

NO. 49892-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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,

Respondents.

OPENING BRIEF OF APPELLANT STATE OF WASHINGTON

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I. INTRODUCTION

Courtrooms have become a common battleground for getting a proposition on the ballot or for blocking a proposition from a public vote. In recent years, vast amounts of money have been spent on pre-election litigation in Washington to ensure either that a ballot proposition is placed before voters, or to prevent it from reaching the voters. Cases where opponents sought to block SeaTac's minimum wage initiative and Initiative 1366, an Eyman-sponsored tax initiative, from the ballot provide just two recent examples.¹ A successful legal challenge accomplishes the same goal as a traditional electoral campaign opposing the legislation, eliminating the need to expend funds on traditional campaign efforts to persuade the public to reject a proposition.

The Economic Development Board for Tacoma-Pierce County, the Tacoma-Pierce County Chamber, and the Port of Tacoma brought a legal action to stop two City of Tacoma ballot propositions from reaching the ballot. The ballot propositions were an attempt to block a controversial effort to bring a methanol plant to Tacoma by requiring voter approval for large water use applications. All of the defendants stated that they brought

¹ *E.g., Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015) (litigation brought by two county election officials *and* initiative opponents over whether a statewide initiative could be placed on the ballot); *Filo Foods, LLC v. City of SeaTac*, 179 Wn. App. 401, 319 P.3d 817 (2014) (litigation over whether a local minimum wage initiative received enough valid signatures to qualify for the ballot).

the lawsuit to prevent harm to their interests, and their members' interests in economic development, as well the Port's proprietary interests for example as a landowner and employer. None of the defendants was charged with conducting the election on the ballot propositions, nor would any defendant be charged with defending the validity of one of the propositions if passed.

The Attorney General's Office has brought several cases in recent years, including this one, to enforce the Fair Campaign Practices Act's (the Act) requirements that "independent expenditure[s]" "made in support of or in opposition to any . . . ballot proposition" must be reported to the Public Disclosure Commission if the expenditures cross a \$100 threshold. RCW 42.17A.255. Reporting independent expenditures made for attorneys to litigate does not prevent the Economic Development Board or the Chamber from bringing such lawsuits. It only requires transparent reporting of such expenditures.

Notably, while the people or the legislature could have limited this reporting requirement to activities related to electioneering or campaign communications to voters, they did not. They chose broader language—"support or oppose." While defendants argue for a narrow construction of "oppose," that would be contrary to the people's and the legislature's intent that the public have access to information about who is supporting

or opposing a ballot proposition and the liberal construction provisions in RCW 42.17A.001, .904, and .907. RCW 42.17A.555's prohibition on public entities using public funds "to support or oppose a ballot proposition" should be applied consistent with RCW 42.17A.255.

Despite the Act's broad language and liberal construction requirements, the trial court concluded that pre-election litigation is not a form of support or opposition to a ballot measure requiring compliance with the Act. As a result, politically active organizations seeking to oppose a ballot proposition through litigation were relieved from the Act's reporting requirements, avoiding the transparency and accountability that the people insisted upon when they adopted the Fair Campaign Practices Act. The State appeals.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that the defendants did not violate the Fair Campaign Practices Act and dismissing the State's complaint. CP 866-67.
2. The trial court erred when it concluded that filing and litigating a lawsuit to protect economic and proprietary interests by seeking to block a proposed local initiative from the ballot is not "in opposition to any . . . ballot proposition" under RCW 42.17A.255. CP 866.

3. The trial court erred when it concluded that filing and litigating such a lawsuit does not trigger reporting requirements in RCW 42.17A.255. CP 867.

4. The trial court erred when it concluded that the prohibition on use of public facilities, “directly or indirectly,” “for . . . opposition to any ballot proposition” in RCW 42.17A.555 does not apply to filing and litigating such a lawsuit. CP 866-67.

5. Because the State should have prevailed, the trial court erred in awarding attorney fees to the defendants. In any event, the trial court also erred by granting any attorney fees to defendants for work done at the investigation phase under RCW 42.17A.765(5).

III. STATEMENT OF ISSUES

1. Does funding a lawsuit seeking to prevent a public vote on a ballot proposition in order to protect a party’s economic and proprietary interests constitute “opposition to” that ballot proposition requiring disclosure under RCW 42.17A.255?

2. Does a public agency’s use of public funds to finance such a lawsuit to prevent a public vote on a ballot proposition, where the agency would neither oversee the election nor defend the validity of the new law if passed, constitute opposition to that ballot proposition requiring disclosure under RCW 42.17A.555?

3. The trial court awarded the defendants attorney fees and costs associated with the court's dismissal of the State's enforcement case. Should those awards be overturned if this Court reverses the trial court's dismissal?

4. Alternatively, should the fee award to the Port officials and the Chamber be reduced because it included time not authorized under the attorney fee statute?

5. Should the State be awarded attorney fees on appeal under RCW 42.17A.765(5)?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. Campaign finance disclosure requirements in Washington

In 1972, voters in Washington adopted Initiative 276, which was designed in part to give the public complete access to information about who funds initiative campaigns and who seeks to influence the initiative process. The people declared that it would be the "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 [and] (10) [t]hat 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.” I-276 § 1. The people incorporated into the definition of “election campaign,” “any campaign in support of or in opposition to . . . a ballot proposition.” I-276 § 2. By an overwhelming 72 percent,² voters adopted Initiative 276 and required financial disclosure for campaigns, including those related to initiatives, referenda, and ballot measures.

Initiative 276 established broad reporting requirements for anyone supporting or opposing a “ballot proposition.” I-276 §§ 3-14 (establishing reporting requirements). Under the law, independent expenditures made during the same election campaign must be reported once they cross a threshold, currently \$100. RCW 42.17A.255(2).³ 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).

Consistent with article I, section 19 of the Washington Constitution and preexisting common law, the voters also adopted a provision

² See *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 996 (9th Cir. 2010).

³ When the people adopted Initiative 276, this provision was worded differently, but it reflects 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 commission a report” I-276 § 10(1).

prohibiting the use of taxpayer-funded public facilities “directly or indirectly” “for the promotion or opposition to any ballot proposition.” I-276 § 13; RCW 42.17A.555. The people included an exception for activities that are “part of the normal and regular conduct of the office.” *Id.*

The people also defined “ballot proposition” to mean “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 constituency which has been filed with the appropriate election officer of that constituency.” I-276 § 2(2). “Measure” has always been more limited than “ballot proposition” because it does not incorporate proposed initiatives, recalls, and referenda before they are submitted to the voters. RCW 29A.04.091; Laws of 1965, Reg. Sess., ch. 9, § 29.01.110; former RCW 29.01.110 (1972).⁴

In 1975, soon after the adoption of Initiative 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 starting when the proposition is filed before signature-gathering:

⁴ 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, Reg. Sess., ch. 111, § 117.

“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).⁵

2. Local ballot propositions in the City of Tacoma

The City of Tacoma’s initiative process is similar to the State’s initiative process. *See* RCW 29A.72.010-.120. Under Tacoma City Charter section 2.19, the citizens of Tacoma may petition the voters to approve or reject ordinances. Petitioners must first file an initiative petition with the city clerk. Tacoma City Charter, § 2.19(a). The city attorney then reviews the petition and writes a statement of the purpose of the measure phrased in the form of a positive question, which becomes the official ballot title. Tacoma City Charter, § 2.19(b)-(d). The ballot title must be finalized before signature gathering can begin, and signature petitions must include the ballot title, among other things. Tacoma City Charter, § 2.19(g). Proponents have 180 days to gather a sufficient number of signatures. Tacoma City Charter, § 2.19(h). Signature petitions are returned to the city

⁵ 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).

clerk, who forwards them to the County Auditor for signature checking. Tacoma City Charter, § 2.19(h), (j). Based on the auditor's review, the city clerk determines the validity of the petition. Tacoma City Charter, § 2.19(j). If the petition is validated, the city can enact or reject the initiative. *Id.* If the city council rejects the initiative or fails to take action in 30 days, then the city council shall submit the proposal to the people at the next qualifying election. *Id.*

3. Save Tacoma Water's local initiatives and subsequent court action

Save Tacoma Water filed a political committee registration form with the Public Disclosure Commission in February 2016, listing its stated purpose as supporting a ballot proposition in the 2016 general election. CP 293. Save Tacoma Water filed Charter Initiative 5 with the City of Tacoma Clerk on March 7, 2016, and then filed Code Initiative 6 with the Clerk on March 11, 2016. CP 293. Tacoma Code Initiative 6 sought to amend the Tacoma Municipal Code by imposing a requirement that any land use proposal requiring water consumption of one million gallons of water or more daily from Tacoma must be submitted to a public vote. CP 75. Charter Initiative 5 was a companion measure that sought to similarly amend the city charter. CP 76-77. The charter amendment petition indicated on its face that proponents believed the initiative would

serve as a way to “stop the methanol refinery,” a controversial local proposal that has since been cancelled. CP 76-77; Ashley Ahearn, *Will Methanol Be The New Aroma of Tacoma?*, (OPB Feb. 18, 2016; updated Feb. 22, 2016), <http://www.opb.org/news/article/mega-methanol-plant-stirs-controversy-in-tacoma/>.

On June 30, 2016, Save Tacoma Water submitted to the City of Tacoma Clerk its signatures qualifying both initiatives to advance for a vote. CP 293. Meanwhile, Port of Tacoma, the Economic Development Board for Tacoma-Pierce County (EDB), and the Tacoma-Pierce County Chamber (Chamber) brought a declaratory judgment action in Pierce County Superior Court against the City of Tacoma on June 6, 2016, months after the initiatives were initially filed with the city clerk. CP 48-74, 294. The complaint explained that the Port’s mission is to foster economic development in Tacoma, and it enters into leases with industrial entities that use more than one million gallons of water per day. CP 52-53. The Port claimed that the initiatives, if adopted, would interfere with its program to provide water service to its industrial and commercial users. CP 53. The EDB explained that its mission is to retain, expand, and recruit primary company jobs in Tacoma-Pierce County and it engages in advocacy to accomplish these goals. CP 53. The EDB and its member investors would have “suffer[ed] economic impact and injury” had the

initiatives become law. CP 54; *see also* CP 71. The Chamber similarly claimed that as an economic advocate, it strives to achieve exceptional business and community growth and promotes efforts to attract businesses that use more than one million gallons of water per day. CP 54-55, 71. The Chamber claimed it would be adversely affected by the initiatives. CP 55, 71. All three entities, therefore, explained that their interest in the lawsuit was that the initiatives would threaten or harm their economic or proprietary interests, or those of their members, including impacting pending real estate and construction projects or their ability to enter or obtain new real estate and construction deals. CP 52-55, 71-72.

The lawsuit sought to (1) declare that Charter Initiative 5 and Code Initiative 6 exceeded the proper scope of local initiative powers and were therefore invalid, (2) enjoin the initiatives' signatures from being validated, and (3) enjoin the initiatives from being placed on the November 2016 ballot, or adopted by the City of Tacoma. CP 73. The Pierce County Superior Court enjoined placement of Charter Initiative 5 and Code Initiative 6 on the ballot on the grounds that the measures exceeded the local initiative power and were invalid. CP 85-86. Save Tacoma Water appealed and the matter is currently pending before this Court. *Port of Tacoma v. Save Tacoma Water*, No. 49263-6-II.

4. Arthur West's citizen action notice against the defendants

Prior to the trial court's decision invalidating the local initiatives, Arthur West filed a citizen action notice under RCW 42.17A.765(4). West claimed that the Chamber and EDB violated state law by operating as a political committee without filing required disclosure reports with the PDC. CP 308-12. His complaint also alleged that the Port officials improperly spent public resources on campaign activity in violation of RCW 42.17A.555. CP 311-12.

After receiving the notice, the Attorney General's Office asked PDC staff to review and possibly investigate West's allegations. CP 583. The PDC staff reviewed the allegations and recommended to the Commission that action be taken against EDB and the Chamber for failure to report independent expenditures to oppose a ballot proposition under RCW 42.17A.255, but that no action be taken against the Port. CP 643. The Commission returned the matter to the Attorney General "with no recommendation for legal action," instead of affirmatively stating "a recommendation that the Attorney General not file an action." *Compare* CP 450-52 with https://www.pdc.wa.gov/sites/default/files/compliance_case_files/City%20of%20Olympia%20-%20AGO%20Letter%20Case%208341.pdf. The Commission did not dispute the results of the

PDC staff investigation, but instead expressed an intent to engage in “rule making to provide clearer guidance to the regulated community and the public regarding what actions constitute activity reportable under RCW 42.17A for ballot propositions, as they are being considered for placement on the ballot and at each stage thereafter.” CP 452.

B. Procedural History

The Attorney General’s Office exercised its independent discretion and authority under RCW 42.17A.765(1) to file a lawsuit on behalf of the State of Washington in Pierce County Superior Court seeking civil penalties and injunctive relief against the Port officials, the EDB, and the Chamber under RCW 42.17A. CP 1-6. The State alleged that the EDB and the Chamber failed to file reports with the PDC disclosing as independent expenditures the value of legal fees paid to their attorneys for the lawsuit to remove the local ballot propositions from the ballot. CP 4-5. The State further alleged that the Port officials violated RCW 42.17A by authorizing the use of public facilities, including payment of legal fees for the same lawsuit. CP 5. The State contended that these expenses and payments constituted opposition activity under RCW 42.17A. CP 4-5.

The EDB, the Chamber, and the Port officials filed motions to dismiss the State’s action. CP 7-38, 162-96. The EDB and the Chamber argued that filing a lawsuit is not a form of activity subject to the statute’s

disclosure requirements; if litigation fees were a form of reportable expenditures under the statute, the statute would violate the First Amendment; and the Court should interpret the statute narrowly to avoid the alleged constitutional problem. CP 7-38. In a separate motion, the Port officials argued that RCW 42.17A.555 did not apply to litigation activities; RCW 42.17A did not apply to local ballot propositions; and the Port officials' conduct fell within the statutory safe harbors for normal and regular agency activities and for "action taken at an open public meeting . . . to express a collective decision," under RCW 42.17A.555. CP 162-96.

The State opposed the motions, arguing that local ballot propositions are expressly subject to the provisions of RCW 42.17A; opposition to a ballot proposition is subject to independent expenditure reporting duties and the restrictions on use of public facilities under RCW 42.17A; public funds spent on litigation fees are a form of public facilities under the statute; exceptions to the prohibition on using public facilities for opposition to a ballot proposition are to be narrowly construed and no exception applies to the Port officials' conduct here; and the statutory statement of purpose calls for liberal construction to achieve "complete disclosure of all information respecting the financing of political campaigns' so as to 'assure continuing public confidence of fairness of elections.'" RCW 42.17A.001. CP 453-79.

The trial court declined to reach the EDB's and the Chamber's constitutional arguments and resolved the motions on statutory construction. Dec. 14, 2016, VRP 99-101. The trial court dismissed the State's enforcement action and awarded \$121,484.32 in attorney fees and costs to the defendants by separate order. CP 865-67, 868-94. The State timely appealed both orders. CP 895-905.

V. ARGUMENT

A. Standard of Review

This Court reviews issues of statutory construction like this one *de novo*. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). In construing a statute, the court's 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) (internal quotation marks omitted). "The meaning of words in a statute is not gleaned from those 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).

B. Where Opponents of a Local Ballot Proposition Expend Legal Fees to Prevent the Local Initiative From Reaching the Ballot, Those Expenditures Must Be Publicly Disclosed in Reports to the PDC

1. The fullest disclosure of independent expenditures is the public policy of the State, and the people and the Legislature have provided that campaign disclosure laws must be liberally construed

“[A]n enacted statement of legislative purpose is included in a plain reading of a statute.” *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010). When adopting Initiative 276, the people declared the public policy of the State of Washington to be that political campaign and lobbying contributions and expenditures “be fully disclosed to the public” and that the public has a “right to know of the financing of political campaigns.” RCW 42.17A.001(1), (10) (I-276 § 1(1), (10)); RCW 42.17A.005(17) (I-276 § 2(11)) (expressly defining “election campaign” to include support of or opposition to a ballot proposition). The people also provided that the campaign finance statutes “shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns . . . so as to assure continuing public confidence of fairness of elections and governmental processes, and . . . that the public interest will be fully

protected.” RCW 42.17A.001 (Declaration of Policy), .904, .907. Any analysis of disclosure provisions and definitions must occur in the context of the strong statement of the people’s intent and the liberal construction requirements.

2. The Fair Campaign Practices Act requires reporting of independent expenditures to oppose a ballot proposition, including legal fees

Organizations such as the EDB and the Chamber must timely file reports of their “independent expenditures” that exceed \$100. RCW 42.17A.255. “For purposes of this section,” “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” RCW 42.17A.255(1) (emphasis added). The people and the legislature did not say that an “independent expenditure” under this section must be related to communications with voters.

The Port officials, EDB, and the Chamber have not denied their expenditures on litigation were intended to prevent a public vote on Save Tacoma Water’s ballot propositions. They acknowledged that they brought the lawsuit because their economic and proprietary interests, and those of their members, including their interest in protecting pending construction and real estate projects, would be harmed if the initiative were adopted. CP 52-55, 71. Instead, they disputed that their expenditures

on the litigation were “opposition to” a ballot proposition within the meaning of that term under RCW 42.17A. But under the plain and ordinary meaning of the term “opposition,” their conduct was the ultimate act of opposition to the ballot propositions, namely, blocking the initiatives from passing by removing them from a public vote.

While the people and the legislature have not defined the term “opposition” in the statute, the Court should begin its analysis “with the plain meaning of the term.” *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36-37, 357 P.3d 625 (2015) (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). “Dictionaries are an appropriate source of plain meaning when the ordinary definition furthers the statute’s purpose.” *Gorre*, 184 Wn.2d at 37 (citing *State v. Veliz*, 176 Wn.2d 849, 854, 298 P.3d 75 (2013)). The dictionary definition of “opposition” includes: “hostile or contrary action or condition : action designed to constitute a barrier or check[.]” Webster’s Third New International Dictionary 1583 (2002). There can be little debate that the defendants’ legal action, which successfully blocked a public vote on proposed local initiatives that they claimed would harm their economic and proprietary interests and those of their members, was a form of opposition to the Save Tacoma Water ballot propositions in the common sense of the word.

The defendants argued below that “opposition” had to be in the form of “electioneering,” advertising, or communications with voters to influence them to vote against the initiatives in order for the reporting requirement to apply. *E.g.*, CP 15-17, 26, 175-78. But the plain language of RCW 42.17A.255 is not so limited. Where the legislature has intended to discuss “electioneering” or “advertising,” within RCW 42.17A, it has used those more limited words, and there is a separate reporting requirement for payments for electioneering communications. *E.g.*, RCW 42.17A.005(19) (defining electioneering), (36) (defining political advertising), .305, .335. The law also clearly sets out required reporting for “political advertising” separately, including mail and voice communication with voters in the form of brochures and letters. RCW 42.17A.260, RCW 42.17A.005(36) (defining political advertising to include various forms of communications with voters or potential supporters or opponents). While the people or the Legislature could have used these more limited terms to describe when independent expenditures must be reported under RCW 42.17A.255, they have not done so, opting instead to address “independent expenditures” separately and in broader terms: “*any* expenditure that is made *in support of or in opposition to* any . . . ballot proposition.” RCW 42.17A.005(17) (emphasis added).

The defendants also asserted that the entire Act applies only in the context of election campaigns, meaning campaigns to influence voters, and its requirements were not intended to apply to expenditures for litigation. CP 667. The sentence imposing the reporting requirement for independent expenditures in RCW 42.17A.255(1) does not use the word “campaign.” Defendants must rely on RCW 42.17A.255(2), which refers to independent expenditures made “during the same election campaign,” and “election campaign” is defined to include “any campaign in support of or in opposition to a . . . ballot proposition.” RCW 42.17A.005(17).

Even so, neither the people, nor the Legislature indicated that they intended to exclude from the broad concept of “campaign,” litigation about whether voters will have a chance to vote on a proposed initiative. As discussed in more detail below, supporters and opponents start their campaigns to support or oppose a ballot proposition when the initiative is first submitted to the filing official; their efforts then extend through the establishment of the ballot title (which is often litigated), the gathering of signatures, the establishment of whether the proposition will appear on the ballot, and through the resulting election.

When an opponent litigates to remove what they perceive to be a harmful initiative from the ballot, that is a tactic for achieving the political goal that they seek, whether they are ultimately successful or not. This is

especially true where litigation is now a common method for opponents of initiatives and referenda to attempt to block their adoption. *E.g.*, *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015) (litigation brought by two county election officials *and* opponents over whether a statewide initiative could be placed on the ballot); *Filo Foods, LLC v. City of SeaTac*, 179 Wn. App. 401, 319 P.3d 817 (2014) (litigation over whether a local minimum wage initiative received enough valid signatures to qualify for the ballot). Expenditures on litigation, including cases to determine the appropriate ballot language or whether a proposition goes on the ballot, can cost tens of thousands of dollars.⁶ To read the statute as the trial court did—that the litigation activity here was not support or opposition—undermines the plain purpose of the statute, which is to give the public access to information about who is bankrolling such efforts. RCW 42.17A.001. The incontestable purpose of such litigation efforts, when brought by opponents of a ballot proposition, is to prevent it from being enacted into law.

⁶ See <http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=U0VBVEdKIDEwNA%3D%3D%3D%3D&year=2013&type=single> (legal services costs spent on local initiative litigation prior to election for Yes! For SeaTac committee support of \$15 minimum wage local initiative).

3. A longstanding, publicly available Public Disclosure Commission Declaratory Ruling and Interpretation apply the statutes to require reporting of legal fees incurred to support or oppose a local ballot proposition

Reading “opposition” to include litigation is consistent with a longstanding PDC ruling and a longstanding PDC interpretation that were available to the defendants on the PDC website. PDC Declaratory Ruling No. 6 (1989), https://www.pdc.wa.gov/sites/default/files/laws-rules-cases/DECL_6.pdf (Attachment A); PDC Interpretation No. 91-02 (June 25, 1991).

First, unsuccessful recall petitioners sought a PDC ruling on whether they had to report expenditures made solely for legal fees expended trying to get the recall on the ballot. Attachment A at 1-2. Under the statutory recall process, a person desiring to recall a state or local elected official must first file recall charges with the appropriate election officer. RCW 29A.56.110, .120. The prosecutor or the Attorney General then drafts a ballot synopsis and a superior court must find the charges sufficient before signatures can be gathered. RCW 29A.56.130, .140. If sufficient signatures are gathered, then the recall proposition appears on the ballot. RCW 29A.56.210.

The PDC explained that where a recall petition has been filed, there may be a lengthy process of judicial review “and it may be true that

during that initial review process, one would not expect to see any political campaigning in the traditional sense; that is, rather than expending money upon advertising, signs, consultants, etc. during this initial process, the supporters of a recall would be most likely to expend monies only for legal fees.” Attach. A at 3. Even so, the PDC reasoned that the “basic purpose of the [statute] is to permit interested citizens to ascertain the source and amount of financial support provided to support or oppose candidates or ballot issues.” *Id.* “[T]he disclosure of the early money in a campaign may be the most significant and important because it provides . . . who most strongly support a particular position.” *Id.* Thus, the PDC ruled that “[w]hatever arguments can be generated regarding the reasonableness of reporting legal fees, we do not see any room for interpretation.” *Id.* When the petitioners filed the recall petition, the matter became a ballot proposition and the statute’s requirement to report independent expenditures, including attorney fees, arose. *Id.* at 3-4. This was true even though the court found the petition to be insufficient and the recall proposition never made it to the ballot. *Id.* at 2.

In a later PDC interpretation, also available to the defendants on the PDC’s website, the PDC reiterated this principle, rejecting the notion that legal fees cannot be reportable: “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 42.17A.” PDC Interpretation No. 91-02 (June 25, 1991), *Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot*, <https://www.pdc.wa.gov/learn/index-of-interpretations-by-subject/legal-fees-related-placing-or-not-placing-proposition-ballot>. The same interpretation distinguished an agency’s expenditures “to defend its official actions related to whether or not a measure should be placed on a ballot or [to defend] the wording of a ballot title are not reportable as campaign expenditures.” *Id.* (emphasis added). Because an agency tasked with accepting an initiative petition, drafting a ballot title, or administering an election must defend its own actions in court, a city or county’s defense action is not treated as a reportable form of support or opposition under the PDC ruling. *See id.* This same reasoning would apply should a city or county, as agencies that must administer the process, want to seek a judicial ruling as to whether to place a ballot proposition on the ballot. Thus, for example, the City of Tacoma (as the entity that must accept the filing and decide whether to adopt the petition or direct that it be placed on the ballot) and Pierce County (as the entity charged with running the election) could litigate whether an initiative should appear on the ballot without a reporting requirement for the legal fees.

Consequently, the PDC for decades has rejected the notion that the Act cannot apply to expenditures for litigation in support of or in opposition to a ballot proposition. Courts should give an “agency’s interpretation of the law great weight where the statute is within the agency’s special expertise.” *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015).

In sum, it furthers the people’s and the Legislature’s purpose to give the term “opposition” its common meaning, which includes litigation efforts as reportable opposition activity. Preventing the local ballot propositions from even appearing on the ballot achieved the same ends as a more traditional electoral appeal to voters to reject the legislation. As RCW 42.17A’s statutory declaration of purpose and its liberal construction provisions make clear, the campaign finance law should be broadly construed to ensure transparency on the part of parties who expend any funds in support of or opposition to a ballot proposition. Reading the term “opposition” to include litigation is consistent with RCW 42.17A’s goals of transparency and accountability for parties seeking to influence whether a ballot proposition is ultimately adopted.

Support for and opposition to local ballot propositions are generally subject to RCW 42.17A’s reporting requirements, and the same should hold whether the reportable activity takes the form of traditional

electioneering communications or political advertising, or as in this case, payment of litigation costs in an action to enjoin a public vote. Each of these reportable activities is calculated to influence the outcome of an election in favor of the point of view of the reporting entity. In this case, the fact that the defendants' underlying lawsuit prevented even holding the election in the first place only shows the appeal of litigation as a tactic for preventing proposed legislation from becoming law. Having successfully prevented a public vote on the ballot propositions, they can hardly question now that their legal challenge was a form of "opposition" in the commonly understood meaning of the term.

4. The term "Ballot Proposition" includes local ballot propositions when they are initially filed and before signature gathering

The defendants argued alternatively below that the local initiatives at issue here did not meet the definition of "ballot proposition," and thus, RCW 42.17A's provisions related to ballot propositions were not triggered. CP 682-86. They are incorrect.

The defendants argue that a local proposition must be a "measure" submitted to voters in order to meet the definition of "ballot proposition," but that defies the plain language of the statute. CP 682-83. The legislature specifically amended RCW 42.17A to include *local* ballot propositions within its definition of ballot propositions.

In pertinent part, the definition of a ballot proposition includes:

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

RCW 42.17A.005(4) (emphasis added). In 1975, the legislature adopted the reference to municipal corporations and political subdivisions to make it clear that local ballot provisions are included. Laws of 1975, 1st Ex. Sess., ch. 294, § 2(2). The plain language of the statutory definition also goes beyond “measures” appearing on the ballot to also include “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[.]” RCW 42.17A.005(4) (emphasis added). If the people and the Legislature intended local initiative propositions to qualify *only* if they were “measures,” the reference to local propositions in the sentence regarding propositions “proposed to be submitted to the voters” would have no meaning. RCW 42.17A.005(4) (emphasis added). The defendants’ interpretation defies the plain language of the statute.

The bill analysis prepared by staff of the House of Representatives when the definition of “ballot proposition” was amended is also helpful. The Supreme Court has looked to such sources to ascertain the legislative

intent behind the passage of statutory amendments. *See State v. Medina*, 180 Wn.2d 282, 291, 324 P.3d 682 (2014) (quoting from a 2009 bill report to show the Legislature’s intent behind the 2009 amendment to the law); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 727, 153 P.3d 846 (2007) (“Useful legislative history materials may include bill reports.”); *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992) (quoting from a Final Legislative Report to ascertain legislative intent).

The bill analysis explains the problem the Legislature intended to solve:

Problem No. 1 *Present language is unclear regarding the voting constituencies to which a measure must be proposed to be submitted to be considered a “ballot proposition” and the time frame during which a proposal becomes such a “ballot proposition”.* This causes confusion as to when reporting obligations are incurred by committees supporting or opposing such measures.

Solution *The bill clarifies that “ballot proposition” includes measures which are proposed to be submitted to the voters of the state or any municipal corporation, political subdivision or other voting constituency from and after the initial filing date but prior to circulation for signatures on petitions to place such measures on the ballot.*

H.B. Analysis of Substitute H.B. 827, at 1, 44th Leg., 1st Ex. Sess. (Wash. Mar. 24, 1975) (emphases added).

This bill analysis during the first years after enacting I-276 reflects that confusion existed about the scope of the definition of the term “ballot proposition” just after the original adoption of Initiative 276. The intent of the Legislature in amending the definition of “ballot proposition” was to clarify that, in fact, the definition (1) included all local ballot propositions and (2) included all propositions as soon as they are proposed and filed with the appropriate election officer. The bill analysis language reflects that the Legislature also intended to incorporate propositions “prior to circulation for signatures on petitions.” H.B. Analysis of Substitute H.B. 827, at 1.

In light of the plain language and the legislative history, this Court should conclude that the local ballot propositions at issue here were “initiative[s] . . . proposed to be submitted to the voters of . . . [a] municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition [was] initially filed with the appropriate election officer of that constituency before its circulation for signatures.” RCW 42.17A.005(4). There is no dispute that at the time the defendants filed their complaint, both initiatives had been initially filed with the city clerk, the city attorney had created a ballot title, and the

initiatives were circulating for signatures.⁷ CP 293, Tacoma City Charter, § 2.19. Thus, the initiatives became ballot propositions under RCW 42.17A well before the defendants brought their lawsuit. This application is consistent with the overall context and purpose of the statute—to accomplish full and complete public disclosure so the public understands who is supporting or opposing propositions. RCW 42.17A.001. It is also consistent with the statute’s liberal construction requirements. RCW 42.17A.001, .904, .907.⁸

This reading is also consistent with the Public Disclosure Commission’s declaratory ruling that a petition became a “ballot proposition” “from and after the time when the proposition has been initially filed with the appropriate election officer.” Attach. A at 3. The Commission emphasized that this definition of “ballot proposition” fulfilled the purpose of identifying the parties spending early money—

⁷ Additionally, prior to the trial court’s decision, local initiative proponents had submitted signatures necessary to qualify the initiatives for the ballot. CP 293, 900.

⁸ The Port argued below that the Tacoma City Clerk is not an “election officer” and therefore the definition of “ballot proposition” was not satisfied upon filing. CP 681-83. But the City Clerk did act as the “election officer” as contemplated under the statute by serving as the filing officer, obtaining a ballot title for the initiatives in advance of signature gathering, and then by accepting the signed petitions. Tacoma City Charter, § 2.19. To decide otherwise would allow municipalities and political subdivisions to opt out of the application of RCW 42.17A’s requirements for ballot propositions before they are placed on the ballot. They could do so simply by doing what the Port claims happened here—drafting their initiative process to require filing with someone other than the county auditor. That would be contrary to the Legislature’s plain intent to incorporate local propositions within RCW 42.17A’s requirements at the early, pre-signature stages of the initiative process.

including money on legal fees—to support or oppose a ballot propositions.
Attach. A at 3.

The more limited application that the defendants suggest, allowing local ballot propositions to be covered only when they become “measures” placed on the ballot, would not only exclude disclosure of money spent on litigation to block an initiative from reaching the ballot, but it would also exclude who is funding the signature-gathering phase at the local level. In that case, the public would not have information about significant resources received and expended in local signature-gathering campaigns. For example, the Seattle Districts Now committee raised over \$57,000 just in the first few weeks of their campaign⁹ and ultimately raised and spent \$130,162.96 for signature gathering in 2013 at the local level.¹⁰ Hiding this early money from voters would create a significant loophole in the law.

Instead, the people and the Legislature intended full and complete public disclosure of expenditures related to ballot propositions, including during the time before a proposition appears on the ballot. This Court

⁹ See http://web.pdc.wa.gov/qviewreports/results.aspx?rpt=http://hera.pdc.wa.gov/AppXtender/ISubmitQuery.aspx?DataSource=IMAGE&AppName=PDC&FILER+NAME=SEATTLE+DISTRICTS+NOW+SPONSORED+BY+FAYE+GARNEAU*&ELECTION+YEAR=2013 (first summary report of funds raised and spent).

¹⁰ See <http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=U0VBVEROIDEwOQ%3D%3D%3D%3D&year=2013&type=single> (signature-gathering expenditures paid).

should read the entire statute, including its purpose and liberal construction sections, consistent with the people's and the Legislature's intent. That each ballot proposition at issue here was never ultimately placed on the ballot does not affect the reporting obligation. Attach. A at 2-4.

In sum, the defendants, unlike the public agencies responsible for a role in the initiative process, chose to challenge the local ballot propositions to protect their economic and proprietary interests. By pursuing their legal action in opposition to the citizens' efforts to place the ballot propositions before the voters, the defendants opposed the ballot propositions and they were obligated to report their legal fees expended to accomplish that goal.

5. The statute's disclosure requirements do not violate the Economic Development Board's and the Chamber's First Amendment rights¹¹

The EDB and the Chamber claim that imposing RCW 42.17A.255's disclosure requirement upon them violates their First Amendment rights, and the statute is unconstitutionally vague when applied to litigation expenditures. CP 19-25. They are wrong. The reporting requirement does not prevent the EDB and the Chamber from

¹¹ The Port officials do not raise a constitutional argument. CP 162-96. This makes sense because the State is entitled to control the conduct of its subdivisions through legislation.

bringing a legal action at issue here—it simply requires that they report the value of their litigation expenditures for an action supporting or opposing a ballot proposition. The reporting requirement does not significantly chill the Chamber or EDB’s ability to bring pre-election legal challenges. *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1003 (9th Cir. 2010) (disclosure viewed as the least restrictive manner of curbing evils).

In the electoral context, the United States Supreme Court has drawn a significant distinction between restrictions on speech and disclosure requirements. *E.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). A campaign finance law’s disclosure requirements are reviewed under less stringent “exacting scrutiny,” rather than strict scrutiny. *See, e.g.*, *Human Life of Wash. Inc.*, 624 F.3d at 1005 (disclosure requirements are subject to the “less demanding standard of review of exacting scrutiny” (describing *Reed*, 561 U.S. at 196)); *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007) (“disclosure regulations must survive ‘exacting scrutiny’”); *Family PAC v. McKenna*, 685 F.3d 800, 805-06 (9th Cir. 2011) (same). For a campaign disclosure law to survive exacting scrutiny, there must only be “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Reed*, 561 U.S. at 196 (internal quotation marks omitted).

The Washington Supreme Court and the Ninth Circuit have long recognized the important governmental interest in requiring transparency for expenditures related to candidates and ballot propositions. The right to free speech “includes the ‘fundamental counterpart’ of the right to receive information.” *Voters Educ. Comm.*, 161 Wn.2d at 483; *see also Fritz v. Gorton*, 83 Wn.2d 275, 296-97, 517 P.2d 911 (1974) (upholding the constitutionality of various other aspects of Initiative 276). “The constitutional safeguards which shield and protect the communicator, perhaps more importantly also assure the public the right to *receive* information in an open society.” *Fritz*, 83 Wn.2d at 297; *Voters Educ. Comm.*, 161 Wn.2d at 481-83. Disclosure laws inherently “seek[] to enlarge the information based upon which the electorate makes its decisions.” *Fritz*, 83 Wn.2d at 298. Similarly, the Ninth Circuit has explained that “by revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention.” *Human Life of Wash. Inc.*, 624 F.3d at 1005.

This interest in the public’s right to receive information is not limited to who is financing communications with voters as defendants have suggested. This interest also exists, for example, in the lobbying

context, where there is also an important government interest in giving the public information about who is wielding power in other ways. *See id.* at 1006-07 (emphasizing the importance of disclosure requirements in the lobbying context). In that context, the disclosed information is not about communication to voters, but about who is attempting to influence the development of the law, yet the State's interest is equally important. *Id.* “[T]hese considerations apply just as forcefully, if not more so, for voter-decided ballot measures . . . where voters are responsible for taking positions on some of the day’s most contentious . . . issues, [and where] voters act as legislators, while interest groups . . . advocat[e] a measure’s defeat or passage act as lobbyists.” *Id.* at 1006 (internal quotation marks omitted); *see also 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.”).

The need for transparency is evident at every stage of the initiative process, starting when a ballot proposition is first filed with the state or local election official, during any controversy about whether a proposition qualifies for the ballot or what exactly the ballot should say, as well as any time when interest groups are advocating that voters support or oppose a

ballot proposition. See RCW 42.17A.005(4). Voters are entitled to information about an initiative’s supporters and opponents because, “[i]f nothing else, knowing who backs or opposes a given initiative will give voters a pretty good idea of who stands to benefit from the legislation.” *Human Life of Wash. Inc.*, 624 F.3d at 1007 (internal quotation marks omitted). The public’s interest in full disclosure in the ballot initiative context only amplifies as “‘more and more money is poured into ballot measures nationwide.’” *Id.* (quoting the District Court) (explaining that in Washington there were more than \$12 million in expenditures for ballot measures in 2006, and as of 2010, expenditures for and against a single ballot measure had reached \$15.5 million).

The ever-increasing amount of money spent to support or oppose a ballot proposition explains why the battle has shifted to the courtroom.¹² Litigation is a comparatively inexpensive way to prevent a ballot proposition from ever taking effect. *E.g.*, *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015) (litigation brought in part by opponents over whether a statewide initiative could be placed on the ballot); *Filo Foods, LLC v. City of SeaTac*, 179 Wn. App. 401, 319 P.3d 817 (2014) (litigation over

¹² See <http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=U0VBVEdKIDewNA%3D%3D%3D%3D&year=2013&type=single> (legal services expenditures of \$74,530.07 for Yes! For SeaTac ballot challenge prior to November 2013 general election).

whether a local minimum wage initiative received enough valid signatures to qualify for the ballot). Whether the litigants are successful or not, the State has an interest in disclosing to the public information about who is wielding money and power to influence whether a ballot proposition will ultimately be adopted. The public has a right to know who is expending sometimes considerable resources to promote or block a proposition.

Washington's disclosure requirements are "substantially related" to these important interests. *See Reed*, 561 U.S. at 196; *Voters Educ. Comm.*, 161 Wn.2d at 482-83. Washington's disclosure law puts no substantial burden on the EDB and Chamber's rights. *See Marchioro v. Chaney*, 90 Wn.2d 298, 309, 582 P.2d 487 (1978); *see also* WAC 390-16-060 (establishing a single form that can be filed electronically for disclosing independent expenditures). The purpose of disclosure is not to hinder political activity or chill political association, but to ensure that the public has "the facts they need to evaluate the various messages competing for their attention." *Human Life of Wash. Inc.*, 624 F.3d at 1005.

Similarly, having to file independent expenditure disclosure reports does not prevent the EDB and Chamber from bringing legal actions. *Contrast Nat'l Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 422-24, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (stricken statute would have prevented the NAACP and its attorneys from

representing clients in Virginia). While there have been prior cases that held that the application of *contribution limits* effectively prevented litigation because the legal costs would exceed the maximum allowed expenditure, there is no contribution limit at issue here—just a reporting requirement. *See Farris v. Seabrook*, 677 F.3d 858, 862 (9th Cir. 2012) (invalidating a contribution limit on the amount of independent expenditures supporting or opposing a recall petition and because the cap was reached, further expenditures were prohibited.) Nor does disclosure prevent the EDB and the Chamber from speaking or politically associating with others. After-the-fact reporting is far less burdensome than an outright prohibition on speech or litigation activity. *Permanent Offense*, 136 Wn. App. at 285; *see also Human Life of Wash. Inc.*, 624 F.3d at 1003 (noting that disclosure requirements appear to be the least restrictive means of curbing the evils of campaign ignorance). The reporting requirement for independent expenditures imposes only a minimal disclosure burden on the EDB and the Chamber that is narrowly targeted at making public expenditures to support or oppose a ballot proposition in court, without preventing either of them from bringing any case or making any argument.

In sum, the requirement that the EDB and the Chamber report the value of legal services expended to support the placement of a ballot

proposition on the ballot is substantially related to the government's important interest in ensuring that the public receive such information.

6. The terms “oppose” or “opposition” are sufficiently clear to survive a vagueness challenge

In addition, the defendants argue that the phrase “support of or opposition to” in RCW 42.17A.255 is unconstitutionally vague. This argument also fails. The plain and ordinary meaning of “opposition” or “oppose” is not so mysterious to the person of common intelligence that they cannot discern its meaning, and the term does not lead to arbitrary enforcement.

State and federal courts have repeatedly rejected vagueness challenges like the one the EDB and the Chamber made below. “A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement.” *Human Life of Wash. Inc.*, 624 F.3d at 1019 (internal quotation marks omitted). The constitution does not, however, require perfect clarity, even when a law regulates speech. *Id.* In developing and enforcing campaign finance laws, the State is not required to limit itself to rigid rules that allow no discretion at all. As the United States Supreme Court explains, even where a law's “standards are undoubtedly flexible, and the officials implementing them will exercise

considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (“Condemned to the use of words, we can never expect mathematical certainty from our language.”)). Instead, to be void for vagueness, a law must be “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 (internal quotation marks omitted). “If persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.” *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

Notably, in *Voters Education Committee*, the Washington Supreme Court concluded that the phrase “in support of, or opposition to, any candidate” was not unconstitutionally vague, albeit when applied to an advertisement that questioned the performance of a candidate without advocating that voters vote for her opponent. *Voters Educ. Comm.*, 161 Wn.2d at 490-91. Even so, the Court did not find these words particularly troubling even when their application was fine-tuned according to particular statements made in a particular advertisement. *Id.*

Application of “opposition to” is much simpler in this context. Where a party’s stated economic and proprietary interests and those of its members will be harmed by a ballot proposition, and the party engages in litigation for the express purpose of keeping the ballot proposition off the ballot, is that “opposition to” the ballot proposition? Especially considering the clear purpose of the Act to maximize public information, application of “support of” or “opposition to” is no more vague in this circumstance than it was in the *Voters Education Committee* case. *Id.*; see also *Human Life of Wash. Inc.*, 624 F3d at 1021 (considering the law’s clear purpose).

C. RCW 42.17A.555 Prohibited the Port From Filing a Lawsuit to Prevent a Public Vote on the Save Tacoma Water Ballot Propositions and the Port Could Not Use Its Public Funds to Support or Oppose the Ballot Propositions

State law prohibits the use of taxpayer money or taxpayer resources to support or oppose ballot propositions. Public agency officials, such as the Port officials, are generally forbidden to “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. The Port claims that two statutory exceptions apply here: “Activities which are part of the normal and regular conduct of the office or agency” or “[a]n action taken at an open public meeting . . .

by an elected . . . commission of a special purpose district including . . . 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 certain public notice requirements are met. RCW 42.17A.555(1), (3).

The parties do not dispute that the Port officials used public funds to fund a lawsuit to keep the ballot propositions from a public vote, nor can they reasonably dispute that public funds are “public . . . facilities” under RCW 42.17A.555. Dec. 14, 2016, VRP at 99 (The trial judge explained that it would make no sense to say that physical facilities cannot be used, but funds could.). For the reasons explained above in section V.B., where a public entity seeks to protect its own financial and proprietary interests (as an employer and landowner, for example) by participating in litigation to keep a filed local initiative off the ballot, public funds spent on that litigation are in “opposition to” a “ballot proposition.” RCW 42.17A.555’s prohibition applies to the Port officials’ expenditures of public funds on the litigation.

The Port officials’ arguments regarding RCW 42.17A.555’s exceptions also fail. First, RCW 42.17A.555’s prohibitions are to be construed “strictly” and its exceptions “narrowly.” Op. Att’y Gen. 1 (2006), at 5. This construction requirement is in accord with

RCW 42.17A's additional declarations of policy: "[t]hat public confidence in government at all levels is essential and must be promoted by all possible means" and that that the chapter's provisions are to be "liberally construed" so as to achieve "public confidence in fairness of elections and governmental processes." RCW 42.17A.001. Thus, the Port officials were on notice that their obligations under RCW 42.17A.555 are strict and the exceptions narrow.

The Public Disclosure Commission has further defined the "normal and regular" conduct referenced in RCW 42.17A.555:

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 (emphases added).

The Port officials have not pointed to a provision specifically authorizing them to use public funds to challenge a ballot proposition. *See Herbert v. Wash. State Pub. Disclosure Comm'n*, 136 Wn. App. 249, 256, 148 P.3d 1102 (2006) (noting absence of constitutional, charter, or statutory provisions separately authorizing the use of school district email

to promote a ballot measure). Moreover, participation in the lawsuit to block the initiatives from the ballot was not “usual” as described above because it was an extraordinary action, outside of the Port’s normal litigation practice. The trial court stated in its oral ruling that, “filing lawsuits about initiatives *is not part of the normal conduct of the Port*. This is the first time they’ve done it,” even though the judge later noted the initiative’s impact on the Port and its tenants made the proposition “within the zone of their interest.” Dec. 14, 2016 VRP 100 (emphasis added). The record does not support reversing this finding. The Port officials failed to identify any case in which they had previously brought pre-election litigation related to any ballot proposition.

The Port officials rely instead on their general litigation history. But adopting the Port officials’ reasoning would mean that any prior engagement in activity that is generally of the same character (legislating generally, litigating generally, etc.) would trigger the exception. That is not how the Washington Supreme Court has approached the exception. Instead, when analyzing whether an endorsement was “normal,” it noted that the council at issue “had passed similar motions on numerous occasions,” as had other local legislative bodies. *King County Council v. Pub. Disclosure Comm’n*, 93 Wn.2d 559, 562, 611 P.2d 1227 (1980); *see also Herbert*, 136 Wn. App. At 256-57 (no evidence that schools or school

districts used school emails to do a similar thing—distribute political materials). This court should approach the instant case the same way: has the Port engaged in *similar* litigation? As the trial court stated, the answer to that question is “no.” To apply the exception more broadly to incorporate any litigation advancing the Port’s interests would be contrary to the plain language of the statute and its underlying public policy.

Finally, RCW 42.17A.555’s exception for a vote in a public meeting applies only to the extent that the legislative body votes to endorse or oppose a ballot proposition. RCW 42.17A.555(1). By its plain language, the exception does not extend beyond expending the limited public resources needed to address an issue at an open public meeting of the Port Commission. RCW 42.17A.555(1) (“an action taken at an open public meeting” . . . to express a collective decision, or to actually vote . . .). This exception, which should be interpreted narrowly, does not provide for additional commission action outside of acting in an open public meeting. *Id.* Thus, neither of the exceptions apply.

This Court should therefore reverse the trial court’s decision to dismiss the State’s complaint. RCW 42.17A.255 and .555 apply to the expenditures on legal fees at issue here, application of RCW 42.17A.255 to the EDB and the Chamber does not violate the First Amendment, and none of the exceptions to RCW 42.17A.555 apply.

D. The Court Should Reverse the Award of Attorney Fees and Costs to the Defendants; Alternatively, the Trial Court's Award of Fees for Time Spent on the Investigation Should Be Overturned Because It Is Contrary to the Plain Language of the Statute

For the reasons argued above, the Court should reverse the trial court's decision to dismiss the State's complaint. In the event the State prevails on appeal, the award of fees and costs to the defendants should also be reversed.

Even if the Court were to affirm the trial court's dismissal, this Court should still modify the fees awarded to the Port officials and the Chamber. The recovery of attorney fees and costs in Washington is limited by Washington's version of the "American Rule" to those instances where by contract, statute, or on equitable grounds, the right exists. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). Whether a party is entitled to an award of attorney fees "is a question of law and is reviewed on appeal de novo." *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). Further, an appellate court's review of an attorney fee award is for abuse of discretion. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827 (2012). Where, as here, the trial court awarded fees for time not authorized by statute, the trial court committed an error of law and should be reversed.

Below, the defendants sought recovery of costs and attorney fees under RCW 42.17A.765(5). CP 731. They provided no other authority for recovery. CP 730-37. That statute provides that in the event a defendant prevails, the defendant

shall be awarded all costs of trial, and *may* be awarded reasonable attorneys' fees to be fixed by the court to be paid by the state of Washington.

RCW 42.17A.765(5) (emphases added.) As such, the Court's authority to award costs is limited to costs of trial, and the Court has discretionary authority as to the award of reasonable attorney fees. Defendants bore the burden below to show that they were entitled to the costs and fees they requested. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

The Port officials and the Chamber sought, and received in part, attorney fees for time spent prior to commencement of the litigation, specifically time billed during the investigation stage of the citizen action notice proceeding. CP 730-37, 744-45, 803-06, 844-46, 868-94. The State objected to the request on the premise that the statute does not allow such recovery. CP 818-24. The trial court rejected the State's argument in part, saying that "[g]enerally I did not allow fees incurred for work done before the Public Disclosure Commission's decision. As argued, some of this time was also useful for preparation of the suit filed by the Atty General's

[O]ffice, so I did allow a bit.” CP 872. Specifically, the trial court awarded the Port officials \$8,999.80 for fees incurred prior to the filing of this action. CP 883-86. It awarded the Chamber \$7,096.50 for fees incurred prior to the filing of the underlying lawsuit. CP 875-81.

“The construction and meaning of a statute is a question of law” that a reviewing court considers de novo. *Columbia Riverkeeper v. Port of Vancouver USA*, No. 92455-4, 2017 WL 2483271, at *5 (Wash. June 8, 2017). Courts will not “add words to an unambiguous statute when the legislature has not included that language.” *Greenhalgh v. Dep’t of Corr.*, 180 Wn. App. 876, 884, 324 P.3d 771 (2014) (citation omitted). Where different terminology is used in a single statutory provision, the legislature is presumed to have intended a different result. *See generally Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 219-20, 173 P.3d 885 (2007) (courts should assume that legislature meant exactly what it says in a statute and apply it as written).

Here, the statutory language is clear and unequivocal. Section 765(5) first authorizes the Court to order recovery of “costs of investigation” as well as trial and reasonable attorney fees *to the State* in the event it prevails. In contrast, the statute does not authorize awarding costs or fees incurred during the investigation to a prevailing defendant. RCW 42.17A.765(5). By imposing an award that included time spent by

defense counsel during the investigation, the trial court exceeded what is allowed under the statute's plain language. The trial court's authorization of \$8,999.80 to the Port officials and \$7,096.50 to the Chamber should be reversed.

E. Attorney Fees and Costs Should Be Awarded to the State for this Appeal

In the event the Court overturns the trial court on appeal, the State requests the award of attorney fees and costs associated with its work on this case on appeal. *See* RCW 42.17A.765(5); *State ex rel. Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. at 295.

VI. CONCLUSION

For the reasons stated above, this Court should reverse the decisions below that dismissed the State's Complaint and awarded the defendants attorney fees and costs. This court should remand to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of July, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, a true and correct copy of the Opening Brief of Appellant State Of Washington upon the following:

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DATED this 3rd day of July 2017, at Olympia, Washington.

s/ Kristin D. Jensen
KRISTIN D. JENSEN
Confidential Secretary



STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

403 Evergreen Plaza, Mail Stop Fj-42 • Olympia, Washington 98504-3342 • (206) 753-1111

DECLARATORY RULING NO. 6

RECALL PETITION IS BALLOT PROPOSITION WHEN INITIALLY FILED (RCW 42.17.020(2)): The reporting requirements of chapter 42.17 RCW begin as soon as supporters of a recall election file a petition with the election officer under RCW 29.82.010 (August 22, 1989).

Stephen Kenyon, Attorney at Law
Erickson & Barkshire
10801 Main Street, Suite 204
Bellevue, WA 98004

Dear Mr. Kenyon:

You petitioned, on behalf of John and Valerie Gower, for a declaratory ruling regarding the application of the state Public Disclosure Law, chapter 42.17 RCW, to their current effort to recall certain elected officials of the Normandy Park City Council. In particular, you have asked when a recall petition becomes a "ballot proposition" thereby initiating the periodic campaign reports required under the Public Disclosure Act. We have agreed to issue this binding declaratory ruling. Your request concerns the interpretation of RCW 42.17.020(2), which provides

"Ballot proposition" means any . . . recall . . . 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 officers of that constituency prior to its circulation for signatures.

BACKGROUND

Your clients have initiated a recall action in King County which, if successful, would be submitted to the voters of the

ATTACHMENT A

City of Normandy Park. You have expressed doubt regarding the application of the reporting requirements of the Public Disclosure Act until such time as the courts have completed their review of the recall charges. You have pointed out that due to amendments of the statutes in 1984, "recall is now very much a judicial process." Every recall petition must now be submitted to the superior court for a determination as to whether the proposed recall charges are legally sufficient. RCW 29.82.020. You have also noted that recent decisions of the supreme court have made it more difficult to obtain judicial approval of recall charges. Estey v. Dempsey, 104 Wn.2d 597 707 P.2d 1338 (1985); Teaford v. Howard, 104 Wn.2d 580 707 P.2d 1327 (1985); Chandler v. Otto, 103 Wn.2d 268, 693 P.2d 71 (1984).

The election laws were amended in 1984. Laws of 1984, chapter 170. Under the amended statute, those seeking a recall must initially draft charges against an elected public official which allege acts of misfeasance, malfeasance or violation of the oath of office. RCW 29.82.010. The recall charges are then filed with the appropriate election's officer. RCW 29.82.015. The election's officer then directs the charges to that person charged with preparing the ballot synopsis. RCW 29.82.021. Upon preparation of the ballot synopsis, the recall charges and synopsis are directed to the superior court which must then review the charges and synopsis for their legal sufficiency. A direct appeal to the supreme court is available for those wishing to appeal the sufficiency decision. RCW 29.82.023.

Your clients initially prepared the charges and the King County Superior Court has declared those charges not legally sufficient. At the time of your request, the matter was on appeal to the Supreme Court.

Finally, we note that you have represented that your clients have not solicited funds to support this effort, rather they have used their own funds to pay the costs associated with preparing the recall charges and legal fees and costs associated with the judicial review of those charges.

ANALYSIS

The question before us is determining when a recall action becomes a "ballot proposition" under the statute quoted above. When the Legislature amended the recall statutes in 1984, it did not amend the statutory definition in the Public Disclosure Act. You argue that the 1984 amendment should be read together with

the Public Disclosure Act definition. You argue that the disclosure of expenditures which consist entirely of legal fees is premature because no political campaign would begin until the initial judicial process was complete and the recall charges would be placed on the ballot.

We cannot agree. The law is clear. A recall action becomes a "ballot proposition" under RCW 42.17.020(2) "from and after the time when the proposition has been initially filed with the appropriate election officer." Following the initial filing there may be a lengthy process of judicial review and it may be true that during that initial review process, one would not expect to see any political campaigning in the traditional sense; that is, rather than expending money upon advertising, signs, consultants, etc. during this initial process, the supporters of a recall would be most likely to expend monies only for legal fees. Arguably, disclosing expenditures for legal fees is of little public interest. However, the reports would also show the source of the monies used to pay those fees.

The basic purpose of the Public Disclosure Act is to permit interested citizens to ascertain the source and amount of financial support provided to support or oppose candidates or ballot issues. We have previously noted that the disclosure of the early money in a campaign may be the most significant and important because it provides insight into those persons and interests who most strongly support a particular position. Declaratory Ruling No. 3, copy enclosed. For whatever reason, the Legislature chose not to amend the Public Disclosure Act and it is the existing language of RCW 42.17.020(2) which this Commission is charged with enforcing.

Whatever arguments can be generated regarding the reasonableness of reporting legal fees, we do not see any room for interpretation. We therefore conclude that when your clients filed the recall charges with the King County Records and Election Division, the matter became a ballot proposition and the reporting requirements of the act applied thereafter.

You have represented that your clients have only expended their personal funds and have not solicited money from other sources. However, we do not feel that we have sufficient information to determine whether your clients have now or will become a "political committee" under RCW 42.17.010(24). We do note, however, that if there is no obligation to file monthly reports as a political committee under RCW 42.17.090, the statute

Declaratory Ruling: 3

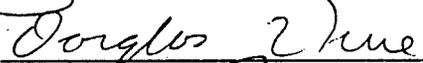
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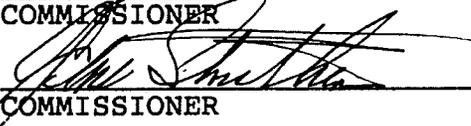
does require reports of independent campaign expenditures under RCW 42.17.100.

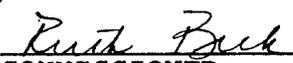
Because we have agreed that no enforcement action would be taken in this matter until after this Declaratory Ruling had been issued, no reports have been filed to date. Given our decision, we will not initiate enforcement action until 30 days after your receipt of this decision so as to allow your clients sufficient time to seek judicial review of this decision if they so desire.

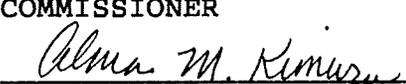
This written, binding Declaratory Ruling was adopted at the regular commission meeting in Olympia on August 22, 1989.

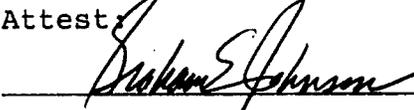

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