No. 932271

**IN THE SUPREME COURT OF THE
THE STATE OF WASHINGTON**

ARTHUR WEST, a Citizen of Washington State,

Petitioner,

vs.

WASHINGTON NORML, *et alia*,

Respondents.

WEST'S AMENDED PETITION FOR DISCRETIONARY REVIEW

On Review from the Published Opinion of the Court of Appeals, Division II, Case No. 46640-6-II

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I. IDENTITY OF PETITIONER

Petitioner Arthur West, (hereinafter, "Mr. West,") is a citizen of Washington State.

II. COURT OF APPEALS DECISION BEING REVIEWED

Petitioner seeks review of the Division II Court of Appeals April 12, 2016 ruling in Case No. 46640-6-II, affirming a Thurston County Superior Court's involuntary dismissal at the trial court level and denying West's effort to bring a citizen's action as a citizen on behalf of himself and other citizens in order to uphold a people's initiative—an initiative intended to protect not simply the state of Washington, but the rights of Washington citizens to police their own self-government, promote transparency over and non-disclosure, and ensure an open government free from secrecy and other non-democratic qualities. (Appendix Ex. A, p 1-8). On May 6, 2016, the Appeals Court also denied West's motion for reconsideration. (Appendix Ex. B, p 9).

III. ISSUES PRESENTED ON REVIEW

1. Does the Court of Appeals Division II decision conflict with the Supreme Court's decision in *Utter* that citizens have a "right" to access the courts and bring a Citizen Action under the Fair Campaign Practices Act, this Court having defined no prerequisite

of retaining counsel, and/or does the appellate court's decision raise significant questions of state law?

2. Is there a significant question of state law regarding an involuntary dismissal of West's claim for failure to provide an attorney when the law surrounding this issue was unclear?
3. Is there a conflict between Division I and Division II Court of Appeals regarding the prerequisites of citizens' actions under the Fair Campaign Practices Act, especially when Division I has recently ruled in *West v. Seattle Port Commission* (decided July 6, 2016) that the term "any person" under a *pari materia* statute was intended "to convey standing broadly"?
4. Is the barrier of retaining counsel in order for the citizens to enforce campaign finance laws, as affirmed by the Court of Appeals Division II, an issue of significant public concern, especially since NORML will evade all public accountability absent the lower court's ruling being overturned?

IV. STATEMENT OF THE CASE

Under the Fair Campaign Practices Act ("FCPA"), chapter 42.17A RCW, political committees are subject to certain registration and reporting requirements. This case involves the Citizen's Action provision of the FCPA. This is a case concerning the pre-requisites for a citizen to bring a

citizen's action under the FCPA, and to clarify how the FCPA is distinguished from other sunshine laws that were part of the same people's initiative (Initiative No. 276 or "I-276") that allow citizen's to bring suit and enforce their right to open and self-government without an attorney.

The relevant FCPA Citizen's Action provision states, in part, that a person may, "bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter." RCW 42.17A.765(4). In 2012, West filed suit against NORML for failing to disclose campaign contributions and appropriate register with the state as a Political Action Committee. NORML moved to dismiss under CR 12(b)(1), lack of subject matter jurisdiction, and CR 12(b)(6), failure to state a claim upon which relief can be granted.

After a year of Petitioner being unable to secure counsel for a unique field of practice, public disclosure and campaign finance law, on August 22, 2014, the Thurston County Superior Court entered an order of involuntary dismissal of West's claim. On September 8, 2014, West timely appealed. On April 12, 2016, the Court of Appeals Division II affirmed the Superior Court's involuntary dismissal. On May 6, 2016, the Appeals Court also denied West's motion for reconsideration. West now petitions for review in this Court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) provides a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case involves all of the above provisions.

1. The Appeals Court's decision conflicts with the Supreme Court's decision in *Utter* and other cases that citizens may bring citizens' actions, satisfying RAP 13(4)(b)(1), and the issue of whether or not an attorney is required to bring a Citizen Action raises a significant question of state law, satisfying RAP 13(4)(b)(3).

The fact that citizens may bring actions under the Fair Campaign Practices Act ("FCPA," chapter 42.17A RCW), and in fact, have a right to access the courts through Citizen Actions, is now clearly settled law. In *Utter v. BIAW*, the Washington Supreme Court held that citizens may bring Citizen Action suits under the FCPA. *Utter v. Bldg. Indus. Assn'n of Wash.*, 182 Wn.2d 398, 406, 341 P.3d 953, cert. denied, 136 S.Ct. 79

(2015). "A statute gives Washington citizens the right to sue for unfair campaign practices..." *Utter*, at 407. *Utter* concedes that the Fair Campaign Practices Act is obviously based on the notion that government may be wrong, and then it is up to citizens to expose the violation. What remains unsettled is whether or not a citizen needs an attorney to proceed with a FCPA claim.

This Court in *Utter* never placed any additional prerequisites on citizens to bringing suit under the FCPA or defined a citizen as a citizen *and* his or her counsel. This Court gave citizens a clear "right" to sue for unfair campaign practices. This Court also defined the ability to bring a suit as a "right" to access the courts. "Right of access to courts includes right to 'bring' or 'commence' actions." See *Utter*, at 409. In accordance with RAP 13.4(b)(1) and (3), the question of whether or not an attorney is a prerequisite to exercising one's right to a Citizen Action under the FCPA should be resolved by this Court.

Significantly, as early as 1974, this Court upheld the Constitutionality of the Citizen's Action provisions of the FCPA, identifying that *qui tam* actions include those that allow Citizens to proceed without counsel (the federal Clean Water and Air Acts and the State Consumer Protection Acts) and further stated that the cost shifting

provisions of the statute adequately protected the public from abuse of the citizen's action provision as follows:

> The statute books are legion with enactments of a *qui tam* nature. See, e.g., Int. Rev. Code of 1954 § 7214; Rivers and Harbours Act of 1889, 33 U.S.C. § 411 (1970); Clean Air Amendments of 1970, amending 42 U.S.C. § 1857h-a (1970); Federal Water Pollution Control Act Amendments of 1972 § 505, Pub. L. 92-500, 86 Stat. 816; Noise Control Act of 1972 § 12, Pub. L. 92-574, 86 Stat. 1234. Our recent decision in Hockley v. Hargitt, 82 Wn.2d 337, 510 P.2d 1123 (1973), upheld the application of a modern *qui tam* provision in the Washington Consumer Protection Act, RCW 19.86.090, which provides for the award of attorney fees, costs and, in the discretion of the court, treble damages. See also Note, 17 Loyola L. Rev. 757 (1971).
>
> In our view, the *qui tam* provision of initiative section 40(4) poses no problem of constitutional dimension. We note respondents' assertion that they fear the threat of frivolous and unwarranted harassment suits. In this connection we can also note that should the suitor fail in his action the trial court, upon finding lack of reasonable cause, may reimburse the defendant for his costs and attorney's fees. In view of the current high costs of legal services, we regard this as no small deterrent against frivolous and harassing suits. Additionally, the plaintiff in such cases is required to give the Attorney General a 40-day notice of an alleged violation. The litigant may then proceed only after the service of a second 10-day notice results in no action on the part of the Attorney General.
>
> ***We feel that these specified safeguards are ample protection against frivolous and abusive lawsuits.***
> *Fritz v. Gorton*, 83 Wn.2d 275, 314, 517 P.2d 911 (1974). [emphasis added.] APPELLANT'S MOTION FOR RECONSIDERATION OF COMMISSIONER'S RULING, at p. 10-11.

These exact same cost-shifting provisions and safeguards that serve as protection against frivolous and abusive lawsuits are present in

the FCPA. The purpose behind requiring an attorney for an action in state court, whose rules and procedures are relatively clear enough for a layman to grasp, is unclear in the context of citizens simply attempting to preserve their right to self-governance.

Indeed, the Public Records Act, chapter 42.56 RCW, grafted from and originally part of the Public Disclosure Act under I-276, provides for attorney fees to the victor, yet does not require an attorney for a citizen to file suit and win. Even if there were sound reasons to require an attorney for a citizen's action, "The court will not add language to a clear statute even if it believe the Legislature intended something else but failed to express it adequately." *Adams v. Department of Soc. Health Servs.*, 38 Wn.App. 13, 16, 683 P.2d 1133 (1984). There is clear statement in the FCPA that an attorney is required to proceed. Hence, a significant question of Washington law is at issue and RAP 13.4(b)(3) applies to this case.

In sum, Petitioner contends that the Court of Appeals panel erred, in its analysis of statutory construction, to consider the letter of the law, its context in history and relation to statutes *in para materia*, and most importantly, completely failed to address the spirit, intent, and purpose of I-276 in its analysis. (Billed as "The Spirit of I-(2)76 in 1974, the

statement in the voters' pamphlet began "Our whole concept of democracy begins with an informed an involved citizenry.")[1]

In light of the purpose of I-276, the Court of Appeals failed to interpret the FCPA liberally.

> The basic rule is that a statute should be construed in light of the legislative purpose behind its enactment... being remedial in nature, (a statute) is entitled to a liberal construction to effect its purpose. *Nucleonics Department v. WPPS*, 101 Wn.2d 24, 677 P.2d 108, (1984)

As this Court noted regarding the FCPA only four years after it was overwhelmingly approved by the Voters:

> A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined. *Hearst Co. v. Hoppe*, 90 Wn.2d 123, 138, 580 P.2d 246 (1978), (cited in *WPPS*).

2. An involuntary dismissal was not appropriate for failure to provide an attorney, when West wished to preserve his right to bring a citizen's action without an attorney, and is a significant question of state law under RAP 13.4(b)(3).

Petitioner contends it satisfies RAP 13.4(b)(3) in that there is a significant question of law as to the appropriate application of involuntary dismissal under CR 41(b) at the trial court level when the law on the issue of retaining counsel for a FCPA claim is unsettled. At the time of the trial court ruling, the law was unclear as to whether an attorney was required to

[1] Available within "The History and Intent of I276," David Cullier, *et. al.*, WSU (2004). http://www.washingtoncog.org/pdfs/I276%20document%20-%20David%20Cuillier.pdf

bring suit under the FCPA, resulting in the present appeal. Failure to find a lawyer within an arbitrarily prescribed amount of time, as well as attempting to ascertain and challenge an uncertain law, cannot be considered an "unacceptable litigation practice" warranting the punitive and administrative death blow of involuntary dismissal. Appellant West now has an attorney. The trial court dismissed West's case prematurely and improperly, by applying the wrong standard of review, and the question of if an involuntary dismissal can be applied for failure to procure an attorney, when that prerequisite is unsettled law, is now at issue.

A discretionary dismissal by the trial court below for failure to procure an attorney prior to this court's determination that an attorney was in fact needed for this type of action, (this having been an issue of first impression to this Court) was improper. Termination of the action, based on law West could not have possibly known to be the accepted standard during the trial court's review, and prior to this appeal, is even less appropriate.

West brought his initial suit before the trial court prior to any running of statute of limitations under the FCPA. Ultimately, he could not procure a licensed attorney to represent him and the case was dismissed involuntarily. Dismissal at the discretion of the trial court is only appropriate when there is a delay caused by "unacceptable litigation

practices." "Dilatoriness of a type not described by CR 41(b)(1)' refers to unacceptable litigation practices other than mere inaction, whatever the duration." *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 P.2d 662 (1997). Uncertainty regarding whether or not a *pro se* exemption applies under *all* provisions of the original Fair Campaign Practices Act, not just the public records section, but also fair campaign practices section, and requiring clarification West's clarification via this appeal, cannot be considered an "unacceptable litigation practice" resulting in dismissal of the case entirely.

Involuntary dismissal under CR 41(b) serves an important administrative function, but not one which applies here. "The primary function of an involuntary dismissal by a clerk's motion is to clear the clerk's record of inactive cases." *Vaughn v. Chung*, 119 Wn.2d 273, 277, 830 P.2d 668 (1992). "It is an administrative provision that creates a 'relatively simple means by which the court system itself, on its own volition, may purge its files of dormant cases.'" *Vaughn*, 119 Wn.2d at 277 (quoting *Miller v. Patterson*, 45 Wn. App. 450, 455, 725 P.2d 1016 (1986)).

The final sentence in CR 41(b)(1) "was promulgated to encourage cases to be heard on the merits, the courts recognizing that involuntary dismissal for want of prosecution 'is punitive or administrative

in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits of the controversy.'" *Foss Maritime Co. v City of Seattle,* 107 Wn. App. 669, 27 P.3d 1228 (2001), citing *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988) (quoting *Yellam v. Woerner*, 77 Wn.2d 604, 608, 464 P.2d 947 (1970)). Affirmation of the involuntary dismissal is improper where "every reasonable opportunity should be afforded to permit the parties to reach the merits..." If this court, in fact, requires counsel for the continuation of this case, West should now be afforded to try the merits of this case with the assistance of counsel.

3. There is a conflict between Division I and Division II Court of Appeals holdings regarding citizen standing under public disclosure laws, satisfying RAP 13.4(b)(2).

The decision of the Court of Appeals Div. II is in conflict with decisions of the Court of Appeals Division I in *West v. Washington State Association of District and Municipal Court Judges (DMCJA)*, __Wn.App.___, Ct. of Appeals Div. I, No. 72337-5-I (Nov. 2, 2015) and *West v. Seattle Port Commission*, Ct. of Appeals Div. I, No. 73014-2-1 (pub. op., July 6, 2016). [Opinion Annexed].

This Court reviews questions of standing, statutory interpretation, and preemption de novo. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn.App. 185, 199, 312 P.3d 976 (2013), review denied, 179

Wn.2d 1010, 316 P.3d 494 (2014) (standing); *State v. Mitchell*, 169Wn.2d 437, 442, 237 P.3d 282 (2010) (statutory interpretation); *Veit. ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011) (preemption).

In *West v. Seattle Port Commission, et. al.*, decided July 5, 2016, the Court of Appeals for Division I observed that within the Open Public Meetings Act, (the sister statute to the FCPA), the term "any person" was intended to convey standing broadly. "Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body." RCW 42.30.130. And '[a]ny person' may bring an action to enforce civil penalties against members of a governing body who attend meetings in violation of the OPMA. RCW 42.30.120." *West v. Seattle Port Commission, et. al.*, Wa. Court of Appeals Div. 1, No. 73014-2-1 (July 5, 2015).

The question remains, then, did the Washington legislature intend for the term "any person" within the Fair Campaign Practices portion of the Public Disclosure Act to be *more narrowly interpreted* than in its parallel open government statute, OPMA, and more restrictive regarding citizen standing? Like the OPMA, the statue pertaining to Fair Campaign Practices Act *requires* broad interpretation in order to encourage public

standing, such as injury in fact, because they "*do not rely on the federal constitution for their authority* [emphasis added].' In federal courts, a plaintiff's lack of standing deprives the court of subject matter jurisdiction, making it impossible to enter a judgment on the merits.' *Trinity Universal*, 176 Wn. App. at 198-99 (citing *Fleck &Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1102 (9th Cir. 2006)). 'By contrast, the Washington Constitution places few constraints on superior court jurisdiction.' *Trinity Universal*, 176 Wn. App. at 198; see Wash. Const, art. IV, § 6." **There is no claim here made by Respondents that Mr. West has failed to satisfy any Washington state constitutional standing requirements.**

Courts may look at the provision of a statute in context to determine its plain meaning. *Dep't of Ecology v. Campbell & Gwinn.* LLC, 146Wn.2d1, 10, 43 P.3d 4 (2002). The context of the legislature's decision to use the term "any person" to bring suit on behalf of the state of Washington was a people's initiative intended to create a more open government, free from corruption and secrecy. The Court of Appeals for Division I recognized and respected that context. This Court should not shy away from the people's directive by hiding behind Georgian, abstract interpretations of the common law and federal, rather than Washington state precedents. To do so would be to defy the will and intent of the

legislature that a citizen may bring a citizen's action *sans* counsel in order to regulate the tyrannies of its own government.

In *West v. DMCJA*, the court held that West's lack of compliance with statutory procedures, not his lack of a lawyer, was the basis for dismissal of campaign non-disclosure claims:

> Because West failed to comply with the statutory procedures, he lacked authority to sue for a judgment that the Association's activities violate the restrictions on agency lobbying.
> *West v. Washington State Association of District and Municipal Court Judges*, __Wn.App.___, Ct. of Appeals Div. I, No. 72337-5-I (Nov. 2, 2015).

All that barred West from Declaratory relief in Division I in the above case was failure to give notice. That lack of a lawyer was not an operative part of that court's decision demonstrates that the court's holding was that citizens need merely follow statutory procedure to bring citizens' actions under the FCPA. This point is not mere dicta.

A conflict between the two appellate courts exist regarding citizen standing very clearly exists and RAP 13.4(b)(2) is satisfied.

4. This case involves issues of substantial public concern, satisfying RAP 13.4(b)(4): NORML will escape all accountability absent this Citizen Action, while the Court of Appeals ruling bars the average citizen from his "right" to access to the courts for the purposes of policing his own government under the FCPA.

Whether or not hiring an attorney is a hurdle a citizen must overcome in order to enforce the FCPA is also an issue of significant

public interest satisfying RAP 13.4(b)(4). Clearly, the history and spirit of I-276, a people's initiative, suggest that a citizen may bring a citizen's action him or herself. This is the only outcome that would ensure the government kept itself in check and that Washington's statute regarding public disclosure of campaign financing is actually enforced.

Applying the spirit of I-276 in this case, and allowing Appellant West to proceed in the trial court, is the only way to ensure the outcome voted for by the people in adopting Washington's public disclosure laws so many years ago: enforcement of its campaign practices to those that believe they are above the law and not beholden to the principals of open government. There is an issue of substantial public concern in that absent West's enforcement of fair campaign practice law, NORML will evade any accountability. In addition, there is an issue of public concern in that the Court of Appeals in Division II placed the onerous and expensive burden of retaining counsel on citizens who wish to enforce their own citizens' initiative via a citizen's action.

X. CONCLUSION

For the reasons described above, the Petitioner respectfully requests that this court grant review to ensure that the citizens' campaign finance laws can be enforced and protected by citizens, without the prerequisite of having to retain counsel, and that the citizens themselves

have standing to protect their own democracy from secrecy and non-disclosure of campaign financing without the imposition of hurdles derived from federal law, rather than from Washington law and the Washington Constitution.

Submitted this 5th day of August, 2016

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ANNEX

No. 932271

SUPREME COURT OF WASHINGTON

ARTHUR WEST, a Citizen of Washington, **Petitioner,** **vs.** NORML, *et. al.*, **Respondents.**	**DECLARATION OF SERVICE**

I, Elizabeth Hallock, do declare under penalty of perjury under the laws of the State of Washington that I am over 18 years of age, am the Attorney for the Petitioner in the above proceedings, and competent to testify to the matters herein that:

On August 5, 2016, I caused to be served by electronic delivery through e-service agreement, and by mail, postage prepaid, the following pleadings along with this Declaration of Service:

1. Petitioner's Amended Petition for Discretionary Review
2. COA Div. 1 Published Op. No. 73014-2-1

To the following at their addresses of record:
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NORML, *et. al.*:

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Dated this 5th Day of August, 2016,

s/Elizabeth Hallock
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Subject: 932271 West v. NORML Amended Petition for Discrentionary Review

Please be in receipt of Petitioner West's Amended Petition for Discretionary Review, Decl of Service and Annex. Hard copies to follow.
Enjoy the sun.

--
Elizabeth Hallock
Attorney at Law

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