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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,

Respondent.

REPLY BRIEF OF APPELLANT STATE OF WASHINGTON

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ORIGINAL

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I. INTRODUCTION

Evergreen Freedom Foundation advocates for a loophole in the law that will allow interest groups to hide from public view independent expenditures promoting or opposing local initiatives at the early stages. Only when a local ballot proposition is placed on the ballot would disclosure requirements begin under their theory. This would undermine transparency during signature-gathering, early campaigning, and litigation over whether and how a local ballot proposition will appear in the ballot. It would hide a local initiative's earliest supporters, even though local initiatives often serve as precursors to, and build momentum for, statewide initiative campaigns.

This outcome contradicts the plain language of the campaign finance disclosure statutes, which at the very least require reporting to begin when a proposition is initially filed with local officials. Here, there is no dispute that the initiatives' proponents filed them before the Freedom Foundation represented the proponents in litigation seeking to place the initiatives on the ballot. Under even a conservative reading of the statutes, the Freedom Foundation was obligated to report independent expenditures occurring after filing, including pro bono representation in litigation related to the propositions. The Freedom Foundation's reading also contradicts the statute's stated purpose and liberal construction provision.

The definition of "ballot proposition" is not void for vagueness where the statute is clear that, at the very least, the definition is satisfied when the local proposition is filed. Because the campaign disclosure

statutes impose disclosure requirements, rather than outright restrictions on speech, this case is also distinguishable from the First Amendment cases the Freedom Foundation relies upon. The reporting requirement does not restrict pro bono services, the value of legal services alone is not privileged, and the reporting requirements do not infringe on this Court's supervision of the legal profession. Finally, the State's complaint-driven enforcement is not impermissibly selective, and Civil Rule 19 does not support the drastic remedy of dismissal.

II. REPLY TO STATEMENT OF THE CASE

For a local initiative, proponents submit signed initiative petitions to local officials, who must certify whether the petition has enough signatures. RCW 35.17.260; CP at 80; Br. Resp't at 4. Here, proponents filed the local initiatives with local officials, along with signature petitions, which the county auditor for Sequim and Shelton, and the city clerk for Chelan, then checked for sufficiency. CP at 7-9, 74-75, 79-81, 85-87. The Freedom Foundation admits that it provided pro bono legal representation to the local initiative proponents *after* the initiatives and signature petitions were initially filed. Br. Resp't at 4.

The Attorney General received a complaint from two individuals on behalf of a "Committee for Transparency in Elections," alleging that the Freedom Foundation had violated RCW 42.17A in various ways. CP at 64. The letter served as a 45-day notice of the authors' intent to

bring a citizens' action should the State fail to commence an action. CP at 64; RCW 42.17A.765(4).

In part based on a need to prioritize because of limited resources, the State has not typically investigated or brought actions under RCW 42.17A absent a complaint. *See* CP at 61-62. To date, the State has received no additional complaints related to the 2014 Sequim, Shelton, and Chelan initiatives or pro bono activities supporting or opposing these local initiatives. While the Freedom Foundation has brought complaints under RCW 42.17A in other circumstances,[1] it has chosen not to do so here, perhaps because it does not believe that the pro bono services at issue are subject to disclosure requirements. Still, under RCW 42.17A.770, the five-year statute of limitations for bringing civil enforcement actions would not expire until 2019. Should this Court hold that pro bono activities in support of or opposition to a local initiative must be reported under RCW 42.17A, additional complaints and investigations related to these 2014 initiatives could be brought.

Finally, while the trial court explained that its basis for dismissal was its finding that "the statutes here [are] ambiguous and vague," the court concluded that it was "not convinced that the statute means what the State says it does in regard to this particular type of situation." VRP at 23-24. The trial court did not declare RCW 42.17A to be unconstitutional

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[1] *See State v. SEIU 775*, Thurston County Superior Court No. 15-2-01825-3 (Freedom Foundation was complainant); *State v. Serv. Emps. Int'l Union, Local 925*, Thurston County Superior Court No. 15-2-01923-3 (same).

for vagueness or any other reason. VRP at 23-24 And while the court indicated it would have declined to join other parties, it did not formally rule on the Plaintiffs' motion that additional defendants be joined under CR 19, specifically calling its comment on CR 19 dicta. VRP at 24-25. The court did, however, analogize the State's discretion in civil enforcement to the significant prosecutorial discretion for charging decisions. VRP at 25.

III. ARGUMENT

This Court must review a CR 12(b)(6) dismissal de novo, and dismissal is proper only if the court concludes that the State can prove no set of facts that would justify recovery. *Trujillo v. Nw Tr. Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Where a court is charged with determining the meaning of a statute, its fundamental objective is to carry out the people's and the Legislature's intent, looking to the entire context of the statutory scheme, as well as the "general object to be accomplished and consequences that would result from" the parties' constructions. *E.g.*, *BAC Home Loans Servicing v. Fulbright*, 180 Wn.2d 754, 766, 328 P.3d 895 (2014) (internal quotation marks omitted).

RCW 42.17A requires any "public or private corporation . . . or any other organization or group of persons, however organized" to timely file reports of "independent expenditures." RCW 42.17A.005(35), .255. "Independent expenditure," for purposes of RCW 42.17A.255, includes "any expenditure that is made in support of or in opposition to any . . . ballot proposition and is not otherwise required to be reported . . ."

RCW 42.17A.255(1). Disclosure is triggered when any expenditure amounts to more than $100. RCW 42.17A.255(2). Required disclosures include an initial report, followed by periodic updates if expenditures continue, as well as three required updates at specific stages of the election season. RCW 42.17A.255(2), (3), (5); *see also Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 998-99 (9th Cir. 2010). Thus, organizations like the Freedom Foundation must file timely reports of the value of their expenditures supporting any "ballot proposition."

A. The Legislature Defined "Ballot Proposition" Broadly to Include, at the Very Least, a Local Initiative That Has Been Initially Filed with Local Officials

1. The text, context, and legislative history of the definition of "ballot proposition" all contradict the Freedom Foundation's interpretation

The Legislature has defined "ballot proposition" for purposes of campaign finance reporting as:

> any "measure" as defined by RCW 29A.04.091, *or* 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* 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) (emphases added).

The definition has two prongs. The first incorporates "any proposition or question submitted to the voters." RCW 29A.04.091 (defining "measure"). The second prong incorporates additional propositions: those "proposed to be submitted to the voters," including

voters of "any municipal corporation, political subdivision, or other voting constituency" "from and after the time when the proposition has initially been filed with the appropriate election officer of that constituency before its circulation for signatures." RCW 42.17A.005(4). The Freedom Foundation acknowledges that its interpretation of "ballot proposition" would mean that no local initiative would ever be covered by the second prong of the definition. Br. Resp't at 12-14. But this reading would be contrary to the plain language of the second prong, as well as legislative intent that the second prong apply to proposed local initiatives.

It is the Freedom Foundation, not the State, that asks the Court to ignore the plain language of the statutory definition. The Freedom Foundation's interpretation is nonsensical because it claims that a *local* ballot proposition "proposed to be submitted to voters" cannot possibly be covered, but ignores the statute's plain references to local entities—"any municipal corporation, political subdivision, or other voting constituency,"—in the second prong of the definition. Why would the Legislature have expressly incorporated those references if it did not intend the second prong to apply at all to local propositions?

At the very least, under the plain language of the second prong, a local initiative becomes a "ballot proposition" once it is initially filed with local officials. RCW 42.17A.005(4) ("from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency"). Here, the local initiatives were filed with county auditors and clerks for signature-checking, and then the local legislative

bodies declined to put the initiatives on the ballot. CP at 74-75, 79-81, 85-86. Thus, the Freedom Foundation provided pro bono legal services after the local initiatives were "initially filed" with local officials for processing. RCW 42.17A.005(4). Under these circumstances, this Court should conclude that the second prong of the statutory definition was plainly met when the local initiative was initially filed, and as soon as independent expenditures to support the initiative crossed the $100 value threshold, the law required the Freedom Foundation to report the value of its legal services as independent expenditures. The Court could stop there.

Alternatively, the Court could recognize that the second prong's plain language contemplates both that it applies to local initiatives, as explained above, *and* that local initiatives become "ballot propositions" "before [the initiative's] circulation for signatures." RCW 42.17A.005(4). The language about initially filing with officials would not be surplusage because it would continue to apply in the context of statewide initiatives. Even so, this Court has recognized that it can ignore surplusage in some instances, for example where application of particular language in a particular circumstance appears to be an unintentional carryover. *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 859, 774 P.2d 1199 (1989). And this Court has explained that "surplusage in a statute may be ignored in order to subserve legislative intent." *Id.* (citing 2A Norman Singer, *Statutory Construction* § 47.37 (4th ed. 1984)).

This broader reading is the most consistent with the people's statement of legislative intent and the legislative history. Here, there are

two strong indicators of the people's and the Legislature's intent to apply disclosure requirements to independent expenditures related to signature-gathering for local initiatives. First, the people provided that the campaign disclosure statutes "shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns [including support of or opposition to a ballot proposition] . . . so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected." RCW 42.17A.001, .005(17). This liberal construction rule, along with the statement of the people's purpose to require full disclosure to promote public confidence, is included in the plain reading of the statute. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010); RCW 42.17A.001.

Second, the legislative history, in particular the 1975 amendment, indicates the Legislature was trying to clarify the language of the definition of "ballot proposition" in order to solve a problem. H.B. Analysis of Substitute H.B. 827, at 1, 44th Leg., 1st Ex. Sess. (Wash. Mar. 24, 1975). The prior language was potentially unclear as to when a *proposed* initiative triggered reporting requirements. *Id.* The bill analysis confirms the Legislature's intent to cover proposed local initiatives, at the very least after the filing with local officials, but also "prior to circulation for signatures on petitions to place such measures on the ballot." *Id.* "[S]uch measures" included "measures which are proposed to be submitted to the voters of the state *or any municipal corporation, political*

subdivision, or any other voting constituency." H.B. Analysis of Substitute H.B. 827, at 1, 44th Leg., 1st Ex. Sess. (Wash. Mar. 24, 1975) (emphasis added).

In sum, every proposed interpretation of the second prong of the definition of "ballot proposition" requires that the Court ignore some phrase or portion of the definition in the context of local initiatives. The Freedom Foundation would have the Court ignore the incorporation of propositions "proposed to be submitted" to "any municipal corporation, political subdivision, or other voting constituency" by advocating that the second prong only applies to statewide initiatives. The State asks the Court to treat as surplusage, in the context of local propositions, either the phrase "after the time when the proposition has been initially filed with the appropriate election officer" or the phrase "before its circulation for signatures." The Court must decide which reading of the definition most comports with the people's and the Legislature's intent in adopting this provision. Considering the text of the definition, the context of the entire statutory scheme, including the stated purpose and liberal construction provision, and the legislative history, this Court should conclude that reporting requirements apply during the signature-gathering phase for both statewide and local initiatives. But even of the Court is not willing to go that far, at the very least it should adopt the construction that triggers reporting requirements when the local proposition is filed.

The Freedom Foundation's reliance on the definition of "election campaign" and its reading of *Human Life of Washington* are incorrect.

First, the Freedom Foundation misuses the definition of "election campaign." While colloquially, the concept of "election campaign," might connote activity once a proposition is on the ballot, that is not how RCW 42.17A defines the term. Instead, "election campaign" includes any campaign in support of or in opposition to a "ballot proposition." RCW 42.17A.005(17). Because it incorporates the term "ballot proposition," which in turn encompasses local initiatives *proposed* to be submitted to the voters, this argument fails. RCW 42.17A.005.

The Freedom Foundation next relies on one phrase in *Human Life of Washington*: "Disclosure requirements are triggered if, in a given election, such an expenditure equals more than $100 or if its value cannot reasonably be estimated." *Human Life of Wash.*, 624 F.3d at 998. But this single reference to an election does not get the Freedom Foundation where it wants to go. The Ninth Circuit was not called upon to decide, nor did the Court discuss, the meaning of "ballot proposition" or when reporting must begin on independent expenditures supporting *local* ballot propositions. *Human Life of Wash.*, 624 F.3d 990. Contrary to the Freedom Foundation's contention, the Ninth Circuit did not conclude anything with regard to the issue presented in this case. Br. Resp't at 15; *Human Life of Wash.*, 624 F.3d at 998-99. And given that *Human Life of Washington* was addressing independent expenditure reporting for a *statewide* initiative, reading this sentence as the Freedom Foundation suggests—to conclude an initiative must be on the ballot for disclosure requirements to apply—contradicts the Freedom Foundation's admission that disclosure

requirements apply to proposed *statewide* initiatives during signature-gathering under RCW 42.17A.005. *Human Life of Wash.*, 624 F.3d at 995; Br. Resp't at 13 n.13.

Finally, the State's interpretation of "ballot proposition" is consistent with the PDC's reading of the term since the late 1980s. CP at 54-57. The current PDC forms do not lead to a different conclusion. The fact that the PDC provides a space on its form to include a ballot proposition number does not equate to a PDC determination that, in the absence of such a number being assigned, the form need not be completed. An agency form cannot alter the meaning if a statutorily defined term. And the form indicates that independent expenditures in support of a ballot proposition "occurring at any time" must be disclosed. WAC 390-16-060 (first line of the form). Nothing prevents the updating of the form to add an initiative number if one is assigned. In sum, the statute's plain language, the purpose of the disclosure laws, the legislative history, and the PDC's application all support reversal.

B. The State's Interpretation of "Ballot Proposition" Does Not Violate the First Amendment

1. This case involves a reporting requirement, not a limitation or prohibition on speech

This Court has recognized the importance of protecting political speech. Full and vigorous discussion of political issues is a cornerstone of our democracy. *Voters Educ. Comm. v. Wash. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 479, 166 P.3d 1174 (2007) (*VEC*). For purposes of a First

Amendment analysis, the U.S. Supreme Court, the Ninth Circuit, and this Court have distinguished between contribution limits, which necessarily reduce the quantity of political expression, and disclosure or reporting requirements, which "'impose no ceiling on campaign-related activities,'" and instead increase information available to the electorate. *Human Life of Wash.*, 624 F.3d at 1003 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)); *see also VEC*, 161 Wn.2d at 482. Disclosure requirements do not prevent anyone from speaking, and in most instances, they are "the least restrictive means" of "curbing the evils of campaign ignorance and corruption." *Human Life of Wash.*, 624 F.3d at 1003; *VEC*, 140 Wn.2d at 483.

The Freedom Foundation incorrectly "presumes a *limitation* of [its] speech, as occurs with limits on political contributions or expenditures" rather than a "disclosure requirement," but this Court has not hesitated to explain the difference. *VEC*, 161 Wn.2d at 482. Disclosure requirements "assure the public the right to *receive* information in an open society," implicating complementary First Amendment values of "uninhibited, robust, and wide-open political speech." *Id.* at 483 (internal quotation marks omitted). This distinction has been a factor in this Court's vagueness analysis as well as its determination of whether a disclosure requirement impermissibly burdens speech. *Id.* at 490, 494-95.

Thus, cases addressing contribution limits or bans on certain speech or activities are inapposite. *See NAACP v. Button*, 371 U.S. 415, 419-20, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (analyzing ban on "improper

solicitation of any legal or professional business" as applied to NAACP); *City of Chicago v. Morales*, 527 U.S. 41, 45, 59-64, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (analyzing ordinance prohibiting gang members from loitering in any public place and concluding the law failed to distinguish between lawful and illegal conduct because it lacked a mens rea requirement); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320-21, 366-67, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (invalidating prohibition on corporation and union contributions to or express advocacy for or against a candidate in certain federal elections; but distinguishing disclaimer and disclosure requirements, requiring only that they show substantial relation between the requirement and an important government interest); *Ariz. Free Enter. v. Bennett*, 564 U.S. 721, 729-30, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) (analyzing a matching public funds system, not a disclosure requirement); Br. Resp't at 19-25.[2]

2. The definition of ballot proposition is not void for vagueness

The definition of "ballot proposition" is not unconstitutionally vague, and even if this Court disagrees, it can adopt a saving construction of the statute. In *VEC*, this Court explained that a statute is void for vagueness "if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its

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[2] This case is also different from *Farris*, where the Ninth Circuit invalidated a contribution limit on the amount of independent expenditures supporting or opposing a recall petition. *See Farris v. Seabrook*, 677 F.3d 858, 862 (9th Cir. 2012).Once the cap was reached, further expenditures were prohibited.

application," or if it is so indefinite as to allow arbitrary enforcement. *VEC*, 161 Wn.2d at 484-85 (internal quotation marks omitted); *Human Life of Wash.*, 624 F.3d at 1019. Some ambiguity is not fatal: "[P]erfect clarity is not required even when a law regulates protected speech," and "we can never expect mathematical certainty from our language." *Human Life of Wash.*, 624 F.3d at 1019 (internal quotation marks omitted).

Vagueness challenges should be rejected when the complete law, including its statement of purpose, makes it clear what is required or prohibited. *Human Life of Wash.*, 624 F3d at 1021 (considering the law's clear purpose). This Court and the Ninth Circuit have held that the phrase "in support of or opposition to any candidate," and the terms "expectation" and "mass communication," are sufficiently precise. *VEC*, 161 Wn.2d at 488-89; *Human Life of Wash.*, 624 F3d at 1020-21.

The definition of "ballot proposition" is also sufficiently precise. It reflects the Legislature's intent to capture independent expenditures during the signature-gathering phase of a local initiative campaign. *See* RCW 42.17A.005(4). And at the very least, as applied in this case, the definition is clear that a local initiative becomes subject to disclosure requirements when the initiative is "initially filed" with local officials. *Id.* This conclusion is supported by the entire context of the statutory scheme, including the stated purpose to promote voter access to information about initiatives, and the Legislature's clear intent to include proposed local initiatives. RCW 42.17A.005(4), .001(11). This is certainly distinct from the statute at issue in *Morales*, where the criminal law prohibiting loitering

without "apparent purpose" lacked a mens rea requirement such that its application could not be defined. *Morales*, 527 U.S. at 53-55. That is a far cry from this situation, where the Freedom Foundation's pro bono support occurred after the initiative petitions had been initially filed with local officials, a clear trigger of disclosure requirements under the law.

3. The definition of "ballot proposition" does not otherwise impermissibly burden speech

The State's reading of "ballot proposition" survives exacting scrutiny because there is a substantial relationship between the government's interest and the information to be disclosed. *Human Life of Wash.*, 624 F.3d at 1003. Campaign disclosure requirements provide the electorate with critical information about the supporters and opponents of issues competing for their attention as voters. *Id.* at 1005-06. This informational interest is not only substantial, but "extremely compelling." *Id.* at 1006-07. The informational interest is especially important in the initiative context where "following the money" allows voters to determine for themselves whether an interest group's involvement in the promotion or opposition of an initiative signals alignment with the voters' interest. *Id.* Further, because our disclosure requirement is not a ban, cap, or limitation on speech, it is "the least restrictive means" of regulating activities in support of proposed local initiatives. *VEC*, 161 Wn.2d at 482-83.

The electorate's compelling informational interest, combined with the disclosure law's lack of prohibition or restriction on speech, renders this case different from those the Freedom Foundation relies upon. The

application of the disclosure requirements where an initiative has been "proposed" does not ban pro bono representation in disputes as to whether an initiative will be placed on the ballot. It simply requires transparency with regard to who is fighting for the initiative. *Contrast* RCW 42.17A.005(4), .255 *with NAACP*, 371 U.S. at 419-20 (analyzing ban on "the improper solicitation of any legal or professional business" as applied to the NAACP); *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 620-21, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (analyzing prohibition on certain targeted direct-mail solicitations); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 455-58, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (analyzing ban on certain broadcast advertisements).

The Freedom Foundation now asserts for the first time that applying public disclosure requirements will chill pro bono representation in support of or opposition to local initiatives because reporting the value of such representation will "require a breach of the attorney-client privilege." Br. Resp't at 22. Not so. Both this Court and the Ninth Circuit have explained that generally, the identity of the client, the amount of a bill or fee, and the general purpose of the work performed are not protected from disclosure by the attorney client privilege. *E.g.*, *Dietz v. Doe*, 131 Wn.2d 835, 846, 935 P.2d 611 (1997) ("Ordinarily, the name of a client is not a confidential communication under the protection of the attorney-client privilege."); *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129-30 (9th Cir. 1992) (bills that contained identity of client, case

name, amount of fee, and general nature of services performed, but not litigation strategy or specific legal research, were not privileged).

This Court has recognized a limited exception where privilege applies to the client's identity if disclosure would "implicate that client in the very criminal activity for which legal advice was sought." *Dietz*, 131 Wn.2d at 846 (internal quotation marks omitted); *see also In re Grand Jury Witness*, 695 F.2d 359, 361 (9th Cir. 1982). But even then, the Court understood the amount, source, and manner of payment of legal fees were not protected because they did not convey the substance of confidential communications. *Dietz*, 131 Wn.2d at 846-47; *In re Grand Jury Witness*, 695 F.2d at 361; *see also Yakima v. Yakima Herald Republic*, 170 Wn.2d 775, 807-08, 246 P.3d 768 (2011) (attorney invoices could be redacted).

It is the person claiming privilege that has the burden of establishing that privilege applies. *Dietz*, 131 Wn.2d at 844. Here, the Freedom Foundation has offered no facts to suggest disclosure of the value of legal services that occurred in the context of public litigation—without more—would somehow reveal client confidences.

The Freedom Foundation also claims that disclosure requirements can apply only to electioneering communications, not pro bono activities or other expenditures. Br. Resp't at 24. But the *Citizens United* decision held the opposite: "we *reject* Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 369 (emphasis added); Br. Resp't at 24. Disclosure requirements are not

constitutionally limited to electioneering. *Citizens United*, 558 U.S. at 369 (Part IV, Justices Kennedy, Stevens, Ginsberg, Breyer, and Sotomayor) (listing non-electioneering disclosure requirements that have been upheld, including disclosure of independent expenditures and lobbying). *Wisconsin Right to Life*, the other cited case, did not address disclosure requirements; it analyzed a ban on corporate expenditures for some electioneering communications. *Wis. Right to Life*, 551 U.S. at 455-57.

Finally, the Freedom Foundation questions the weight of the State's interest in promoting transparency. Disclosure of early support for a proposed initiative will spotlight those interest groups who are most committed to its adoption. Local initiatives have become a gateway for issues to enter the statewide stage and courtrooms have become significant battlegrounds for promoting or blocking an initiative from appearing on the ballot. *See* Br. Appellant at 33 (listing examples). The public has a right to know what interest groups are expending sometimes significant resources to promote or block proposed initiatives in the earliest stages. *State v. Permanent Offense*, 136 Wn. App. 277, 284-85, 150 P.3d 568 (2006) (describing electorate's interest in obtaining information about who is supporting ballot propositions).

The First Amendment requires only that campaign disclosure requirements show a substantial relation between the requirement and an important government interest. Here, the disclosure requirement is substantially related to the strong interest in transparency for local voters.

C. Requiring Reporting of Pro Bono Services to Support a Local Ballot Proposition Does Not Infringe on the Court's Regulation of the Practice of Law

The Freedom Foundation continues to rely on inapposite cases involving attempts to regulate the WSBA itself or who is permitted to practice law in Washington. Br. Resp't at 25-26. The campaign disclosure laws do neither. RCW 42.17A does not restrict or prohibit the practice of law in any particular case—it simply requires reporting of the value of pro bono services in certain circumstances. *See* RCW 42.17A.255. Nor do the campaign disclosure requirements conflict with any court rule, including those listed by the Freedom Foundation. Br. Resp't at 26-27. The statutes do not restrict any attorney's participation in any particular case, nor do they prevent the filing of amicus briefs, nor do they interfere with the reporting of pro bono hours to the WSBA. *See id.* As explained above, the campaign disclosure requirements do not require attorneys to reveal privileged communications. *See supra* at pp.16-17. Even in the context of pre-litigation legal services, the amount of an attorney fee and a general description of the services provided does not generally violate the attorney-client privilege. *E.g.*, *Dietz*, 131 Wn.2d at 846 (ordinarily, the name of a client or the fact of representation is not a confidential communication). Nothing about the disclosure requirements infringes on this Court's regulation of the practice of law.

D. Civil Rule 19 Does Not Independently Support Dismissal

The trial court said that it would have denied the Freedom Foundation's motion to join additional defendants, but noted this

discussion was dicta, leaving the issue open if this case is remanded. VRP at 24. The Freedom Foundation did not cross appeal, but now argues instead that failure to join an indispensable party warrants dismissal. Br. Resp't at 28 Neither CR 19 nor the case law supports this drastic remedy.

Under CR 19, a court must first analyze whether a party is necessary. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 221-22, 285 P.3d 52 (2012) (*AUTO*). If so, the Court must determine whether the missing party can feasibly be joined. *Id.* If not, the court must then determine if the party is indispensable. *Id.*; CR 19(b). Even if a party is necessary, it is not necessarily indispensable, and an action can be dismissed only if an indispensable party cannot be joined. CR 19(b); *see also AUTO*, 175 Wn.2d at 220. Dismissal is a "drastic remedy" that should be ordered only where a defect cannot be cured and significant prejudice to the absent parties will result. *AUTO*, 175 Wn.2d at 222-23.

The Freedom Foundation focuses on whether the initiative opponents are necessary parties, without addressing the remaining requirements for dismissal: whether joinder is feasible and, if not, whether the initiative opponents are indispensable.[3] Br. Resp't at 28-35. The Freedom Foundation offers nothing to support a conclusion that joinder

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[3] The State does not concede that the initiative opponents are necessary parties. They are not. But the most efficient way to address the Freedom Foundation's CR 19 argument is to consider first whether joinder is feasible (it would be) and whether the opponents are indispensable (they are not).

would not be feasible. *Cf. AUTO*, 175 Wn.2d at 226 (tribes' sovereign immunity made joinder not feasible).

The initiative opponents are also not indispensable under CR 19(b). If this Court reverses and remands, a judgment entered without the initiative opponents' participation would not prejudice the Freedom Foundation. CR 19(b)(1). Nothing prevents the Freedom Foundation from fully setting forth its arguments against application of the disclosure requirements. *Cf. AUTO*, 175 Wn.2d at 225 (State's arguments were actually adverse to the missing tribes). The Freedom Foundation cites nothing to support an established right to share the expenses of losing litigation. Br. Resp't at 34. Nor does the Freedom Foundation even attempt to establish any of the remaining indispensability factors in CR 19(b), including whether judgment in the initiative opponents' absence would be adequate to resolve this case (yes); and whether the State would have an alternative adequate remedy upon dismissal (no). Br. Resp't at 34-35.

Rather than addressing all of the indispensability factors, the Freedom Foundation primarily relies on its assertion that the State has selectively enforced the disclosure statutes. To prove selective enforcement, a defendant must show (1) disparate treatment *and* (2) improper motivation, meaning prosecution deliberately based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984) (internal quotation marks omitted). Here, given its limited resources, the

State distinguished between those against whom it had received complaints, and those against whom it had not. CP at 61-87. Washington courts have upheld this basis for distinction before. *See Frame Factory, Inc. v. Dep't of Ecology*, 21 Wn. App. 50, 57, 583 P.2d 660 (1978) (applying selective enforcement analysis in a civil enforcement case; fact that Ecology had received complaints about Frame Factory was enough to establish prosecution was not arbitrary).[4] Thus, just because someone could have complained about the initiative's opponents, but did not, does not render those parties necessary and indispensable to this litigation. Nothing prevents the State from bringing a new action against other parties once this case is resolved, if that is a concern, so long as the five-year statute of limitations has not expired. *See* RCW 42.17A.770.

The Freedom Foundation's failure to establish that joinder is not feasible and indispensability are fatal to its CR 19 argument for dismissal. Because these questions are so easily resolved, this Court need not address whether joinder of other parties is necessary under CR 19.

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[4] Other cases brought on similar grounds: *State v. Econ. Dev. Bd. for Tacoma-Pierce County*, Pierce County Superior Court, No. 16-2-10303-6 (dismissed on different grounds, currently on appeal to Division Two); *State v. Wash. Budget & Policy Ctr.*, Thurston County Superior Court, No. 16-2-04961-34.

IV. CONCLUSION

For the reasons explained above, this Court should reverse the trial court's dismissal of this case and remand for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of February 2017.

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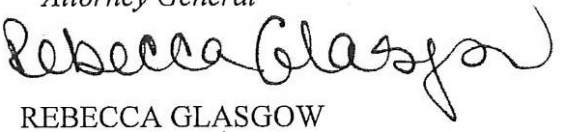

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I certify, under penalty of perjury under the laws of the state of Washington, that I served, via regular United States Postal Service mail and electronic mail, a true and correct copy of the Reply Brief Of Appellant State Of Washington, upon the following:

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Attached for filing in the above referenced matter please find the following document:

1. Reply Brief of Appellant State of Washington.

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