

NO. 49892-8

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

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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.

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**REPLY BRIEF OF APPELLANT STATE OF WASHINGTON**

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ROBERT W. FERGUSON  
*Attorney General*

REBECCA GLASGOW, WSBA 32886  
*Deputy Solicitor General*  
LINDA A. DALTON, WSBA 15467  
*Senior Assistant Attorney General*  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
(360) 753-6200

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## I. INTRODUCTION

The defendants in this case used litigation as a tool to defeat two controversial local initiatives by blocking them from appearing on the ballot. Undisputedly, litigation has become a common and often successful tactic for defeating an initiative. While the Economic Development Board (EDB) and the Tacoma-Pierce County Chamber (the Chamber) were certainly entitled to bring this type of legal action, they were required to report their expenditures on the litigation so that the electorate can know who is wielding money and power to influence the development of the law. Regardless of the initiatives' ultimate outcome, disclosure is critical for transparency, especially where local initiative attempts are sometimes repeated or brought to the statewide stage.

It is plain that the people and the legislature intended reporting not only of expenditures related to electioneering in the sense of communications with voters, but also reporting of *any* expenditures in support of or opposition to ballot propositions. RCW 42.17A.255. If the people and the legislature meant what the defendants suggest, they would have said so using terms specifically confined to communications with voters about their vote—"electioneering" and "political advertising." Instead, the people and the legislature chose to use broader language, requiring the reporting of *any* expenditure made to support or oppose a

ballot proposition. And under the law, that reporting begins as soon as a ballot proposition comes into being either when signature gathering begins or when the initiative is initially filed. RCW 42.17A.005(4). It was never intended to begin only when a proposition actually appears on a ballot.

Moreover, RCW 42.17A.555 prohibits the use of taxpayer dollars to oppose a ballot proposition except in limited circumstances. While some governmental entities (including cities and counties) that play a role in the initiative process can challenge an initiative as part of that process, the Port of Tacoma (Port) officials had no official role to play in the initiative process. Instead, they sued only to protect the Port's proprietary interests as a landowner and to avoid negative consequences on Port real estate and construction deals. While others, like the EDB and the Chamber, could legitimately sue to keep the local initiatives off the ballot (reporting their expenditures, of course), the people and the legislature decided that the Port officials could not.

## **II. STATEMENT OF FACTS**

None of the defendants disputes that the purpose of their pre-election lawsuit was to defeat the Save Tacoma Water initiatives by keeping them off the local ballot. Similarly, none of the defendants dispute that their lawsuit occurred after the signature gathering had begun and the initiative petition had been filed with the city clerk. CP 48-74, 293-94. Finally, all of

the defendants acknowledge that they had a proprietary interest to protect. The EDB and the Chamber sought to protect the economic interests of their members, including pending construction and real estate projects. CP 52-55, 71-72. The Port officials sought to protect the Port's interest as landowner and employer, as well as to preserve construction and real estate deals. CP 52-53, 71-72.

Finally, the defendants contend that another purpose of their lawsuit was to protect the integrity of the ballot. Yet they do not dispute that only the City of Tacoma and Pierce County are charged with determining the validity of an initiative, directing whether an initiative is placed on the ballot, creating the ballot title, using public funds to administer the election, and defending the constitutionality of a local initiative had one been adopted. The City of Tacoma is charged with receiving the initiative petition, determining the validity of the initiative petition, enacting the initiative or rejecting the petition, and then ultimately defending an enacted initiative. Tacoma City Charter § 2.19. The City Council is charged with submitting the proposal to the people for a vote. Tacoma City Charter § 2.19. And the County Auditor conducts the signature check and serves as the chief election officer, printing and distributing ballots and administering the election. RCW 29A.04.216 (County Auditor conducts the election and

the City pays for its share of election costs). The City and County, not the Port officials, perform these roles in the local initiative process.

As a result, the trial court here found 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.” VRP 100 (Dec. 14, 2016) (emphasis added).

### III. ARGUMENT

#### A. **The Purpose of the Fair Campaign Practices Act Is to Guarantee Full Disclosure of Expenditures Related to Ballot Propositions and to Prevent Taxpayer Dollars From Being Spent on Such Efforts Except in Limited Circumstances**

When adopting Initiative 276, the people declared that political campaign and lobbying contributions and expenditures should “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)). The concept of “campaign” included support of or opposition to a ballot proposition. 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, .904, .907. Any analysis of disclosure provisions and definitions must occur in the context of the strong statement of the people’s intent to mandate transparency, and the liberal construction requirements intended to achieve this goal.<sup>1</sup>

And yet here, the defendants attempt to limit the impact of the people’s clear intent by asserting that the law was intended to regulate only communications with voters about how they should vote. Br. Resp’ts at 15 (claiming the entire statute applies only to “political electioneering activity designed to sway the electorate”).<sup>2</sup> But this narrow reading of the law would create an enormous loophole that defies common sense: other activities (including litigation) conducted for the purpose of supporting or defeating a local initiative that occur prior to the placement of the proposition on the ballot would not be reported. This is not what the people and the legislature intended.

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<sup>1</sup> The Port officials contend that they are entitled to a lenient interpretation of the Fair Campaign Practices Act because the Act involves civil enforcement. Port’s Br. at 32-33. But that would conflict with the more specific, express direction that the Act be liberally construed. RCW 42.17A.001, .904, .907.

<sup>2</sup> Br. Resp’ts refers to the Brief of Respondents filed September 1, 2017, on behalf of all of the respondents and signed by all of their attorneys.

**B. The Independent Expenditure Reporting Requirement Applies to Any Expenditure to Support or Oppose a Ballot Proposition**

**1. The defendants' interpretation of the independent expenditure disclosure requirement contradicts the people's and the legislature's plain intent**

**a. The plain language of the independent expenditure reporting requirement in RCW 42.17A.255 and the definition of ballot proposition in RCW 42.17A.005(4) cover more than just electioneering or activities to communicate with voters**

Individuals and organizations must timely file reports of their “independent expenditures” that exceed \$100. RCW 42.17A.255. “For the 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) (emphases added). The people and the legislature said that *any* expenditure must be reported, not just expenditures related to electioneering or communications with voters.

The defendants argue, without support, that “opposition” must be in the form of “electioneering,” advertising, or communications with voters in order for the reporting requirement to apply. Br. Resp’ts at 15. They are wrong. The plain language of RCW 42.17A.255 is not so limited. Where the legislature intended to limit disclosure to “electioneering” or “advertising,” within RCW 42.17A, it used those more limited words,

which are specifically defined in the Act. RCW 42.17A.005(19) (defining “electioneering” to mean a broadcast, transmission, mailing, billboard, newspaper, or periodical about a candidate), (36) (defining “political advertising” to mean any mass communication for the purpose of appealing for votes or for other support or opposition). In contrast, neither the term “electioneering” nor “political advertising” appears in RCW 42.17A.255.

Moreover, there is a separate reporting requirement for expenditures for electioneering communications. *E.g.*, RCW 42.17A.005(19), .305, .335. The law also clearly sets out required reporting for “political advertising” separately, including mail and voice communications with voters in the form of brochures and letters. RCW 42.17A.260, .005(36). 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.255 (emphases added).

The defendants seek to avoid the dictionary definition of “opposition,” likely because a lawsuit to defeat an initiative by keeping it off the ballot clearly meets the dictionary definition: “hostile or contrary action or condition : action designed to constitute a barrier or check[.]”

*Webster's Third New International Dictionary* 1583 (2002). The Washington Supreme Court and this Court look to dictionary definitions as articulations to the “plain and ordinary meaning” of a term. *E.g.*, *Lindeman v. Kelso Sch. Dist.* 458, 162 Wn.2d 196, 201-02, 172 P.3d 329 (2007); *State v. Watson*, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002) (in the absence of a statutory definition, the court will give a term its plain and ordinary meaning “ascertained from a standard dictionary”); *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (same).

So, the people and the legislature plainly intended the independent expenditure reporting requirement to extend beyond reporting of electioneering or communications with voters about their votes. Had the people and the legislature intended what the defendants claim, (1) they would have not needed to include the independent expenditure requirement at all because reporting for electioneering and political advertising is already covered in other provisions of the Act, or (2) they would have used the terms “electioneering” and/or “political advertising” in RCW 42.17A.255(1).

Further, the definition of “ballot proposition” would be rendered meaningless if the Act applied only to electioneering or communications with voters about an initiative that is “on the ballot”. The statutory definition of “ballot proposition” in the campaign finance law includes “any initiative

. . . [that is] *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). The definition of “ballot proposition” expressly incorporates a proposition before it becomes a “measure” that is “submitted to the voters.” RCW 42.17A.005(4); RCW 29A.04.091.

Under the Act’s definition, a local ballot proposition exists as soon as the proposed initiative is gathering signatures or is filed with local elections officials. RCW 42.17A.005(4). If the people and the legislature intended reporting to occur *only* where an expenditure is related to convincing voters to vote for or against a proposition, they would not have incorporated initiatives that are “*proposed to be submitted to the voters*” within the coverage of the law. RCW 42.17A.005(4) (emphasis added). Thus, the defendants’ interpretation defies the plain language of the definition of “ballot proposition.”

Finally, the Public Disclosure Commission’s decision not to make a recommendation for enforcement here does not overcome the Fair Campaign Practices Act’s plain language, its liberal construction provisions, or the Act’s underlying purpose to provide the public with transparency.

**b. Working to defeat a ballot proposition through litigation is a campaign tactic that occurs within the scope of the election campaign**

Defendants' insistence that a "campaign" only encompasses communications with voters does not overcome the plain reading of RCW 42.17A.255 and .005(4). RCW 42.17A.255(1) requires reporting of "any expenditure that is made *in support of or in opposition to* any . . . ballot proposition." RCW 42.17A.255(1) (emphasis added). This requirement is not limited by the word "campaign." While the Act defines "election campaign," that definition simply refers back to "support of, or . . . opposition to, a ballot proposition." RCW 42.17A.005(17). And as previously noted, the statutory definition of "ballot proposition" makes clear that the regulated campaign begins upon signature gathering or when the initiative is initially filed, not the later time when a proposition appears on the ballot. RCW 42.17A.005(4).

More importantly, litigation is now a tactic in ballot proposition campaigns. A legal challenge is an arrow in the quiver of opponents seeking to defeat a ballot proposition, whether successful or not, and litigation is now a common means of blocking adoption of an initiative. *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). In 2017 alone, two local initiatives were successfully blocked from a public vote through litigation—a Spokane initiative regarding sanctuary status/immigration and a Seattle initiative regarding safe injection sites.<sup>3</sup> The incontestable purpose of such litigation efforts, when brought by opponents of a ballot proposition, is to prevent it from being enacted into law. To read the statute as the defendants suggest would undermine the plain purpose of the campaign finance laws, which is to give the public access to information about who is bankrolling efforts to support or defeat initiatives. RCW 42.17A.001.

The defendants never explain why a “campaign” would or should be limited solely to communications with voters, especially where longstanding, publicly available Public Disclosure Commission decisions, to which the legislature has acquiesced, have explained that litigation expenditures are reportable. Declaratory Ruling No. 6 (Pub. Disclosure Comm’n Aug. 22, 1989), [https://www.pdc.wa.gov/sites/default/files/laws-rules-cases/DECL\\_6.pdf](https://www.pdc.wa.gov/sites/default/files/laws-rules-cases/DECL_6.pdf) (Opening Br. Attach. A); PDC Interpretation No. 91-02 (June 25, 1991) (holding that litigation expenses related to ballot

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<sup>3</sup> <http://www.spokesman.com/stories/2017/aug/30/tossed-immigration-initiative-in-spokane-will-get-/>; <https://www.seattletimes.com/seattle-news/health/initiative-to-ban-safe-injection-sites-in-king-county-knocked-down-by-judge/>.

propositions had to be reported). Had the legislature wanted to draw a bright line between “the legal sphere,” Br. Resp’ts at 17-18, and other acts of support or opposition to a ballot measure, it would have adopted statutory language to undo these decisions. Since 1989, the legislature has never done so. *E.g.*, *Whitehead v. Dep’t of Soc. & Health Servs.*, 92 Wn.2d 265, 268, 595 P.2d 926 (1979) (acquiescence to agency interpretation is evidence of legislative intent).

Moreover, the people and the legislature have defined regulated communications with voters as “electioneering” and “political advertising,” using those terms, rather than the term “campaign,” to describe communications with voters. RCW 42.17A.005(19), (36); RCW 42.17A.300-.345 (specifically regulating electioneering and political advertising). Why would the people and the legislature separately define and regulate “electioneering” and “political advertising” in only a part of the Fair Campaign Practices Act if they meant the entire Act to cover only these activities? They would not.

Further, taking such a narrow view of what is part of a “campaign” contradicts the liberal construction provisions that direct the courts to interpret any ambiguity in favor of disclosure. RCW 42.17A.001, .904,

.907.<sup>4</sup> The defendants' reading of the campaign finance statutes is inconsistent with the Act's plain language and purpose.

**c. The defendants' other arguments against transparent reporting all fail**

The defendants try a variety of other arguments to overcome the plain language and intent of the Act. Each argument fails.

First, the defendants assert that because they could challenge the constitutionality of the initiatives after their adoption without any reporting, they should be able to challenge the initiatives' constitutionality before adoption without reporting. Br. Resp'ts at 21. This reasoning ignores that litigation to keep an initiative off the ballot is a tool for defeating an initiative *by keeping it from ever reaching the voters*. Where a person or entity is making independent expenditures to oppose the adoption of a local ballot proposition, those expenditures must be reported because under the law, the voters have the right to transparency in who is spending resources to influence whether an initiative is ultimately adopted. RCW 42.17A.255.

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<sup>4</sup> Adopting the defendants' argument would undermine the people's and the legislature's intent in other ways. Limiting reportable expenditures to only electioneering or communications with voters could eliminate reporting of other independent expenditures that ultimately support or oppose a candidate or ballot proposition, but that are a step removed from direct communications with voters. This would include expenditures for things like office space, food, and consulting. Limiting expenditure reporting to "electioneering" as the defendants request, Br. Resp'ts at 15, would drastically narrow the current reporting requirement.

A challenge brought after the voters have had their say is fundamentally different.

Next, the defendants contend that litigation to support a ballot proposition is somehow categorically different from litigation to defeat a ballot proposition. Br. Resp'ts at 24-25. Yet that reasoning directly conflicts with the plain language of the statute, which requires reporting of expenditures made "in support of *or opposition to* any . . . ballot proposition." RCW 42.17A.255 (emphasis added).

Then, the defendants contend that because the litigation itself is public enough, voters should be able to obtain information about legal expenditures without campaign finance reporting. This is not true. Specific attorney fee expenditures are entered in the public court file only when the prevailing party seeks attorney fees; as such, at best, only one side's expenditures would be disclosed. The amount of fees or expenditures, as well as the payor, for the non-prevailing side would remain secret. That is not what the legislature intended where an expenditure is made "to oppose a ballot proposition." RCW 42.17A.255. The people and the legislature intended disclosure and transparency to apply to all sides of the ballot proposition debate.

Alternatively, the defendants argue that knowing the amount of legal fees expended is not important to the public. At least one court has

concluded that the voters are entitled “‘to know who is being hired, who is putting up the money, and how much.’” *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1006-07 (9th Cir. 2010) (noting that where citizens act as lawmakers, entities trying to defeat a ballot proposition are similar to lobbyists) (quoting *United States v. Harris*, 347 U.S. 612, 625, 74 S. Ct. 808, 98 L. Ed. 989 (1954)). The amount an entity is willing to spend to defeat a ballot proposition gives voters and taxpayers “a pretty good idea” how deeply that entity would be affected should the initiative be adopted. *See id.* at 1007 And even where an initiative is defeated in court prior to an election, public access to this information is valuable because initiative efforts are often repeated either in a different locality or even statewide. For example, the minimum wage initiative effort began as a local initiative, it survived a legal challenge, and a similar minimum wage initiative was eventually adopted statewide. *Filo Foods, LLC*, 179 Wn. App. 401; Initiative 1433.

The defendants also argue that applying the plain language of the campaign finance laws could impact non-profits’ ability to litigate to support or oppose a ballot proposition if they have 26 U.S.C. § 501(c)(3) tax status. Br. Resp’ts at 27-28. But according to the IRS, a non-profit’s § 501(c)(3) status does not create an absolute bar preventing the organization from taking a position to support or oppose a ballot

proposition—the absolute restriction applies only to supporting or opposing a candidate.<sup>5</sup> Non-profits like Legal Voice and the ACLU support or oppose initiatives all of the time, presumably within the IRS limits.<sup>6</sup> Moreover, federal tax law, not state law, governs whether litigation can impact § 501(c)(3) status.

State law, on the other hand, governs campaign finance reporting. Neither non-profit entities nor “vulnerable individuals” are prevented from challenging what they believe are harmful initiatives in court. Br. Resp’ts at 27-29. Individuals and non-profit organizations who want to support or oppose a ballot proposition by funding or participating in litigation can certainly do so; Washington law simply requires them to do so transparently. RCW 42.17A.255.

In *Human Life of Washington, Inc.*, the Ninth Circuit recognized that in the initiative context, the people step into the shoes of legislators, and individuals or groups trying to influence the adoption or defeat of an initiative act as lobbyists. *Human Life of Wash., Inc.*, 624 F.3d at 1006. If nothing else, knowing who supports or opposes an initiative will give voters

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<sup>5</sup> <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations>.

<sup>6</sup> <https://www.irs.gov/charities-non-profits/lobbying>; e.g., <http://www.legalvoice.org/single-post/2016/02/25/Legal-Voice-Endorses-Initiative-for-Statewide-Paid-Sick-Leave>; <https://www.aclu-wa.org/events/washington-won%E2%80%99t-discriminate-volunteer-orientation>.

information about who stands to gain or lose from an initiative's adoption. *Human Life of Wash., Inc.*, 624 F.3d at 1007.

Recognizing these concerns that arise specifically in the context of ballot propositions, the people and the legislature have concluded that it is important for voters to have information about who is trying to influence whether an initiative becomes law, and this information is no less important when litigation is the tool used to achieve the desired outcome. RCW 42.17A.255. In sum, applying RCW 42.17A's plain language to require reporting of expenditures spent on litigation is consistent with the plain intent of the people and the legislature that it be transparent who is bankrolling these efforts.

**2. Applying the plain statutory language, the defendants “opposed” the local ballot propositions when they brought a lawsuit to remove them from a public vote**

Bringing a lawsuit to knock a local initiative off the ballot is an action in opposition to the initiative. While the defendants attempt to claim their litigation was “politically neutral,” their argument fails for two reasons.

First, it is highly unlikely that the people and the legislature intended a party to be able to avoid campaign finance reporting simply by claiming their own motivations for removing an initiative from the ballot were politically neutral. Adopting such a rule would hinder disclosure because

any party could articulate some arguably “neutral” reason for bringing such a lawsuit, including the preservation of public resources in the conduct of elections. That would create a huge loophole in the law.

Second, the EDB and the Chamber admitted that their motivations were self-interested. CP 52-55, 71-72. In the litigation to defeat the ballot proposition, they told the superior court that their interest was to protect their own economic interests and those of their members. CP 52-55, 71-72. Similarly, the Port officials stated the same. CP 71-72; Port Br. at 15-18 (discussion of standing). The defendants used litigation as a tool to accomplish their own political goal. Of course the EDB and the Chamber have every right to do so, subject to reporting any expenditures they made in opposition to a ballot proposition in accordance with RCW 42.17A.255.

The defendants assert that the State confuses standing, which they had to establish to be able to challenge the initiatives, with what triggers the reporting requirements. The State is not confused. The defendants had to establish standing to bring their lawsuit, but when they did so, they also acknowledged their self-interest in defeating the initiative. CP 52-55, 71-72. Nothing prevents the EDB and the Chamber from bringing such lawsuits, but they must report “any expenditure” that is made “in opposition to a ballot proposition.” RCW 42.17A.255. That way, the public can see who is spending resources to defeat the proposition.

**3. Applying the Fair Campaign Practices Act in these circumstances does not render the statute vague or otherwise unconstitutional**

As previously acknowledged, the reporting requirement does not prevent the EDB or the Chamber from bringing the legal action at issue here. It simply requires that they report the value of their litigation expenditures. That difference is constitutionally significant. *Human Life of Wash., Inc.*, 624 F.3d at 1003 (disclosure viewed as the least restrictive manner of curbing evils). The defendants acknowledge that a campaign finance law’s disclosure requirements are reviewed under less stringent “exacting scrutiny,” rather than strict scrutiny. *See, e.g., id.*, 624 F.3d at 1005. There must only be “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (internal quotation marks omitted).

The government interest in the public’s right to receive information is not limited to who is financing communications with voters. This interest also exists, for example, in the lobbying context, where the public is entitled to information about who is wielding power in other ways. *Human Life of Wash., Inc.*, 624 F.3d 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. *Human Life of Wash., Inc.*, 624 F.3d at 1006-07 “[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.”). Because local initiatives are often repeated, sometimes as statewide initiatives, transparency is important especially where a local initiative is removed from the ballot.

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.’” *Human Life of Wash., Inc.*, 624 F.3d at 1007 (quoting the district court). In an effort to avoid such expenses, opponents of initiatives have shifted the ballot to the courtroom.<sup>7</sup> *E.g., Huff*, 184 Wn.2d 643; *Filo*

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<sup>7</sup> *See* <http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=U0VBVEdKIDewNA%3D%3D%3D%3D&year=2013&type=single> (legal

*Foods, LLC*, 179 Wn. App. 401. Whether the litigants are successful or not, this shift makes the State’s interest in transparency even more profound. The State has a significant interest in providing the public with information about who is paying to defeat an initiative.

Washington’s disclosure requirements are “substantially related” to these important interests. *See Reed*, 561 U.S. at 196; *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 482-83, 166 P.3d 1174 (2007). The disclosure laws require initiative supporters and opponents to complete and electronically submit a form reflecting independent expenditures. WAC 390-16-060. The defendants have pointed to no proof that this simple disclosure hinders political activity or chills political association. As courts have repeatedly held, it does not. In fact, disclosure is the least restrictive means of ensuring that the public has the facts they need to understand who is working to defeat an initiative and how much they are spending. *See Human Life of Wash., Inc.*, 624 F.3d at 1005.

Moreover, the defendants’ half-hearted attempt to establish vagueness fails. Br. Resp’ts at 31. Defendants fail to overcome, or even address, the fact that in *Voters Education Committee*, the Washington Supreme Court concluded that the phrase “in support of, or opposition to,

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services expenditures of \$74,530.07 for Yes! For SeaTac ballot challenge prior to November 2013 general election).

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. The Court did not find these words troubling or difficult to understand even when they had to be applied to a particular factual scenario. *Id.* Here, there is no doubt that the defendants’ litigation to get an initiative stricken from the ballot is an action “in opposition to [the] ballot proposition.” RCW 42.17A.255.

**C. The Port Officials Cannot Spend Taxpayer Dollars to Oppose a Ballot Proposition; Only the City or County Can**

**1. RCW 42.17A.555 prohibits the Port officials from using taxpayer dollars to oppose a ballot proposition where they play no official role in the initiative process**

The plain language of RCW 42.17A.555 prohibits the use of taxpayer money or taxpayer resources to support or oppose ballot propositions: “No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, *directly or indirectly*, for the purpose of assisting a campaign for election of any person to any office *or for the promotion of or opposition to any ballot proposition.*” RCW 42.17A.555 (emphases added). Again, where addressing the promotion of or opposition to any ballot proposition, the

people and the legislature did not use the word “campaign”; that word is used only in the clause about candidates for public office. In addition, by using “directly or indirectly,” the people and the legislature reflected their intent for broad application of this restriction.

This prohibition exists for good reason. The statute “was enacted to ensure that public resources are not used to provide advantages [or disadvantages] to a particular candidate or ballot measure . . . .” *Herbert v. Pub. Disclosure Comm’n*, 136 Wn. App. 249, 264, 148 P.3d 1102 (2006). Put another way, the statute was designed to prohibit preferential use of public resources to influence a public election. *City of Seattle v. State*, 100 Wn.2d 232, 247-48, 668 P.2d 1266 (1983). The people do not want public dollars to be a thumb on the scale in favor of or in opposition to a ballot proposition, with only limited exceptions.

The Port officials’ expenditures to strike the local initiatives from the ballot clearly fit within RCW 42.17A.555’s prohibition. As demonstrated above, the litigation *was* opposition to a ballot proposition. As such, the Port officials used taxpayer dollars “directly or indirectly” “for the . . . opposition to [a] ballot proposition.” RCW 42.17A.555. Thus, the central issue is whether the Port officials’ expenditure fits within one of the statutory exceptions. It does not.

**2. The exception for normal and regular conduct of the agency does not apply because litigation opposing ballot propositions is not normal conduct for the Port nor is it separately or specifically authorized by law**

The Port officials argue that their conduct fits the exception for “[a]ctivities which are a part of the normal and regular conduct of the office or agency.” RCW 42.17A.555(3). By regulation, the Public Disclosure Commission has defined “normal and regular conduct” as “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). Thus, any “normal and regular conduct” must be “specifically” and “separately” authorized in order for the exception to apply.

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 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 of fairness of elections *and* governmental processes.” RCW 42.17A.001 (emphasis added). While the Port officials assert that as a regulatory statute RCW 42.17A.555 should be interpreted narrowly, that is not how the campaign finance laws in RCW 42.17A have been applied. Declarations of policy requiring liberal construction are a command that the coverage of an act’s provisions be liberally construed and that its exceptions be narrowly confined. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978); *see also Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 406, 341 P.3d 953 (2015) (invoking the liberal construction clause); *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 111 Wn. App. 586, 599, 49 P.3d 894 (2002) (same).

In order to invoke this narrow exception, the Port officials must show that they are “specifically authorized” to take this particular kind of action—fund a lawsuit to keep an initiative off the ballot. *See Herbert*, 136 Wn. App at 256 (noting failure to cite to “any constitutional, charter, or statutory provision separately authorizing the use of Seattle School District e-mail or mailboxes *for the purposes of promoting a ballot measure*” (emphasis added)). The Port officials fail to show specific authorization.

Port Br. at 13, 19 n.14, 20 (citing to RCW 53.08.047, RCW 59.57.030,<sup>8</sup> and RCW 53.08 more generally). While the Port officials point to general statutes authorizing them to manage the port and engage in economic development, they have not pointed to any law that “separately” or “specifically” authorizes them to use public taxpayer dollars to support or oppose a ballot proposition, or even to take a public position on a ballot proposition. Port Br. at 13; WAC 390-05-273 (requiring both specific and separate authorization).

In addition, in order to show this activity was “normal,” the Port officials would have to establish they have engaged in prior litigation *of the same character*. That is what the Washington Supreme Court has required in order to invoke the exception. For example, when analyzing whether an endorsement was “normal” for the King County Council, the Court noted that the Council “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) (emphasis added); *see also Herbert*, 136 Wn. App. at 256-57 (finding no evidence that schools or school districts used school e-mails to do a similar thing—distribute

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<sup>8</sup> This statute does not appear to exist. Perhaps the Port officials meant to refer to RCW 53.57.030, which grants a port district general management authority over a port and the ability to sue or be sued, but no separate or specific power to support or oppose ballot propositions.

political materials). Simply showing a prior practice of filing lawsuits is not enough. Otherwise, the Washington Supreme Court and this Court would have found that adoption of any prior motion in *King County Council*, and any use of school e-mail in *Herbert*, would have been enough to meet the exception. But those courts required more. *King County Council*, 93 Wn.2d at 562; *see also Herbert*, 136 Wn. App. at 256-57.

The trial court did not agree with the Port officials, stating 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.” VRP 100 (Dec. 14, 2016) (emphasis added). The Port officials did not challenge this finding and point only to the Port’s litigation history generally. Port Br. at 13.

The Port officials rely on cases where other counties or cities litigated to establish whether an initiative or referendum can go on the ballot in order to argue that the Port officials can do so too. Port’s Br. at 16-18. What the Port officials fail to comprehend is that those cities and counties are different because they each played a specific role in the initiative process. Here, as in the cases cited by the Port, the city council, the city clerk, the city attorney, and the county auditor determine whether (and how) the initiative will be placed on the ballot. Tacoma City Charter § 2.19. In that capacity, the city or the county auditor, the chief election official in the county responsible for determining the content of the ballot, can refuse to

put an invalid initiative on the ballot and defend that decision in court. RCW 29A.04.216. Alternatively, a city or county can affirmatively bring litigation to resolve the question before ballots must be printed. *E.g.*, *City of Port Angeles v. Our Water-Our Choice*, 170 Wn.2d 1, 6, 239 P.3d 589 (2010) (city council declined to either enact the initiatives or refer them to the ballot, instead seeking declaratory judgment that they were beyond the scope of the initiative power). As entities with a formal role in the process, the city and county exercise a required governmental function when they take action to establish or defend the content of the ballot. *See Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003). Moreover, while the Port officials point to one instance where a port was involved in a lawsuit to challenge a ballot initiative, the issue of whether that port's participation was proper under RCW 42.17A.555 was never raised. *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004). Indeed, the port is never mentioned in that case except in the caption. *Id.*

In contrast, under the Tacoma City Charter, the Port itself had no official role to play in the initiative process. Instead, the Port officials acted in a proprietary role for the Port's own special benefit or profit. Specifically, the Port officials claimed that the Port would suffer an economic injury as a landowner if the initiatives passed because the Port's leases would be affected. CP 71. They argued that the Port's current and future real estate

and construction deals would also be harmed. CP 72. Absent specific legal authority to the contrary, RCW 42.17A.255 and WAC 390-05-273 prevent the use of taxpayer dollars to achieve the Port officials' political goal—to protect the Port's own economic interests.

Indeed, if this Court were to read the “normal and regular conduct” exception as broadly as the Port officials suggest, then any public entity could use public dollars to support or oppose a ballot proposition so long as the entity simply stated it was protecting integrity of the ballot or its own interests. That would allow the exception to swallow the rule by allowing public entities a means of avoiding the prohibition in every case.

**3. RCW 42.17A.555's exception for port commission votes occurring in an open public meeting also does not apply because the Port officials' actions extended outside of the meeting room**

The Port officials also attempt to rely on RCW 42.17A.555's exception for “[a]ction taken at an open public meeting by members of an elected legislative body or by an elected board, council, or 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.” RCW 42.17A.555 (emphasis added). By its plain language, this exception applies only to action taken at a public meeting, therefore using only limited public

resources, to “express a collective decision” or to “actually vote” to express support or opposition to a ballot proposition. RCW 42.17A.555. The exception does not authorize any further action (like a lawsuit) taken outside of the public meeting.

To read the statutory exception as the Port officials suggest would again create an exception that swallows the rule. The Port officials’ reading would permit taxpayer dollars to fund any action that a board or commission later ratifies in an open public meeting, no matter how expansive. That cannot be what the people and the legislature intended, in light of the longstanding public policy that taxpayer dollars should not be used to support or defeat an initiative. *See* Op. Att’y Gen. 1 (2006), at 3. Instead, the plain language of the exception applies only to votes or collective decisions of the commission made in a public meeting to express support or opposition to a ballot proposition, something that requires minimal use of public resources.

**4. The Port officials’ other arguments do not overcome the plain language of the statute**

The Port officials insist that they “took no campaign action,” Port Br. at 1, thus choosing to ignore that the plain language of RCW 42.17A.555 does not refer to or include “campaign” in the clause addressing ballot propositions. (“No elective official . . . may use or authorize the use of any

of the facilities of a public office or agency, directly or indirectly . . . for the promotion of or opposition to any ballot proposition.”). Moreover, the legislature’s definition of “ballot proposition” begins when signatures are gathered or the initiative has been filed. RCW 42.17A.005(4). Thus, the Port officials participated in a lawsuit to defeat the initiative long after the initiative process had begun under the Act.

While other entities, like the EDB and the Chamber, could certainly challenge the validity of the initiative in court in order to get it stricken from the ballot (and report their expenditures), the Port officials could not use taxpayer dollars to do so. RCW 42.17A.255, .555. Similarly, the courts’ undeniable authority to address the legality of an initiative is irrelevant. Port Br. at 14-15. RCW 42.17A.555 restricts the Port officials’ use of public money to bring such lawsuits. It does not prevent such lawsuits altogether.

The Port officials claim they engaged in an “even handed” inquiry into whether the initiatives were proper. Port Br. at 10. But that is not what the Port officials told the superior court—instead, the Port officials explained that the Port’s existing leases and other real estate and construction projects, as well as future deals, would be negatively impacted if the initiatives passed. CP 71. The Port officials’ stated purpose for bringing the lawsuit was neither even-handed nor benign. CP 71.

The Port officials also rely on a single sentence in *King County Council*, 93 Wn.2d at 564, for support, noting that a “campaign was not waged” in that case. Port Br. at 12. But the Court’s next sentence explained that the public hearing at issue there did not require “an expenditure in support of the initiative,” in contrast with a New York decision where the public agency had spent money on campaign flyers, and radio and television advertisements. *King County Council*, 93 Wn.2d at 564. What the *King County Council* court meant, in context, was that unlike the New York situation, the King County Council had not spent any money engaging in ongoing activities to support or defeat the initiative. Here, the Port spent \$45,000 in taxpayer dollars to defeat the initiatives. Port Br. at 5.

The Port officials insist that because the Public Disclosure Commission would not have filed an enforcement action against the Port, the inquiry should end there. They miss the fact that the Attorney General as well as local prosecutors have statutory authority to enforce the law also. RCW 42.17A.765(1). RCW 42.17A.555 directly prohibits the use of taxpayer dollars to oppose a ballot proposition, the Port officials have no specific or separate authority to do so, and opposition to ballot propositions is not normal conduct for the Port, as the trial court explained. As a result, this Court should conclude that the Port could not use taxpayer dollars to

bring the lawsuit to defeat the ballot proposition, even if other entities were entitled to do so.

The Port officials rely on the distinctions between state and local initiatives without explaining why those differences matter in the application of the plain language of RCW 42.17A. Port Br. at 29-32. Finally, the Port officials point to one case that is currently under review by this court, *State v. Evergreen Freedom Foundation*, No. 502241, and another case that addressed a contribution limit (not a reporting requirement) that would have placed a cap on the amount of pro bono legal fees that could be expended in a federal civil rights challenge to a state campaign finance provision, *Institute for Justice v. State*, Pierce County No. 13-2-10152-7. These cases do not undermine the State's position here.

In sum, none of the Port officials' arguments overcomes the plain language of RCW 42.17A.555.

**D. RCW 42.17A.765 Does Not Provide For the Award of Attorney Fees and Costs to Defendants For Time Spent Prior to the Commencement of the Enforcement Case Against Them; the Trial Court's Award of Such Fees Should Be Reversed**

With little comment and no analysis, two defendants (the Port officials and the Chamber) ask this Court to affirm the trial court's award of pre-litigation attorney fees to them. Br. Resp'ts at 32-33. They do so

without regard to the plain language of RCW 42.17A.765 and without legal support for their request.

For their underlying fees request, the defendants relied solely on RCW 42.17A.765. RCW 42.17A.765(5) first authorizes the trial 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). Defendants are not entitled to fees for any work conducted prior to the case filing. RCW 42.17A.765(5).

The Port and the Chamber appear to argue without citation that even though the statute only provides an award to the State for pre-litigation costs, they too should also be allowed to recover for pre-litigation work.<sup>9</sup> Br. Resp’ts at 32-33. But that reading contradicts the plain language of the statute. Even if defendants prevail on appeal, the trial court award of attorney fees should be reduced by \$8,999.80 to the Port and \$7,096.50 to the Chamber.

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<sup>9</sup> The Port officials’ and the Chamber’s argument is limited to saying they were being investigated and that they would have done the work they billed (and for which the trial court provided some award) anyway. This is not a standard applied by any Washington court and for which they supply no authority. As a test, it should be rejected out of hand.

**IV. CONCLUSION**

This Court should apply the plain language of the Fair Campaign Practices Act and reverse.

RESPECTFULLY SUBMITTED this 26th day of October, 2017.

ROBERT W. FERGUSON  
*Attorney General*



REBECCA GLASGOW, WSBA 32886  
*Deputy Solicitor General*

LINDA A. DALTON, WSBA 15467  
*Senior Assistant Attorney General*

Office ID 91087  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
(360)753-6200  
RebeccaG@atg.wa.gov  
LindaD@atg.wa.gov

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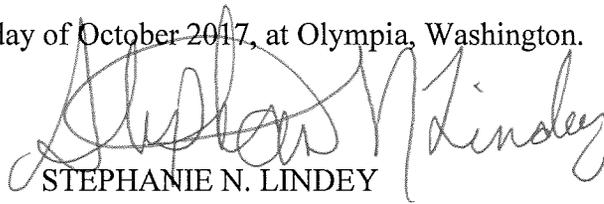
Carolyn A. Lake  
Seth S. Goodstein  
Goodstein Law Group, PLLC  
501 S. G Street  
Tacoma, WA 98405  
clake@goodsteinlaw.com  
sgoodstein@goldsteinglaw.com  
dpickney@goldsteinglaw.com

Valarie S. Zeeck  
Christine Scheall  
Daniel Richards  
Warren Martin  
Jennifer Millsten-Holder  
Gordon Thomas Honeywell  
PO Box 1157  
Tacoma, WA 98401-1157  
vzeeck@gth-law.com  
cscheall@gth-law.com  
Daniel.lee.richards@gmail.com  
jholder@gth-law.com

Steven Goldstein  
Kathryn N. Boling  
Betts Patterson & James  
One Convention Place  
701 Pike Street, Suite 1400  
Seattle, WA 98101  
sgoldstein@bpmlaw.com  
kboling@bpmlaw.com

Jason Whalen  
Marsha Reidburn  
Ledger Square Law  
710 Market Street  
Tacoma, WA 98402  
jason@ledgersquarelaw.com  
marsha@ledgersquarelaw.com

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