid to cover a loss, and the money spent to, *e.g.*, hire a proficient self-defense attorney or credible expert witness is not money covering a "loss" in any sense of the word. And given the discretion a member retains in choosing her lawyer or expert, these fees are not triggered by a third-party's act.

Most fundamentally, though, the Network's decision to provide funds is not premised on covering a "loss" suffered by a member. The Network's discretionary decision to provide funds is based on its belief that justice is essential whenever lawful force is used, and in some cases, providing financial assistance is the best way to ensure that a judge or jury receives the tutelage it needs to understand why, given the circumstances, a law-abiding citizen decided to protect herself,



and why the factfinder would have made the same rational choice. This is not indemnity.

Nor is it a financial benefit provided solely to the person who acted in self-defense. It is, instead, a service that the Network may elect to provide so judicial factfinders have the information necessary to ensure that justice is fairly administered. When the Network concludes that it can help educate factfinders as to what actions the law allowed in a particular situation, it may act to ensure that this message is conveyed. To lump the Network's decision to provide financial resources into the same category as roof repairs after a bad storm is profoundly wrong and contradicts well-established precedent regarding statutory interpretation.

**B. The Court of Appeals Decision Contradicts Supreme Court Decisions Requiring True Risk-Shifting and Risk-Distribution in Defining Insurance.**

Insurance contracts *must* involve *both* risk-shifting and risk-distribution. “Risk-shifting” means that one party “shifts” his risk of loss to another party, while “risk-distribution” means

that the assuming party distributes potential liability among others. Certain contracts may be “risk-shifting,” if one party takes on risk of another’s loss, but unless that party “distributes” the risk among others, the contract lacks an essential element of insurance. *In re Estate of Smiley*, 35 Wn. 2d 863, 867, 216 P.2d 212, 214 (1950), citing *Helvering v. Le Gierse*, 312 U.S. 531 (1941); *Amerco, Inc. v. Comm’r IRS*, 979 F.2d 162, 165 (9th Cir. 1992), citing *Beech Aircraft Corp. v. United States*, 797 F.2d 920, 922 (10th Cir. 1986); see also Robert E. Keeton and Alan I. Widiss, *Insurance Law* § 1.3(b)(2) (1988) (without “risk-shifting” and “risk-distribution” both present, a contract may not be deemed an insurance contract).

Here, the Court of Appeals identified insurance in the absence of risk distribution or risk shifting. The membership Terms of Service clearly indicate there is no obligation for the Network to provide access to the Fund and the members

unequivocally understood there was no such obligation. Absent this obligation, there can be no shifting of risk.

In addition, the Fund is funded by more than member contributions. Money flows in from five different sources. Thus, any “distribution” of risk is not among members alone, unlike an insurance policy that distributes risk among policyholders.

By determining an insurance contract existed here, the decision below contradicts prior determination and application of risk-shifting and risk-distribution as done by the Supreme Court.

**C. The Court of Appeals Decision Involves A Significant Question of Law Under the Constitution of the United States.**

The Court of Appeals also summarily rejected the Network’s due process arguments without analysis. *Op.* at 18. However, the conclusion that Network membership somehow constitutes insurance is so vague that, if correct, it is not

obvious to a person of common intelligence and thus unconstitutional.

A law that describes a crime or violation in vague terms raises due process concerns because of the potential chilling effect on protected rights. The U.S. Supreme Court has held that a law is unconstitutionally vague when people “of common intelligence must necessarily guess at its meaning.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). If a regulation is too vague and imposes limits without sufficient notice, it creates substantial problems under the due process clause of the Fourteenth Amendment.

Here, the Network has been targeted and fined under a statute never previously interpreted in this way against a similar organization. There is simply no way that the Network, its members, or anyone else would view the Network’s membership benefits as insurance. The novelty of the decisions below—as well as the vagueness of the statutes at issue—demonstrate this point.

The Court of Appeals (1) entirely rewrote the elements of a contractual agreement, and (2) redefined the word “indemnity,” read out the word “specified” from “specified amount,” and transformed “specified amount” into “specified event.” If this result was correct, and what the Network provides *does* meet the definition of insurance, then the definition is so hopelessly vague that it does not give any person of normal intelligence a clear understanding of what it forbids.

Every example in the record demonstrates that the average person of normal intelligence believes that the Network is not engaged in the practice of insurance. Every lawyer knows the elements of a contract and can apply a multipronged definition of indemnity from Black’s Law Dictionary. If none of this matters, then all of us are just “guess[ing] at [the] meaning” of Washington’s insurance code. *Connally*, 269 U.S. at 391. And if we are, then the insurance code is unconstitutionally vague.

**D. There is An Issue of Substantial Public Importance that Should Be Determined By the Supreme Court.**

The Network provides a meaningful service to the community in the form of education about proper self-defense, acts as a conduit between its members and the professional self-defense legal community, and at times offers financial assistance to help with, among other things, bail, attorneys' fees, and expert witnesses. Many Washington citizens have purchased these memberships. Additionally, it is crucial that proper self-defense education be made widely available, especially as society becomes increasingly violent.

The existence of the Network and the services it provides are therefore of utmost importance to the public.

**VI. CONCLUSION**

For the foregoing reasons discretionary review is warranted.

DATED this 28<sup>th</sup> day of September, 2023.

*I certify that this brief is in 14-point Times New Roman font and contains 4,492 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).*

Dated this 28<sup>th</sup> day of September, 2023.

Spencer D. Freeman

Spencer D. Freeman, WSBA #25069  
Attorney for Appellants

Dennis W. Polio

Dennis W. Polio, Pro Hac Vice  
Attorney for Appellants

Edward M. Wenger

Edward M. Wenger Pro Hac Vice Pending  
Attorney for Appellants

## APPENDIX

### DECLARATION OF SERVICE

I hereby certify that on September 28, 2023, a copy of the foregoing *Document* and this *Declaration of Service* were served on the parties below as noted:

**Marta DeLeon**  
Attorney For Respondent  
Office of the Attorney General  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
(360)753-3168 (direct)  
[marta.deleon@atg.wa.gov](mailto:marta.deleon@atg.wa.gov)

I certify under penalty of perjury of the law of the State of Washington that the foregoing is true and correct.

Signed this 28<sup>th</sup> day of September, 2023 at Tacoma, WA

*Elizabeth Chaves*  
Elizabeth Chaves  
Litigation Paralegal



**Appendix A**  
**Court of Appeals Decision**

August 29, 2023

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

**DIVISION II**

ARMED CITIZENS' LEGAL DEFENSE  
NETWORK,

Appellant,

v.

WASHINGTON STATE INSURANCE  
COMMISSIONER,

Respondent.

No. 57043-2-II

PUBLISHED OPINION

CHE, J.—Armed Citizens' Legal Defense Network (ACLDN) appeals the trial court's order affirming an Office of the Insurance Commissioner (OIC) order granting summary judgment for OIC and fining ACLDN \$50,000 for unlawfully transacting insurance.

ACLDN is a for-profit Washington corporation. ACLDN offers memberships that include, among other benefits, financial assistance to members for legal expenses incurred as a result of a self-defense incident. RCW 48.01.040 states, "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

In March 2020, the OIC served a cease and desist order on ACLDN requiring that ACLDN cease selling its memberships in Washington without having the necessary authority. The OIC later imposed a \$200,000 fine for violating Washington's insurance laws. ACLDN appealed the OIC's order to OIC's hearing unit, and both parties filed for summary judgment. The presiding officer denied summary judgment for ACLDN but granted summary judgment for

OIC. The presiding officer concluded that ACLDN transacted insurance without the necessary authority and ordered ACLDN to pay a \$50,000 fine. The superior court affirmed.

We hold that (1) ACLDN contracted with members to provide funds for members' legal expenses, (2) ACLDN undertook to indemnify or pay a specified amount of members' legal expenses, (3) self-defense and the resulting legal expenses incurred after an incident of self-defense are determinable contingencies, (4) ACLDN fails to provide any meaningful argument concerning whether RCW 48.01.040 is unconstitutionally vague beyond a reasonable doubt, and (5) ACLDN fails to demonstrate that SUBSTITUTE S.B. 5810 (S.S.B. 5810), LAWS OF 2023, ch. 3, § 1, applies in this appeal. Consequently, we affirm.

## FACTS

### A. *Background*

ACLDN was formed in June 2011 as a Washington for-profit corporation. ACLDN is not authorized to operate as an insurer in Washington. ACLDN is comprised of over 17,000 members.

In its online advertising, ACLDN describes itself as “an organization of gun owners pooling their strength to protect one another when a member comes under scrutiny of the legal system after acting in self defense.” Admin. Rec. (AR) at 316. ACLDN is “committed to the defense of its members should they be involved in a self-defense incident.” AR at 280.

ACLDN's website describes the organization's

two core missions: first, to help members in the legal fight after they justifiably use force in self defense by paying for the services of attorneys, expert witnesses, private investigators and other professionals essential to mounting a vigorous legal

defense of self defense on behalf of our members. Our second mission is educating our members (and to some extent, the gun-owning public) in the law governing use of force in self defense and how armed citizens can protect against unmeritorious prosecution.

AR at 317.

Following a self-defense incident, ACLDN provides financial assistance for a member's legal expenses through the ACLDN's Legal Defense Fund (Fund). The Fund receives "25% of all Network membership dues and renewals, plus 100% of corporate donations, estate and bequest gifts, and personal contributions." AR at 336. The Fund contains over \$2,000,000 and has been used to fund 22 members' legal expenses following an incident involving self-defense. The amount expended by ACLDN on each member's claim varied, ranging from \$400 to \$75,000. Of the 22 members that have received funds from ACLDN, one was in Washington. In that case, ACLDN provided \$2,000 to the member for legal expenses. ACLDN declined to provide funds in three instances, including one instance in Washington.

ACLDN's membership brochure encourages individuals to join the network and not "face the legal aftermath of self defense alone." AR at 262. In order to join the organization, prospective members must select a membership term length and pay a membership fee. The membership brochure states that "members receive financial assistance to assure vigorous legal representation after using deadly force in self defense. [Members] can rely on the Network leadership, attorneys and legal experts for knowledgeable assistance and guidance." AR at 261. The brochure further explains that "[w]hen a member uses force in self defense, the Network immediately sends up to \$25,000 to the member's attorney and can provide up to \$25,000 in bail

assistance.<sup>1</sup> This assistance is extended after any legal self-defense incident whether [a member] use[s] a firearm or other defense option.” AR at 262. ACLDN makes clear that its financial assistance “pays attorney fees and if needed, the expertise of an additional attorney or attorneys . . . as well as pay[s] for expert witnesses, private investigators and other expenses to defend the member’s self-defense actions,” including “legal funding to defend against [a] civil law suit,” retrial, or appeal. AR at 262. ACLDN’s brochure provides an explicit disclaimer that “membership benefits are not insurance reimbursements.” AR at 262.

After joining ACLDN, members receive an “Explanation of Member Benefits.” AR at 264 (most capitalization omitted). ACLDN explains that members will receive educational materials, “access to listings for Network Affiliated Attorneys,” an initial attorney fee deposit in incidents of self-defense, and bail assistance “upon a showing of legal self defense.” AR at 264-65. When a member requests additional funding “to defray the cost of going to trial,” ACLDN’s “Advisory Board will review the facts of the case and advise [ACLDN] leadership on specific issues of legal self defense on which decisions to grant financial support rest.” AR at 265.

---

<sup>1</sup> ACLDN alleged that it removed the “up to \$25,000” language from its website before the OIC’s enforcement action and claims that it no longer specifies the amount of funding it provides members. Reply Br. of Appellant at 15. The record does not show when ACLDN removed this language; however, the language is present in the materials provided to the presiding officer as part of the administrative record. Furthermore, the OIC issued a notice of investigation to ACLDN on April 15, 2019, a subpoena for all documents available to members related to the Fund and member benefits on June 26, 2019, and a cease and desist order on March, 26, 2020. AR at 239, 252, 38 (capitalization omitted). ACLDN responded to the OIC’s subpoena by “providing the materials . . . available to prospective, new, and renewing members.” AR at 258. In its cease and desist order, the OIC explained that it had obtained ACLDN’s advertising and membership materials. The materials contained the “up to \$25,000” language. AR at 39.

ACLDN explains that its review process “is never undertaken to deny assistance to a member who acted in legitimate self defense, but rather to prevent accusations that the [ACLDN] supports or encourages use of force without justification.” AR at 265.

ACLDN’s online materials reiterated that it is not insurance or a pre-paid legal service plan. ACLDN explains that it pays a fee deposit to a member’s attorney

to ensure a member has legal representation immediately after an incident, and that the member’s attorney can pull out all the stops in protecting the member’s rights, including being with the member during contact with law enforcement, hiring a private investigator . . . keeping the news media away . . . , and other services as may be needed.

AR at 273. ACLDN does not require members to repay the fee deposit paid to their attorney.

Furthermore, where “charges are not dropped or if a grand jury is convened,” ACLDN will ask the member’s counsel “to estimate how much money is needed to prepare for and go to trial.” AR at 345. Once the question of cost is settled, ACLDN “will fund the entire defense, assuming no new evidence has surfaced that invalidates the self-defense claim.” AR at 345-46.

ACLDN does not automatically pay a set amount to a member’s attorney, instead ACLDN works with the member’s attorney to ensure that ACLDN provides a sufficient retainer. ACLDN explains that membership benefits apply “to any justifiable use of force.” AR at 321 (underline omitted). Receipt of funding “is subject to a review of the facts of the case as known at the time and a determination [that] it was a legitimate act of self defense.” AR at 336. Members “are entitled to case review by one of the [ACLDN’s] experts.” AR at 336.

A grant of bail assistance is also subject to ACLDN’s review. Before providing funding for bail expenses, ACLDN requires sufficient evidence that the member’s use of force was for

self-defense. ACLDN cautions members “that assistance with posting bail may not meet in full the requirements of the bail bonding agent, and in all likelihood will require financial participation from the member, as well.” AR at 342.

B. *OIC Investigation and Administrative Proceedings*

In April 2019, after reviewing ACLDN’s website, the OIC’s regulatory investigations unit formally began investigating ACLDN.<sup>2</sup> In March 2020, the OIC issued a cease and desist order to ACLDN. The order required that ACLDN cease selling its memberships in Washington without having the necessary authority. ACLDN moved to stay the OIC’s cease and desist order, but the presiding officer denied the motion. In May 2020, the OIC issued an order imposing a \$200,000 fine against ACLDN for violating Washington’s insurance laws. Both parties filed demands for hearings with the OIC’s hearings unit concerning imposition of a fine and the cease and desist order. The hearings unit’s presiding officer consolidated the hearings.

Subsequently, both parties moved for summary judgment. In support of ACLDN’s opposition to the OIC’s motion for summary judgment, 13 of ACLDN’s members<sup>3</sup> submitted declarations stating that “[a]t no time did [the member] think or believe that ACLDN was

---

<sup>2</sup> The OIC’s investigation of ACLDN was part of a string of investigations into similar membership organizations. Of note, the OIC investigated Lyndon Southern Insurance Company (Lyndon) for its provision of prepaid legal services to members who use a weapon in a self-defense incident. The OIC levied a fine against Lyndon because the company’s policy potentially covered illegal acts. After revising the language of its policy, Lyndon received the OIC’s approval for its firearms legal defense insurance program.

<sup>3</sup> In its briefing to this court, ACLDN alleged that “[d]ozens of members filed declarations.” Br. of Appellant at 26. However, the record before this court contains only 13 member declarations.

providing [them], as a member, insurance or contractual obligation to have access to the ACLDN fund.” AR at 650. In September 2020, the presiding officer issued a Final Order on Summary Judgment; however, the record remained open to allow for briefing regarding the fine amount.

In November 2020, the presiding officer entered a Second Amended Final Order on Summary Judgment (Final Order) granting summary judgment for OIC and denying the same for ACLDN, concluding (1) ACLDN’s promise to pay either ““up to \$25,000,”” a ““legal expense,” or a ‘bail expense’” qualified as a specified amount; (2) the act of self-defense is determinable and the circumstances that precede a decision to act in self-defense is contingent, which made it a determinable contingency; (3) ACLDN’s disclaimer that membership “is not insurance,” along with its other materials and advertisements did not alter the relationship it created between insurer and insured; and (4) ACLDN memberships qualified as insurance under RCW 48.01.040. Clerk’s Papers (CP) at 24-28. Having determined that ACLDN transacted insurance without a certificate of authority, the presiding officer concluded that the OIC had authority to issue a cease and desist order and to impose a \$50,000 fine.

ACLDN sought judicial review. On review, the superior court determined that (1) a contract exists between ACLDN and its members, (2) “the amounts specified are the categories of legal expense or bail expense” and that such categories are “specific enough to satisfy the definitional standards” of insurance, (3) in the alternative, ACLDN undertakes to indemnify its members “where members are contracting for reimbursement for legal expenses or bail expenses,” and (4) an act of self-defense, although an intentional act, is a determinable



contingency. CP at 49-50. The superior court affirmed the presiding officer's Final Order and ACLDN appeals.

## ANALYSIS

### I. STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs judicial review of the OIC's actions. *Chicago Title Ins. Co. v. Off. of Ins. Comm'r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). Under the APA, we will only grant relief under certain circumstances, including where "[t]he agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d). In reviewing an administrative action, we sit in the same position as the superior court and apply the APA standards directly to the agency's record. *Superior Asphalt & Concrete Co. v. Dep't of Lab. & Indus.*, 112 Wn. App. 291, 296, 49 P.3d 135 (2002). Under the APA, the party asserting invalidity of an agency action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a).

"[W]here the original administrative decision was on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard." *Verizon Nw., Inc. v. Emp. Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008). "Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law."<sup>4</sup> *Id.* Accordingly, we review facts in the record de novo and in the light most favorable to

---

<sup>4</sup> In its motion for summary judgment before the presiding officer, ACLDN acknowledged that "all material *facts* laid out in the OIC Order are undisputed" and that the "dispute here is purely legal, not factual." AR at 381-82.

the nonmoving party. *Id.* We further review legal conclusions under the “error of law” standard. *Id.*

Under the “error of law” standard, we may “substitute our view of the law for that of the Commissioner.” *Id.* at 915. However, we give “substantial weight to an agency’s interpretation of a statute within its expertise.” *Id.*

## II. LEGAL PRINCIPLES

Under RCW 48.01.040, insurance “is [1] a contract [2] whereby one undertakes to indemnify another or pay a specified amount [3] upon determinable contingencies.” The term “insurance contract” captures “a general and broad category of contracts that are both risk-shifting and risk-distributing devices.” *Pope Res. LP v. Certain Underwriters at Lloyd’s*, 19 Wn. App. 2d 113, 142, 494 P.3d 1076 (2021), *review denied*, 198 Wn.2d 1040 (2022). Generally, insurance is presented “in the form of a written ‘policy’”; however, “there are a variety of contracts that may satisfy the definition of ‘insurance’ without resembling a traditional ‘policy.’” *Id.*

## III. EXISTENCE OF A CONTRACT

ACLDN argues that its memberships cannot be considered a contract for insurance because ACLDN membership does not entitle members to financial assistance. ACLDN further argues that even where it declines to provide financial assistance for a member’s lawful use of force, nothing in its membership agreements would allow a member to sue for financial assistance. We disagree.

Under RCW 48.01.040, “[i]nsurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.” As noted above, a contract of insurance requires that “the agreement . . . be both a risk-shifting and risk-distributing device.” *Pope*, 19 Wn. App. 2d at 142. “A contract is a legally enforceable promise or set of promises.” *Id.* at 141 (quoting 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 301.01, at 163 (7th ed. 2019)).

A contract requires an offer, acceptance, and consideration. *Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 95, 969 P.2d 1078 (1998). If a party retains “an absolute right not to perform at all, there is an absence of consideration.” *Felice v. Clausen*, 22 Wn. App. 608, 611, 590 P.2d 1283 (1979). Where “the provisions of an agreement leave the promisor’s performance entirely within his discretion and control, the ‘promise’ is illusory.” *Id.* We decline to “give effect to interpretations that would render contract obligations illusory.” *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997).

Here, ACLDN’s brochure itself constitutes an offer to prospective members. The brochure explains that, among educational benefits, members also “receive financial assistance to assure vigorous legal representation after using deadly force in self defense.” AR at 261. The brochure further provides that when members use “force in self defense, the Network immediately sends up to \$25,000 to the member’s attorney and can provide up to \$25,000 in bail assistance.” AR at 262. The brochure emphasizes that the “Network advantage is particularly apparent when we fund a trial team when the money’s needed upfront to prepare and defend at trial.” AR at 262. Similar language reiterates that ACLDN’s “post self-defense support doesn’t

end when the criminal trial is over.” AR at 262. Instead, “[a]s a Network member . . . benefits include legal funding to defend against [a] civil law suit, . . . retrial or appeal.” AR at 262. The brochure’s language explicitly communicates ACLDN’s offer to provide financial benefits to its members.

Members are invited to accept ACLDN’s offer by completing the membership application attached to its brochure. In addition to providing background information and selecting a membership term length, members are required to provide payment information. Here, submitting the membership application, selecting the membership term length, and paying the membership fees serve as acceptance and consideration.

Furthermore, the agreement between ACLDN and its members is “both [a] risk-shifting and risk-distributing device[.]” *Pope*, 19 Wn. App. 2d at 142. A portion of each member’s dues is automatically deducted and deposited into the Fund. The Fund is then used “to provide legal defense support to . . . members after a self-defense incident.” AR at 273. By “pooling resources to support one another’s legal defense,” the membership agreement between ACLDN and its members is a risk shifting and distributing device. AR at 337.

We do not accept ACLDN’s position that any promise to provide financial assistance is illusory because ACLDN retains discretion to withhold funds. First, nothing in ACLDN’s membership application brochure informs members that ACLDN retains funding discretion. Next, although ACLDN suggests that it maintains funding discretion, ACLDN exercises such discretion to determine only the lawfulness of the member’s actions. For example, ACLDN explains that its review process “is in place to assure the Network that the . . . Fund is not wasted

defending a criminal act and that the member's actions were indeed justifiable." AR at 265.

ACLDN explicitly provides that a "review is never undertaken to deny assistance to a member who acted in legitimate self defense." AR at 265. Nowhere in its materials does ACLDN disclose that it retains discretion to deny funds for a member's lawful act of self-defense.

Accordingly, we find a contract exists under these circumstances.

#### IV. INDEMNIFICATION OR PAYMENT OF SPECIFIED AMOUNT

ACLDN argues that even if it decides to provide monetary support to its members, that support is not indemnification nor an agreement to pay a specified amount. We disagree.

Under RCW 48.01.040, an insurance contract requires that "one undertakes to indemnify another *or* pay a specified amount upon determinable contingencies." (Emphasis added.) Washington's insurance code does not define "indemnify" nor "specified amount." In the absence of these definitions, we give the terms their "plain and ordinary meaning[s] ascertained from a standard dictionary." *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

"Indemnify" means "to secure or protect against hurt or loss or damage," "to exempt from incurred penalties or liabilities," and "to make compensation to for incurred hurt or loss or damage." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1147 (8th ed. 2002). *New Appleman on Insurance* explains that "the term 'indemnity' refers to the compensation necessary to reimburse the insured's loss." 1 JEFFREY E. THOMAS & FRANCIS J. MOOTZ III, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 1.05(4) (2023). Where an insured "suffers a loss, the insurer pays proceeds, a benefit, to the insured in an amount that offsets the loss." *Id.*

“Specify” means “to mention or name in a specific or explicit manner,” or to “tell or state precisely or in detail.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2187. “Amount” means “the total number or quantity,” or “the quantity at hand or under consideration.” *Id.* at 72.

Here, ACLDN undertook to indemnify or pay a specified amount of its members’ legal and bail expenses. First, ACLDN’s webpage explained that the payment of membership fees “buy[s]” members “[a]n initial fee deposit of up to \$25,000 paid to the member’s attorney by the Network if the member has been involved in a self-defense incident.” AR at 281. ACLDN expands on this language in its application brochure, explaining that in addition to attorney fees, ACLDN “can [also] provide up to \$25,000 in bail assistance.” AR at 262. In stating a specific dollar amount and tying payments to specific events, ACLDN’s language demonstrates that it undertook to pay a specified amount of members’ expenses.

Even in the absence of the “up to \$25,000” language, ACLDN’s website and materials provide language sufficient to establish that it undertook to pay a specific amount. Throughout its materials, ACLDN indicates that it will pay legal expenses associated with expert witnesses, private investigators, attorney fees, bail, civil law suits, retrials, and appeals. Although, not tied to a dollar amount, these categories of expenses provide sufficient detail to determine what costs ACLDN considers in providing funding.

Regardless of whether ACLDN undertook to pay a specified amount, ACLDN’s materials suggest that it undertook to provide funding to its members, whether by making payments directly to its members or to a third party. Throughout its website and brochure, ACLDN emphasizes that it is “committed to the defense of its members.” AR at 280. By

providing funding to its members throughout the various stages of litigation, ACLDN protects its members from the costs of litigation. Accordingly, ACLDN undertakes to provide funding for expenses to its members in self-defense actions.

#### V. DETERMINABLE CONTINGENCY

ACLDN argues that “a lawful act of self-defense . . . is not a determinable contingency.” Br. of Appellant at 26. ACLDN explains that it does not offer “financial resources for losses caused by a third-party; instead, whatever resources it may choose to provide are dependent entirely on the conscious choices made and the intentional actions undertaken by the member who chose to protect herself.” Br. of Appellant at 52. We disagree.

Under RCW 48.01.040, insurance requires the occurrence of a “determinable contingency.” “Determinable” means “capable of being determined, definitely ascertained, or decided upon.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 616. “Contingency” means, in pertinent part, “the condition that something may or may not occur,” “the condition of being subject to chance,” “an event or condition occurring by chance and without intent, viewed as possible or eventually probable, or depending on uncertain occurrences or coincidences.” *Id.* at 493.

The “determinable contingency” requirement reflects insurance law’s fundamental assumption of “fortuity.” 1 THOMAS & MOOTZ, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 1.05(1). Deeply rooted in insurance law is the concept “that an insurer will not pay for a loss unless the loss is ‘fortuitous,’ meaning that the loss must be accidental in some sense.”

*Id.* at § 1.05(2)(a). In analyzing fortuity, focus “is not on the fortuity of the *cause(s)* of the loss, but rather on the fortuity of the *loss itself*.” *Id.* at § 1.05(2)(b).

In Washington, the fortuity principle is analogous to the known loss principle. *Alum. Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 556, 998 P.2d 856 (2000). The known loss defense is grounded “on the principle that an insured cannot collect on an insurance claim for a loss that the insured subjectively knew would occur at the time the insurance was purchased.” *Pub. Util. Dist. No. 1 of Klickitat County v. Int’l Ins. Co.*, 124 Wn.2d 789, 805, 881 P.2d 1020 (1994). Under the known loss defense, courts “must determine whether a particular occurrence was expected by the insured before the insurance coverage was obtained.” *Id.* However, because “[t]he knowledge that some loss may occur in the future is the driving force behind the purchase of insurance,” such general knowledge does not preclude coverage. *Id.* at 808.

RCW 9A.16.020 defines when use of force is lawful. It states in relevant part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

.....

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3).

Here, the legal consequences of an act of self-defense are determinable contingencies. The consequences of an act of self-defense are determinable and manifest in the form of legal expenses, including bail costs and attorney fees. The contingency is defined at the time of the



contract, not at the time of the loss or claim for coverage. *Klickitat*, 124 Wn.2d at 805, 808. At the time of entering into a contract with ACLDN, members may have general knowledge that such expenses may occur; however, such general knowledge does not rise to the level of subjective knowledge required to preclude coverage.

The legal expenses incurred satisfies the plain meaning of determinable contingency. First, legal expenses are capable of being determined. In its materials, ACLDN explains that it will work with a member's attorney in reaching a fee agreement, will send up to \$25,000 to the member's attorney, and can provide up to \$25,000 in bail assistance. Next, incurring legal fees is contingent on the prosecutor's decision to bring criminal charges against the member or on a private party's decision to file a civil action against the member. Specifically, ACLDN's Fund is not implicated unless a legal expense is incurred, such as an attorney fee or a bail expense. However, if a prosecutor declines to pursue charges or a private party declines to file an action against the member, these expenses may not arise.

Next, characterizing self-defense as a determinable contingency is consistent with *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 776 P.2d 123 (1989). In *Grange*, our Supreme Court explicitly recognized that insuring acts of self-defense is possible. The court considered whether an insurance association had "a duty to defend its insured in a wrongful death action where the insured allegedly killed the decedent in that action in self-defense." 113 Wn.2d at 92. The court held that the insurance association did not have a duty to defend the insured under the specific language of the insured's insurance policies. *Id.* at 97. Both of the policies provided "coverage for an 'occurrence,' where bodily injury results from 'an accident.'" *Id.* at 95. The

language of the policies did not apply because the insured's act of self-defense was a deliberate act and because serious bodily injury was an expected result from the insured's standpoint. *Id.* at 99.

Although the insured's policy in *Grange* did not cover an act of self-defense, the court expressly recognized, "members of the public may wish to insure themselves from the cost of defending liability actions where the facts ultimately exonerate them, and that it would not violate public policy to permit an insurance company to defend an action where the insured is excused on the basis of self-defense." *Id.*<sup>5</sup> Although the court concluded that the specific policies in *Grange* did not cover the defendant's act of self-defense, the court's subsequent explanation made clear that such coverage was possible.

In light of the definition of determinable contingency and the court's language in *Grange*, self-defense and the resulting legal expenses are determinable contingencies under RCW 48.01.040. Furthermore, having determined that ACLDN contracted with its members and undertook to indemnify its members or pay a specific amount of members' legal expenses, we agree that the OIC did not err in finding that ACLDN transacted insurance as defined under RCW 48.01.040.

---

<sup>5</sup> Confirming the court's language in *Grange*, the OIC recently approved a firearms legal defense insurance program. Under the insurance agreement, the insurer provides legal services to members following any incident in which the member "either discharges or displays a weapon for the purpose of using the weapon to stop a threat." AR at 488.

## VI. DUE PROCESS RIGHTS

ACLDN argues that if we “conclude that membership in the Network . . . constitutes insurance in Washington . . . , it then follows that Washington’s laws are so vague that persons of common intelligence must guess at their meaning.” Br. of Appellant at 53. We do not decide whether RCW 48.01.040 is unconstitutionally vague.<sup>6</sup>

We will not consider an issue where the appellant fails to provide meaningful argument. RAP 10.3(a)(6); *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). The “[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Mason*, 170 Wn. App. at 384 (alteration in original) (internal quotations omitted) (quoting *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)).

Here, ACLDN asserts that if this court finds that membership in ACLDN’s network constitutes insurance, then RCW 48.01.040 is vague. ACLDN further contends that “[t]here is simply no way that . . . [ACLDN], its members, or anyone else could have guessed that the . . . membership benefits qualify as insurance.” Br. of Appellant at 54. Such conclusory statements do not amount to meaningful argument. Therefore, in the absence of meaningful argument, we decline to decide whether RCW 48.01.040 is unconstitutionally vague.

---

<sup>6</sup> A law “is unconstitutionally vague ‘if it does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited, or if it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement.’” *State v. Locklear*, 105 Wn. App. 555, 559, 20 P.3d 993 (2001) (quoting *State v. Groom*, 133 Wn.2d 679, 691, 947 P.2d 240 (1997)). Statutes are presumed constitutional; thus, “the party asserting unconstitutionality must show unconstitutionality beyond a reasonable doubt.” *Id.*

VII. S.S.B. 5810: LEGAL SERVICE CONTRACTORS

In a statement of additional authorities, ACLDN refers us to S.S.B. 5810. ACLDN contends that under S.S.B. 5810, “the Washington Legislature clarified that prepaid legal service plans, like those . . . [ACLDN] offers, are specifically exempt from the definition of ‘Insurance’ under RCW 48.01.050.” Statement of Additional Auth. at [1]. We disagree.

In 2022, the Washington legislature passed S.S.B. 5810,<sup>7</sup> “exempting certain prepaid services from insurance regulation.” LAWS OF 2023, ch. 3.<sup>8</sup> S.S.B. 5810 states “[l]egal service contractors are not insurers under RCW 48.01.050 and legal service plans are not insurance under RCW 48.01.040.” *Id.* at § 1(2).

S.S.B. 5810 defines “[l]egal service contractor” as “any person, entity, or group of persons, including associations, who does [sic] not engage in the practice of law or the business of insurance and who, for consideration, provides members with access to legal services through agreements with providing attorneys.” *Id.* at § 1(5)(a).

Under S.S.B. 5810 a “[l]egal service plan” is

an arrangement between a legal service contractor and an individual or person or group of individuals or persons, whereby specified legal services may be provided to, or provided at discounted rates to members by providing attorneys in consideration of a periodic payment that does not constitute payment of attorney fees of any providing attorneys.”

---

<sup>7</sup> S.S.B. 5810 was filed with the Secretary of State on March 27, 2023 after the legislature voted unanimously to override the governor’s veto. FINAL B. REP. ON SUBSTITUTE S.B. 5810, 68th Leg., Reg. Sess. (Wash. 2023). S.S.B 5810 took effect on July 23, 2023. LAWS OF 2023, ch. 3.

<sup>8</sup> <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5810-S.SL.pdf?q=%2020230417084919>.

*Id.* at § 1(5)(b).

Under S.S.B. 5810, a “[p]roviding attorney” is “an attorney licensed, in good standing, and eligible to practice law in this state who provides legal services under a providing attorney agreement in accordance with the terms of the legal service plan, and pursuant to an engagement agreement between the providing attorney and the member.” *Id.* at § 1(5)(d).

A “[p]roviding attorney agreement” is “a written contract or agreement between a legal service contractor and a providing attorney under which the providing attorney renders and provides legal services to members of a legal service plan.” *Id.* at § 1(5)(e).

“A statute is presumed to operate prospectively unless the Legislature indicates that it is to operate retroactively.” *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007) (quoting *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999)). This presumption is overcome where “(1) the Legislature explicitly provides for retroactivity, (2) the amendment is curative, or (3) the statute is remedial.” *Kellogg v. Nat’l R.R. Passenger Corp.*, 199 Wn.2d 205, 220 504 P.3d 796 (2022) (internal quotation marks omitted) (quoting *Densley*, 162 Wn.2d at 223). Furthermore, in determining whether a statute is retroactive we also look to the statute’s purpose, language, and legislative history. *Id.* at 221.

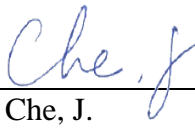
Here, our legislature has not indicated that S.S.B. 5810 operates retroactively. Nothing in the plain language of S.S.B. 5810 suggests that it is retroactive. The bill’s legislative history also fails to indicate any intention for the retroactive application of S.S.B. 5810. Also, ACLDN has not provided any authority supporting retroactive application of S.S.B. 5810 in this case.

Furthermore, even if S.S.B. 5810 was retroactive, ACLDN is not a “legal service contractor” nor are its memberships “legal service plans.” The record does not indicate that ACLDN is an entity that, “for consideration, provides members with access to legal service through agreements with providing attorneys.” LAWS OF 2023, ch. 3 at § 1(5)(a). Instead, ACLDN explicitly states that it is not “a pre-paid legal service plan.” AR at 347. ACLDN does “not have any attorneys on staff or under contract to assign to handle [a member’s] case.” AR at 347. Although, ACLDN provides members “access to listings for Network Affiliated Attorneys,” nothing in the record suggests that a “providing attorney agreement” exists between ACLDN and its affiliated attorneys. AR at 264.

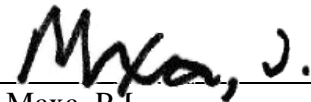
Accordingly, ACLDN has not established that S.S.B. 5810 is applicable to the issues raised here.

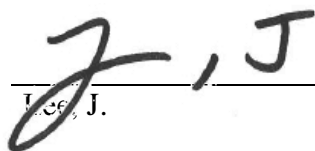
CONCLUSION

We affirm.

  
\_\_\_\_\_  
Che, J.

We concur:

  
\_\_\_\_\_  
Maxa, P.J.

  
\_\_\_\_\_  
Lee, J.

**FREEMAN LAW FIRM, INC.**

**September 28, 2023 - 4:13 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 57043-2  
**Appellate Court Case Title:** Armed Citizens' Legal Defense Network, Inc, App v. Office of Insurance Commissioner, Resp  
**Superior Court Case Number:** 20-2-00723-2

**The following documents have been uploaded:**

- 570432\_Petition\_for\_Review\_20230928161037D2397832\_7448.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was 2023.09.28 ACLDN Petition Discretionary Review Final.pdf*

**A copy of the uploaded files will be sent to:**

- danielle.anderson@atg.wa.gov
- dwpolio@holtzmanvogel.com
- emwenger@holtzmanvogel.com
- marta.deleon@atg.wa.gov

**Comments:**

---

Sender Name: Elizabeth Perea - Email: reception@freemanlawfirm.org

**Filing on Behalf of:** Spencer Douglas Freeman - Email: sfreeman@freemanlawfirm.org (Alternate Email: )

Address:  
1107 1/2 Tacoma Avenue South, Suite 2  
Tacoma, WA, 98402  
Phone: (253) 383-4500

**Note: The Filing Id is 20230928161037D2397832**