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NO. 57893-6-I
57894-4-I
57895-2-I
57896-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

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

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MICHAEL J. FOX

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. NEITHER THE GENERAL/SPECIFIC RULE NOR THE GENERAL/SPECIAL RULE APPLIES HERE.

a. The Defendants Have Abandoned The General/Specific Rule That They Argued Below And On Which The Trial Court Based Its Ruling.

The most striking aspect of the Brief of the Respondents (hereinafter "Defendants' Response") is its precipitate abandonment of the general/specific rule that the Defendants had argued so vigorously in the trial court. In their Defendants' First Motion to Dismiss (hereinafter "Defendants' Motion to Dismiss"), the bulk of the Defendants' Motion (at 4-8) is taken up with this argument. CP 19-23. After the State filed its Response, the Defendants filed a Reply Memorandum in which they once again argued (at 5-8) that the general/specific rule entitled them to a dismissal of the Information here. CP 121-124.

After hearing oral argument on the Defendants' First Motion to Dismiss, the trial judge agreed with the Defendants' arguments. The judge stated in his oral ruling that "the specific versus general rule is a rule that applies here." RP (2/16/06) 26. Judge Fox went on to acknowledge that none of the parties had been able to find a case that "dealt with the application of the specific versus general

rule with regard to a criminal and a civil statute." *Id.* In response to the arguments raised below, and the grounds cited in the trial court's order granting dismissal, the bulk of the State's Opening Brief was devoted to a refutation of the defense argument, and the trial court's ruling, that the general/specific rule mandated dismissal of all charges against the Defendants.

Now, in the Defendants' Response, they have abruptly abandoned this line of argument. The Defendants' *volte-face* is quietly announced in a footnote of their Response, which is set out here in its entirety:

> 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.

Defendants' Response at 11 n. 5. This analysis is hopelessly muddled.

b. The Defendants' Proposed General/Special Rule Is The Same As The General/Specific Rule And Yields The Same Result: The Trial Court Erred And The Case Should Be Remanded For Trial On The Merits.

The Defendants, in contrasting the "general/specific" rule they are now disavowing with the "general/special" rule that they now wish to embrace, are seeking to draw a distinction between two terms that are in fact different names for the same concept, a concept that is used in both civil <u>and</u> criminal cases. The two terms are used interchangeably, with older cases, in particular, tending to use the "general/special" terminology, and the more recent cases usually favoring the "general/specific" formulation.

For example, there are older cases in the area of criminal law that use the "general/special" wording. *See, e.g., State v. Cann*, 92 Wn.2d 193, 196-97, 595 P.2d 912 (1979); *State v. Walls,* 81 Wn.2d 618, 620-24, 503 P.2d 1068 (1972); *Walder v. Belnap*, 51 Wn.2d 99, 101-102, 316 P.2d 119 (1957) (habeas corpus

proceeding); and *State v. Becker,* 39 Wn.2d 94, 95-98, 234 P.2d 897 (1951). There are more recent cases like *State v. Danforth*, 97 Wn.2d 255, 257-59, 643 P.2d 882 (1982), which use the "general/specific" language, but cite as authority older cases like *Cann*, *Walls*, and *Becker*, which used the "general/special" wording.

The same phenomenon exists in civil cases. In *Wark v. Nat'l Guard*, 87 Wn.2d 864, 867-68, 557 P.2d 844 (1976), the Washington Supreme Court used the "general/special" nomenclature, but 25 years later, in *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146-47, 18 P.3d 540 (2001), the same Court cited *Wark*, but used the "general/specific" language. This Court has used "specific" and "special" interchangeably in referring to statutes in such an analysis. *State v. Presba*, 131 Wn. App. 47, 52-54, 126 P.2d 1280 (2005). And in *State v. Mierz*, 127 Wn.2d 460, 478, 901 P.2d 286 (1995), the Washington Supreme Court stated the rule thus: "Where conduct falls within the scope of two criminal statutes, the accused only may be charged under the more specific (or 'special') statute and may not be charged under the more general statute." The distinction that the Defendants seek to make between "general/specific" and "general/special" is as valid and illuminating as that between "six" and "one-half dozen".

In the second place, the general/specific rule in criminal cases is wholly independent from an equal protection argument. Although, as the State noted in its Opening Brief (at 21-23), the tests for an equal protection violation in the case of concurrent criminal statutes and that for the general/specific rule are very similar, equal protection is a matter of constitutional dimension, while the general/specific rule is a matter of statutory construction. *State v. Walker*, 75 Wn. App. 101, 105, 879 P.2d 957 (1994), *review denied*, 125 Wn.2d 1015 (1995). That is why the general/specific rule of statutory construction lives on, even though the equal protection claim in criminal cases, based on the argument that prosecutorial discretion to choose between identical statues with differing punishments violates the constitutional guarantee of equal protection, appears to be no longer viable after *United States v. Batchelder*, 442 U.S. 114, 124-25, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) and *City of Kennewick v. Fountain*, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991). *See State v. Eakins,* 73 Wn. App. 271, 273-76, 869 P.2d 83 (1994), *affirmed*, 127 Wn.2d 490, 902 P.2d 1236 (1995). A close reading of the case cited by the Defendants on this point, *State v. Hupe*, 50 Wn. App. 277, 748 P.2d 263 (1988), demonstrates that the defendant in that case actually

had both "concurrent statute and equal protection arguments". *Hupe*, 50 Wn. App. at 279 (emphasis added).

The underlying reason for the Defendants' intellectual disarray here is not hard to fathom. They have decided to abandon ship because the general/specific arguments that they relied on in the court below (and upon which the trial judge based his ruling) do not survive close scrutiny. They want the results that the general/specific rule and implied repeal doctrine would yield, but they realize that they cannot meet the requirements imposed by those doctrines. The Defendants have therefore decided to fashion new arguments in their Defendants' Response. The arguments to which they have now retreated, however, are equally meritless.

2. THE SAME PRINCIPLES OF STATUTORY CONSTRUCTION THAT APPLY TO ENACTMENTS OF THE LEGISLATURE ALSO APPLY TO INITIATIVES.

One of the new arguments that the Defendants have fashioned in their attempt to support the dismissal of the Information is the argument that because RCW 42.17 is the product of two initiatives, I-276 and I-134, it should not be construed like statutes enacted by the legislature. Defendants' Response at 11-

12, 32. Once again, the Defendants have conflated two different concepts.

The Washington Supreme Court has in fact held, in cases such as *Amalgamated Transit Union Local 587 v. State,* 142 Wn.2d 183, 204, 11 P.3d 762 (2000), that in determining intent from the language of a statute based on an initiative, "the court focuses on the language as the average informed voter voting on the initiative would read it." As the Supreme Court has also put it: "The words of an initiative will be read 'as the average informed lay voter would read [them].'" *Parents Involved in Community Schools v. Seattle School District No. 1*, 149 Wn.2d 660, 671, 72 P.3d 151 (2003), *cert. granted*, _ U.S. _, 126 S. Ct. 2351, _ L. Ed. 2d _ (June 5, 2006), (*quoting Petroleum Imps., Inc. v. Friedt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995), *citing Estate of Turner v. Dep't of Revenue*, 106 Wn.2d 649, 654, 724 P.2d 1013 (1986)). The State does not quarrel with this proposition, but notes its limited applicability to the instant case. Our Supreme Court has also held that, while in determining the voters' intent in enacting an initiative, courts should not read into the initiative "technical and debatable legal distinction[s]" not apparent to the average informed lay voter, "the intent behind the language of an enactment becomes relevant

only if there is some ambiguity in that language." *City of Spokane v. Taxpayers of the City of Spokane*, 111 Wn.2d 91, 97-98, 758 P.2d 480 (1988) (*quoting In re Estate of Hitchman*, 100 Wn.2d 464, 469, 670 P.2d 655 (1983)).

Here, there is no real argument between the parties as to the meaning of any particular words in RCW 42.17.[1] The real question is in the interplay of RCW 42.17 and RCW 40.16.030, the statute which the Defendants are charged with violating. That, in turn, is a matter of statutory construction.[2]

The Washington Supreme Court has held many times that once enacted into law, initiatives are interpreted according to the same rules of statutory construction that apply to the Legislature's enactments. *See, e.g., Smith v. McGowan,* 148 Wn.2d 278, 288, 60 P.3d 67 (2002); *Amalgamated Transit,* 142 Wn.2d at 205. That means, first of all, that a court should construe two statutes dealing

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[1] One of the subheadings in the Defendants' Response is even entitled "The Plain and Unambiguous Text of RCW 42.17 Documents An Exclusively Civil Penalty Scheme". Defendants' Response at 11.

[2] Defendant's Response (at 11 n. 5) refers to the "general versus special" rule as "the appropriate tool of statutory construction to resolve the interplay between RCW 40.16.030 and RCW 42.17."

with the same subject matter so that the integrity of both will be maintained. *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995); *City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 503, 275 P.2d 933 (1954). That also means that this Court must presume that the voters, in enacting I-276 and I-134, acted with full knowledge of existing laws. *Daly v. Chapman,* 85 Wn.2d 780, 782, 539 P.2d 831 (1975); *Thurston County v. Gorton,* 85 Wn.2d 133, 138, 530 P.2d 309 (1975). In other words, the voters of Washington must be presumed to have enacted RCW 42.17, with its requirements that campaign contribution reports be filed with a public office (i.e., the Public Disclosure Commission (PDC)), with full knowledge that RCW 40.16.030, with its plainly intended self-operative effect, made it a Class C felony to knowingly offer any false or forged instrument in any public office under any law of the State of Washington or of the United States. Given this key presumption, it is absolutely irrelevant that RCW 42.17 says nothing at all about criminal sanctions for filing false campaign contribution reports; the voters were well aware that RCW 40.16.030 was already in effect and would apply to the newly created instruments to be filed with the PDC.

3. *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* DOES NOT PRECLUDE CRIMINAL PROSECUTION HERE FOR VIOLATION OF RCW 40.16.030.

Another argument of the Defendants making its first appearance in the Defendants' Response is their contention that the principle of statutory construction known as "expressio unius est exclusio alterius" applies here to bar criminal prosecution. According to the Defendants, this principle supports their position that the bare fact that Ch. 42.17 RCW does not mention criminal sanctions at all, while providing for various civil penalties, leads to the conclusion that criminal prosecution for knowingly offering false campaign contribution reports is prohibited here. Defendants' Response at 13. The Defendants cite no authority whatsoever in support of this position, and this argument is a misapplication of that principle of statutory construction.

The United States Supreme Court has pointed out that:

> As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.

Barnhart v. Peabody Coal Co., 537 U.S. 149, 168, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2003) (*quoting United States v. Vonn*, 535 U.S. 55, 65, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002)). The U.S. Supreme Court has also said of this principle that: "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which [is] abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron USA Inc. v. Echazabal*, 536 U.S. 73, 81, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002) (*citing* E. Crawford, *Construction of Statutes*, 337 (1940)). The fact that RCW 42.17 lists civil penalties and does not mention criminal sanctions does not lead logically to the inference that criminal penalties for knowingly offering false instruments to be filed with the PDC were meant to be excluded. This is especially so given the principle of statutory construction that the voters are presumed to be aware of all prior legislative enactments. Given that presumption, the far more logical inference to be drawn from the absence of any criminal sanctions in RCW 42.17 is that the drafters of the initiatives and the voters who approved them were well aware that RCW 40.16.03 already criminalized the knowing offering of false instruments, such as false campaign contribution

reports, for filing in any public office. The Defendants' invocation of *expressio unius est exclusio alterius* is, in sum, another unsuccessful attempt to justify the trial court's dismissal of the Information while bypassing the general/specific rule and the doctrine of implied repeal.

4. THE DUE PROCESS CLAUSE DOES NOT SUSTAIN THE TRIAL COURT'S DISMISSAL OF THE INFORMATIONS.

The Defendants also argue that they were not provided with fair notice that they could be prosecuted for violation of RCW 40.16.030 in connection with the campaign contribution reports mandated by RCW 42.17, specifically by, e.g., RCW 42.17.080 and .090. This lack of fair notice, the Defendants argue, violates the guarantee of Due Process contained in the Washington Constitution, art. I, § 3.[3] The Defendants note that this ground was not cited by the trial judge as a basis for his ruling dismissing the

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[3] The Defendants do not specifically cite the United States Constitution, amendment 14, § 1, in their Response, but do cite (at 41 n.14) several United States Supreme Court cases that discuss the due process clause of the 14th Amendment. Because the Defendants have not engaged in the analysis mandated by *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), necessary for determining whether the due process clause of the Washington Constitution provides greater protection than its federal counterpart, this Court should consider the due process claim only under federal constitutional law. *State v. Sullivan*, 143 Wn.2d 162, 180 n.73, 19 P.3d 1012 (2001).

Informations here, but argue that this Court may consider the due process argument even though the trial court did not consider it. The State agrees that this Court may consider this argument, but this due process argument too lacks merit.

A statute is presumed constitutional, and the party challenging its constitutionality has the burden of proving beyond a reasonable doubt that it fails to make plain the general conduct it prohibits. *State v. Sullivan*, 143 Wn.2d 162, 180, 19 P.3d 1012 (2001) (*citing State v. Groom*, 133 Wn.2d 679, 691, 947 P.2d 240 (1997)). The United States Supreme Court has summarized thus the fair notice required by due process: "'The ... principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *United States v. Lanier*, 520 U.S. 259, 265, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (*quoting Bouie v. City of Columbia*, 378 U.S. 347, 351, 84 S. Ct. 1697, 1701, 12 L. Ed. 2d 894 (1964)) (*quoting United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 811-812, 98 L. Ed. 989 (1954)). The Supreme Court has also elaborated three "related manifestations" of the fair notice requirement of due process. First, the fair notice doctrine bars enforcement of a statute which is so vague "'that men of common intelligence must necessarily guess at

its meaning and differ as to its application.'" *Lanier*, 520 U.S. at 266 (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926)). Second, the rule of lenity ensures fair warning by resolving statutory ambiguity so as to apply it only to conduct clearly covered. *Lanier*, 520 U.S. at 266. Third, "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 [.]" *Id.*

The Defendants' due process argument is predicated on two points. The first is based, like almost all of the arguments advanced by the Defendants, on the fact that RCW 42.17 provides only civil penalties for violations of its various provisions, and does not mention criminal sanctions at all. The Defendants argue from this fact that, "[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." Defendants' Response at 39.

The problem with this analysis is that it is focused entirely on RCW 42.17 and on various sections of the Seattle Municipal Code, while ignoring the statute which the Defendants are actually charged with violating, RCW 40.16.030. This argument, in effect,

amounts to a claim that one who looked only at RCW 42.17 and the Seattle Municipal Code would have no idea that RCW 40.16.030 applied to his or her conduct. The Defendants do not make any claim that RCW 40.16.030 is itself vague in any way. This failure to deal with the operative statute underscores the weakness of the Defendants' statutory analysis.

There is nothing vague or unclear about RCW 40.16.030. It reads as follows:

> **Offering false instrument for filing or record**
>
> Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a Class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

The Washington Supreme Court has noted that: "According to the plain language of the statute, any offending filing must occur 'under any law of this state or of the United States.'" *State v. Hampton,* 143 Wn.2d 789, 794, 24 P.3d 1035 (2001). As the State argued in its Opening Brief (at 26-27), a prosecution under RCW 40.16.030 will almost always involve another statutory scheme that permits and/or requires a particular instrument to be filed in a public

office. There is no need for this other, invariably more specific statutory scheme to refer to RCW 40.16.030. The lack of such a reference does not come close to rising to the level of a lack of fair notice that the knowing filing of false campaign contribution reports with the PDC may be prosecuted under RCW 40.16.030.

The other prong of the Defendants' due process argument is based on the aspect of the fair notice requirement of due process that forbids prosecution under "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". *Lanier*, 520 U.S. at 266. According to the Defendants, this principle applies to the prosecution of them under RCW 40.16.030, since there has been no reported decision in Washington in which that statute has been applied to campaign contribution reports mandated by RCW 42.17. The absence of such a decision, however, does not mean that the Information in the instant case charges a novel legal theory. Instead, it is simply the application of a well-settled legal theory to a new set of facts, i.e., the instruments (campaign

contribution reports) that RCW 42.17 requires campaign treasurers to file with the PDC.[4]

The United States Supreme Court's decision in *Lanier,* 520 U.S. 259, serves as a rebuttal to the Defendants' due process claims here. In *Lanier*, the defendant, a Tennessee State Court Judge, was charged with violating a statute, 18 U.S.C. § 242, that, instead of describing the conduct it prohibited, criminalized the deprivation of "rights protected by the Constitution or laws of the United States." *Id.* at 264. The Indictment in Lanier alleged that the defendant had acted willfully and under color of Tennessee law, and specifically charged that he had deprived his victims of "rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from willful sexual assault." *Id.* at 261-62. The conduct underlying Lanier's convictions was his sexual assaults of several women while Lanier served as a state judge in Tennessee. Lanier

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[4] Federal courts have upheld convictions for using straw contributors to conceal the true source of campaign contributions, thereby causing political committees to file false reports with the Federal Election Commission, against defense claims that such prosecutions did not comport with due process. *See United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999) and *United States v. Hsia*, 176 F.3d 517 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1136, 120 S. Ct. 978, 145 L. Ed. 2d 929 (2000).

was convicted by a jury, but on appeal, an *en banc* Sixth Circuit Court of Appeals reversed Lanier's convictions because of the "'lack of any notice to the public that this ambiguous criminal statute [*i.e.,* § 242] includes simple or sexual assault crimes within its coverage.'" *Id.* at 263 (*quoting United States v. Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996)).

The Supreme Court reversed the Sixth Circuit, vacated the judgment, and remanded the case to the Sixth Circuit for application of the proper standard of review. The Supreme Court first noted that § 242's general terms incorporated constitutional law by reference, and that "many of the incorporated constitutional guarantees are, of course, themselves stated with some catholicity of phrasing." *Id.* at 265. In the course of concluding that the standard for determining the adequacy of the fair warning that the defendant was entitled to was the same as the standard for determining whether a constitutional right was "clearly established" in civil litigation under 42 U.S.C. § 1983, the Supreme Court noted that:

> Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is "fundamentally similar" at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241

> [proscribing a conspiracy against civil rights] or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.

Id. at 269. There is, therefore, no need for a prior prosecution of knowingly false campaign contribution reports under RCW 40.16.030 in order for that statute to be able to pass constitutional muster for providing fair notice that the conduct which the Defendants here are alleged to have undertaken was susceptible of criminal prosecution pursuant to RCW 40.16.030. It is sufficient that RCW 40.16.030 (and the decisions that have explicated that statute, such as *State v. Hampton*, 143 Wn.2d 789, 24 P.3d 1035 (2001) and *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980)), provide reasonable warning that the knowing filing of false instruments required or permitted to be filed with a public office under any state or federal law constitutes a felony. The Defendants' fair notice argument is without merit.

5. THE DEFENDANTS' ATTEMPTS TO DISTINGUISH *UNITED STATES v. HANSEN* ARE WITHOUT MERIT.

The Defendants devote considerable space in their Response to attempts to distinguish the opinion of the District of Columbia Circuit Court of Appeals in *United States v. Hansen*, 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986). One of the grounds that the Defendants advance in support of their argument is that *Hansen* involved reports mandated by an act of Congress, the Ethics in Government Act of 1978 ("EIGA"), while RCW 42.17 is almost entirely the product of two initiatives, I-276 and I-134. This argument, in turn, relies on the Defendants' argument that RCW 42.17 must be construed "through the eyes of a lay voter", as the Defendants put it in their Response (at 32). As the State has already argued, *supra*, the interplay between RCW 40.16.030 and RCW 42.17 is a matter of statutory construction in which initiatives are subject to the same rules as enactments by the legislature. It is therefore of no moment that *Hansen* analyzed the interplay between two statutes enacted by Congress, while the case at bar involves the interplay between a statute enacted by the Washington Legislature and a statutory chapter based on two initiatives.

A second line of attack the Defendants launch on *Hansen* is that *Hansen*, citing United States Supreme Court precedent, noted that repeal by implication will be found only upon a showing of "clear and manifest" intent. *Id.* at 944. The Defendants' Response (at 32) argues that, "[n]o Washington court has ever applied this standard to find an implied repeal." Washington law, however, is if anything even more inhospitable to repeal by implication than federal law, as evidenced by the Washington Supreme Court's holding that, "[r]epeal by implication is strongly disfavored". *ATU Legislative Council of Washington v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002).

A third way in which the Defendants try to distinguish *Hansen* is their argument that in *Hansen*, the Court found that, "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[.]" Defendants' Response at 32. The Defendants follow this up with a lengthy quote from *Hansen.* In actuality, the *Hansen* Court found the legislative history to be equivocal at best, as indicated by other language from that opinion, such as the Court's noting that: "The weakness of indication of legislative intent is highlighted when one realizes that all the

expressions of views described in the foregoing legislative history pertain only to the House. We have no indication beyond the text of the statute what members of the Senate thought on this issue." *Hansen*, 772 F.2d at 948. The *Hansen* Court summed up its review of the legislative history of the EIGA by concluding that, "there is not remotely-neither in the textual indications we have considered, nor in the various episodes of legislative history, nor in all of them combined-a *clear and manifest* indication of an intent to repeal." *Id.* at 948. In sum, the *Hansen* Court did not find "that Congress did not intend to preclude operation of the federal false statement statute", as the Defendants claim, but instead only found the legislative history of the EIGA did not provide the requisite clear and manifest indication of an intent to repeal the application of the federal false statement statute. Similarly, in the instant case, there is no such indication of an intent to repeal by implication the Washington false statement statute, RCW 40.16.030.

One final argument that the Defendants employ to distinguish *Hansen* is their pointing to the language contained on the reports at issue in that case, which warned that, "'[a]ny individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and

criminal sanctions.'" *Id.* at 949. According to the Defendants, "[t]his critical distinction makes *Hansen's* holding inapposite here as well." Defendants' Response at 33 (footnote omitted). While this argument makes it appear that the warnings on the forms Hansen signed were of prime importance in the D.C. Circuit's opinion, even a cursory examination of the context in which that warning is discussed in *Hansen* reveals that that is not the case. The defendant Hansen had argued on appeal that the rule of lenity in criminal cases should apply to his conviction for violation of 18 U.S.C. § 1001. The *Hansen* Court preceded its reference to the warning contained on the forms Hansen signed by noting with respect to the rule of lenity that:

> Moreover, to the extent the rule is based upon solicitude for the individual defendant who violates the law before its meaning is clarified, rather than upon some more general notion that in case of doubt Congress should not be deemed to have unsheathed the sword of criminal penalty, it has no valid application here. Hansen has not only not been surprised by a novel or unexpected interpretation of the law, *cf.* *United States v. Mallas*, 762 F.2d 361, 363 (4th Cir.1985), but was in fact warned of its application with a specificity that a prospective lawbreaker rarely enjoys.

Id. at 949. This language makes it clear that the warning on the EIGA forms Hansen signed was not a critical factor in the

Hansen Court's affirming of the defendant's criminal convictions, but was instead an additional reason why his rule of lenity argument was unavailing. The fact that the campaign contribution reports at issue here may not have carried such warnings does not serve to distinguish the reasoning of the Court of Appeals in *Hansen*. The State respectfully submits that the analytical framework laid out in that case remains the appropriate one with which to approach the interplay between RCW 40.16.030 and RCW 42.17 in the instant case. The State further respectfully submits that this analytical framework leads inexorably to the conclusion that, just as the federal false statement statute was held to be applicable to the EIGA forms the defendant signed in *Hansen*, RCW 40.16.030 applies to the campaign contribution reports that the Defendants are alleged to have caused to be filed here.

B. CONCLUSION

The trial court erred in dismissing the Information against the Defendants. For that reason, the State respectfully requests this

Court to reverse the trial court's order dismissing the Information, and remand this matter to the trial court for trial on the merits.

DATED this 19th day of July, 2006.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 1

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	No. 57893-6-I
	)	57894-4-I
vs.	)	57895-2-I
	)	57896-1-I
JOHN GILBERT CONTE,	)	
FRANK F. COLACURCIO, JR.,	)	AFFIDAVIT OF SERVICE
FRANK F. COLACURCIO, SR.,	)	
AND MARSHA MARIE	)	
FURFARO,	)	
	)	
Respondents,	)	
	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Monicka Ly-Smith, being first duly sworn on oath, deposes and says: That she is an American citizen over 21 years of age, that on July 20, 2006, she served via legal messenger (ABC-Legal Messenger, Inc.) one copy of *Reply Brief of Appellant* upon the following:

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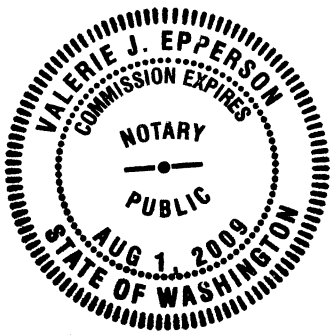
MONICKA S. LY-SMITH

SUBSCRIBED AND SWORN to before me this 19th day of July, 2006.

VAL EPPERSON
NOTARY PUBLIC in and for the State of Washington, residing at Renton.



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