

FILED
Court of Appeals
Division II
State of Washington
3/13/2018 4:22 PM

NO. 49892-8

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

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 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.

SUPPLEMENTAL BRIEF OF RESPONDENTS

Steven Goldstein, WSBA #11042
Kathryn N. Boling, WSBA #39776
Betts Patterson & Mines, P.S.
701 Pike Street, Suite 1400
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053

*Attorneys for Respondent Economic
Development Board for Tacoma-
Pierce County*

Jason M. Whalen, WSBA #22195
Ledger Square Law, P.S.
710 Market Street
Tacoma, WA 98402-3712

*Attorney for Respondent Economic
Development Board for Tacoma-
Pierce County*

Valarie S. Zeeck, WSBA #24998
Gordon Thomas Honeywell
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402

*Attorney for Respondent Tacoma-
Pierce County Chamber*

Carolyn A. Lake, WSBA #13980
Seth S. Goodstein, WSBA #45091
Goodstein Law Group, PLLC
501 South G Street
Tacoma, WA 98405-4715

*Attorneys for Respondents John
Wolfe, Connie Bacon, Don Johnson,
Dick Marzano, Don Meyer, and
Clare Petrich*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
A. The Evergreen Freedom Foundation’s Entire Defense to the State’s Enforcement Action Was Premised on a Technicality That Has No Application To this Case.....	1
B. <i>Evergreen</i> ’s Discussion of the “Liberal Construction” Rules Applicable to the FCPA Merely Restate Existing Law.....	3
C. The <i>Evergreen</i> Court’s Interpretation of the Term “Election Campaign” Does Not Change the Result in This Case.....	5
D. <i>Evergreen</i> Does Not Change the Fact That Imposing Liability Against the Respondents Under RCW 42.17A.255 Would Violate the First Amendment.....	7
E. Vagueness	9
II. CONCLUSION.....	11

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON CASES</u>	
<i>Evergreen</i>	2, 4, 5, 6, 8, 10
<i>Postema v. Pollution Control Hr'gs Bd.</i> , 142 Wn.2d 68, 114, 11 P.3d 726 (2000).....	10
<i>State v. Evergreen Freedom Foundation</i> , 1 Wn. App. 2d 288, 404 P.3d 618	1, 2
<i>Voters Educ. Comm. v. Pub. Disclosure Comm'n</i> , 161 Wash.2d 470, 484, 166 P.3d 1174 (2007).....	10
<u>FEDERAL CASES</u>	
<i>Citizens United</i>	8, 9
<i>Citizens United v. Federal Election Commission</i> , 558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010).....	8
<u>WASHINGTON STATUES</u>	
RCW 42.17A.255(2).....	1, 2, 3, 4, 5, 6, 9

Pursuant to the Court’s order of January 29, 2018, Respondents hereby provide the following supplemental brief regarding the Court’s recent decision in *State v. Evergreen Freedom Foundation*, 1 Wn. App. 2d 288, 404 P.3d 618 (2017) (hereafter *Evergreen*). Respondents also take note that by Order dated March 7, 2018, the Washington Supreme Court accepted review of *Evergreen*.¹

A. The Evergreen Freedom Foundation’s Entire Defense to the State’s Enforcement Action Was Premised on a Technicality That Has No Application To this Case.

In *Evergreen*, the State brought an enforcement action against the Evergreen Freedom Foundation under the same legal theory as the enforcement action in this case: that the Foundation had violated RCW 42.17A.255(2) by failing to report certain litigation costs to the Public Disclosure Commission as “independent expenditures.” It is undisputed that the trial court in that case dismissed the State’s case against the foundation and that this Court reversed that dismissal on November 7, 2017. The question now is whether the same result is required in this case, where the trial court also dismissed an enforcement action brought under

¹ Department I of the Supreme Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens, Wiggins and Gordon McCloud, considered at its March 6, 2018, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and **unanimously agreed** to accept review. See copy of Order attached.

RCW 42.17A.255. The same result is not required here as the defense in each case, and therefore the issues is dispute, are fundamentally different.

For a violation of RCW 42.17A.255(2) to occur, a person or organization must have spent more than one hundred dollars (\$100) in “independent expenditures,” which are defined to mean “any expenditure that is made in support of or in opposition to any candidate or ballot proposition.” RCW 42.17A.255(1). In *Evergreen*, the Foundation’s defense was premised on the argument that the local initiatives at issue did not constitute “ballot propositions” under the statutory definition in RCW 42.17A.005(4). It was a timing-based argument, rather than a substance-based one. Specifically, the statutory definition applied to propositions only at certain moments in time, *i.e.* “before [their] circulation for signatures.” Because the expenditures at issue in *Evergreen* had been made after signatures had already been gathered, the Foundation made the technical argument that the disclosure requirement could not apply. *Evergreen*, 1 Wn. App. 2d at 293. The trial court agreed with this argument and dismissed on that basis. *See id.*

By contrast, the trial court in *this* case never ruled that the Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 at issue were not “ballot propositions” under RCW 42.17A.005(4). Indeed, most of the

Respondents in this case never even made that argument.² Instead, the Respondents in this case have always focused on a broader, more fundamental issue: whether filing a declaratory judgment action to determine the constitutional validity of a local initiative petition can constitute “*opposition to*” that petition under RCW 42.17A.255(1), in the context of the Fair Campaign Practices Act as a whole. *See* Resp. Brief at 3. The Evergreen Freedom Foundation never raised this argument, and the *Evergreen* court never decided it.

In light of this context, the assertions by the State that the *Evergreen* decision has purportedly “disposed” of certain issues pertinent to this case is simply not accurate.

B. *Evergreen’s* Discussion of the “Liberal Construction” Rules Applicable to the FCPA Merely Restate Existing Law.

The *Evergreen* court did not state that “Washington’s campaign finance laws must be liberally construed in favor of transparency” as the State suggests. State Supp. Br. at 1. Rather, the *Evergreen* court merely stated the rule already presented in previous case law and the parties’ briefs: “The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of

² While the Port Defendants did make a similarly technical argument about the definition of “ballot proposition” in RCW 42.17A.005(4) below, they have not relied on that argument in this appeal.

political campaigns and lobbying.” *Evergreen*, 1 Wn. App. 2d at 296 (quoting RCW 42.17A.001); *id.* at 305.

What Respondents have always argued with respect to this rule is that “liberal construction” only applies when it comes to matters within the scope of the FCPA’s purpose: promoting disclosure of information *respecting the financing of political campaigns*.³ See Resp. Br. at 18 n.10; see also RCW 42.17A.904 (“The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act.”). The legislature did not intend this statute to be interpreted “liberally” so as to allow the State to expand its purview beyond its stated goals. If the State wishes for broader substantive authority, it should undertake further rule-making procedures as was suggested in this very case by the governing agency, the PDC. In the meantime, the statutory “liberal construction” rule does *not* apply where, as here, the information sought to be disclosed is not about the financing of political campaigns.

Nothing about the *Evergreen* court’s decision changes this analysis. The court was properly invoking the “liberal construction” rule to reject the Foundation’s argument that the statutory definition of “ballot proposition” “cannot apply to local jurisdictions.” See *Evergreen*, slip op.

³ This qualifying language was conspicuously omitted from the State’s brief. See State Supp. Br. at 6.

at 23 (unpublished portion).⁴ This argument sought the categorical exclusion of campaign financing information not because it was outside the scope of the statute’s policy goals, but because certain localities’ campaign procedures arguably created a technical loophole. This is precisely the sort of scenario in which the “liberal construction” rule is designed to apply. In this case, by contrast, the Respondents are arguing categorically that their conduct falls outside the scope of the statute’s policy goals altogether; liberal construction is not the proper vehicle to resolve this issue.

C. The *Evergreen* Court’s Interpretation of the Term “Election Campaign” Does Not Change the Result in This Case.

The *Evergreen* court held that a lawsuit by an initiative’s proponent to get it on the ballot can be an “election campaign” under the statutory definition in RCW 42.17A.005(17). This holding, like the Court’s interpretation of the term “ballot proposition,” has no direct application in this case because the Respondents are not disputing the requirement under RCW 42.17A.255 that the expenditures at issue were made “*during* [an] election campaign.” See *Evergreen*, 1 Wn. App. 2d at 306 (emphasis added). That is because the requirement is timing-based,

⁴ Available at <http://www.courts.wa.gov/opinions/pdf/D2%2050224-1-II%20Published%20Opinion.pdf>

not actor-based; in other words, it does not require that the “election campaign” must be undertaken by the party whose expenditures are at issue. The Foundation *was* making a timing-based argument, *i.e.*, that an “election campaign” cannot exist for a ballot initiative until the moment it is submitted to the voters. *Id.* This argument failed because under the statutory definitions, an “election campaign” can exist any time a “ballot proposition” exists. RCW 42.17A.005(17). Thus, because the Court was rejecting the Foundations timing-based interpretation of “ballot proposition,” it had to also reject its timing-based interpretation of “election campaign.” *See Evergreen*, 1 Wn. App. 2d at 306. None of this is relevant to the instant case.

The State now argues, however, that the Court’s holding regarding the term “election campaign” has significance far beyond this technical issue; it even asserts that the holding means that the court “rejected the argument that to be reportable, expenditures must be made on electioneering or communications with voters.” State Supp. Br. at 1. The Court did no such thing. At most, the Court stated that a lawsuit seeking to force a locality to place a “ballot proposition” on the ballot can be considered an act “in support of” that ballot proposition. As discussed in the Respondents’ Brief at pages 28-29, this is not inconsistent with the Respondents’ position in this case that a declaratory judgment action on

the legal validity of a ballot proposition is not “in opposition to” the proposition under the FCPA. While both scenarios involve judicial proceedings, that is where the similarity stops. In cases like *Evergreen*, the party’s lawsuit to get the proposition on the ballot is only one part of the overall goal of getting it passed. Indeed, the relief sought in the suit makes no sense outside the context of the “campaign.” By contrast, when the constitutionality of a proposed law is at issue, anyone can bring a declaratory judgment action at any time. Indeed, such suits are regularly brought after the law has been passed and are never considered “campaign” activities subject to campaign finance disclosure requirements. It is only when the same issues are brought to court *before* passage that the State attempts to assert their authority over them through campaign disclosure laws. The Court should reject these illogical attempts to commandeer citizens’ rights to access the courts for the maintenance of constitutional integrity in state and local law.

D. *Evergreen* Does Not Change the Fact That Imposing Liability Against the Respondents Under RCW 42.17A.255 Would Violate the First Amendment

The State cites *Evergreen* as an authority favorable to its position, but in reality it merely confirms the position of the Respondents. For one thing, it confirms that the burden of persuasion rests with the State to show that the First Amendment is *not* violated by the FCPA’s disclosure

requirements. *Evergreen*, 1 Wn. App. 2d at 307. *Evergreen* also confirmed that forcing disclosure of the expenditures at issue in this case would not be “substantially related” to the important “governmental interests” served by the FCPA. That is because those government interests all had to do with protecting voters’ ability to assess the campaign messaging they receive. *See id.* at 308-09 (naming the interests as, *inter alia*, (1) “providing ***the voting public*** with the information with which to assess the various messages vying ***for their attention*** in the marketplace of ideas”; (2) disclosing expenditures for ***political campaigns and lobbying***; (3) improving public confidence in the fairness of ***elections and government processes***; (4) educating ***voters*** and (5) preventing concealment). Declaratory judgment actions have nothing to do with the messaging that voters receive; they raise pure questions of law that are properly decided by the independent judiciary.

Finally, to the extent that the Foundation and the *Evergreen* court addressed *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010), they did so incompletely. It is true that in *Citizens United*, the United States Supreme Court reversed its previous holdings that disclosure and reporting requirements are only valid if they are “limited to speech that is functionally equivalent to express political advocacy.” *Id.* at 369. But that does not mean that any

and all disclosure and reporting requirements are now valid under the First Amendment, no matter what speech they encompass. The speech that the Court held to be fair for regulation fell in two categories: (1) the *Hillary: The Movie* documentary film, which the court said was “express political advocacy,” *id.* at 326, and (2) advertisements encouraging people to watch the *Hillary* Movie, which was not. It was this latter category of speech that the Court had to abrogate the “express advocacy” requirement for, and it did so because the government interest in “provid[ing] the electorate with information about the sources of *election-related* spending.” *Id.* at 367 (quotations omitted). Filing a declaratory judgment action on whether a proposed law is constitutional is not in any way analogous to advertising a propaganda film that even the Supreme Court recognized as “express political advocacy.” In other words, *Citizens United* does nothing to validate the State’s position in this case.

E. Vagueness

Finally, the State cites to the *Evergreen* court’s holding that the term “ballot proposition” in RCW 42.17A.255 is not unconstitutionally vague. This holding is inapplicable to this case, of course, as the term at issue here is “in opposition to” rather than “ballot proposition.” And, the *Evergreen* decision actually demonstrates the material distinction between the two.

As the *Evergreen* court stated, “a statute may be void for vagueness if it is framed in terms so vague that persons of common intelligence must guess at its meaning and cannot agree on its application.” *Evergreen*, slip op. (unpublished portion) at 22 (quoting *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wash.2d 470, 484, 166 P.3d 1174 (2007)). The doctrine has two goals: to provide fair notice as to what conduct is prohibited and to protect against arbitrary enforcement. *Evergreen*, slip op. at 22 (citing *Postema v. Pollution Control Hr’gs Bd.*, 142 Wn.2d 68, 114, 11 P.3d 726 (2000)).

The reason that the *Evergreen* court rejected the Foundation’s vagueness challenge was that its complaints were not actually about vagueness; it identified no problems with the language of the statute itself or any of its terms. *Evergreen*, slip op. (unpublished portion) at 23. Rather, “[t]he core of the Foundation’s argument appear[ed] to be that the statute [was] inconsistent with the local initiative process,” *i.e.*, by making certain ballot initiatives into “ballot propositions” even where signatures had already been gathered. *Id.* Here, by comparison, the Respondents are asserting that the phrase “in opposition to” is classically vague in that it would require persons of common intelligence to guess at its meaning and not agree on its application, particularly in the case of declaratory judgment actions brought by citizens to determine the legal validity of

ballot measures, where even the governing agency (the Public Disclosure Commission) itself believed the statute to be too vague to enforce.

II. CONCLUSION

The Court's recent *Evergreen* case does not materially change the law on any of the points raised in the present appeal, and the Court should affirm the judgment below.

RESPECTFULLY SUBMITTED this 13th day of March, 2018.

BETTS, PATTERSON & MINES, P.S.

Per electronic authority

By /s/Kathryn N. Boling

Steven Goldstein, WSBA #11042

Kathryn N. Boling, WSBA #39776

Betts Patterson & Mines

701 Pike Street, Suite 1400

Seattle WA 98101-3927

Telephone: (206) 292-9988

Facsimile: (206) 343-7053

*Attorneys for Economic Development Board
for Tacoma-Pierce County*

LEDGER SQUARE LAW, P.S.

Per electronic authority

By /s/Jason M. Whalen

Jason M. Whalen, WSBA #22195

Ledger Square Law, P.S.

710 Market Street

Tacoma, WA 98402-3712

Telephone: (253) 327-1900

Facsimile: (253) 327-1700

*Attorney for Economic Development Board
for Tacoma-Pierce County*

GORDON, THOMAS, HONEYWELL

Per electronic authority

By/s/Valarie S. Zeeck

Valarie S. Zeeck, WSBA #24998

Gordon Thomas Honeywell

1201 Pacific Avenue, Suite 2100

Tacoma, WA 98402

Telephone: (253) 620-6500

Facsimile: (253) 620-6565

*Attorney for Tacoma-Pierce County
Chamber*

GOODSTEIN LAW GROUP, PLLC

By/s/Carolyn A. Lake

Carolyn A. Lake, WSBA #13980

Seth S. Goldstein, WSBA #45091

Goodstein Law Group, PLLC

501 South G Street

Tacoma, WA 98405-4715

Telephone: (253) 779-4000

Facsimile: (253) 779-4411

*Attorneys for John Wolfe, Connie Bacon,
Don Johnson, Dick Marzano, Don Meyer,
and Clare Petrich*

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Counsel for Plaintiff State of Washington

Robert W. Ferguson
Linda Anne Dalton
Rebecca R. Glasgow
Chad Corwyn Standifer
Washington State Attorney General's Office
PO Box 40100
Olympia, WA 98504-0100
Email: lindad@atg.wa.gov
rebeccag@atg.wa.gov
chads@atg.wa.gov
CFUEF@atg.wa.gov

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

***Counsel for Co-Defendant Economic Develop.
Board for Tacoma***

Jason M. Whalen
Ledger Square Law PS
710 Market St
Tacoma, WA 98402-3712
Email: jason@ledgersquarelaw.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Co-Defendant Tacoma-Pierce County Chamber

Valarie S. Zeeck
Shelly Andrew
Warren E. Martin
Gordon Thomas Honeywell LLP
1201 Pacific Ave #2100
Tacoma, WA 98402
Email: vzeeck@gth-law.com
sandrew@gth-law.com
wmartin@gth-law.com
cscheall@gth-law.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

Counsel for Co-Defendants Economic Development Board for Tacoma-Pierce County

Steven Goldstein, WSBA #11042
Kathryn N. Boling, WSBA #39776
Betts Patterson & Mines
701 Pike Street, Suite 1400
Seattle WA 98101-3927
Email: sgoldstein@bpmlaw.com
kboling@bpmlaw.com

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight
- E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of March, 2018.

/s/Carolyn A. Lake

Carolyn A. Lake

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,)	No. 95281-7
)	
Respondent,)	ORDER
)	
v.)	Court of Appeals
)	No. 50224-1-II
EVERGREEN FREEDOM FOUNDATION,)	
)	
Petitioner.)	
)	
_____)	

Department I of the Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens, Wiggins and Gordon McCloud, considered at its March 6, 2018, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is granted. Any party may serve and file a supplemental brief within 30 days of the date of this order, see RAP 13.7(d).

DATED at Olympia, Washington, this 7th day of March, 2018.

For the Court



CHIEF JUSTICE

GOODSTEIN LAW GROUP PLLC

March 13, 2018 - 4:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49892-8
Appellate Court Case Title: State of Washington, Appellant v Economic Development Board of Tacoma, Respondents
Superior Court Case Number: 16-2-10303-6

The following documents have been uploaded:

- 498928_Briefs_20180313161420D2386157_7210.pdf
This File Contains:
Briefs - Respondents - Modifier: Supplemental
The Original File Name was 180313.Respondent Supplemental Briefing with Attachment.SIGNED.pdf

A copy of the uploaded files will be sent to:

- Jason@ledgersquarelaw.com
- cfuolyef@atg.wa.gov
- chads@atg.wa.gov
- daniel.lee.richards@gmail.com
- dwolfard@bpmlaw.com
- jen@ledgersquarelaw.com
- kboling@bpmlaw.com
- klangridge@bpmlaw.com
- lindsay@atg.wa.gov
- rebeccag@atg.wa.gov
- sgoodstein@bpmlaw.com
- sgoodstein@goodsteinlaw.com
- sgoolyef@atg.wa.gov
- stefany.lontz@ATG.WA.GOV
- vzeeck@gth-law.com

Comments:

Sender Name: Deena Pinckney - Email: dpinckney@goodsteinlaw.com

Filing on Behalf of: Carolyn A. Lake - Email: clake@goodsteinlaw.com (Alternate Email: dpinckney@goodsteinlaw.com)

Address:
501 South G Street
Tacoma, WA, 98405
Phone: (253) 779-4000

Note: The Filing Id is 20180313161420D2386157