

78995-9

No. 57893-6-I, No. 57894-4-I,
No. 57895-2-I, and No. 57896-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

STATE OF WASHINGTON,

Appellant,

v.

JOHN GILBERT CONTE, FRANK FRANCIS
COLACURCIO, JR., FRANK FRANCIS COLACURCIO, SR.,
and MARSHA MARIE FURFARO,

Defendants/Respondents.

FILED
COURT OF APPEALS
DIVISION 1
SEATTLE
JUN 1 1994

BRIEF OF RESPONDENTS

John W. Wolfe
6110 Columbia Center
701 5th Avenue
Seattle, WA 98104
Counsel for Frank Colacurcio, Jr.

Mr. Richard A. Hansen
Allen Hansen & Maybrown, P.S.
600 University Street, Suite 3020
Seattle, WA 98101-4105
Counsel for Gil Conte

Irwin H. Schwartz
Law Offices of Irwin H. Schwartz
710 Cherry Street
Seattle, WA 98104
Counsel for Frank Colacurcio, Sr.

Mr. Robert S. Mahler
Bullivant Houser Bailey
1601 5th Avenue, Suite 2300
Seattle, WA 98104-1592
Counsel for Marsha Furfaro

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUES.....	2
III.	STATEMENT OF THE CASE.....	2
	A. The Charges.....	2
	B. Trial Court Proceedings.....	4
IV.	ARGUMENT.....	5
	A. Standard of Review.....	5
	B. The Trial Court Properly Dismissed The Information Because Defendants Cannot Be Criminally Prosecuted Under RCW 40.16.030 For Conduct That Falls Within The Exclusive Civil Penalty Provisions Of RCW 42.17.....	6
	1. The People Enacted RCW 42.17 To Create A Comprehensive Campaign Finance Law And To Specifically Prohibit The Conduct At Issue Here.....	6
	2. The Civil Penalty Provisions Of RCW 42.17 Are Exclusive And Preclude Criminal Prosecution For Alleged Conduct That Violates The Act.....	10
	a. The Plain and Unambiguous Text of RCW 42.17 Documents An Exclusively Civil Penalty Scheme.....	11
	b. The History of RCW 42.17 and The 1972 Voters Pamphlet Confirm The Exclusivity of The Act's Civil Penalties.....	18
	c. The Subject-In-Title Rule Embodied in Article II, Section 19 Of The Washington Constitution Further Demonstrates The Voters' Intent to Create An Exclusively Civil Penalty Scheme with I-276.....	21
	d. The Public Disclosure Commission Regulations And The Seattle Municipal Code Interpret RCW 42.17 To Preclude Criminal Penalties.....	23
	3. The Repeal By Implication Doctrine, If It Applies At	

	All, Further Supports The Trial Court’s Judgment.....	27
	4. The Trial Court’s Judgment Does Not Undermine RCW 40.16.030, But Rather Fulfills The Intent Behind RCW 42.17.....	34
C.	The Trial Court’s Dismissal Can Also Be Sustained On Due Process Grounds Because There Was No Fair Notice That RCW 40.16.030 Could Apply To Violations Of The Campaign Finance Laws.....	37
	1. This Court Can Sustain The Trial Court’s Dismissal On Any Theory Raised Below.....	37
	2. Defendants Were Not Given Fair Notice That The Alleged Conduct Would Be Subject To Criminal Prosecution.....	38
V.	CONCLUSION.....	41

TABLE OF AUTHORITIES

Constitutional Provisions

Wash. Const. art. I, § 3.....	38
Wash. Const. art. II, § 19.....	21

Cases

<i>ATU Legislative Council of Wash. v. State</i> , 145 Wash.2d 544 (2002)	28
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996).....	38
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964).....	41
<i>Brown v. State</i> , 155 Wash.2d 254 (2005)	6, 18
<i>City of Richland v. Michel</i> , 89 Wash.App. 764 (1998).....	38
<i>City of Spokane v. Taxpayers</i> , 111 Wash.2d 91 (1988).....	12, 32
<i>Commonwealth v. Bidner</i> , 422 A.2d 847 (Pa.Super. 1980).....	36
<i>Cotton States Mut. Ins. Co. v. DeKalb County</i> , 304 S.E.2d 386 (Ga. 1983).....	28
<i>Crisman v. Pierce Co. Fire Protection Dist. No. 21</i> , Wash.App. 16 (2002).....	17
<i>Day v. Inland Empire Optical, Inc.</i> , 76 Wash.2d 407 (1969).....	16
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wash.2d 582 (1998)	25
<i>Evergreen Freedom Found. v. Wash. Educ. Assoc.</i> , 140 Wash.2d 615 (2000).....	12, 19, 32
<i>Fritz v. Gorton</i> , 83 Wash.2d 275 (1974).....	7, 22
<i>Gardens at West Maui Vacation Club v. County of Maui</i> , 978 P.2d 772 (Hawaii 1999).....	28
<i>Hama Hama Co. v. Shorelines Hearings Bd.</i> , 85 Wash.2d 441 (1975).....	25
<i>Mountain Park Homeowners Assoc., Inc. v. Tydings</i> , 125 Wash.2d 337 (1994).....	38
<i>Pierce Co. v. State</i> , 150 Wash.2d 422 (2004).....	6, 21

<i>Port Townsend Sch. Dist. v. Brouillet</i> , 21 Wash.App. 646 (1978).....	10, 11, 27
<i>Seattle v. State</i> , 100 Wash.2d 232 (1983).....	39
<i>Seeber v. Wash. St. Pub. Disclosure Comm'n</i> , 96 Wash.2d 135 (1981).....	7
<i>Senate Republican Campaign Comm. v. PDC</i> , 133 Wash.2d 229 (1997).....	12
<i>State v. Freigang</i> , 115 Wash.App. 496 (2003)	6
<i>State v. Heckel</i> , 143 Wash.2d 824 (2001).....	6
<i>State v. Hunter</i> , 102 Wash.App. 630 (2000).....	38
<i>State v. Hupe</i> , 50 Wash.App. 277 (1988)	11
<i>State v. Knapstad</i> , 107 Wash.2d 346 (1986).....	5
<i>State v. Price</i> , 94 Wash.2d 810 (1980)	35, 36
<i>State v. Seattle</i> , 94 Wash.2d 162 (1980)	26, 39
<i>State v. Shipp</i> , 93 Wash.2d 510 (1980).....	38
<i>State v. Shriner</i> , 101 Wash.2d 576 (1984).....	11
<i>State v. The (1972) Dan J. Evans Campaign Comm.</i> , 86 Wash.2d 503 (1976).....	7
<i>State v. Thorne</i> , 129 Wash.2d 736 (1996)	19
<i>State v. Wilson</i> , 39 Wash.App. 883 (1985).....	29, 30
<i>United States v. Hansen</i> , 772 F.2d 940 (D.C. Cir. 1985).....	16, 32, 33
<i>United States v. Lanier</i> , 520 U.S. 259 (1997).....	41
<i>Wark v. Nat. Guard</i> , 87 Wash.2d 864 (1976).....	10, 27
<i>Wash. Fed. of St. Employers v. State</i> , 127 Wash.2d 544 (1995).....	21
<i>Wash. St. Grange v. Locke</i> , 153 Wash.2d 475 (2005)	23

Wash. St. Republican Party v. PDC,
141 Wash.2d 245 (2000)..... 13

Weiss v. Glemp, 127 Wash.2d 726 (1995)..... 38

Federal Statutes

2 U.S.C. § 706..... 33

18 U.S.C. § 1001..... 33

Washington State Statutes

RCW 9.91.020 29

RCW 18.11.205 15

RCW 21.20 *et seq.* 14

RCW 40.16.030 passim

RCW 42.17 passim

RCW 42.17.080 7

RCW 42.17.120 8, 9

RCW 42.17.390 passim

RCW 42.17.395 31

RCW 42.17.400.....passim

RCW 42.17.640 8

RCW 42.17.780.....9

RCW 42.17.920 15

RCW 46.61.502 29

RCW 50.36.010 15

Washington Administrative Code 390-37-010 24

Washington Administrative Code 390-37-090.....25

Seattle Municipal Ordinances

SMC 2.04.150 26

SMC 2.04.250 3

SMC 2.04.340 26

SMC 2.04.500 26, 27, 40

Other Authorities

2A Norman J. Singer, Sutherland Statutory Construction §
47.16, at 183 (5th ed. 1992) 16

I. INTRODUCTION

The State accused Defendants of engaging in “political money laundering” to improperly influence a Seattle City Council election.¹ In 1972 the people of Washington overwhelmingly approved Initiative 276 to address this kind of alleged behavior. That initiative, now codified as RCW 42.17, established a new comprehensive campaign finance law that contained provisions banning the precise conduct at issue in this case. More important for purposes of this appeal, the people created an exclusive and stringent civil enforcement mechanism to promote compliance with the law and to punish its violators. Since its enactment, the legislature has refused to inject criminal sanctions into RCW 42.17 and, as a result, no one has been criminally prosecuted for violation of the act. Until now.

Although the State admits that the conduct at issue is prohibited by and punishable under RCW 42.17, it nonetheless charged Defendants with violation of RCW 40.16.030, a general criminal statute. That general criminal statute is inapplicable in the field of campaign finance. As the trial court concluded, RCW 42.17 is an exclusive and comprehensive enactment which precludes criminal prosecution under a general criminal

¹ July 12, 2005 Press Release of King County Prosecutor Norm Maleng (www.metrokc.gov/proatty/news/2005/moneylaunderingtp.htm).

statute. Any other result would frustrate the intent of the people and ignore RCW 42.17's plain language. If the State is unsatisfied with the civil penalties available under RCW 42.17, its proper recourse is to seek legislative change to the law, not to circumvent it. The judgment of the trial court should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly dismiss the information against Defendants for violation of RCW 40.16.030 on the grounds that Defendants may not be prosecuted criminally for alleged conduct that is specifically and exclusively prohibited by and punishable under RCW 42.17's comprehensive campaign finance provisions?

2. Should the trial court's dismissal be affirmed on the alternative ground that Defendants were denied due process because no person of common intelligence would know that the alleged conduct could be prosecuted criminally?

III. STATEMENT OF THE CASE

A. The Charges

The Information charged Defendants with nine counts, all of which are predicated on an allegation that Defendants engaged in a scheme to "knowingly procure or offer, or cause an innocent person to offer, . . . false instrument[s]" for filing in a public office in violation of RCW

40.16.030. CP 1-5.² The allegedly “false instruments” at issue relate to campaign contribution disclosure (“C3”) reports filed by then Seattle City Councilmembers Jim Compton, Judy Nicastro and Heidi Wills during their respective 2003 re-election campaigns. *Id.* Both state and local campaign finance law require that candidates disclose the identity of persons making a contribution, together with the money value and date of their contributions, in periodic reports publicly filed with the Washington Public Disclosure Commission and Seattle City Clerk. RCW 42.17.080 and .090; Seattle Municipal Code 2.04.250 & .260.

For all issues relevant to this appeal, the factual allegations against the four Defendants are identical and can be summarized as follows. The Certification for Determination of Probable Cause (“Certification”) alleged that various individuals contributed to the Compton, Nicastro and Wills campaigns by check between November 2002 and June 2003. CP 36-40. The State claimed that Defendants were the true sources of these contributions but concealed their identity as such by allegedly reimbursing named contributors in cash after they made contributions. *Id.* It is the State’s theory that this concealment and reimbursement scheme caused

² Count One alleges that all four Defendants conspired to violate RCW 40.16.030. Counts Two through Nine allege that that each Defendant violated RCW 40.16.030 directly and via Washington’s accomplice liability statute, RCW 9A.08.020(1) and 2(a). CP 1-5.

campaign officials to file C3 reports that were false because they did not identify Defendants as the true source of the contributions at issue. CP 40-43. Defendants denied these allegations.

B. Trial Court Proceedings

On January 20, 2006, Defendants jointly filed multiple motions to dismiss the Information. CP 16-68. Only the first of these motions, “First Motion to Dismiss: The Non-Applicability Of RCW 40.16.030 As A Matter Of Law,” is relevant to this appeal. In that motion, Defendants argued that the charges in this matter should be dismissed for two reasons. First, Defendants’ alleged conduct could be punished, if at all, under the exclusive and specific penalty provisions of RCW 42.17. Second, prosecution under RCW 40.16.030 violated Defendants’ right to due process. CP 16-68.³ The State’s response and Defendants’ reply memoranda were filed on February 3, 2006, and February 6, 2006, respectively. CP 69-130.

The motions were argued before the Honorable Michael J. Fox, Judge, during a hearing on February 16, 2006. After hearing oral argument on Defendants’ First Motion to Dismiss only, Judge Fox granted the motion. RP (2/16/06) 25-26. After briefly discussing the history and

³ Defendants also raised an equal protection argument in their first motion to dismiss, but withdrew that argument in their reply brief.

comprehensive scope of RCW 42.17, Judge Fox cited the “general versus specific rule” to hold that the specific provisions of RCW 42.17 precluded prosecution under RCW 40.16.030. RP (2/16/06) 26, 28. In explaining his decision, Judge Fox emphasized that RCW 42.17 was intended to address the precise conduct at issue in this case:

[T]he comprehensive nature of the public disclosure law deal[s] with contributions and reporting and specifically with regard to the precise charges that are before the court, [T]he specific subject . . . is dealt with very specifically in the statute and it is clear that it is prohibited, and it’s prohibited in order to give meaning to the disclosure requirements that will let everybody see, through the public disclosure commission, who is contributing to what candidate and how much.

RP (2/16/06) 27. Having granted Defendants’ motion on this basis, Judge Fox did not reach the due process argument raised in Defendants’ First Motion, nor did he rule on any of Defendants’ other motions. An order granting Defendants’ First Motion to Dismiss was entered on February 22, 2006. CP 131-133. The State appealed.

IV. ARGUMENT

A. Standard of Review

This Court must review all issues presented by this appeal *de novo*. As a procedural matter, a trial court’s pre-trial dismissal of criminal charges pursuant to its authority under *State v. Knapstad*, 107 Wash.2d 346 (1986), is a question of law and subject to *de novo* review. *See State*

v. Freigang, 115 Wash.App. 496, 501 (2003); *State v. Snedden*, 112 Wash.App. 122, 126 (2002). As a substantive matter, statutory interpretation, including interpretation of an initiative, and constitutional issues are subject to *de novo* review as well. See *Brown v. State*, 155 Wash.2d 254, 261 (2005); *Pierce Co. v. State*, 150 Wash.2d 422, 429 (2004); *State v. Heckel*, 143 Wash.2d 824, 831-32 (2001).

B. The Trial Court Properly Dismissed The Information Because Defendants Cannot Be Criminally Prosecuted Under RCW 40.16.030 For Conduct That Falls Within The Exclusive Civil Penalty Provisions Of RCW 42.17.

1. The People Enacted RCW 42.17 To Create A Comprehensive Campaign Finance Law And To Specifically Prohibit The Conduct At Issue Here.

This case is about the proper scope of Washington's campaign finance laws. Specifically, it poses the issue of whether RCW 42.17 constitutes not only a comprehensive body of law to regulate political candidates and contributions, but also an *exclusive* one. The trial court correctly determined that it did. The necessary starting point for the trial court's analysis was its determination that the provisions of RCW 42.17 expressly prohibited Defendants' alleged conduct. RP (2/16/06) 27. The State does not challenge the court's ruling in this regard, and for good reason. The people enacted the campaign finance laws expressly for the purpose of regulating and punishing the conduct at issue in this case.

RCW 42.17 was overwhelmingly approved by the people in 1972 as part of I-276, the Public Disclosure Act, to “provide[] a comprehensive financial reporting scheme for lobbyists, campaign committees, public officials and candidates.” *Seeber v. Wash. St. Pub. Disclosure Comm’n*, 96 Wash.2d 135, 138 (1981). The people created this comprehensive scheme “for the expressed purpose of fostering openness in their government.” *Fritz v. Gorton*, 83 Wash.2d 275, 309 (1974). To achieve this purpose, the initiative required political candidates to disclose the identities of their contributors and the amounts of their contributions. *See* RCW 42.17.080 & .090. As the State notes (App. Br. at 13), it was hoped that this transparency would curb the potential influence that contributions had on elected officials. *See State v. The (1972) Dan J. Evans Campaign Comm.*, 86 Wash.2d 503, 507-08 (1976) (“Initiative 276 was designed to inform the public . . . of expenditures made by persons whose purpose is to influence or affect the decision-making processes of government.”).

Some 20 years later, however, the people determined that transparency was not enough. In 1992, the people passed I-134, the Fair Campaign Practices Act, to address the “public perception that decisions of elected officials are being improperly influenced by monetary contributions.” RCW 42.17.610(2). By passing I-134, the people amended RCW 42.17 to cap the amount an individual could contribute to

a candidate in any particular election cycle. *See* RCW 42.17.640. Taken together, these two initiatives reflected the people's intent to regulate the influence of money in politics by requiring that contributions be both fully disclosed and limited in amount. Importantly, prior to I-276 and I-134, no Washington law regulated campaign contribution disclosures or limits whatsoever.

The conduct at issue in this case squarely implicates the policies that motivated I-276 and I-134. As described above, the State alleged that Defendants reimbursed contributions made by third persons as a way to conceal their identities as a source of the funds and to circumvent the limits on contribution amount. CP 34-43. The State further alleged that the motive for Defendants' actions was to secure a favorable outcome on a zoning issue then under consideration by the Seattle City Council - - precisely the kind of influence-peddling RCW 42.17 was designed to thwart. CP 34-35. Not surprisingly, then, the trial court found that the precise conduct at issue, if proven, would violate at least two separate provisions of RCW 42.17. RP (2/16/06) 27.⁴

⁴ As the State notes (App. Br. at 17), the trial court did not identify any particular section of RCW 42.17, stating only that, "with regard to the precise charges that are before this court, which is individuals reimbursing other individuals to make contributions to campaigns and then submitting information that these contributions are only being made in the name of the so-called pass through people." RP (2/16/06) 27. The State appears to agree, however, that RCW 42.17.120 and .780 are the relevant provisions to consider for purposes of this appeal.

The first provision involves acts of concealment. As part of I-276's disclosure requirements, the people expressly prohibited individuals from taking any actions to conceal their identity as the source of a contribution. This statute, RCW 42.17.120, reads:

Identification of contributions and communications. No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.

The second provision involves reimbursement. As part of I-134, RCW 42.17.780 was enacted to prevent individuals from avoiding the initiative's contribution limits through reimbursement. The statute states:

Reimbursement for contributions. A person may not, directly or indirectly, reimburse another person for a contribution to a candidate for public office, political committee, or political party.

If the State's allegations were proven, and its theory of the law was correct, one or both of these statutes was violated. As the trial court also correctly recognized, violation of either section would subject Defendants to the act's punitive sanction provisions. RP (2/16/06) 26-27.

The State does not dispute that Defendants' alleged conduct would violate RCW 42.17, or even that Defendants could be punished under that act. Rather, the State relies on Defendants' alleged violation of RCW 42.17 as the very predicate of its false instrument prosecution, while at the

same time ignoring the act's exclusive and specific civil enforcement scheme. Put simply, the State is trying to have its cake and eat it too. The trial court correctly recognized the inherent contradiction of the State's position and rejected it. As explained below, the exclusive nature of RCW 42.17's penalties forbids the State from looking outside the act to punish violators of the act.

2. The Civil Penalty Provisions Of RCW 42.17 Are Exclusive And Preclude Criminal Prosecution For Alleged Conduct That Violates The Act.

On the issue of penalties, the trial court held that criminal prosecution was precluded in this case under the "general versus specific" rule. RP (2/16/06) 26-28. This rule is well-established in Washington. "It is a fundamental rule of statutory construction that where a general statute and a subsequent special statute relate to the same subject matter, the provisions of the special statute will prevail unless it appears the legislature intended expressly to make the general statute controlling." *Port Townsend Sch. Dist. v. Brouillet*, 21 Wash.App. 646, 655 (1978) (citing *Wark v. Nat. Guard*, 87 Wash.2d 864, 867 (1976)). As a result, a statutory scheme that is intended to exclusively regulate a particular field will necessarily preempt an earlier general statute. *See Wark*, 87 Wash.2d at 866 (special statute controlled because it provided "exclusive and

comprehensive remedy”); *Port Townsend*, 21 Wash.App. at 655 (statute prevails where “legislature intended to create a complete scheme”).

The trial court correctly applied the rule in this case. RCW 42.17 constitutes a special statute within the meaning of the rule and, as the trial court concluded, its specific provisions were intended to regulate the same subject matter that underlies the State’s RCW 40.16.030 prosecution in this case. More importantly, as discussed below, the unambiguous text, legislative history and subsequent interpretation of RCW 42.17 all demonstrate that the people intended the act’s penalty provisions to be exclusive. As such, the specific terms of RCW 42.17 must prevail over the general provisions of RCW 40.16.030.⁵

a. The Plain And Unambiguous Text Of RCW 42.17 Documents An Exclusively Civil Penalty Scheme.

Whether RCW 42.17’s penalty provisions are exclusive is, in the first instance, an exercise in statutory interpretation. RCW 42.17’s

⁵ The State’s discussion of the “general versus specific” rule is irrelevant because it is dedicated entirely to the issue of concurrent *criminal* statutes. App. Br. at 8-30. In that specific context, the State correctly notes that the rule additionally requires that the general criminal statute be violated in each instance where the special criminal statute has been violated. App. Br. at 16 (*citing State v. Shriner*, 101 Wash.2d 576, 580 (1984)). This additional requirement is grounded on equal protection concerns, “because the State, by selecting the crime charged, can obtain varying degrees of punishment while proving identical criminal elements.” *State v. Hupe*, 50 Wash.App. 277, 280 (1988). Because RCW 42.17 is a civil statute, and Defendants have raised no equal protection argument, this version of the rule is inapposite. Rather, the traditional “general versus special” rule cited above is the appropriate tool of statutory construction to resolve the interplay between RCW 40.16.030 and RCW 42.17.

penalties were enacted by initiative through I-276. Initiatives are not construed like other legislation. Reviewing courts must focus on the language of the initiative as the “*average informed lay voter*” would read it, a standard the State ignores completely. *State ex. rel. Evergreen Freedom Found. v. Wash. Educ. Assoc.*, 140 Wash.2d 615, 637 (2000) (emphasis added); *Senate Republican Campaign Comm. v. PDC*, 133 Wash.2d 229, 243 (1997). Accordingly, in construing initiatives, courts “should not read into an initiative ‘technical and debatable legal distinction[s]’ not apparent to the average informed lay voter.” *City of Spokane v. Taxpayers*, 111 Wash.2d 91, 97-98 (1988) (citation omitted). The unambiguous language of I-276 (now codified as RCW 42.17), read plainly as a lay voter would read it, manifests a clear intent that the act’s penalties be complete, exclusive, and non-criminal.

RCW 42.17.390 and .400 contain the act’s sole provisions regarding penalties and remedies. Neither statute imposes nor authorizes a criminal sanction for violation of any portion of the act, including its contribution disclosure requirements. Rather, RCW 42.17.400, entitled “Enforcement,” states in relevant part:

The attorney general and the prosecuting authorities of political subdivisions of this state may bring *civil actions* in the name of the state for any appropriate *civil remedy*, including but not limited to the special remedies provided in RCW 42.17.390.

RCW 42.17.400(1) (emphasis added). On its face, RCW 42.17.400 empowers and specifically limits state attorneys and county prosecutors to bring only “civil actions” for “civil remed[ies]” for conduct prohibited by the act. The act makes no provision for criminal sanctions. By empowering authorities to bring only civil actions, while omitting any reference to criminal actions, RCW 42.17.400 must be viewed as an express limitation on the State’s power to bring a criminal action.⁶ Not only is this interpretation required under ordinary rules of statutory construction, it is how any lay voter would read the act.

The “special remedies” enumerated in RCW 42.17.390 similarly limit available enforcement options to civil remedies and sanctions, not criminal prosecution. Indeed, the title of this section, “Civil Remedies and Sanctions,” could not make this point more clear to a lay voter. The remedies and sanctions include actions to void an election (RCW 42.17.390(1)); to revoke, suspend or enjoin a lobbyist’s registration (RCW 42.17.390(2)); penalties of up to \$10,000 per violation or up to three times the amount of an illegal contribution (RCW 42.17.390(3)); penalties of \$10 per day for delinquency in filing any report (RCW 42.17.390(4));

⁶ See *Wash. St. Republican Party v. PDC*, 141 Wash.2d 245, 280 (2000) (“Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, *i.e.*, the rule of *expressio unius est exclusio alterius* applies.”).

penalties for any contributor who fails to report a contribution in an amount equal to the unreported contribution (RCW 42.17.390(5)); and injunctive relief (RCW 42.17.390(6)). If a violation is intentional, monetary penalties may be trebled. RCW 42.17.400(5). Like RCW 42.17.400, nothing in RCW 42.17.390 suggests that violators of the act may be prosecuted criminally.

The exclusivity of RCW 42.17's civil penalty provisions is made even more evident when the text of the act is compared to similarly comprehensive statutory schemes. For example, much like RCW 42.17 comprehensively regulates state campaign finance law, RCW 21.20 *et seq.* completely and exclusively regulates state securities practices. The securities act also contains extensive penalty provisions, both civil and criminal. *See* RCW 21.20.390, .395, .400, .410, .420 & .430. But unlike RCW 42.17, the text of RCW 21.20 unambiguously demonstrates that the legislature did not intend the securities act's penalties to be limited to civil sanctions. Rather, the statute specifically provides that: "Nothing in this chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law." RCW 21.20.420.

The equally expansive workers' compensation regime contains similar language. "The penalty prescribed in this section *shall not be deemed exclusive*, but any act which shall constitute a crime under any

law of this state may be the basis of prosecution under such law notwithstanding that it may also be the basis for prosecution under this section.” RCW 50.36.010 (emphasis added).⁷ In short, where the legislature wants to add criminal penalties to the remedies otherwise available in a comprehensive regulatory scheme, it says so expressly. By the same token, the absence of express language of this sort in RCW 42.17 reflects an opposite intent by the people.

The act’s only provision regarding the interplay between it and other statutes further shows that the people intended RCW 42.17’s civil penalty provisions to be comprehensive and exclusive. RCW 42.17.920, entitled “Construction,” reads in relevant part:

The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. ***In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern.***

RCW 42.17.920 (emphasis added). In other words, the act expressly forbids the imposition of penalties that conflict with those spelled out in RCW 42.17. Certainly, any lay voter reading RCW 42.17’s civil penalty

⁷ The RCW contains many other examples. *See, e.g.*, RCW 18.11.205 (“[a]ssessment of an administrative fine shall not preclude the initiation of any . . . criminal action for the same or similar violations”); RCW 19.34.502 (“This chapter does not preclude criminal prosecution under other laws of this state, nor may any provision of this chapter be regarded as an exclusive remedy for a violation.”).

provisions along with this construction clause would consider the act's penalties to be self-contained, exclusive, and non-criminal.

The State finds no textual support for its argument that RCW 42.17 permits concurrent criminal prosecution. All it can say on this dispositive issue is that RCW 42.17.390's opening clause – which states, “the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law,” – evinces “an inclusive intention.” App. Br. at 32. No lay voter, however, would reasonably construe the reference to “other remedies” to encompass criminal penalties, and the State does not argue otherwise. Indeed, this language appears immediately after the phrase, “civil remedies and sanctions,” and the two would be read hand-in-hand with each other. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.16, at 183 (5th ed. 1992) (“coupling of words denotes an intention that they should be understood in the same general sense”); *Day v. Inland Empire Optical, Inc.*, 76 Wash.2d 407, 419 (1969) (sections of statute must be read *in pari materia*). Read together, the term “other remedies” can only be understood to give a court the ability to order other consistent *civil remedies*, not criminal penalties.⁸

⁸ Indeed, this very point was made in *United States v. Hansen*, the case relied on so heavily by the State. The court there noted in connection with the phrase, “[s]uch remedy shall be in addition to any other remedy available under statutory or common law,” that “[t]he language of the disclaimer seems *specifically directed to civil actions*,
(Footnote continued)

The Court of Appeals has previously construed RCW 42.17.390's "other remedies" clause narrowly. In *Crisman v. Pierce Co. Fire Protection Dist. No. 21*, 115 Wash.App. 16 (2002), an unsuccessful candidate for county fire district commissioner filed a tort action alleging that the defendants' violations of RCW 42.17 cost him the election and caused him damages. *Id.* at 22. The question before the Court, similar to the issue presented here, was whether RCW 42.17's civil enforcement provisions were exclusive or whether, as the plaintiff argued, they could be construed to permit an implied private cause of action. *Id.*

The Court of Appeals rejected the plaintiff's arguments and refused to inject additional remedies into the act. After examining the express language of RCW 42.17.390 and .400(1), the Court held that the remedies identified in the act were intended to be both comprehensive and complete:

Chapter 42.17 RCW sets out various enforcement procedures and provides for both legal and equitable remedies. But the various remedies RCW 42.17.390 authorize suggest that the legislature intended not to create private causes of action to enforce the code, but to give the attorney general, county prosecutor, or citizen enforcer considerable latitude in seeking the appropriate relief.

since criminal actions are rarely described as 'remedies'." 772 F.2d 940, 946 (D.C. Cir. 1985) (emphasis added).

Id. at 24. The Court also observed that the policies underlying RCW 42.17 – the public disclosure of campaign finances and potential conflicts of interest – were adequately served by RCW 42.17’s express penalty provisions. The court found that allowing additional remedies would provide no greater public accountability or deterrent value. *Id.*

The Court’s interpretation of RCW 42.17 and its rationale are instructive here. If RCW 42.17’s comprehensive list of *civil* remedies could not be read to encompass an implied *civil* cause of action in *Crisman*, the act should not be read to permit a *criminal* prosecution here. And as the *Crisman* court also noted, the act’s broad civil enforcement mechanisms and stringent penalties are more than adequate to promote the statute’s goal of public disclosure. It is notable in this regard that the State does not and cannot argue that RCW 42.17’s civil penalties are inadequate to enforce the campaign finance laws as a matter of public policy.

b. The History Of RCW 42.17 And The 1972 Voters Pamphlet Confirm The Exclusivity Of The Act’s Civil Penalties.

Because the plain language of RCW 42.17 is clear and unambiguous, the Court does not need to examine extrinsic sources regarding legislative intent. *Brown*, 155 Wash.2d at 268. But even if RCW 42.17 were ambiguous on the issue of exclusivity, the history and context of I-276 support the trial court’s judgment. Where an initiative is

subject to more than one reasonable interpretation, a court may determine the voters' intent by examining the statements contained in the official voters pamphlet. *Evergreen Freedom Found.*, 141 Wash.2d at 636-37; *State v. Thorne*, 129 Wash.2d 736, 763 (1996). The 1972 Official Voters Pamphlet ("1972 Pamphlet") reveals an intent by the drafters that the campaign finance laws embodied in I-276 be enforced exclusively through civil means. CP 46-68.

Beginning with I-276's ballot title, which was prepared by the attorney general, voters were informed that the initiative would provide only "*civil penalties.*" CP 46 (emphasis added). Nothing in the ballot title or explanatory comments, and nothing in the text of the initiative itself (which was later codified as RCW 42.17) mentioned the possibility that individuals could be punished criminally for conduct that violated the act. CP 46-47, 50-61, 68. The pamphlet also described the few existing laws governing campaign disclosures that would be repealed if I-276 was approved. A section entitled, "The Law as it now exists," noted that:

Presently, candidates seeking nomination at a primary election must file a statement indicating the expenditures made for the purpose of obtaining their nomination.
Violation is a misdemeanor.

CP 47 (emphasis added). In other words, in voting for I-276, the people were not only being asked to approve a comprehensive regulatory scheme

that imposed exclusively “civil penalties,” they were informed that doing so would repeal existing criminal penalties touching on the same subject.

Moreover, the 1972 ballot included an alternative campaign finance law, Referendum Bill 25 (“R-25”), proposed by the legislature in direct response to I-276. CP 48-49, 62-68.⁹ The 1972 Pamphlet asked the voters to compare the measures, and choose between the two. CP 68. Like I-276, R-25 proposed a comprehensive statutory scheme for regulating campaign contributions and disclosures. But unlike I-276, violators of R-25 would have been subject to criminal prosecution, and both the plain text of the referendum and its ballot title informed voters of the proposed law’s “criminal penalties.” CP 48, 66. The comments to R-25 also noted that those violating the act, “would be guilty of misdemeanors.” CP 68.

In sum, as voters went to the ballot box in 1972, they were confronted with a choice between two new regulatory schemes, both designed to comprehensively regulate campaign finance. In choosing I-276 over R-25, the voters did not just approve a measure that imposed only civil penalties; they rejected a competing measure that would have imposed criminal penalties and simultaneously repealed existing criminal

⁹ The ballot also included Referendum 24 as a response to those portions of I-276 dealing with lobbyists.

penalties. This history demonstrates the drafters of I-276 intended the state's campaign finance laws to be enforced strictly through civil, and not criminal, penalties. And that is precisely what average lay voters understood when they overwhelmingly approved the measure.

c. The Subject-In-Title Rule Embodied In Article II, Section 19 Of The Washington Constitution Further Demonstrates The Voters' Intent To Create An Exclusively Civil Penalty Scheme With I-276.

The history of I-276 and the 1972 Pamphlet reveal another flaw in the State's argument. Article II, section 19 of the Washington Constitution mandates that, "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." Wash. Const. art. II, § 19. The second clause of this article, the "subject-in-title" rule, requires that the title of a law, "notify members of the Legislature and public of the subject matter of the measure." *Pierce Co.*, 150 Wash.2d at 645-46 (quotation omitted). The rule applies equally to initiatives. *Wash. Fed. of St. Employers v. State*, 127 Wash.2d 544, 553 (1995). With respect to initiatives, it is the ballot title, not the legislative title, that matters. The ballot title must, "give[] notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law." *Pierce Co.*, 150 Wash.2d at 649.

When the attorney general's office drafted I-276's ballot title for the 1972 Pamphlet, it necessarily did so with this rule in mind. The ballot title for I-276 was broad in scope, but specific in detail. It read:

AN ACT relating to campaign financing, activities of lobbyists, access to public records, and financial affairs of elective officers and candidates; requiring disclosure of sources of campaign contributions, objects of campaign expenditures, and amounts thereof; limiting campaign expenditures; regulating the activities of lobbyists and requiring reports of their expenditures; restricting use of public funds to influence legislative decisions; governing access to public records; specifying the manner in which public agencies will maintain such records; requiring disclosure of elective officials' and candidates' financial interests and activities; establishing a public disclosure commission to administer the act; *and providing civil penalties.*

CP 46 (emphasis added). The Supreme Court has noted that, "[t]he lengthy, detailed and explicit ballot title given Initiative 276 by the Attorney General's Office leaves no doubt in our minds that a reasonably careful and intelligent reader would be informed as to what was covered or embraced in the body of Initiative 276." *Fritz*, 83 Wash.2d at 291.

After reading I-276's lengthy title, no reasonably careful and intelligent reader would believe that criminal penalties were available for conduct falling within the scope of the act. Rather, the "detailed and explicit" ballot title, with its specific reference to "civil penalties," notified inquiring voters that the only penalties permitted by I-276 were civil in

nature, not criminal. *See Wash. St. Grange v. Locke*, 153 Wash.2d 475, 492-93 (2005) (words in ballot title must be given “common and ordinary meanings”). This is especially so given that the ballot title to R-25, the legislature’s competing measure, expressly stated that, “designated violators [were subject to] criminal penalties.” CP 48. Application of the “subject-in-title” rule to I-276, therefore, further demonstrates the voters’ intent that RCW 42.17’s penalties be exclusively civil in nature. .

d. The Public Disclosure Commission Regulations And The Seattle Municipal Code Interpret RCW 42.17 To Preclude Criminal Penalties.

Finally, agency and intergovernmental interpretation of RCW 42.17 likewise confirms the exclusively civil and non-criminal nature of the act’s penalty scheme. The people created the Public Disclosure Commission (PDC) to enforce RCW 42.17 and to adopt, “rules to carry out the policies and purposes” of the act. RCW 42.17.360(7) & .370(1). If RCW 42.17 permitted concurrent criminal prosecution for violations of the act, then the PDC’s comprehensive regulations would reflect that fact. After all, the PDC is specifically directed to, “report apparent violations of this chapter to the appropriate law enforcement authorities.” RCW 42.17.360(5). But the regulations say no such thing. They contain no

reference to the possibility of criminal charges or prosecution whatsoever.

See Title 390 WAC *generally*.

On the contrary, the PDC’s regulations confirm the exclusively civil nature of RCW 42.17’s enforcement scheme. In particular, the PDC “encourages the parties to consider alternative resolution or partial resolution procedures,” as well as “informal settlements.” WAC 390-37-010. And one of its rules expressly lays out a procedure for informal resolution of enforcement proceedings. It reads in relevant part:

(1) . . . The following procedures are available for informal resolution prior to an adjudicative proceeding that may make more elaborate proceedings under the Administrative Procedure Act unnecessary.

(a) Any enforcement matter before the commission which has not yet been heard in an adjudicative proceeding may be resolved by settlement. . . . Settlement negotiations shall be informal and without prejudice to rights of a participant in the negotiations.

(b) When the executive director and respondent agree to terms of any stipulation of facts, violations, and/or penalty, commission staff shall prepare the stipulation for presentation to the commission.

(c) . . . If the commission accepts the stipulation or modifies the stipulation with the agreement of the opposing party, the commission shall enter an order in conformity with the terms of the stipulation. . . .

(2) Parties are encouraged to be creative in resolving cases without further litigation where appropriate.

WAC 390-37-090. The PDC, of course, has no authority over criminal matters. By its terms, then, WAC 390-37-090 seeks to promote compromise and finality through *civil* settlements.

In promulgating this regulation, the PDC apparently interpreted RCW 42.17 to preclude the possibility of concurrent criminal prosecution. The PDC could not expect those charged with violating RCW 42.17 to negotiate an ostensibly final resolution if prosecutors could subsequently file criminal charges based on precisely the same conduct. The benefit or finality offered by WAC 390-37-090's settlement mechanism would be illusory. The PDC's interpretation, "while not controlling on the courts, should be given great weight in determining legislative intent." *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash.2d 441, 448 (1975); *see also Dep't of Ecology v. Theodoratus*, 135 Wash.2d 582, 589 (1998) (Dep't of Ecology interpretation of statutes and rules given great weight). Such great weight is particularly deserving here since the PDC's interpretation is entirely consistent with the text and history of the act.

Like the PDC, local agencies charged with enforcing campaign finance law have also recognized that RCW 42.17 precludes criminal prosecution. Of particular importance in this regard is the Seattle Municipal Code (SMC) because it contains campaign contribution disclosure rules and limitations parallel to those found in RCW 42.17. *See*

SMC 2.04.150 *et seq.* (disclosures); SMC 2.04.340 *et seq.* (limits). In passing these codes, the city expressly intended to have, “legislation at the municipal level complementary to the concept of disclosure established in Initiative 276.” SMC 2.04.150(A)(7). Of course, these codes not only had to be complementary to I-276, they had to be entirely consistent with it. *See State v. Seattle*, 94 Wash.2d 162, 166 (1980) (local ordinance cannot conflict with state law).

On the issue of penalties, it is clear that Seattle’s lawmakers interpreted I-276 to impose exclusively civil penalties and to preclude the possibility of criminal prosecution. Like RCW 42.17.390, the SMC’s penalty provision is entitled, “Civil remedies and sanctions.” SMC 2.04.500. It provides in relevant part:

Whether or not there is an administrative determination as provided in subsection A, the violation or failure to comply with the provisions of Sections 2.04.160 through 2.04.290 (regarding campaign reporting), Section 2.04.370 (regarding contribution limitations) or Section 2.04.310 of this chapter (regarding political signs) ***shall constitute an infraction, not subject to the Seattle Criminal Code***, for which a monetary fine, not to exceed Five Thousand Dollars (\$5,000), may be assessed by a court, however, a person or entity who violates Section 2.04.370 may be subject to a civil fine of Five Thousand Dollars (\$5,000) or be required to return the illegal contribution and pay a penalty of two (2) times the amount of the contribution illegally made or accepted, whichever is greater. ***Violation of the ordinance and existence of an infraction may be proven by a preponderance of the evidence and need not be proven beyond a reasonable doubt.***

SMC 2.04.500(B) (emphasis added). Like RCW 42.17, then, the SMC subjects its violators to civil penalty and remedies only. But it goes further. In an effort to avoid conflict with RCW 42.17's civil penalty scheme, Seattle's lawmakers expressly disavowed any effort to subject violators to criminal prosecution.¹⁰ This interpretation harmonizes with the intent underlying RCW 42.17, and it too supports the judgment below.

3. The Repeal By Implication Doctrine, If It Applies At All, Further Supports The Trial Court's Judgment.

The repeal by implication doctrine does not warrant reversal, as the State contends. As a threshold matter, the doctrine does not even apply to this situation, and the trial court properly ignored the State's argument in this regard below. For the reasons explained above, where a special statute deals with a particular subject matter specifically and exclusively, that statute necessarily prevails over a more general one. *See Wark*, 87 Wash.2d at 867; *Port Townsend*, 21 Wash.App. at 655-56. Under those circumstances, the special statute is construed as an exception to, or

¹⁰ As will be discussed below in connection with Defendants' due process argument, these provisions of the SMC apply equally to Defendants' alleged conduct and show that they could not reasonably have known that the alleged conduct could be subject to criminal prosecution.

qualification of, the general statute, and no implied repeal analysis is necessary. *Id.* That is the precisely situation here.¹¹

But even if the traditional repeal by implication doctrine did apply here, the result would be the same. As the State concedes, a statute may be implicitly repealed *pro tanto* by another statute if, “the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect.” App. Br. at 31 (*quoting ATU Legislative Council of Wash. v. State*, 145 Wash.2d 544 (2002)). Under this test, RCW 42.17 impliedly repeals RCW 40.16.030 in the field of campaign finance because criminal prosecution under that statute is patently inconsistent to and cannot be reconciled with RCW 42.17’s exclusively civil enforcement scheme.

There is no merit to the State’s claim that this Court can reconcile RCW 40.16.030 and RCW 42.17. *See* App. Br. at 33-40. The State’s entire argument on this issue is based on the premise that in enacting RCW 42.17, the people did not intend to completely regulate the field of

¹¹ To be fair, other courts have characterized this rule in terms of implied repeal, although the analysis is identical. *See e.g., Gardens at West Maui Vacation Club v. County of Maui*, 978 P.2d 772, 778 (Hawaii 1999) (“when the latter act is exclusive, that is, when it covers the whole subject to which it relates, and is manifestly designed by the legislature to embrace the entire law on the subject, it will be held to repeal by implication all prior statutes on that matter whether they are general or special, even though they are not repugnant, unless it is expressly provided that prior special acts shall not be affected”); *Cotton States Mut. Ins. Co. v. DeKalb County*, 304 S.E.2d 386, 388 (Ga. 1983) (same).

campaign finance law and, in particular, the penalties that may be imposed for violations of that law. As discussed above, that premise is fatally flawed. When RCW 42.17 is properly viewed as a comprehensive and exclusive statutory scheme, it is clear that the implied by repeal doctrine, if it applies at all, supports the judgment below. Indeed, Washington courts have applied the doctrine in cases remarkably similar to this one.

In *State v. Wilson*, 39 Wash.App. 883 (1985), the defendant was convicted of driving while intoxicated pursuant to RCW 46.61.502. The defendant argued that he should have been charged under an earlier enacted statute, RCW 9.91.020, which prohibited the same conduct but carried a lesser penalty. *Id.* at 884-85. In upholding the conviction on repeal by implication grounds, the Court of Appeals stated at length:

The legislative history of the rules of the road demonstrates the intent of the Legislature to treat exclusively and comprehensively the operation of motor vehicles within the state RCW 46.61.502 is also more specific detailing several ways in which the crime of driving under the influence may be committed.

Further, the two acts provide for vastly differing penalties which are inconsistent, repugnant and cannot be reconciled. RCW 46.61.515 contains specific sentencing procedures for first, second and third time offenders, whereas RCW 9.91.020 simply states violation of that provision is a gross misdemeanor. . . .

Hence, while there has been no direct repeal of the portion of 9.91.020 dealing with driving a motor vehicle on streets or highways while intoxicated, an intent to do so must be implied by the more recent and comprehensive treatment of

the subject under RCW 46.61.502. . . Even if we were not persuaded by the comprehensive treatment of the subject, the more specific sentencing scheme of RCW 46.61.515 must repeal the penalty in RCW 9.91.020.

Id. at 885-86 (citations omitted). All of the foregoing reasons apply with equal force here. The significant legislative history and resultant statutory scheme demonstrate that the people intended RCW 42.17 to treat the field of campaign finance “exclusively and comprehensively.” And, beyond that, RCW 40.16.030 and RCW 42.17 provide for “vastly different penalties which are inconsistent, repugnant and cannot be reconciled.” As in *Wilson*, the more specific penalty provisions of RCW 42.17 must be construed to impliedly repeal the inconsistent penalty in RCW 40.16.030.

The *Wilson* decision is noteworthy in another respect. As the Court noted, RCW 46.98.050 contained a schedule of repealed statutes that did not include RCW 9.91.020. *Id.* at 885-86. Although it recognized that this could have indicated that the legislature did not intend to repeal the earlier statute, the court rejected that theory in light of the exclusive, comprehensive, and inconsistent nature of the subsequent statute. *Id.* For the same reasons, this Court should reject the State’s suggestion that the schedule of repealed statutes in I-276 makes Defendants’ burden here “especially acute.” App. Br. at 40. Besides, if RCW 42.17 is construed to have repealed RCW 40.16.030, it would do so only in the specific context

of the campaign finance laws. Since it is clear that the people never intended to repeal RCW 40.16.030 in its entirety, there simply would have been no reason to specifically mention it in I-276.¹²

The comprehensive nature of RCW 42.17 highlights further errors in the State's analysis. Specifically, the State claims that the two statutes must be reconciled to provide a "progression of penalties." App. Br. at 37. The act itself already contains such a progression. For minor issues, the PDC can impose penalties of not more than \$1,000 per violation. RCW 42.17.395(4). Where the scope of the violations increase, the PDC must refer the matter to prosecuting authorities to bring a civil action. RCW 42.17.395(3) & .400(1). The superior court may then impose a penalty of \$10,000 or three times the amount of an illegal contribution, whichever is greater. RCW 42.17.390(3). Lastly, where the violation is intentional, the penalties may be trebled, an aspect of the act that the State wholly fails to mention. RCW 42.17.400(5). In this respect, the act includes a *mens rea* element that adequately promotes public policy by subjecting knowing

¹² As discussed above, the 1972 Pamphlet stated that these statutes were the few then-existing laws that touched on campaign finance issues. It makes perfect sense that the initiative would specifically cite these laws for repeal, while omitting reference to RCW 40.16.030, since the drafters of the initiative did not intend that violations of the act would be subject to any criminal sanction.

violators to increased punishment. Injection of RCW 40.16.030 into this scheme is therefore both contrary to the people's intent and unnecessary.

The State's reliance on *United States v. Hansen*, 772 F.2d 940 (D.C. Cir. 1985) is also misplaced. Not only is the language of the statute at issue there different than RCW 42.17, the standard applied by the court to construe that statute does not apply in this case. The *Hansen* court held that an implied repeal may be found only upon a showing of "clear and manifest" intent. *Id.* at 944. No Washington court has ever applied this standard to find an implied repeal. More importantly, in applying this standard, the *Hansen* court did not construe the relevant statute as a lay voter would understand it, the standard that applies here. *Evergreen Freedom Found.*, 140 Wash.2d at 637. Indeed, even a cursory reading of *Hansen* reveals that the court engaged in precisely the kind of "technical and debatable legal distinctions" this Court must avoid when interpreting RCW 42.17. *City of Spokane*, 111 Wash.2d at 97-98. Had the *Hansen* court construed the relevant statute through the eyes of a lay voter, the result may very well have been different.

There is another, even more fundamental, difference between *Hansen* and this case. As the court found, the legislative history of the statute at issue there (the "EIGA") demonstrated that Congress did not intend to preclude operation of the federal false statement statute:

As the District Court found, while there is categorical indication in the legislative history that some Members of Congress believed § 1001 would apply by its terms to an EIGA violation, there is no *unequivocal* indication that *any* Member of Congress thought the contrary. . . . Reading the legislative history in the light most favorable to Hansen, it reveals that both the Clerk of the House and the Department of Justice . . . expressed to the relevant House committee the view that § 1001 would apply; . . . and that in the House debate several members expressed views indicating a belief that § 1001 would not apply to EIGA violations, . . . while two Members . . . stated explicitly their belief that it would

772 F.2d at 947-48 (emphasis in original). Moreover, the actual reports at issue in *Hansen* contained the following warning: “[a]ny individual who knowingly and willfully falsifies . . . this report may be subject to civil and criminal sanctions. See 2 U.S.C. § 706 and 18 U.S.C. § 1001.” *Id.* at 949. Unlike *Hansen*, nothing in RCW 42.17’s legislative history discloses an intent that RCW 40.16.030 also apply to a violation of RCW 42.17. As discussed above, the history of I-276 shows exactly the opposite. This critical distinction makes *Hansen*’s holding inapposite here as well.¹³

¹³ The State’s reliance on the Double Jeopardy Clause can also be easily dismissed. Defendants did not argue below, and do not argue here, that the significant penalties in RCW 42.17 qualify as criminal punishment for purposes of a double jeopardy analysis. Thus, whether RCW 40.16.030 can coexist with RCW 42.17 as matter of constitutional law is simply irrelevant to the Court’s determination of whether the two statutes can coexist as a matter of statutory construction. The latter is the only relevant issue here, and none of the federal or Washington double jeopardy cases cited by the State remotely address it.

4. The Trial Court's Judgment Does Not Undermine RCW 40.16.030, But Rather Fulfills The Intent Behind RCW 42.17.

Finally, the State complains that the trial court's judgment would eliminate prosecutions under RCW 40.16.030 and undermine the intent of the legislature that enacted it. App. Br. at 26. The State's concerns are exactly backwards. If the State can criminally prosecute Defendants under RCW 40.16.030 for alleged conduct that is concededly prohibited by and punishable under the plain terms of RCW 42.17, then it is RCW 42.17 that would be undermined. The State would be free, as it has done in this case, to simply ignore RCW 42.17's civil penalty provisions whenever it is politically expedient for it to do so. For all the reasons explained above, the text and history of RCW 42.17 demonstrate that the people did not intend to give the State this kind of discretion.

Moreover, there is no basis to find that the legislature ever intended RCW 40.16.030 to apply in this situation. The statute was first enacted in 1909, over sixty years before the people approved I-276. Clearly, the drafters of RCW 40.16.030 did not originally intend campaign contribution reports to fall within statute's scope. Following the passage of I-276, the legislature has taken no steps to incorporate RCW 40.16.030 (or any criminal law) into RCW 42.17's civil penalty scheme. Lastly, there have been no reported prosecutions under RCW 40.16.030 (or any

criminal law) for violation of RCW 42.17, a point the State apparently concedes but does not explain. App. Br. at 45-46. In short, there is no legal authority for the State's use of RCW 40.16.030 against these Defendants, and no historical support for the proposition that the statute should apply in the field of campaign finance.

In fact, the Supreme Court's interpretation of RCW 40.16.030 suggests that the statute was not intended to compete with more specific regulatory schemes. In *State v. Price*, 94 Wash.2d 810, 818 (1980), the defendant was charged with RCW 40.16.030 for filing false fish receiving tickets. Although the requirements for filing these tickets were governed by the Game Code and its implementing regulations, neither imposed penalties. The Court noted that it was this absence of penalties that made prosecution under RCW 40.16.030 appropriate:

We are not cited to any statute within the Game Code nor any regulations providing penalties for ticket violations. ***This appears to be the reason the State relies on RCW 40.16.030 for charges on the [fish receiving] tickets.***

Id. at 813 (emphasis added). Implicit in the Court's analysis is a recognition that had the specific provisions of the Game Code or its regulations provided penalties for the conduct at issue, prosecution under RCW 40.16.030 would be improper. That is precisely the situation here.

Thus, while it is true that prosecution under RCW 40.16.030 will almost always involve a more specific statutory scheme, it does not follow that the statute will be preempted in all such cases. Rather, as the trial court correctly determined, the question will turn on the particular statutes involved. Where, as here, a specific statutory scheme not only requires that a particular “instrument” be filed in a public office, but also exclusively punishes all conduct associated therewith, then prosecution under RCW 40.16.030 is both unnecessary and contrary to legislative intent. On the other hand, where the relevant scheme fails to provide a penalty (as in *Price*) or explicitly permits concurrent prosecution under the criminal code (as with RCW 21.20.420), then RCW 40.16.030 may apply.

Other courts have recognized this principle. The most analogous case is *Commonwealth v. Bidner*, 422 A.2d 847 (Pa.Super. 1980). There, the defendant was accused of making a false statement under oath to a local elections court. *Id.* at 849. Prosecutors charged the defendant for, among other things, perjury under Pennsylvania’s general Crimes Code, even though the state’s Election Code specifically prohibited the making of a false statement in an election court hearing. *Id.* at 849-850. The trial court dismissed the perjury charges on the ground that the defendant could be charged only with violating the Election Code. *Id.*

The Pennsylvania appellate court affirmed. The court emphasized the comprehensiveness of the state elections law, and especially its penalty provisions. It held:

Since the Election Code establishes its own comprehensive scheme of offenses and penalties, . . . it would seem that the legislature intended to accord special treatment to this area of criminal conduct to the exclusion of the more general provisions of the Crimes Code. Moreover the legislature has recently amended certain sections of the election laws penalty provisions, thus manifesting its intention that the Election Code remains viable and should continue to govern whenever the misconduct appertains to elections. We thus conclude that the Crimes Code was not meant to prevail over the specific penalty measures of the Election Code.

Id. at 850 (citation omitted). The court's reasoning applies with equal force in this case. RCW 42.17 establishes its own comprehensive scheme of offenses and penalties, demonstrating that the people intended to accord special treatment to the field of campaign finance when they approved I-276 in 1972. The judgment below does not frustrate RCW 40.16.030; it appropriately respects and gives deference to the legislative intent underlying RCW 42.17.

C. The Trial Court's Dismissal Can Also Be Sustained On Due Process Grounds Because There Was No Fair Notice That RCW 40.16.030 Could Apply To Violations Of The Campaign Finance Laws.

1. This Court Can Sustain The Trial Court's Dismissal On Any Theory Raised Below.

As discussed above, the trial court granted Defendants' first motion to dismiss on statutory grounds and did not reach Defendants' due

process argument. However, “[a]n appellate court can sustain a trial court judgment on any theory established by the pleadings and proof, even if the trial court did not consider it.” *Weiss v. Glemp*, 127 Wash.2d 726, 730 (1995); *Mountain Park Homeowners Assoc., Inc. v. Tydings*, 125 Wash.2d 337, 344 (1994) (same). This tenet is particularly appropriate here since Defendants’ due process argument is subject to *de novo* review in the first instance. In the event that the Court reverses the trial court on statutory interpretation grounds, it can and should consider Defendants’ constitutional arguments.

2. Defendants Were Not Given Fair Notice That The Alleged Conduct Would Be Subject To Criminal Prosecution.

Due process guarantees that, “[n]o person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. art. I, § 3. It requires that persons be given fair notice of proscribed criminal conduct and standards. *City of Richland v. Michel*, 89 Wash.App. 764, 770 (1998). A person must, “receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *State v. Hunter*, 102 Wash.App. 630, 638 (2000) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996)). “Men of common intelligence cannot be required to guess at the meaning of the enactment.” *State v. Shipp*, 93 Wash.2d 510, 515-16 (1980)

(quotation omitted). No person of common intelligence would know that the conduct alleged in this case could be subject to criminal sanction.

The conduct unquestionably pertains to the arena of campaign finance disclosures and contribution limitations. These subjects are comprehensively and exclusively addressed in RCW 42.17, and it is the text of that act where a common person would first look to understand the proscriptions of the law. The plain and unambiguous text of RCW 42.17, read as a lay reader would read it, notifies potential violators that they are subject to only “civil actions,” for which only “civil remedies” are available. RCW 42.17.390 & .400. There is no reference to criminal penalties. A person of common intelligence would necessarily understand the act’s express and exclusive reference to civil remedies as a limitation on the State’s power to seek criminal penalties.

That understanding is bolstered by reference to the Seattle Municipal Code, which applied concurrently to the local election at issue. The code is also informative as to the meaning of RCW 42.17 because local law must be consistent with state law in order to be valid. *Seattle*, 94 Wash.2d at 166; *also Seattle v. State*, 100 Wash.2d 232 (1983) (SMC does not conflict with RCW 42.17). The plain text of the SMC informs the reader that, like the identical provisions of RCW 42.17, violators are subject exclusively to “civil remedies,” and more importantly that

violation “shall constitute an infraction, *not subject to the Seattle Criminal Code.*” SMC 2.04.500(B) (emphasis added). No one would misunderstand the meaning of this provision: one cannot be prosecuted criminally for violation of the campaign finance laws.

Lest there be any doubt, a person of common intelligence (but uncommon diligence) might look to the legislative history that gave birth to RCW 42.17 and inspired the Seattle code. That history reveals that the 1972 Pamphlet informed voters that if they approved I-276, they would be enacting a comprehensive campaign finance initiative that promised to impose only “civil penalties.” CP 46. Those same voters were informed that if wanted they wanted their state’s campaign finance law enforced by “criminal penalties,” they would have to reject I-276 in favor of the legislature’s competing referendum, R-25. CP 48-49, 68. Viewed from the perspective of an ordinary person, the voters’ rejection of R-25 must be viewed, at least in part, as a rejection of criminal penalties.

In stark contrast to the foregoing, there is not a single source of information that would inform a person of common (or extraordinary) intelligence that RCW 40.16.030 could apply in these circumstances. There is no reference to it in RCW 42.17; no reference to it in the SMC; no reference to it in the PDC’s extensive regulations; and, to our knowledge, no judicial decision, attorney general opinion or other

authoritative source discussing the possibility that RCW 40.16.030 or any criminal law may apply to violations of RCW 42.17. Under these circumstances, Defendants were not fairly informed that the alleged conduct would be subject to anything other than the act's civil penalties.

Lastly, even if reversed by this Court, the trial court's thoughtful analysis and holding below demonstrates that Defendants' interpretation of the law is inherently reasonable. It would be highly incongruous to hold that Defendants, or any persons of common intelligence, should have known that the alleged conduct would be subject to criminal penalties given the absence of any prior judicial opinion to that effect and the trial court's ruling to the contrary. Certainly, the Court should not expect ordinary citizens to understand the law better than the judiciary itself.¹⁴

V. CONCLUSION

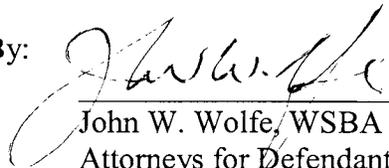
For the foregoing reasons, this Court should affirm the trial court's dismissal of the criminal charges in this matter.

¹⁴ At a minimum, reversal of the trial court would represent a novel construction of RCW 42.17, and its interplay with RCW 40.16.030. Defendants cannot be prejudiced by such a construction. "Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (violation results from "unforeseeable and retroactive judicial expansion of narrow and precise statutory language"). If the Court determines that RCW 42.17 permits concurrent criminal prosecution for conduct squarely prohibited by our state's exclusively civil campaign finance laws, it must do so prospectively and affirm the dismissal on this ground.

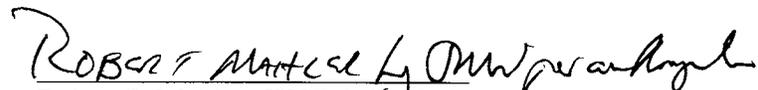
DATED this 20th day of June, 2006.

Respectfully submitted,

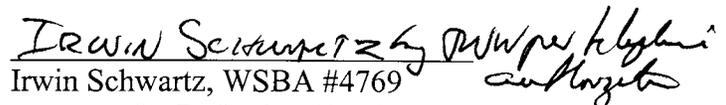
WOLFE LEINBACH, P.S.

By: 
John W. Wolfe, WSBA #08028
Attorneys for Defendant Frank
Colacurcio, Jr.

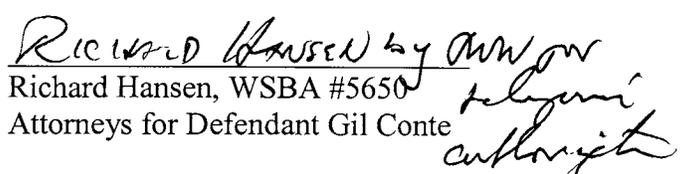
BULLIVANT HOUSER BAILEY, PC

By: 
Rober S. Mahler, WSBA #23913
Attorneys for Defendant Marsha
Marsha Marie Furfaro

IRWIN SCHWARTZ

By: 
Irwin Schwartz, WSBA #4769
Attorney for Defendant Frank
Colacurcio, Sr.

ALLEN, HANSEN & MAYBROWN, PS

By: 
Richard Hansen, WSBA #5650
Attorneys for Defendant Gil Conte

1 Robert S. Mahler
2 Attorneys for Marsha Furfaro
3 Bullivant Houser Bailey
4 1601 5th Avenue, Suite 2300
Seattle, WA 98104-1592
206-521-6435

5 Richard A. Hansen
6 Attorneys for Gil Conte
7 Allen Hansen & Maybrown, P.S.
8 600 University Street, Suite 3020
Seattle, WA 98101-4105
206-447-9681

9 Irwin H. Schwartz
10 Attorneys for Frank Colacurcio, Sr.
11 Law Offices of Irwin H. Schwartz
710 Cherry Street
Seattle, WA 98104
206-623-5084

12 The original of the same document was filed with the Court of Appeals, Division I.

13
14 
15 MEE PANGILINAN

16 SUBSCRIBED AND SWORN to before me this 20th day of June, 2006.



23
24
25
26
27

Celestial F. Barquet
exp. 9/19/2009
King County, WA