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NO. 49892-8-II

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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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**SUPPLEMENTAL BRIEF OF APPELLANT  
STATE OF WASHINGTON**

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## I. INTRODUCTION

This Court's recent decision in *State v. Evergreen Freedom Foundation*, 1 Wn. App. 2d 288, 404 P.3d 618 (2017) (published in part) disposes of some issues that the defendants raise in defense of the trial court's dismissal in this case and assists with the resolution of others. First, this Court reiterated that Washington's campaign finance laws must be liberally construed in favor of transparency. Second, this Court concluded that legal services expended to advocate about whether a local proposition will appear on the ballot are made "during an election campaign" under RCW 42.17A.255 if they occur after the ballot proposition is filed with local officials. In doing so, this Court rejected the argument that to be reportable, expenditures must be made on electioneering or communications with voters, concluding instead that legal services were expenditures in support of the ballot proposition in *Evergreen Freedom Foundation*. Third, this Court's interpretation of "ballot proposition" established that a local initiative becomes a ballot proposition at least when it is first filed with local officials. Finally, this Court held that the First Amendment allows application of campaign finance reporting requirements to litigation about whether a local initiative appears on the ballot.

Moreover, the unpublished portion of the opinion provides persuasive authority weighing in favor of reversal in this case. This Court

applied the liberal construction provision and concluded that the definition of “ballot proposition” and RCW 42.17A.255’s reporting requirements were not unconstitutionally vague. Thus, *Evergreen Freedom Foundation* disposes of or weighs against many of the defendants’ arguments in this case.

## II. ARGUMENT

### A. ***In State v. Evergreen Freedom Foundation, This Court Liberally Interpreted the Fair Campaign Practices Act Consistent with Its Purpose and Rejected Challenges to Its Constitutionality***

In *Evergreen Freedom Foundation*, the State appealed the dismissal of its campaign finance action against the Evergreen Freedom Foundation, alleging that the Freedom Foundation should have reported its independent expenditures for legal services expended to argue that certain local initiatives should be placed on the ballot. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 292-93. The Freedom Foundation argued that its expenditures on legal services were not reportable under RCW 42.17A.255 and that the local initiatives were not “ballot propositions” as that term is defined in RCW 42.17A. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 301-02, 306. The Freedom Foundation also argued that it would violate the First Amendment to apply the Fair Campaign Practices Act (FCPA), RCW 42.17A, and require reporting about legal services to support or

oppose placement of a local proposition on the ballot. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 307. This Court disagreed.

This Court explained that RCW 42.17A.255(2) requires any person who makes an “independent expenditure” in support of or in opposition to a “ballot proposition” to report that expenditure if their expenditures made during the same “election campaign” equal \$100 or more. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 300. This Court recognized that “election campaign” as defined under the campaign finance statutes, includes “‘any campaign in support of, or in opposition to . . . , a ballot proposition.’” *Id.* at 301 (quoting RCW 42.17A.255(2)).

Emphasizing the purpose of the FCPA’s reporting requirements, “to fully disclose to the public political campaign contributions and expenditures,” and the Act’s liberal construction provisions, this Court held that reporting independent expenditures for legal services must occur once a local initiative has been filed with local officials. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 305.

The Freedom Foundation argued that “any reporting obligations in this case could not be triggered because RCW 42.17A.255(2) requires that an independent expenditure was made ‘during an election campaign.’” *Evergreen Freedom Found.*, 1 Wn. App. 2d at 306. This Court recognized instead that litigation about whether a local initiative should be placed on

the ballot is part of an election campaign: “The Foundation’s pro bono legal services were rendered in support of the local initiatives—to assist their placement on the ballot. Therefore, because we conclude that the initiatives at issue here qualified as ‘ballot propositions,’ the Foundation’s support occurred during an ‘election campaign.’” *Evergreen Freedom Found.*, 1 Wn. App. 2d at 306. Ultimately, this Court held that the trial court erred when it dismissed the State’s enforcement action. *Id.*

In addition, this Court rejected the Freedom Foundation’s argument that requiring disclosure would impermissibly infringe on the Foundation’s right of free speech under the First Amendment. *Id.* This Court applied the “exacting scrutiny” test appropriate for disclosure requirements. *Id.* at 307-08. This Court reviewed case law from the Ninth Circuit, the Washington Supreme Court, and Division One, concluding that the “goal of disclosure was intended to improve public confidence in the fairness of elections and government processes and to protect the public interest.” *Id.* at 308-09. “[T]he governmental interests in educating voters and preventing concealment noted by other courts apply with equal strength here.” *Id.* at 309. The reports required under RCW 42.17A.255 “are [also] substantially related to the government’s interest in disclosure.” *Evergreen Freedom Found.*, 1 Wn. App. 2d at 310. In sum, applying reporting requirements to legal expenditures survived exacting scrutiny. *Id.* at 310-11.

Notably, this Court also rejected the Freedom Foundation’s assertion that disclosure and reporting requirements must be limited to express political advocacy to be constitutionally valid. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 311. The United States Supreme Court specifically rejected this argument in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 366, 368-69, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). *Evergreen Freedom Found.*, 1 Wn. App. 2d at 311.

Finally, in the unpublished portion of its opinion, which is persuasive but not binding under General Rule 14.1, this Court recited the appropriate framework for analyzing a vagueness challenge. *State v. Evergreen Freedom Found.*, No. 50224-1-II, slip op. (unpublished portion) at 22-25, <http://www.courts.wa.gov/opinions/pdf/D2%2050224-1-II%20Published%20Opinion.pdf>. To determine whether RCW 42.17A.255’s reporting requirement is sufficiently definite, this Court looked to the provision “within the context of the enactment, giving language a sensible, meaningful, and practical interpretation.” *Evergreen Freedom Found.*, No. 50224-1-II, slip op. at 22-23. This Court presumed constitutionality and declined to hold a statute invalid simply because it could have been drafted with greater precision. *Id.* at 23. Ultimately, this Court rejected the Freedom Foundation’s vagueness challenge because RCW 42.17A.005(4) and RCW 42.17A.255 established “a clear course of conduct, requiring persons

to report independent expenditures.” *Evergreen Freedom Found.*, No. 50224-1-II, slip op. at 24.

In sum, in *Evergreen Freedom Foundation*, this Court held that a local initiative becomes a “ballot proposition,” at the very least, when it is filed with local officials. RCW 42.17A.255 requires reporting of independent expenditures, including legal fees spent to support placing a local ballot proposition on the ballot. And imposing this disclosure requirement does not violate the First Amendment.

**B. Application of *Evergreen Freedom Foundation* to This Case**

While the *Evergreen Freedom Foundation* decision does not resolve all of the issues raised in this case, it does resolve some and it provides significant guidance in resolving others.

First, the *Evergreen Freedom Foundation* decision emphasized both the clear purpose behind the FCPA—that campaign contributions and expenditures be fully disclosed to the public and that public confidence in government at all levels is to be promoted by all possible means. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 295 (reciting RCW 42.17A.001(1), and (5)). The public’s right to know about the financing of political campaigns outweighs secrecy and privacy. *Id.* at 296 (discussing RCW 42.17A.001(10), (11)). In addition, the provisions of RCW 42.17A must be “‘liberally construed to promote complete disclosure . . . .’” *Id.*

(quoting RCW 42.17A.001). This Court should continue to determine the meaning of the FCPA by viewing its provisions through this lens, emphasizing the people's and the Legislature's intent when adopting the law.

Second, the defendants' arguments here rely heavily on the premise that litigation about whether a local initiative should appear on the ballot is not "campaigning" and is therefore not subject to the FCPA. Br. of Resp't at 1, 15. Defendants argue that an "election campaign" or "campaign activity" can include only "electioneering" or communications "designed to sway the electorate." Br. of Resp't at 15-16, 26 (relying, in part, on the definition of "election campaign"); Port of Tacoma Br. at 1-2, 8-10 (arguing litigation was not part of a "ballot initiative campaign."). But if this Court believed this argument to be correct, it would not have decided *Evergreen Freedom Foundation* as it did. This Court would have upheld the dismissal of the State's action if this Court understood that legal services provided to litigate ballot content were not covered by or reportable under the FCPA.

Instead this Court explained: "But an 'election campaign' is defined in RCW 42.17A.005(17) to include 'any campaign in support of, or in opposition to, a ballot proposition.' *The Foundation's pro bono legal services were rendered in support of local initiatives—to assist their placement on the ballot. Therefore, because we conclude that the initiatives*

at issue here qualified as ‘ballot propositions’ *the Foundation’s support occurred during an ‘election campaign.’*” *Evergreen Freedom Found.*, 1 Wn. App. 2d at 306 (emphases added).

Surely if legal services to force a ballot proposition onto the ballot are part of an “election campaign” governed by the FCPA as this Court said in *Evergreen Freedom Foundation*, so are legal services to prevent a local ballot proposition from appearing before the voters. Moreover, if legal services to force a ballot proposition onto the ballot were “rendered in support of local initiatives,” then legal services to prevent a ballot proposition from reaching voters are surely “in opposition to” that ballot proposition. *See id.* at 306. In other words, the reasoning in *Evergreen Freedom Foundation* is directly contrary to the trial court’s conclusion below that expenditures for litigation about what appears on the ballot are not covered by the FCPA or reportable. *See* VRP (Dec. 14, 2016) at 100-01 (quoted at Br. of Resp’t at 10-11).

Third, this Court’s discussion of what constitutes a “ballot proposition” in *Evergreen Freedom Foundation* defeats the Port’s argument that “the Tacoma Petitions were never ‘ballot propositions.’” Port of Tacoma Br. at 36. This Court plainly held in *Evergreen Freedom Foundation* that local initiatives meet the definition of “ballot proposition” at the very least when they are filed with local officials. *Evergreen Freedom*

*Found.*, 1 Wn. App. 2d at 303 (“[W]e conclude that the only reasonable interpretation is the State’s position that a local initiative becomes a ‘ballot proposition’ once it is filed with the appropriate election official.”). Here, the local initiatives were indisputably filed before the expenditures for legal services occurred. CP 48-74, 293-94. The Port’s argument should be rejected.

Fourth, this Court has disposed of the defendants’ First Amendment challenge. Like the Evergreen Freedom Foundation, the defendants here argued that the FCPA’s disclosure requirements fail to survive exacting scrutiny under a First Amendment analysis. Br. of Resp’t at 30. But in the context of evaluating the disclosure of pro bono legal services, this Court found both an important government interest in transparency and a substantial relationship between the reporting of legal expenditures and that government interest. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 307-11.

Finally, this Court also persuasively rejected a vagueness challenge. Specifically, this Court rejected the argument that the independent expenditure reporting requirement was unconstitutionally vague, finding instead that RCW 42.17A.005(4) and RCW 42.17A.255 established “a clear course of conduct, requiring persons to report independent expenditures.” *State v. Evergreen Freedom Found.*, No. 50224-1-II, slip op. (unpublished portion) at 24; *see also* Br. of Resp. at 31. If the FCPA established a clear

reporting requirement for expenditures on legal services supporting a local initiative, it also established a clear reporting requirement for expenditures on legal services opposing a local initiative. *See id.*; RCW 42.17A.255.

### III. CONCLUSION

This Court should apply its recent decision in *Evergreen Freedom Foundation*, interpreting the Fair Campaign Practices Act through the lens of its liberal construction provisions. Like it did in *Evergreen Freedom Foundation*, this Court should conclude that expenditures on legal services to litigate whether a local initiative should appear on the ballot are reportable under RCW 42.17A.255 because they are part of the campaign to support or oppose the local proposition. This Court should also apply the same First Amendment analysis that it did in *Evergreen Freedom Foundation*, concluding that the disclosure requirement is sufficiently tailored to an important government interest in transparency, and the FCPA is not unconstitutionally vague.

RESPECTFULLY SUBMITTED this 20th day of February 2018.

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