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DIVISION II

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STATE OF WASHINGTON
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NO. 28375-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON EDUCATION ASSOCIATION,

Appellant,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY WOLCOT,

Respondents, individually and on behalf of
all other nonmembers similarly situated.

REPLY BRIEF ON BEHALF OF APPELLANT,
WASHINGTON EDUCATION ASSOCIATION

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ORIGINAL

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SUMMARY OF REPLY

In their Response to Appellant's argument that RCW 42.17.400 precludes any implied right of action under the PDA, Respondents rely almost exclusively upon *Nelson v. McClatchy Newspapers*, 131 Wn. 2d 523, 936 P.2d 1123 (1997). But that case actually supports Appellant's position, and the other cases on which Respondents rely are distinguishable: *Wingert v. Yellow Freight*, 146 Wn.2d 841, 50 P.3d 256 (2002) and *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). There is no basis in either case law or statute for implying a private cause of action in this case.

Inasmuch as Respondents' other arguments hinge on their improper interpretation of *McClatchy*, they too must fail. The tort claims must also fail as they arise out of the collective bargaining relationship and thus are subsumed by the duty of fair representation, for which the appropriate statute of limitations is six months. This Court should reverse the lower court rulings and remand the case for proper disposition.

COUNTERSTATEMENT OF THE CASE

Respondents make a factual misstatement in their Brief that bears comment. They state [Brief at p. 4]: "As the AG did not have standing to represent the individual interests of agency fee payers, Judge Tabor did

not order the WEA to return their agency fees.”¹ Judge Tabor never ruled that the AG did not have standing to represent fee payers, indeed, that issue was never before the court for determination in the PDC case. Nor did Judge Tabor consider and refuse to order such relief, as Respondent asserts; he simply did not rule on such issue: “this court is not addressing what if any monies or damages any individual or group of fee payers would be entitled to.” (CP 361). He concluded [CP 364-65]:

the parties agreed to bifurcate the trial as to certain issues concerning specific expenditures or dollar amounts. This court is not prepared to rule **at this time** as to the nature of certain contested expenditures which may or may not be “political”. Likewise, as previously noted, this court declines to rule on issues involving repayment or restitution amounts owed to individual fee payers.

Although Judge Tabor did not order restitution of fees in his December 2001 order, there is no ruling or other indication that he will not consider such relief in the future.² Accordingly, there is no basis in this record for Respondents’ assertion that they are without a remedy for their alleged statutory right.

¹ The original citation was to “CP 232”, subsequently corrected to “CP 356”, the final page of Judge Tabor’s letter opinion. That opinion, however, does not support Respondents’ assertion that Judge Tabor categorically rejected return of agency fees as a possible remedy.

² The Permanent Injunction, issued therein, provides that the parties may bring the matter back for further consideration by Judge Tabor if WEA is not liable in *Davenport* for agency fees collected in 2000-01. See CP 380-81 in the *PDC v. WEA*, No. 2826401-II.

ARGUMENT IN REPLY

I. THERE IS NO IMPLIED CAUSE OF ACTION

A. The *McClatchy* Is Not Dispositive

Respondents' heavy reliance on the *McClatchy* case is misplaced. Respondents assert, throughout their brief, that in *McClatchy*, the Supreme Court of Washington "has already determined that there is an implied right of action" (Brief, p. 7), and thus this Court has no authority to hold otherwise. *McClatchy* does not so hold. First, Respondents mischaracterize the arguments made by the defendant newspaper in *McClatchy*: "[t]he newspaper argued that the statute did not create a private right to be free from discrimination." (Brief, p. 8). However, the *McClatchy* decision shows that what the newspaper in fact argued was that "Washington already has a labor law statute forbidding discrimination against an employee on the basis of age, sex [etc] . . . Nelson's reading, TNT argues, in effect creates an additional category, that of political activist, but would locate it in the campaign finance reform law rather than in labor or other civil rights laws." 131 Wn.2d at 533.³

Next, Respondents wrongly assert that the Washington Supreme Court held "that the statute did create a private cause of action related to

³ TNT also had argued that the statute applies "only when the employer requires an employee to adopt its political position and does not apply when the employer merely requires political neutrality of its employees" 131 Wn.2d at 532.

campaign finance reform because ‘employers may not disproportionately influence politics by forcing their employees to support their position . . . ’ *Id.* at 534” (Brief, p. 8). No where in the *McClatchy* decision did the Supreme Court consider and decide the issue of whether the PDA “create[s] a private cause of action.” It simply held that “RCW 42.17.680(2) applies to the present case and substantial evidence supports its application.” 131 Wn.2d at 534. Indeed, there was no need to imply a private right of action in *McClatchy*, because the plaintiff in that case, unlike the *Davenport* plaintiffs, had followed the requirements of RCW 42.17.400(4), had requested the Attorney General and County Prosecutor to file suit on her behalf, and they had declined to do so.⁴ Having complied with the prerequisites of §400(4), Sandra Nelson had a statutory right to file suit. The *McClatchy* case simply does not establish that there is, or should be, an implied right of action.⁵

⁴ Appellant requests that the Court take judicial notice of the briefing submitted to this Court in *McClatchy*, COA No. 19615-8-II. It is clear from the Appellants’ Brief therein that she exhausted the requirements of RCW 42.17.400(4) as a prerequisite to bringing suit. *See*: Brief of Appellant in, at p. 26, citing CP 29-188, Ex. F, attached hereto in the Appendix, for the Court’s convenience.

⁵ Respondents’ expressed concern about overruling *McClatchy* is simply not well taken. *See*: Brief, pp. 10, 18.

B. *Bennett* and *Wingert* Are Distinguishable

1. These Cases Arose Under Different Statutes

The *Bennett* case arose under Chapter 49.44 RCW, and *Wingert* arose under Chapter 49.12 RCW. Neither of those statutes contains a *qui tam*-like provision similar to that in Chapter 42.17 RCW. Thus, unless the Court was willing to imply a right of action, there would have been no access to redress whatsoever. Here, RCW 42.17.400 provides access to court “for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17.390.” RCW 42.17.400 merely requires that such access be through specified mechanisms (suit by the Attorney General or Prosecutor or, if they fail to bring action, by citizen action). The difference is significant, because rather than support an implied right of action, it actually undercuts it. For in RCW 42.17.400, the drafters obviously considered how the rights in the Chapter were to be enforced and so specified. They did not authorize a private action. The Court should not do so either.

2. Respondents’ Interpretation of the Statute Would Violate Article II, §19.

If RCW 42.17.760 is interpreted to create a private right of action for agency fee payers, as Respondents contend, both Initiative 134 and

Initiative 276 would be unconstitutional.⁶ Article II, §19 provides: “No bill shall embrace more than one subject, and that shall be expressed in the title.” Article II, §19 applies to initiatives. *Washington Federation of State Employees v. State*, 127 Wn.2d 544, 901 P.2d 1028 (1995).

Initiative 134 asked the voters the following question:

Shall campaign contributions be limited; public funding of state and local campaigns be prohibited; and campaign related activities be restricted?

1992 Voters Pamphlet, Initiative Measure 134, at p. 8, quoted in *McClatchy*, 131 Wn.2d at 533. If, in fact, §760 bestows individual rights upon agency fee payers that can be litigated in private suits, then that would be a separate subject within a law governing campaign regulation, in violation of the dual subject matter prohibition. And, in further violation of Article II, §19, that subject was not disclosed in the ballot title nor in the voters pamphlet. See: *Washington Education Association v. State*, 93 Wn.2d 37; 604 P.2d 950; (1980).

The ballot title for Initiative 276, the initiative wherein the enforcement mechanisms for Chapter 42.17 are contained, provides:

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

⁶ Neither *Bennett* nor *Wingert* arises from statutory schemes that were created by initiative.

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.

Fritz v. Gorton, 83 Wn.2d 275, at 290-91, 517 P.2d 911 (1973). The

Explanatory Statement further provides, in pertinent part:

The initiative would also establish a “public disclosure commission” to administer and enforce its provisions and would prescribe several procedures and penalties for its enforcement.

No where in either text is there reference to a private right of action. And clearly there is no language from which legislative intent to create such relief could be presumed.

This court must determine the intent of the voters “as the average informed lay voter would read [the initiative].” *Repub. Comm. v. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).⁷ The average voter would not understand from reading the ballot title of Initiative 276 that it was granting individuals a private right of action. Initiative 134 did nothing to change the enforcement mechanisms of Chapter 42.17 RCW or to notify the voters of any such changes.

⁷ The *Rep. Comm.* Court also quotes *Estate of Turner v. Department of Revenue*, 106 Wn.2d 649, 654, 724 P.2d 1013 (1986).

Courts disfavor interpretations of statutes that would render them unconstitutional. *Swanson v. White*, 83 Wn.2d 175, 183, 517 P.2d 959 (1973). Here, as shown above, the lower court's interpretation of §760 as providing a private right of action jeopardizes the constitutionality of both initiatives that created the PDA. Accordingly, this Court should reject Respondents' argument that the statute bestows individual private rights that can give rise to an implied right of action.

C. The Legislative Intent Implicitly Supports Denying a Private Right of Action

Even if this Court determines that the other prongs of the *Bennett* test are met, which Appellant in no way concedes, this Court should refused to imply a private right of action where the second prong – whether the legislative intent explicitly or implicitly supports creating or denying a remedy - is not met. *See: Cazzanigi v. General Elec. Credit*, 132 Wn.2d 433, 938 P.2d 819 (1997). In the case at bar, the *Davenport* Plaintiffs do not meet the second prong of the *Bennett* test for reasons similar to those addressed by the court in *Cazzanigi*.

In *Cazzanigi*, the Washington Supreme Court refused to imply a private right of action in circumstances similar to those presented here. The statutory scheme in *Cazzanigi* involved the Retail Installment Sales

of Goods and Services Act (RISA)⁸, where one portion expressly provides for a private right of action and another portion does not. The section not providing for a private right of action is enforceable pursuant to a different section providing that the attorney general or prosecuting attorney can bring an action in the name of the state to restrain and prevent any violation of the act. Thus, the *Cazzinigi* Court held that “[n]o cause of action should be implied when the Legislature has provided an adequate remedy in the statute” (132 Wn.2d at 445, citing *Bennett*).

Continuing its analysis, the *Cazzinigi* Court said [*Id.*, at 446]:

Aside from the question whether a remedy already exists, the *Bennett* three-factor test does not support an implied cause of action.

Contrasting the private cause of action provisions elsewhere in the statute with the provisions vesting enforcement in the AG for other violations, the *Cazzinigi* Court held that such statutory scheme established that there was no legislative intent to create a private right of action, and accordingly, that the plaintiffs failed to meet the second prong of the *Bennett* test.

Application of the *Cazzinigi* analysis to this case compels a similar holding. The legislative intent of the remedial portions of Chapter 42.17 implicitly support denying a private right of action. The remedial sections were part of the Initiative 276, adopted by the voters in 1972 and have not

⁸ RCW 63.14.010, *et seq.*

been amended either by the Legislature or by Initiative 134. In Initiative 276, the voters specifically created an unfettered private cause of action in the public records portion of the PDA. *See*: RCW 42.17.340. However, in the enforcement sections relating to campaign finance, the voters created only the limited private cause of action in RCW 42.17.400(4). This difference in language indicates a difference in legislative intent. *Expressio unius est exclusio alterius*. *See: Cazzanigi, supra* at 446, citing *State v. Cronin*, 130 Wn.2d 392, 399, 923 P.2d 694 (1996); *Seeber v. PDC*, 96 Wn.2d 135, 634 P.2d 303 (1981). Accordingly, this Court should determine that the *Davenport* Plaintiffs failed to meet the second prong of *Bennett* and that the court below erred in implying a private right of action.

D. RCW 42.17.400 Provides An Adequate Remedy.

Contrary to Respondents' assertions, WEA has not argued that the PDA specifically provides for "private restitution." (Brief, p. 19). Rather, WEA has accurately argued that the PDA does provide for broad equitable remedies. RCW 42.17.390(6) unequivocally provides that "[t]he court may enjoin any person to prevent the doing of any act herein prohibited or to compel the performance of any act required herein." And, the preamble to RCW 42.17.390 provides that "[o]ne or more of the following civil remedies and sanctions may be imposed by court order **in addition to any**

other remedies provided by law . . .” (emphasis added). Consequently, in a case properly brought under RCW 42.17.400(4), a court could, under §390, compel the restitution of wrongfully withheld monies, or other such equitable relief. Thus, this is clearly not a case where a statute has created a right but no civil remedy; all civil remedies are available to a court under an action brought pursuant to RCW 42.17.400.

As the Washington Supreme Court, in upholding the constitutionality of the *qui tam* provision in RCW 42.17.400(4), stated:⁹

Section 40(4) of the initiative is merely a codification of the ancient common-law “*qui tam*” procedure or doctrine. Essentially a *qui tam* action is brought by an “informer” or volunteer for violation of a particular civil or criminal statute which generally provides that the informer, if successful, may recover his costs and attorney fees, **as well as a share of the penalty**. It is called a “*qui tam* action” because the plaintiff states that he sues for *the state as well as himself*. Black's Law Dictionary 1414 (rev. 4th ed. 1968)(emphasis added).

Respondents suggest that the Attorney General does not have the power to seek relief for fee payers, citing a press release. (Brief, p. 19). Respondents cite no competent authority for such position and it should be rejected on its face. The above-cited portions of RCW 42.17.390 clearly empower the Attorney General to avail herself of “any . . . remedies provided by law”. The fact that in this case, PDC’s counsel chose not to

⁹ *Fritz v. Gorton*, 83 Wn.2d 275, at 312, 517 P.2d 911 (1973).

do so, does not mean that such remedies are not available. There is no justification for implying a private right of action under the statutory scheme of the PDA.

E. Implying a Private Right of Action Is Not Consistent With the Underlying Purpose of the Act

Even if Respondents correctly describe the purpose of RCW 42.17.760 as “ensuring . . . fair and equal [elections] . . . and reduc[ing] the influence of large organizational contributors” (Brief, p. 21), they fail to show how those purposes were not fulfilled by the State’s enforcement action against the WEA. Surely, the goal of RCW 42.17.760 to “reduce the influence of large organization contributions” (Brief, p. 22) was met by the entry of Judge Tabor’s decision and Permanent Injunction in the *PDC* case.¹⁰

If there had been no action by the PDC regarding EFF’s complaint against WEA, Davenport could have brought a citizen action and fashioned his request for relief differently than did the PDC, if he so chose. But where, as here, the State has acted, the statute simply does not permit an additional suit based on the same allegedly illegal conduct. *See: State ex rel. Evergreen Freedom Foundation v. WEA*, 111 Wn.App. 586, 606-9, 49 P.3d 894 (Div. II, 2002) where the court found that the priority

¹⁰ See CP 357-382 in *PDC v. WEA*, No. 2826401-II.

of action doctrine precluded a second suit when the administrative agency had acted. In applying RCW 42.17.400(4) to that case, this Court held that there was no substantive difference in parties between the state and the citizen pursuing a citizen action pursuant to § 400(4).

Implying a private right of action is also inconsistent with the purposes specified in RCW 42.17.620 and RCW 42.17.010. The established enforcement mechanisms found in RCW 42.17.400 protect the integrity of the election process. The PDC has been granted the authority to screen complaints and to choose to pursue the ones that it contends are meritorious. This scheme prevents individual contributors or candidates from pursuing frivolous claims, seeking injunctions and potentially disrupting elections without consequence. Creating an implied private right of action under Chapter 42.17 would open the floodgates for political battles between candidates to be fought in private litigation before the courts. It could thrust the courts in the middle of current election disputes or into the role of overseer of reporting and funding squabbles, *ad nauseum*. Such a conclusion would have enormous consequences. Implying a private cause of action is not consistent with the underlying purposes of either Initiative 134 or Initiative 276.

F. Federal Law Is Applicable Here

Respondents claim that this Court should disregard *Gonzaga University v. Doe*, ___ U.S. ___, 122 S. Ct. 2268, (2002) because it was “issued by a federal court relying on federal law.” (Brief, p. 23). That claim, of course, conveniently overlooks that fact that the “federal court” was the U.S. Supreme Court, and that it was reviewing, and reversing, decisions of the Washington Supreme and Appellate Courts.¹¹ Appellant never suggested that *Gonzaga* was “binding” on this Court; only that it should be considered. Its rationale offers compelling and persuasive justification for rejecting a private right of action in this case where RCW 42.1770 provides no indication that the drafters of Initiative 134 intended to create new individual rights for agency fee payers.

G. If A Private Right of Action Is Upheld, It Should Be Applied Prospectively Only.

Respondents contend that because “courts customarily focus on whether particular persons have relied justifiably upon the overruled decision”,¹² since there was no prior decision on which to rely, prospective application would be inappropriate (Brief, p. 25-26). That interpretation of the law of prospective application is too narrow. The touchstone of the doctrine is “justifiable reliance”. *State of Washington, ex rel.*

¹¹ *John Doe v. Gonzaga University*, 143 Wn.2d 687, 24 P.3d 390 (2001) and *Doe v. Gonzaga Univ.*, 99 Wn. App. 338, 992 P.2d 545 (Div. III 2000).

Washington State Finance Committee v. Martin, 62 Wn.2d 645, 384 P.2d 833, (1963). The “reliance” need not be just on a prior decision, it can be on a statute, a constitutional provision, or other rule of law. *Id.* The *Martin* Court said [62 Wn.2d at 666]:

If rights have vested under a faulty rule, or a constitution misinterpreted, or **a statute misconstrued**, or where, as here, subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected. By means of this doctrine, courts of the most prudent and careful tradition can move boldly to right the very wrong they have been traditionally perpetuating under the old, rigidly-applied, single-minded view of the doctrine of stare decisis. The courts can act to do that which ought to be done, free from the fear that the law itself is being undone (emphasis added).

Here, our courts’ only interpretation of 42.17.400(4) implies that there is no private right of action because a citizen, in pursuing a *qui tam* suit can sue “for the state as well as himself.”¹³ Our courts never have addressed the issue of whether there was a private right of action where the State had proceeded with an enforcement action in accordance with RCW 42.17.400. Thus, the question of whether WEA’s reliance that there is no a private right of action under the campaign finance portion of Chapter 42.17 was justified turns on both the interpretation of a statute and

¹² Citing *Haines v. Anaconda Aluminum Co.*, 87 Wn.2d 28, 34, 549 P.2d 13 (1976).

¹³ *Fritz*, *supra* at 312. See quote *supra* at pp. 10-11.

decisional law. Clearly, on its face, RCW 42.17.400 would appear to provide the exclusive means for enforcing §760. There is nothing in the record or in case law that would suggest otherwise.

And here, as shown, retroactive application of a decision implying a private right of action would “result in substantial hardships to the parties who have relied in good faith on [the plain language of the statute]. *Geise v. Lee*, 10 Wn.App. 728, 733, 519 P.2d 1005 (Div. I, 1974), *rev'd on other grounds*, 84 Wn.2d 866, 529 P.2d 1054 (1975). Prospective application minimizes or eliminates the hardships. *Id.* Appellate courts possess the power to give their decisions prospective effect. *Martin, supra*; *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965). If this Court were to imply a private right of action, it should do so prospectively only.

II. THE TORT CLAIMS ARE NOT VIABLE

A. The Conversion Claim Is Not Well-Founded

Respondents argue that, notwithstanding the provisions of RCW 41.59.100, WEA could not have legal title because “the political portion of

the agency fee was never WEA's property to begin with" (Brief, p. 27).¹⁴

This argument puts the proverbial cart before the horse.¹⁵

RCW 41.59.100 gives WEA a right to collect agency fees equivalent to members dues,¹⁶ provided it negotiates collective bargaining agreements with school districts authorizing agency shops. Agency fee statutes authorize the collection of an amount **equivalent** to that charged to members and greater than the costs related to collective bargaining. *See: Powerhouse Engineers v. State.*¹⁷ Once that is done, and the school district has deducted and remitted agency fees to the WEA, the WEA rightfully has title to those funds. There can be no conversion because once fees are deducted, the fee payer no longer has lawful possession of the money.

Conversion is "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of possession of it". *Kruger v. Horton*, 106 Wn.2d 738, 743,

¹⁴ The conversion claim herein is dependent upon this court upholding Judge Tabor's decision in *PDC v. WEA*, No. 2826401-II. WEA has challenged the trial court's decision herein, *inter alia*, as an erroneous interpretation of §760 and as rendering RCW 42.17.760 unconstitutional.

¹⁵ WEA incorporates by reference its arguments made in *PDC v. WEA*, No. 2826401-II, currently pending before this Court, that it did not violate §760 in making political expenditures and in collecting agency fees by commingling agency fees with membership dues. See Appellant's Opening Brief pp. 16-35 and Reply Brief, pp. 4-19.

¹⁶ Respondents argue, at p. 28, that WEA "would have to return the fees collected without authorization". There are no agency fees collected "without authorization" – RCW 41.59.100 provides such authorization.

¹⁷ 89 Wn.2d 177, 570 P.2d 1042 (1977).

725 P.2d 417 (1986). Respondents' conversion claim fails on a number of bases: by receiving monies to which it is statutorily and contractually entitled, WEA is not "willfully interfering;" even if it were, it has "lawful justification"; and at the time WEA made the expenditures at issue, the fee payer is no longer "entitled to it". Respondents' conversion claim clearly fails on the elements.

Respondents mistakenly rely upon Restatement (Second) of Torts §228 in arguing that even if WEA is entitled to receive the agency fees, its "unauthorized use can constitute conversion." (Brief, p. 27). First, the appropriate definition of "use" is specifically an issue for resolution by this Court in *PDC v. WEA*. Second, the Comments to the Restatement state [Restatement (Second) of Torts § 228, Comment c]:

The limits of the permitted use ordinarily are determined by the terms, express or reasonably to be implied, of the contract or other agreement between the parties, and the question becomes one of whether there is a material breach of the agreement.

Thus, as argued *supra* at pp. 18-20, this tort claim necessarily arises out of the collective bargaining agreement. It cannot be pursued independently, but rather must be pursued as a breach of the duty of fair representation.

B. The Duty of Fair Representation Applies to Both Conversion and Fraudulent Concealment.

Respondents seek to distinguish *United Steelworkers v. Rawson*, 495 U.S. 362, 110 S. Ct. 1904 (1990) on the grounds that “it related to the collective bargaining agreement . . . in a federally regulated private-sector labor union” (Brief, p. 29). The distinction is without a difference. Washington state has adopted the federal principle that the duty of fair representation is applicable to public sector unions. *Allen v. Seattle Police Officers’ Guild*, 100 Wn.2d 361, 670 P.2d 246 (1983). It is indisputable that the agency fee payers’ relationship with the WEA and the collection of agency fees via payroll deduction through the various school districts are creatures solely of the collective bargaining agreement, as authorized by statute.

Neither are Respondents correct in arguing that the court’s rationale in *Rawson* does not apply to intentional torts. (Brief, p. 30). The principle from *Rawson* that is applicable here is that where the duty owed arises out of the collective bargaining relationship, there can be no independent tort action arising out of that relationship. Under federal law, a union member can pursue an independent action only when the tort claim alleges a violation of a duty “owed to every person in society,” as opposed to a duty owed only to employees covered by the collective

bargaining agreement. *Rawson*, 495 U.S. 362, 371. Here, to the extent there is any tort, which Appellants dispute, it involves only those covered by the collective bargaining agreements for whom there is a duty of fair representation. That duty does not extend to “every person in society”. *Id.* Accordingly, the *Davenport* claims are not independent, but rather are subsumed by the duty of fair representation. This Court should so hold.

Respondents correctly assert that *Allen, supra*, is a duty of fair representation case. However, Respondents erroneously argue that *Allen* is not applicable to the issues before the court here. Respondents ignore that the Court adopted and applied the duty of fair representation to a wide scope of union activities and specifically to union expenditures. In so holding, the Court extensively analyzed the basis for the judicially created doctrine as arising out of the union’s responsibilities as the exclusive bargaining representative to represent all the employees within the bargaining unit without regard to membership. It would be inconsistent for a court to give the union the latitude inherent in the standards applicable to the duty of fair representation - no liability unless the union is discriminatory, arbitrary or in bad faith - and simultaneously, permit a claim for conversion or fraud - imposing a differing and broader duty of care.

Our Court's holding in *Allen*, the broad principles established by the duty of fair representation doctrine and the U. S. Supreme Court's holding in *Rawson* do not permit the conversion and fraud claims to proceed. Accordingly, the decision of the court below should be reversed.

III. *DELCOSTELLO IS GOOD LAW*

Respondents cite no case authority for their claim that Washington should not adopt *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281 (1983). Instead they cite to a note written by one individual in which it is admitted that "most courts . . . simply looked to state law for the limitation period" (Brief, p. 33). Adopting *DelCostello* would be consistent with Washington precedent that our state labor statutes are to be interpreted in a like manner as the NLRA.¹⁸ See also: RCW 41.59.110(2). The applicable limitation period is set forth in Washington's labor statutes, RCW 41.59.100(1) and RCW 41.56.160(1). It is six months.

¹⁸ *State v. Board of Trustees*, 93 Wn.2d 60, 67, 605 P.2d 1252 (1980); *Public Employees v. Community College*, 31 Wn. App. 203, 642 P.2d 1248 (1982); *Vancouver Sch. District v. Service Employees*, 79 Wn. App. 905, 906 P.2d 946 (1995); *City of Bellevue v. International Ass'n. of Fire Fighters, Local 1604*, 119 Wn.2d 373, 383, n.2, 831 P.2d 738 (1992); *Nucleonics Alliance, Local Union 1-369 v. Washington Pub. Power Supply Sys.*, 101 Wn.2d 24, 32-33, 677 P.2d 108 (1984).

IV. THE CLASS WAS NOT PROPERLY CERTIFIED

Respondents claim that the class was properly certified and that “why each plaintiff or public school employee chose to become an agency fee payer is utterly irrelevant both to class certification and this litigation in general.” (Brief, p. 37). They cite no authority for that assertion.

In *Weaver v. District 925, SEIU*, 970 F.2d 1523 (6th Cir. 1992), the Court found such issues highly relevant. Indeed, it affirmed a lower court’s denial of class certification because the plaintiffs refused to reveal their reasons for declining to join the union. *Id.*, at 1531. The Sixth Circuit described the issue as follows [970 F.2d at 1530-31]:

The plaintiffs contend that the district court erred by refusing to certify the class as requested because they satisfied the requirements for class representatives. They argue that all potential class members have interests in common and that they will provide adequate representation. The defendants respond that the plaintiffs failed to satisfy their burden of demonstrating that they could adequately represent the proposed class. There are factors indicating that various nonmembers have different reasons for refusing to join the union, thus negating the commonality of purpose.

* * * * *

Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by the union but won’t pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible to destroy the union; the second, a free rider, wants merely to shift as much of the cost of

representation as possible to other workers, i.e. union members.

* * * * *

Hence, even if plaintiffs in this case only wish to guarantee that all nonunion employee's rights under *Hudson* are protected, their choice of remedy is arguably antagonistic to the wishes of other employees.

The same considerations are extant herein. As shown in our opening brief,¹⁹ plaintiff Martha Lofgren is virulently opposed to WEA on ideological grounds; whereas Walt Pierson had been a member and resigned because he had a dispute with local leadership. On the basis of *Gilpin* and *Weaver*, and the similar facts in this record, this Court should reverse the lower court's certification of a class herein.

V. THE LEER CLASS MEMBERS ARE PRECLUDED FROM CLASS MEMBERSHIP HERE.

This Court must disregard Respondents' arguments that the *Leer* Settlement does not preclude *Leer* class members from suing herein. Respondent misreads the "Binding Effect" language of its own settlement agreement. A careful reading of that provision makes it obvious that *Leer* class members should be precluded from participating in this action.

The language at issue provides [CP 352-3]:

This Stipulation shall fully and finally resolve all claims that were or **could have been asserted by any plaintiff or class member with respect to defendants agency fees** for the school years 1994-95 through 1997-98, and shall

¹⁹ See: pp. 39-40, 42-43.

determine the procedures and methods of calculation to be used **in the future to fix, assess and collect the agency fees of defendants** and their local affiliates in the state of Washington.

Nothing in federal law or otherwise would have precluded the *Leer* plaintiffs from invoking the federal court's pendent jurisdiction to bring a state law claim in the *Leer* action. And the above-cited language is in accord in its application to "all claims .. that could have been asserted by any .. class member with respect to defendants agency fees. Contrary to Respondents' assertions "all claims" is not limited to all constitutional claims. Rather, "all claims ... with respect to ... agency fees," as a matter of law, must include all claims brought herein as the claims herein specifically relate to the procedure and methods of calculation WEA used "in the future" to "collect ... agency fees."

The specific terms of the *Leer* Settlement govern any subsequent claims by *Leer* class members. This specific language in the Agreement supersedes any general rule pertaining to subsequent relief for class members. Consequently, this Court should disregard Respondents' argument to the contrary. (Brief, p. 46).

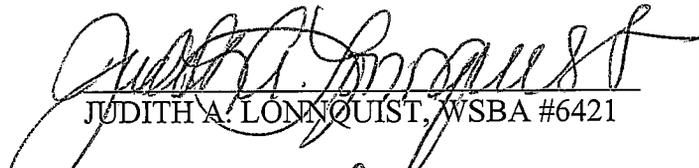
WEA does not dispute that it is only the first *Leer* subclass that could overlap with the *Davenport* class. However, the first *Leer* subclass included **all** persons who were agency fee payers at any time between July

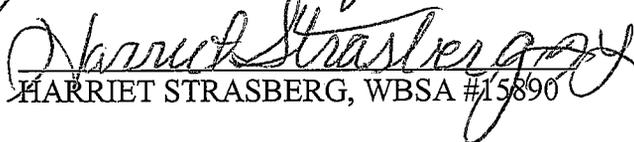
1, 1994 and August 31, 1997.²⁰ Thus, as a matter of law, any person who was an agency fee payer at any time from July 1, 1994 through August 31, 1997, is barred from being a class member herein.

VI. CONCLUSION

For the reasons set forth herein and in WEA's Opening Brief, we respectfully request that this Court hold that there is no private right of action with respect to RCW 42.17.760, that Respondents' tort claims are subsumed by the duty of fair representation and accordingly subject to a six-month statute of limitations; and that the court below erred in granting class certification herein.

Dated this 30th day of September, 2002.


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HARRIET STRASBERG, WSBA #15890

Attorneys for Appellants

²⁰ See Supp. Designation of CP, Subnom. 75, Ex. B in *PDC v WEA*, No. 2826401-II.

APPENDIX

Trial Court No. 93-2-06389-5
Court of Appeals No. 19615-8-II
Supreme Court No. 62943-9

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

SANDRA S. NELSON,

Appellant,

vs.

McCLATCHY NEWSPAPERS, INC. and TACOMA NEWS, INC.:

Respondents.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DENTY

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INTRODUCTION

Defendant News Tribune transferred Plaintiff Sandra Nelson from her position as a reporter to a position as a swing shift copy editor because of her off-duty participation in a ballot initiative. The News Tribune has stated that Ms. Nelson remains ineligible for a position as a reporter until she gives up her off-duty political activity.

The News Tribune has presented no evidence of biased journalism on the part of Ms. Nelson. The News Tribune has presented no evidence of complaints by readers or advertisers about Ms. Nelson's political activity. The News Tribune has presented no evidence of any adverse effect caused by Ms. Nelson's political activity.

Ms. Nelson claims in part that the News Tribune violated Washington statutory and constitutional provisions that guarantee political freedom. The trial court dismissed all of Ms. Nelson's constitutional and statutory claims on summary judgment, ruling in part that the First Amendment creates a privilege that allows the News Tribune to restrict Ms. Nelson's political activities.

Ms. Nelson respectfully submits that the trial court erroneously confused the News Tribune's First Amendment right

to control the published content of its newspaper with a "right" to control the off-duty political activity of its employees. The News Tribune contends that it may exclude Ms. Nelson from a position as a reporter because its readers might react adversely if they discovered that she was active in the politics of lesbian and gay rights. Ms. Nelson contends that her right to participate in political activities cannot be held hostage to the News Tribune's concern that it might sell fewer newspapers if the public learned that it employed a politically active lesbian.

ASSIGNMENTS OF ERROR

1. The trial court erred in holding that RCW 42.17.680(2), which provides that no employer may discriminate against an employee in the terms or conditions of employment for in any way supporting or opposing a candidate, ballot proposition, political party, or political committee, is unconstitutional if it is applied to protect the political activity of a newspaper reporter.

2. The trial court erred in holding that RCW 42.17.680(2) is only effective if an employee has specifically and formally applied for an open position since the passage of that statute.

3. The trial court erred in holding that Art. 2, § 1 of the Washington Constitution, which reserves to the people the power to make legislation by initiative, does not apply on the facts of this case.

4. The trial court erred in holding that Art. 1, § 19 of the Washington Constitution, which guarantees free and equal elections, does not apply on the facts of this case.

5. The trial court erred in holding that Art. 1, §§ 4 and 5, which guarantee the freedom of speech and assembly, do not apply without state action.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a newspaper violate RCW 42.17.680(2) when it removes an employee from her reporting position, refuses to make her eligible for a return to a reporter position, refuses to offer open positions to the reporter, and subjects the reporter to additional scrutiny and disclosure requirements because of the employee's off-duty political activities?

2. Is a politically active newspaper reporter entitled to the protection of RCW 42.17.680(2), when the reporter's off-duty political activity has had no adverse effect on the business or credibility of the newspaper?

3. Does Art. 2, § 1 of the Washington Constitution reserve to an employee the right to participate in an initiative campaign, without reprisal from her private sector employer?

4. Does Art. 1, § 19 of the Washington Constitution guarantee to an employee the right to participate in an initiative campaign, without reprisal from her private sector employer?

5. Do Art. 1, §§ 4 and 5 protect the speech and assembly rights of an employee against restriction by a private sector employer?

STATEMENT OF THE CASE

A. Background and terms of Ms. Nelson's employment

Defendants own and operate a Tacoma-based daily newspaper called the News Tribune. CP 10-17, ¶ 4. Defendant McClatchy purchased the News Tribune and hired Plaintiff Sandra Nelson to work as a reporter in 1986. CP 10-17, ¶ 6.

At the time she was hired by McClatchy, Ms. Nelson was notified that she could be disciplined or discharged only for just cause. CP 29-188, Ex. B, answers to Requests for Admission Nos. 13, 14, 16, 18. There have been no written or verbal agreements between the News Tribune and Ms. Nelson that would alter the terms agreed to at the time of Ms. Nelson's hiring. CP 29-188, Ex. B, Request for Admission No. 27. No "ethics code" was in place that would allow the News Tribune to be disciplined for her political activity. CP 29-188, Ex. B, answers to Requests for Admission Nos. 3, 27; CP 29-188, Ex. D at 52.

B. Ms. Nelson's off-duty political involvement did not limit her performance as a reporter.

Prior to her transfer, Ms. Nelson received "excellent" performance evaluations and regular raises from the News Tribune. CP 10-17, ¶ 11; CP 29-188, Ex. D at 28. Ms. Nelson received several awards for her writing, including awards from the Freedom Foundation, the Daughters of the American Revolution and the Society of Professional Journalists. CP 29-188, Nelson Decl.

During her off-duty hours, Ms. Nelson was involved in defense of abortion clinics, civil rights activities, activities relating

to gay and lesbian rights, and socialist feminist activities. CP 10-17, ¶ 10. These activities have been in support of or sponsored by the Freedom Socialist Party, of which Ms. Nelson is a member. CP 303-308. Ms. Nelson has also been involved in various political and legislative committees. Id.

The News Tribune knew of Ms. Nelson's political activities when she was rehired in 1986. CP 10-17, ¶ 10; See CP 29-188, Ex. D at 23-24. In Ms. Nelson's 1988 evaluation, her supervisor stated that "Sandy's outside commitments have not limited the types of stories that she must do on her beat." CP 29-188, Ex. B, Request for Admission No. 81.

In 1989, during her off-duty hours, Ms. Nelson helped found the Committee to Protect Tacoma Human Rights, an organization dedicated to preserving a city ordinance aimed at preventing housing and employment discrimination based on sexual orientation. CP 10-17, ¶ 16. Ms. Nelson is a lesbian. CP 29-188, Nelson Decl. Ms. Nelson felt that this political action was necessary to secure her civil rights. Id. After a referendum overturned the antidiscrimination ordinance in November 1989, Ms. Nelson helped launch and campaigned on behalf of a ballot initiative to reinstate the law in 1990. CP 10-17, ¶ 16. Ms.

Nelson collected signatures in order to place the initiative on the November 1990 ballot. Id. The initiative was ultimately unsuccessful.

C. The News Tribune admitted that it transferred Ms. Nelson because of her participation in a gay and lesbian rights initiative.

On August 15, 1990, Defendants transferred Ms. Nelson to a position as a swing shift copy editor. CP 10-17, ¶ 19. Ms. Nelson's new position required her to work nights and weekends and she was no longer assigned to write news stories. Id. At the time of this transfer, Ms. Nelson was employed as an education reporter, and was not reporting on ballot initiatives. CP 29-188, Ex. B, Request for Admission Nos. 35, 36.

Jan Brandt was assistant managing editor of the News Tribune at the time of the transfer. CP 29-188, Ex. D at 4. She later became managing editor, with responsibility for the entire newsroom. CP 29-188, Ex. D at 5. She stated that "when [the News Tribune] learned that reporter Sandy Nelson was actively campaigning for Proposition One [the Human Rights Initiative], we acted. We moved her from her reporting job to a copy editing job." CP 29-188, Ex. B, Requests for Admission No. 40.

Norman Bell was the News Tribune's managing editor at the

time of the transfer. CP 29-188, Ex. D at 5. He stated that Ms. Nelson was transferred "because of her active involvement in support of a ballot initiative." CP 29-188, Ex. B, Request for Admission No. 25, 30, 32. Mr. Bell told Ms. Nelson that she could return to reporting "if she agreed to forego certain political activities." CP 29-188, Ex. B, Requests for Admission No. 41. Mr. Bell stated that "Sandy is free to exercise her First Amendment rights. But first, she needs to find a new occupation." CP 29-188, Ex. B, Requests for Admission No. 45. Ms. Nelson refused to give up her political activity and has not been returned to a job as a reporter. CP 10-17, ¶ 27.

As an education reporter, Ms. Nelson had a "beat" that did not include reporting on political or civil rights issues. CP 29-188, Ex. D at 55-56. As a copy editor, Ms. Nelson must edit a wide variety of local and national stories. *Id.* at 56-57.

D. The News Tribune stated that Ms. Nelson remained ineligible for a position as a reporter because of her political activity.

From 1990 to the present, the News Tribune has made it perfectly clear that Ms. Nelson remains ineligible for a position as a reporter because of her political activity. CP 303-308. In its Answer, the News Tribune admitted that Ms. Nelson "continues

to be ineligible for a transfer to the position of a reporter" because of her political activity. CP 10-17, ¶ 27.

E. RCW 42.17.680 took effect in 1992.

RCW 42.17.680(2) became effective in December, 1992.

This statute provides:

No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.

Since the passage of this statute, all of Ms. Nelson's political activity has been in support of the Freedom Socialist Party, or in support of political committees, or in opposition to anti lesbian and gay rights ballot initiatives. CP 396-406, Nelson Decl.

F. The News Tribune threatened to further isolate Ms. Nelson because of her continued involvement in gay and lesbian rights issues.

In March, 1994, the Stonewall Committee for Lesbian and Gay Rights supported a bill in the Washington State Legislature aimed at preventing discrimination against lesbians and gays. Id. Ms. Nelson testified before the Senate Law and Justice Committee in support of the Stonewall Committee. Id. The Freedom Socialist Party also supported this bill. Id.

After the News Tribune found out that Ms. Nelson testified before the State Legislature, Managing Editor Jan Brandt sent a letter to Ms. Nelson, stating:

During your leadership of the Tacoma gay rights initiative campaign, you demonstrated your activism to newspaper readers and sources in Tacoma. Now the state legislature knows you as a spokesperson and lobbyist for House Bill 1443, and as a News Tribune journalist, you are further conflicted and the newspaper's credibility further compromised.

* * *

If your activism further compromises your capacity to function as a journalist, we may need to take additional steps to protect the paper's credibility. That may mean a need to further isolate you from the affected news and copy flow. . . .

If you fail to disclose in advance the types of highly visible political activity earlier discussed to a senior newsroom manager--Tom Osborne, myself or Gary Jasinek--as we have instructed you to do, we will view it as insubordination and take appropriate disciplinary action.

CP 303-308, Ex. B.

The News Tribune demands that Ms. Nelson reveal her political activities in advance, and submit herself to censorship. Ms. Nelson is the only News Tribune employee who has been subjected to this type of treatment. CP 396-406, Nelson Decl. Other News Tribune reporters have been politically active. See CP

315-318; 319-322.

G. Ms. Nelson repeatedly requested reassignment to a reporter position.

Ms. Nelson repeatedly requested reassignment to a reporter position. For example, on October 6, 1993, Ms. Nelson wrote to her supervisor, requesting a writing position. CP 303-308, Ex. A; CP 325-328. Ms. Nelson subsequently applied for the position. Id. In January, 1995, Ms. Nelson sent a letter and resume to the News Tribune's Managing Editor, asking to be considered for an opening for an education reporter. CP 303-308, Ex. C. Ms. Nelson has since reapplied for comparable positions. CP 303-308.

Since 1992, several reporter positions have been filled at the News Tribune. CP 396-406. Ms. Nelson is qualified to fill most or all of these positions. Id. None of these positions have been offered to Ms. Nelson. Id.

H. Ms. Nelson's political activity has had no demonstrable adverse effect on the News Tribune

The News Tribune has received no complaints relating to Ms. Nelson's political activities. CP 29-188, Ex. D at 31; CP 29-188, Ex. B, Interrogatories No. 32, 46. The News Tribune has produced no evidence of lost advertising, lost readership, or lost profits due to Ms. Nelson's political activity. CP 29-188, Ex. B,

Interrogatories No. 18, 45, Request for Production No. 4. The News Tribune has produced no evidence that any readers, sources or advertisers knew that Ms. Nelson was politically active.

The News Tribune has pointed to no examples of biased journalism on the part of Ms. Nelson. CP 29-188, Interrogatory No. 17, Request for Production No. 3. Although the News Tribune knew of Ms. Nelson's political activities, it never suggested that Ms. Nelson was not objective, and never declined to publish any of Ms. Nelson's articles for this reason. CP 266-268. In short, the News Tribune has produced absolutely no evidence of any adverse effect to its business, reputation, credibility, or integrity caused by Ms. Nelson's political activity.

I. Ms. Nelson's complaint

Count I of Ms. Nelson's Amended Complaint alleges a violation of Art. 2, § 1 of the Washington Constitution, which reserves to the people the right to participate in ballot initiatives. CP 18-27. Count I further alleges a violation of Art. 1, § 19 of the Washington Constitution, which guarantees free and equal elections. Count II alleges breach of the employment contract. Count III alleges wrongful constructive discharge. Count IV alleges a violation of Art. 1, §§ 4 and 5 of the Washington

Constitution, which guarantee freedom of speech and assembly. Count V alleges a violation of RCW 42.17.680(2). Count VI seeks an injunction against retaliatory measures.

Ms. Nelson claims that working as a copy editor damaged her career, caused her to lose opportunities, and damaged her future earning potential. CP 18-27, ¶ 23.

J. The trial court's rulings

The parties brought cross motions for partial summary judgment on the statutory claim and the Art. 2, § 1 claim. In addition, the News Tribune brought motions for summary judgment to dismiss the Art. 1, § 19 claim, and the claim based on Art. 1, §§ 4 and 5.

The trial court dismissed the Art. 2, § 1 claim, ruling that this section "restricts state action, with the exception established in Alderwood Assocs. v. Washington Environmental Council," 96 Wn.2d 230 (1981). CP 291-93. The trial court dismissed the Art. 1, § 19 claim, ruling that this section "is inapplicable because Defendants have not violated plaintiff's right to vote." Id. The trial court dismissed Count IV, ruling that Art. 1, §§ 4 and 5 "limit only state action, not the actions of private parties." Id. The trial court denied both motions relating to Count V, the statutory claim.

Both parties moved for reconsideration of the ruling on the statutory claim. The court granted the News Tribune's motion and dismissed Count V, ruling as follows:

RCW 42.17.680 took effect on December 3, 1992. This statute is not retroactive. Defendants' 1990 transfer of Plaintiff did not violate this statute.

Plaintiff has produced no evidence that she applied for transfer to an open position since December 3, 1992. She was familiar with the application process, and did apply for several specific positions in 1993 and 1995, but these positions were not open.

Since there has been no application for an open position, Defendants have not denied Plaintiff a transfer in violation of RCW 42.17.060.

The News Tribune did not attempt to impose its political views on Plaintiff.

To interpret the statute as Plaintiff asks would deny Defendants the ability to maintain the neutrality of its employees that, as a newspaper, it must uphold in order to remain credible with the public.

The First Amendment and the Washington Constitution protect Defendants' editorial discretion. Under the First Amendment and the Washington Constitution, Defendants have a right to protect the newspaper's unbiased content, both in fact and as perceived by its readers, its sources and its advertisers. In order to protect the newspaper's credibility, Defendants may enforce the political neutrality of reporters. Plaintiff's interpretation of RCW 42.17.680 would violate this right.

CP 425-29.

ARGUMENT

- I. THE NEWS TRIBUNE DISCRIMINATED AGAINST MS. NELSON IN THE TERMS AND CONDITIONS OF HER EMPLOYMENT IN VIOLATION OF RCW 42.17.680(2) BY REFUSING TO CONSIDER HER FOR A POSITION AS A REPORTER AND BY SUBJECTING HER TO INCREASED SCRUTINY AND DISCLOSURE REQUIREMENTS BECAUSE OF HER POLITICAL ACTIVITY.

A. Standard of review: The construction and application of the statute are reviewed de novo, with all facts viewed in the light most favorable to the party against whom summary judgment was granted.

In reviewing a grant of summary judgment, an appellate court engages in the same inquiry as the trial court. Swanson v. Liquid Air Corp., 118 Wn.2d 512, 518 (1992). "Facts and all reasonable inferences therefrom are considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." Id.

"The interpretation and applications of statutes is a question of law." Schriener v. Spokane, 74 Wn.App. 617, 621 (1994). "If the language is unambiguous, the plain wording of the statute controls." Anderson v. Seattle, 123 Wn.2d 847, 851 (1994); Spokane v. Taxpayers, 111 Wn.2d 91, 97 (1988) (applying this rule to an initiative).

- B. The statute should be interpreted to prevent employer from discriminating against an employee because an employee in any way supports, opposes a candidate, ballot proposition, political party, or political committee.

RCW 42.17.680(2) states:

No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.

This statute was passed as part of the 1992 Initiative 134.

Neither party has claimed that this statute is ambiguous. The statute simply forbids discrimination against an employee because the employee "in any way supports or opposes" the listed political activities. The statute does not contain the exceptions and limitations adopted by the trial court.

1. The statute does not allow employers to force their employees to be politically neutral.

The trial court found:

To interpret the statute as Plaintiff asks would deny Defendants the ability to maintain the neutrality of its employees that, as a newspaper, it must uphold in order to remain credible with the public.¹

¹Although this finding mentions "newspaper," it does not appear to rest on the First Amendment. Accordingly, this finding is addressed as one of statutory interpretation/construction. The

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This construction of RCW 42.17.060(2) is consistent with subsections (a) and (b), which forbid an employer from compelling political participation by an employer. However, to restrict the statute to this meaning, the court must eliminate subsection (c), which forbids an employer from preventing political participation by an employee.

In fact, during the course of this litigation, the legislature considered a bill that would have removed subsection (c). See CP 372-395, Ex. A. The Senate Bill Report noted that subsection (c) "prohibits employers or labor organizations from demanding the appearance of political neutrality from their employees." Id., Ex. B. This attempt to remove subsection (c) from the statute failed. Having failed in the legislative process, the News Tribune may not now ask the court to remove subsection (c) from the statute.

RCW 42.17.680 expressly forbids an employer from discriminating based on an employee's support of various political activities. An employer may not force employees to be politically neutral without offending this statute.

News Tribune's First Amendment defense is addressed separately in Section II, below.

2. The statute contains no "business justification" exception.

The trial court created an exception to the statute based on the nature of the News Tribune's business. However, the statute contains no exception for newspaper employers.² Nor does the statute contain an exception for a real or perceived "business justification." Nor does the statute contain or imply any sort of balancing of interests. The statute simply forbids an employer from discriminating against an employee who "in any way" supports or opposes the listed political activities.

Courts interpreting similar statutes from other states have rejected such a business justification exception:

We note the "business" justification for firing plaintiff in this case is a real one: plaintiff's candidacy would antagonize persons who could withdraw business from plaintiff's employer. In that sense, plaintiff by his candidacy made himself a detriment to his employer and was "disloyal" to his employer. But the policy of the statute is unmistakable: the employer may not control political candidacy of his employees. We see no exception from the legislative purpose because of the nature of the employer's business.

Davis v. Louisiana Computing Corp., 394 So.2d 678, 679 (La.

²The News Tribune's First Amendment defense, which is based on its status as a newspaper, is addressed in Section II, below.

App.)(emphasis added), writ denied, 400 So.2d 668 (La. 1981).

Similarly, the News Tribune cannot nullify the Washington statute by making the unsubstantiated claim that Ms. Nelson's political activities are detrimental to its "credibility" or "integrity." This claim simply does not remove an employer's obligations under the statute.

3. The statute should be interpreted in a manner that is consistent with its own findings and with the policies of this state.
 - a. The findings of Chapter 42.17 express the policy that financially powerful organizations should not have a disproportionate influence on the political process.

The findings of RCW Chapter 42.17 state: "The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates." RCW 42.17.610(1). This finding clarifies the intent behind RCW 42.17.680: Economically powerful employers must not use their position of power to restrict the political participation of employees. The trial court's construction of the statute violates the above finding by enhancing the employers' disproportionate influence on the political system.

- b. It would be contrary to the public policy of this state to allow employers to suppress the political activity of employees.

"Statutory interpretation is for the court and it is proper for the court to consider public policy in defining the scope of the duty created in the statute." Donaldson v. Seattle, 65 Wn.App. 661, 671 (1992), review dismissed 120 Wn.2d 1031 (1993).

Freedom of speech is a "preferred right" under the Washington Constitution.³ State v. Reyes, 104 Wn.2d 35, 43 (1985). Political speech is given greater protection over other forms of speech. Collier v. Tacoma, 121 Wn.2d 737, 746 (1993). RCW 41.06.250(2), which governs public employees, reflects this policy in the employment context: "Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party office or participate in the management of a partisan, political campaign."

Reyes, Collier and RCW 41.06.250 demonstrate that it is the highest policy of this state to preserve the right of all citizens, including employees, to engage in political speech. By restricting

³Ms. Nelson's constitutional arguments are set forth in Sections III-V, below.

Ms. Nelson's political activity, the News Tribune chills the political activity of its other employees. See CP 323-24; 315-18; 312-14; 319-22. It would be contrary to this policy to read into RCW 42.17.680 the exceptions adopted by the trial court.

C. Ms. Nelson presented evidence that the News Tribune violated RCW 42.17.680.

1. Ms. Nelson presented evidence that the News Tribune discriminated against her in the terms or conditions of her employment.

Ms. Nelson alleges that the News Tribune discriminated against her in violation of RCW 42.17.680 in two ways: (1) The News Tribune refused to consider Ms. Nelson for several open reporter positions because of her political activity after 1992, even though she repeatedly requested assignment to a reporter position; and (2) the News Tribune subjected her to increased scrutiny and disclosure requirements because of her political activity. Ms. Nelson presented evidence to support these arguments.

- a. The News Tribune continues to discriminate against Ms. Nelson by refusing to consider her for reporter positions because of her political activity.

The News Tribune admitted that it transferred Ms. Nelson

because of her support of the lesbian and gay rights ballot initiative. CP 29-188, Ex. B, Requests for Admission No. 40. Since the passage of the statute, the News Tribune has made it perfectly clear that Ms. Nelson remains ineligible for a position as a reporter because of her political activity. CP 303-308; CP 10-17, ¶ 27.

Ms. Nelson repeatedly requested reassignment to a reporter position and applied for several positions. CP 303-308, Ex. A; CP 325-328. Since 1992, several reporter positions have been filled at the News Tribune. CP 396-406, Nelson Decl. Ms. Nelson is qualified to fill most or all of these positions. Id. None of these positions have been offered to Ms. Nelson. Id.

The News Tribune does not dispute these facts. Nevertheless, the trial court ruled that the News Tribune did not violate the statute because Ms. Nelson "did apply for several specific positions in 1993 and 1995, but these positions were not open."⁴ Under this ruling, the News Tribune can insulate itself from the effects of the statute by declaring a position to be "not

⁴It would appear that each time Ms. Nelson applied for a position, the News Tribune declared that the position was no longer open. This constitutes additional evidence of discrimination.

open" when Ms. Nelson applies.⁵ Nothing in the statute requires this interpretation. This court should hold that the News Tribune continues to violate RCW 42.17.680 by refusing to consider Ms. Nelson for reporter positions because of her political activity.

- b. The News Tribune discriminated against Ms. Nelson by subjecting her to increased scrutiny and disclosure requirements because of her political activity.

In 1988, the News Tribune stated that Ms. Nelson's political activity did not "limit[] the types of stories that she must do on her beat." CP 29-188, Ex. B, Request for Admission No. 81. In 1990, the News Tribune told Ms. Nelson that if she did not cease her off-duty political activity, she could be a copy editor, but not a reporter. CP 29-188, Ex. B, Requests for Admission Nos. 25, 30, 32, 40, 41, 45.

In March, 1994, the News Tribune again changed its position on Ms. Nelson's political activity and decided that Ms. Nelson could not be politically active if she is employed as a copy editor. CP 303-308, Ex. B. The News Tribune threatened to

⁵Recent developments at the News Tribune have rendered this question academic. The News Tribune has announced that it is reorganizing its newsroom, and that all reporter positions are open. Ms. Nelson has applied for several positions.

"take additional steps" to "further isolate" Ms. Nelson, and to "take appropriate disciplinary action" unless she cleared her political activity in advance with the management. Id.

This increased scrutiny and disclosure requirement evidences discrimination after the passage of RCW 42.17.680, independent of the News Tribune's refusal to consider Ms. Nelson for a reporter position. The statute simply does not allow an employer to threaten to discipline and isolate an employee because of the employee's political activity.

c. The News Tribune engaged in viewpoint based discrimination against Ms. Nelson for her support of lesbian and gay rights issues.

Nothing in RCW 42.17.680 limits its application to discrimination that is viewpoint based. Nevertheless, it is worth noting that the News Tribune has engaged in a pattern of viewpoint based discrimination. See Collier v. Tacoma, 121 Wn.2d 737, 753 (1993)(explaining the difference between subject-matter based and viewpoint based discrimination).⁶

The News Tribune had no problem with Ms. Nelson's

⁶Under Collier, in addition to being viewpoint based, the News Tribune's restriction is also "subject-matter based," in that it restricts only speech on political subjects.

various political activities from 1983 until 1990. CP 29-188, Ex. B, Request for Admission No. 81. In 1990, the News Tribune transferred Ms. Nelson because of her participation in a lesbian and gay rights initiative. CP 29-188, Ex. B, Requests for Admission No. 40. In 1994, the News Tribune threatened Ms. Nelson with further disciplinary action because of her testimony in support of a lesbian and gay rights bill. CP 303-308, Ex. B. Ms. Nelson has produced evidence that the News Tribune engaged in viewpoint-based discrimination because of her support of lesbian and gay rights issues.

2. Ms. Nelson presented evidence that the News Tribune discriminated against her because of her participation in a ballot proposition, political party or political committee.

RCW 42.17.680 forbids discrimination against an employee for "in any way supporting or opposing a candidate, ballot proposition, political party, or political committee." Since the passage of this statute, all of Ms. Nelson's political activity has been (1) in support of the Freedom Socialist Party, of which she is a member; (2) in support of political committees organized around specific issues; or (3) in opposition to ballot initiatives aimed at denying civil rights to lesbians and gays. CP 396-406,

Nelson Decl. Ms. Nelson has engaged in precisely the type of activity protected by the statute.

D. This court should reverse the denial of Ms. Nelson's motion for partial summary judgment and should reverse the News Tribune's motion on the issue of the News Tribune's violation of RCW 42.17.680.

The News Tribune has admitted that it transferred Ms. Nelson because of her participation in a ballot initiative, and that she remains ineligible for a reporter position because of her political activity. Ms. Nelson submits that these undisputed facts establish a violation of RCW 42.17.680, as a matter of law. Accordingly, Ms. Nelson requests that this court reverse the trial court's denial of her motion for partial summary judgment on this issue.

Should this court find that these facts do not establish a statutory violation as a matter of law, Ms. Nelson submits that factual issues prevent summary judgment in favor of the News Tribune. The News Tribune has simply not established as a matter of law that it did not discriminate against Ms. Nelson because of her political activity in violation of RCW 42.17.680.

E. Ms. Nelson requests attorney fees under RCW Chapter 42.17.

Ms. Nelson has asked the Attorney General and the Pierce

County Prosecutor to file suit in her behalf, pursuant to RCW 42.17.400(4). CP 29-188, Ex. F. These authorities declined to do so. CP 309-11. Ms. Nelson's complaint contains claim under RCW Chapter 42.17, asserting private Attorney General status and seeking attorney fees and costs. CP 18-27, ¶ 54.

Generally, "those entitled to an award of attorney fees below are also entitled to attorney fees on appeal." Xieng v. Peoples Nat'l Bank, 63 Wn.App. 572, 587 (1991), aff'd, 120 Wn.2d 512 (1993). Ms. Nelson hereby renews her request for fees under RCW 42.17.400(4), and requests fees on appeal, pursuant to RAP 18.1.

II. RCW 42.17.680(2) PROTECTS MS. NELSON'S POLITICAL ACTIVITY WITHOUT OFFENDING THE NEWS TRIBUNE'S FIRST AMENDMENT RIGHTS.

The News Tribune claims that the First Amendment insulates it from the effects of RCW 42.17.680. The News Tribune plead the following affirmative defense: "Defendants were privileged to take the actions they took with regard to Plaintiff under the First Amendment to the United States Constitution and article 1 section 5 of the Washington

Constitution."⁷ CP 10-17, § 59.

The trial court ruled:

The First Amendment and the Washington Constitution protect Defendants' editorial discretion. Under the First Amendment and the Washington Constitution, Defendants have a right to protect the newspaper's unbiased content, both in fact and as perceived by its readers, its sources and its advertisers. In order to protect the newspaper's credibility, Defendants may enforce the political neutrality of reporters. Plaintiff's interpretation of RCW 42.17.680 would violate this right.

CP 425-29, § 9.

Ms. Nelson does not dispute the News Tribune's right to print her articles, refuse to print her articles, or edit her articles in any way. Ms. Nelson admits that under the First Amendment, the News Tribune has the sole right to determine the content of its newspaper, and that no statute could constitutionally infringe upon this right. However, the First Amendment does not give a newspaper the right to restrict an employee's off-duty political activity.

⁷The News Tribune plead a privilege under the state constitution, but has presented no authority or argument for why the state constitution should apply differently than the federal First Amendment. Courts will not consider whether to apply state constitutional provisions differently unless this issue is specifically briefed. State v. Furman, 122 Wn.2d 440, 448 (1993).

A. Standard of review: The News Tribune bears the burden of showing that the statute is unconstitutional.

When reviewing a constitutional challenge to a legislative enactment, a court "presume[s] the enactment is constitutional, and the party challenging the enactment bears the burden of proving it unconstitutional beyond a reasonable doubt." Erickson & Assoc. v. McLerran, 123 Wn.2d 864, 869 (1994).

B. Newspapers are not immune to employment statutes and other laws of general application.

Courts have repeatedly held that "[t]he publisher of a newspaper has no special immunity from the application of general laws." Cohen v. Cowles Media Co., 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed. 2d 586, 597 (1991); Associated Press v. NLRB, 301 U.S. 103, 132, 81 L.Ed. 953 (1936)(holding that the First Amendment does not prevent the application of the NLRA to newspapers). Newspapers have "no special privilege to invade the rights and liberties of others." Id.; Newspaper Guild v. NLRB, 636 F.2d 550, 558 (D.C.Cir. 1980).

"It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability,

[and] otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." Branzburg v. Hayes, 408 U.S. 665, 682-83, 92 S.Ct. 2648, 33 L.Ed.2d 626 (1972). In other words, "enforcement of [] general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." Cohen, 115 L.Ed. 2d at 597.

In light of this rule, courts address the scope of the First Amendment protection of newspapers in two ways: (1) The First Amendment protects a newspaper from regulations that directly affect its content; and (2) the First Amendment guarantees to a newspaper the freedom to establish reasonable rules that are narrowly tailored to the protection of the core purposes of the enterprise. These are addressed in turn.

C. The First Amendment protection of the press is not triggered by the News Tribune's remote and speculative concerns that the "perceived bias" of Ms. Nelson will affect the content of its newspaper.

1. The First Amendment protects the content of a newspaper, but does not insulate its employment decisions.

The state may not dictate the content of newspapers. See

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974)(invalidating state statute requiring newspaper to print replies of political candidates); Passaic Daily News v. NLRB, 736 F.2d 1543 (D.C.Cir. 1984) (declining to compel newspaper to resume publication of weekly column that was discontinued in violation of the NLRA). However, the state may regulate a newspaper under generally applicable labor and employment law. Passaic, 736 F.2d at 1548.

In Passaic, the newspaper canceled a column and demoted the columnist because of his union-related political activities. 736 F.2d at 1548. The NLRB ordered the newspaper to cease violating the columnist's rights, to reinstate the columnist, and to resume publication of the column. Id. The newspaper "characterize[d] its decision as an editorial one and contend[ed] that the First Amendment prevents the [NLRB] from challenging its decision." Id. at 1556. The newspaper asserted that "it follows that if government may not dictate what words a newspaper can or cannot print, then it may not question the editorial decision-making process which precedes the printing." Id. The court rejected this argument. Id. at 1556 n.20.

The court upheld the NLRB's order, but held that under the

First Amendment's protection of a newspaper's content, the NLRB could not require the newspaper to print the column, illustrating the distinction between regulation of content and regulation of employment decisions. Id. at 1549; see Associated Press v. NLRB, 301 U.S. at 131 (rejecting the argument that under the First Amendment, a newspaper "must have absolute and unrestricted freedom to employ and to discharge" news editors).

The trial court did not require the News Tribune to demonstrate that Ms. Nelson's political activities affected the content of its newspaper. The News Tribune did not present any evidence that Ms. Nelson's political activity caused her to be biased, or affected the content of the newspaper in any way.

2. Without proof of actual bias, the "perceived bias" of a journalist does not implicate the content of a newspaper and does not trigger First Amendment protections.

The News Tribune does not allege that Ms. Nelson has done or failed to do anything at work that has resulted in actual biased journalism, conflict of interest, compromised integrity, or decreased credibility. See CP 29-188, Ex. B, Interrogatory No. 17, Request for Production No. 3; CP 29-188, Ex. D, 56-57. Lacking any evidence of actual bias, the trial court decided that

the content of the newspaper is affected by "perceived" bias on the part of Ms. Nelson: "Defendants have a right to protect the newspaper's unbiased content, both in fact and as perceived by its readers, its sources and its advertisers." CP 425-29, ¶ 9 (emphasis added). The notion that a newspaper has a constitutional right to protect against perceived bias was rejected in Newspaper Guild v. NLRB, 636 F.2d 550 (D.C.Cir. 1980).

In Newspaper Guild, the newspaper imposed an "ethics code," which disallowed "conflicts of interest, real or apparent." Id. at 555. The Newspaper argued that the First Amendment granted it the right to impose these conditions, and therefore it could not be compelled to bargain on these issues. Id. at 557-58. The court rejected this argument, holding that the newspaper's "reliance on the First Amendment is plainly foreclosed by long-standing precedent." Id. at 558, citing Associated Press v. NLRB, 301 U.S. 103. The court pointed specifically to a clause in the "ethics code," which required employees to "conduct their personal lives as would protect them from conflict of interest." Id. at 563. The court stated that such a regulation "interferes substantially with the civil and economic rights of the employees (and indeed their private lives) without clearly defined, directly

necessary compensating benefits in terms of the employer's legitimate concerns." Id.

Under Associated Press, the News Tribune does not have a constitutional right to shield itself from "apparent" or "perceived" bias allegedly resulting from an employee's off-duty political activity. The News Tribune has not pointed to a single reader who perceives Ms. Nelson to be biased. However, even if the News Tribune produced affidavits from concerned readers, each of whom testified that they believed Ms. Nelson to be a biased journalist because she is a lesbian political activist, the News Tribune's First Amendment rights would not be implicated. The readers' perception of Ms. Nelson's political activity simply does not affect the content of the newspaper.

Without proof, the News Tribune assumes that its readers will consider Ms. Nelson to be a biased journalist because she is a lesbian activist, even though Ms. Nelson did not report on issues in which she was politically active. Even if this were true, Ms. Nelson's statutory and constitutional rights simply cannot be subject to the "perceptions" of the News Tribune's readers. No case in any state or federal court stands for the proposition that a reporter's statutory and constitutional rights are null and void

because of the readership's alleged "perception" of the reporter's political activity. Newspaper Guild rejected the notion that a newspaper has a constitutional right to restrict "apparent" conflicts of interest. 636 F.2d at 557-58.

3. At best, the News Tribune has raised remote and speculative concerns about the content of its newspaper.

Newspapers are not protected against "attenuated, remote, and speculative" concerns about their content. Hausch v. Donrey of Nevada, Inc., 833 F.Supp. 822, 832 n.9 (D.Nev. 1993)(holding that the newspaper failed to demonstrate a burden on the First Amendment with its "general allegation" that its choice of editors affects the content of its newspaper); see Cohen, 115 L.Ed.2d at 596-97 (holding that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

Without evidence of actual or perceived bias, the News Tribune's asserted connection between Ms. Nelson's political activity and the content of its newspaper is far too remote and speculative to warrant the sweeping First Amendment privilege that it seeks. Simply put, Ms. Nelson's political activity "in no

way requires the newspaper to publish any material it does not wish to publish." See Hausch, 833 F.Supp. at 830. If Ms. Nelson's political activity has had any effect on the News Tribune, "it is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law" See Cohen, 115 L.Ed.2d at 598.

D. The News Tribune's restriction on Ms. Nelson's political activity is not a reasonable rule that is narrowly tailored to prevent activities that directly compromise its integrity.

As discussed above, the instant case does not implicate the First Amendment because Ms. Nelson's political activity does not affect the content of the News Tribune. Accordingly, this Court should apply RCW 42.17.680 according to its plain terms, as described in Section I above. However, even if this court finds to the contrary, the First Amendment does not provide newspapers with an unlimited right to control off-duty political conduct. See Newspaper Guild v. NLRB, 636 F.2d 550 (D.C.Cir. 1980).

In Newspaper Guild, the court rejected the notion that the First Amendment grants to a newspaper a blanket protection against "real or apparent" conflict of interest. 636 F.2d at 555-58. The court stated, however, that under the First Amendment,

"a news publication must be free to establish without interference, reasonable rules designed to prevent its employees from engaging in activities which may directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity." Newspaper Guild, 636 F.2d at 561 (footnotes omitted, emphasis added). Accordingly, "[t]he degree of control which may be exercised by a publication in this regard is not open-ended, but must be narrowly tailored to the protection of the core purposes of the enterprise." Id. at 561 n.36.

1. The News Tribune's restriction on Ms. Nelson's political activity is not a reasonable rule.

Viewing the facts in the light most favorable to Ms. Nelson, the News Tribune's restriction on Ms. Nelson's political activity is not a "reasonable rule."⁸ See Newspaper Guild, 636 F.2d at 561. This restriction is not a "rule" at all, in that it appears to apply only to Ms. Nelson. No other employees have been subjected to the scrutiny and disclosure requirements described in

⁸If the employee's activities do not affect the content of the newspaper, the First Amendment does not apply and this reasonableness test need not be performed at all. See Section II.C above.

Fact Section F above. CP 396-406, Nelson Decl.; see CP 319-22; CP 315-18.

Furthermore, Ms. Nelson has presented evidence that the News Tribune changed its position on Ms. Nelson's political activity because she was active in lesbian and gay rights issues. See Section I.C.1.c above. This course of action demonstrates that the News Tribune's restriction is discriminatory, rather than reasonable.

Lastly, the News Tribune's rationale for the transfer demonstrates the unreasonableness of the restriction on Ms. Nelson's political activity. The News Tribune claims that it transferred Ms. Nelson to a position as a copy editor because her political "bias" could affect her reporting. However, at the time of her transfer, Ms. Nelson worked as an education reporter, and did not report on political or civil rights issues; following the transfer, Ms. Nelson must edit a wide variety of local and national stories. CP 29-188, Ex. D at 55-57. If Ms. Nelson were "biased," the transfer would have put her in a better position to affect the content of political stories. This is evidence that the transfer was arbitrary and punitive. The News Tribune has not met its burden of demonstrating that its restriction on Ms.

Nelson's political activity is reasonable.

2. The News Tribune's restriction on Ms. Nelson's political activity is not narrowly tailored to prevent activities that directly compromise its integrity.

In no sense is the News Tribune's blanket restriction on Ms. Nelson's political activity "narrowly tailored." See Newspaper Guild, 636 F.2d at 561. Newspaper Guild provided examples of restrictions by a newspaper that would be sufficiently narrow to be protected by the First Amendment:

[I]t may be that a newspaper might have the right, for example, to order a reporter assigned to the city hall beat to refrain from 'moonlighting' as a mayor's assistant for public relations; to require a nationally syndicated columnist to make a choice between his column and participation in a national political campaign as a prominent party official; or to forbid its reporters to work for the Central Intelligence Agency if such employment were deemed to diminish the publication's credibility abroad as a bona fide news organization.

636 F.2d at 563 n.50. In contrast with these examples of obvious conflict of interest, Ms. Nelson did not report on issues in which she was involved. CP 266-68.

Nor has the News Tribune demonstrated that it is restricting activities that directly compromise its integrity. See Newspaper Guild, 636 F.2d at 561. The News Tribune has produced

absolutely no evidence of bias on the part of Ms. Nelson, real or perceived. See CP 29-188, Ex. B, Interrogatory No. 17, Request for Production No. 3; CP 29-188, Ex. D, 56-57. Ms. Nelson's political activity has not affected the News Tribune's integrity, credibility or objectivity in any way.

The News Tribune has not met its burden of showing that its restriction on Ms. Nelson's political activity is narrowly tailored to prevent activities that directly compromise its integrity.

In sum, the First Amendment protection of the press is not triggered in this case because Ms. Nelson's political activity does not affect the content of the News Tribune. If Ms. Nelson's political activity did affect the newspaper's content, the News Tribune's restriction on her political activity is not protected by the First Amendment because this restriction is not a reasonable rule that is narrowly tailored to prevent specific activities that directly compromise its integrity. Case law provides no authority for the broad privilege asserted by the News Tribune.

III. THE NEWS TRIBUNE VIOLATED MS. NELSON'S RIGHTS UNDER ART. 2, § 1 OF THE WASHINGTON CONSTITUTION BY TRANSFERRING HER BECAUSE OF HER PARTICIPATION IN A BALLOT INITIATIVE.

In addition to her claim under RCW 42.17.680, Ms. Nelson claims independent and alternative relief under Art. 2, § 1 of the Washington Constitution.

A. Art. 2, § 1 of the Washington Constitution guarantees that the initiative process be available to all citizens, without a showing of "state action."

The trial court dismissed Ms. Nelson's Art. 2, § 1 claim, ruling that this section "restricts state action, with the exception established in Alderwood Assoc. v. Environmental Council," 96 Wn.2d 230, 234 (1981) This ruling is erroneous for two reasons: (1) Art. 2, § 1 contains no state action requirement; and (2) the Art. 2, § 1 holding in Alderwood is not limited to factual situations involving shopping malls.⁹

1. Art. 2, § 1 contains no state action requirement.

Art. 2, § 1 of the Washington Constitution (Amendment 7), states:

⁹ The question of whether certain actions violate the constitutional rights of speech and initiative is a question of law for the court. See Alderwood Assoc. v. Environmental Council, 96 Wn.2d 230, 234 (1981).

The legislative authority of the state of Washington shall be vested in the legislature, . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature

(a) Initiative: The first power reserved by the people is the initiative.

Nothing in this section states or implies that it is restricted to "state action." Unlike some sections of Article 1, which limit the power of the state, Art. 2, § 1 reserves power to the people. This distinction is implied in the titles of the Articles themselves: Article 1 is entitled "Declaration of Rights," whereas Article 2 is entitled "Legislative Department."

A careful reading of Alderwood reveals that this case does not create an "exception" to the state action requirement; rather, Alderwood reaffirms that Art. 2, § 1 is not limited by a state action requirement. See Alderwood, 96 Wn.2d at 252 (Dolliver, J., concurring). In Alderwood, a private shopping mall sought to enjoin a political group from soliciting signatures for a ballot initiative on mall property. The four-justice plurality discussed at length the state action requirement of Art. 1, § 5. Id. at 240-43 (Utter, J. for the plurality). In ruling for the political group, the plurality relied upon the conclusion that Art. 1, § 5 did not require

state action in all situations. Id.

Justice Dolliver relied upon the powers reserved to the people in Art. 2, and sharply criticized the plurality's approach to the state action requirement of Art. 1, § 5: "Rather than emasculate the state action requirement from the Declaration of Rights, however, I would hold that the activity engaged in here by the [political group] is authorized by Const. Art. 2, § 1(a)" Id. at 247-51. Justice Dolliver pointed out that unlike the provisions of Article 1, Art. 2, § 1 (Amendment 7) is not subject to the state action requirement:

It should be noted that the initiative process is not a "right" against government in the sense of Const. art. 1, § 5. Rather, amendment 7 is a declaration by the people in their constitution that they are part of the legislative process. Amendment 7 declares not that the people have a right against government but that the people are part of the apparatus of government--the legislative branch. As a part of government the initiative process may be exercised, as may other aspects of government, only in such a way as not to restrict the use of private property so as to amount to a taking. [cite]

* * *

To bar the reasonable activity engaged in here by [the political group] would be an unwarranted weakening of the vital interest of the State. [The political group] should have been allowed to collect their signatures at Alderwood Mall.

Id. at 253. Justice Dolliver's concurring opinion created a majority in favor of the environmental group on the Art. 2, § 1 issue.

In Southcenter Joint Venture v. NDPC, 113 Wn.2d 413, 416 (1989), the Court reaffirmed that Art. 2, § 1 contains no state action requirement:

Our decision on the "state action" issue in this case is also consistent with the decision of this court in Alderwood [cite]. In Alderwood, the Washington Environmental Council asserted that it had the right to solicit signatures for an initiative at a shopping mall. A 4-member plurality of this court . . . maintained that there was no "state action" requirement under the free speech and initiative provisions of the state constitution. That plurality then followed what it termed a "balancing approach" for determining when these guaranties prevail over the rights of a private property owner and concluded that the balance tipped in favor of the initiate supporters in that case.

Although a fifth member of the court, Justice Dolliver, concurred "with the result", he sharply rejected the plurality's reasoning . . . The concurrence nonetheless reasoned that the activity of soliciting signatures for an initiative was authorized by the initiative provision of the state constitution (Const. art. 2, § 1(a)(amend. 7)) As the concurring opinion pointed out, unlike the free speech provision, the initiative provision is not part of our state constitution's Declaration of Rights and does not establish a right against the government but declares that the people are part of the legislative process.

* * *

As a consequence, the holding in Alderwood was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners. We expressly do not here disturb that holding.

Id. at 427-29 (footnotes omitted, emphasis added). Thus, Southcenter confirms the holding in Alderwood: The "state action" requirement simply does not apply to Art. 2, § 1.

2. Nothing in Art. 2, § 1 or the connected case law limits the application of this section to cases involving shopping malls.

Nothing in Art. 2, § 1 limits its application to shopping malls. Nor does Alderwood limit the application of Art. 2, § 1 to shopping malls.¹⁰ No case holds that Art. 2, § 1 does not apply to private parties unless the private party is a shopping mall. On the contrary, the Alderwood Court concluded that Art. 2, § 1 "should be liberally construed, to the end that these popular legislative rights of the people would be preserved and rendered effective." Id. at 252 (Dolliver, J., concurring).

¹⁰The Alderwood plurality discussed the significance of the shopping mall in the context of the state action requirement of Art. 1, § 5. 96 Wn.2d at 243-46.

B. To apply Art. 2, § 1, a court must weigh the initiative rights of the plaintiff with the competing constitutional rights of the private party defendant.

The Alderwood Court held that Art. 2, § 1 required a balancing of the plaintiff's right to participate in an initiative with the rights of the private party defendant. Alderwood, 96 Wn.2d at 243-46 (Utter, J., for the plurality), 253 (Dolliver, J., concurring); see Sunnyside v. Lopez, 50 Wn.App. 786, review den., 110 Wn.2d 1034 (1988)(applying this balancing test). The Court held that "[t]he overriding public interest here involved is to make the initiative process available to all." 96 Wn.2d at 252.

The News Tribune has admitted that it transferred Ms. Nelson because of her participation in the Tacoma lesbian and gay rights ballot initiative.¹¹ CP 29-188, Exhibit B, Request for Admission No. 83. The court must balance Ms. Nelson's political rights with the infringement on the News Tribune's property rights.

1. Ms. Nelson's right to participate in the initiative process is substantial and concrete.

The right of initiative is "the first of all the sovereign rights of the citizen." Save our Park v. Hordyk, 71 Wn.App. 84, 90

¹¹Article 2, Section 1 applies to local ballot initiatives. See Mandatory Bussing v. Palmason, 80 Wn.2d 445, 450 (1972).

(1993), citing State ex rel. Mullen v. Howell, 107 Wash. 167, 171 (1919). Thus, "where the exercise of the speech also involves the initiative process, the activity takes on added constitutional significance." Alderwood, 96 Wn.2d at 245 (Utter, J., for the plurality), 252 (Dolliver, J., concurring).

Ms. Nelson's participation in the initiative process carries particular importance. The initiative for which she worked would have prohibited discrimination on the basis of sexual orientation in employment and housing. As a lesbian and as the potential target of such discrimination, Ms. Nelson felt that her participation in this initiative was necessary to secure her own civil rights. See Gay Law Students Ass'n v. Pacific Tel & Tel., 595 P.2d 592, 610 (Cal. 1979)(noting the political nature of the Gay Rights movement and comparing the movement to "the continuing struggle for civil rights waged by blacks, women, and other minorities").

The News Tribune has stated that Ms. Nelson is free to exercise her political rights, "[b]ut first, she needs to find a new occupation." CP 29-188, Ex.B, Requests for Admission No. 45. This statement points out the severity of the restriction on Ms. Nelson's activities. The News Tribune would have Ms. Nelson

give up her career as a prerequisite to participation in the political process. This restriction is much more severe than that in Alderwood, in which the environmental group could have simply gathered signatures elsewhere.

2. Ms. Nelson's political rights outweigh the remote and speculative infringement upon the News Tribune's rights.

The News Tribune argues that Ms. Nelson's political activity might infringe its "rights" by undermining the News Tribune's "objectivity", resulting in perceived bias and a loss of readership, advertising, and profits. The News Tribune has failed to produce any evidence that Ms. Nelson's political activity has affected its "objectivity" in any way. The News Tribune points to no examples of real or perceived biased reporting, and no complaints by readers or advertisers. See Section II.D, above.

Similarly, there is no evidence that Ms. Nelson's political views or activities ever decreased her value as a reporter. To the contrary, one of her evaluations specifically states that her outside activities have not limited the types of stories that she must write on her beat. CP 29-188, Ex. B, Request for Admission No. 81. In sum, the News Tribune can point to no concrete infringement upon its rights. At best, the News Tribune offers abstract,

speculative infringement of its "right" to "objectivity".

The Supreme Court's application of the balancing test in Alderwood is instructive. Alderwood, 96 Wn.2d at 243-46. In Alderwood, the property owner had an interest in maintaining the physical integrity of its private property by excluding unwanted solicitors. The News Tribune has no such concrete interest at stake. Ms. Nelson has the same interest at stake as the political group in Alderwood: The right to participate in the initiative process. The balance in the instant case weighs in favor of Ms. Nelson's political rights, even more than in Alderwood.

C. The purpose of Art. 2, § 1 would be frustrated if employers are allowed to deny employees' access to the initiative process.

The initiative right is the "first power reserved to the people." Art. 2, § 1. Accordingly, Alderwood holds that "[t]he overriding public interest here involved is to make the initiative process available to all." 96 Wn.2d at 252 (Dolliver, J., concurring).

This first power is simply not available to all if employers may forbid employees from participating in the initiative process. Ms. Nelson's boss described this result quite clearly: If Ms. Nelson wants to participate in the initiative process, "she needs

to find a new occupation." CP 29-188, Ex. B, Requests for Admission No. 45. Given this choice, most employees will probably need to keep their jobs. The trial court's construction would reshape Art. 2, § 1 into a weak and narrow clause that protects only the rights of employers.

In sum, the trial court's construction is contrary to the language and purpose of Art. 2, § 1, and contrary to Alderwood and Southcenter. No authority exists for the proposition that Art. 2, § 1 requires state action, or that this provision only applies to shopping malls. The trial court's dismissal of Ms. Nelson's Art. 2, § 1 claim should be reversed.

IV. UNDER ART. 1, § 19 OF THE WASHINGTON CONSTITUTION, ELECTIONS ARE NOT FREE AND EQUAL IF PRIVATE SECTOR EMPLOYERS MAY PROHIBIT EMPLOYEES FROM PARTICIPATING IN THE POLITICAL PROCESS.

Art. 1, § 19 explicitly guarantees: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." There is no state action requirement set forth in this provision of the Constitution.¹²

¹²See David Skover, "Washington State Action Doctrine," 8 Univ. Puget Sound Rev. 221, 245 (1985).

In Foster v. Sunnyside Valley Irrigation District, 102 Wn.2d 395 (1984), the Washington Supreme Court held that the rights secured by this constitutional guarantee are substantially greater than the rights secured by the federal constitution. Foster addressed whether the right of suffrage could be restricted to landowners in a special purpose election for water district commissioners. The Court held that this restriction was unconstitutional, even though the federal constitution would permit such a restriction, because it created two classes of citizens. Id. at 409-410.

The News Tribune has denied Ms. Nelson the opportunity to participate freely and openly in an election campaign; it has stifled her voice and prevented her from discoursing on political subjects with her fellow citizens. Thus, the News Tribune denies employees the right to participate in pre-election debate on equal terms with their employer.

The fact that Ms. Nelson and other employees could still cast a vote, if their candidate or their initiative made the ballot, does not remove the restriction from the scope of Art. 1, § 19. For example, in Seattle v. State, 103 Wn.2d 663, 670-71 (1985), the Court held that although the statute in question "does not

directly limit the right to vote in annexation elections to property owners, . . . it gives property owners the power to prevent an election by filing a petition," in violation of Art. 1, § 19.

Similarly, by preventing employees from speaking out in favor of a ballot initiative, employers can prevent an initiative measure from ever getting on the ballot. In sum, the News Tribute violated Art. 1, § 19 by limiting Ms. Nelson's participation in an election campaign.

V. THIS COURT SHOULD HOLD THAT ART. 1, §§ 4 AND 5 APPLY WITHOUT STATE ACTION.

The trial court dismissed Ms. Nelson's claim under Washington Constitution Art. 1, §§ 4 and 5, ruling that those sections limit only state action. CP 291-93. Ms. Nelson respectfully submits that to the extent that it required state action under Art. 1, § 5, Southcenter, 113 Wn.2d 413, was wrongly decided. Ms. Nelson urges the Court to adopt the reasoning stated in the concurring opinion of Justice Utter. Southcenter, 113 Wn.2d at 434. Recognizing that a court of appeals may not overrule Southcenter, Ms. Nelson reserves the right to provide supplemental briefing on this issue and on the issues raised by the requirements of State v. Gunwall, 106 Wn.2d 54 (1986), should

the Supreme Court decide to take direct review of this case.

CONCLUSION AND REQUEST FOR RELIEF

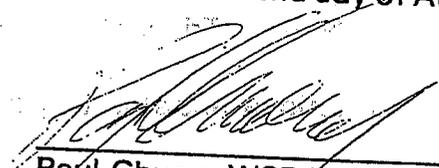
The News Tribune has sent a message to its employees: If they support unpopular political causes, they will be transferred, threatened and disciplined, until their political voices are silenced. The News Tribune's practice violates the Washington constitutional and statutory laws that guarantee political freedom.

The News Tribune claims that its status as a newspaper insulates it from this constitutional and statutory law. The News Tribune claims that the First Amendment grants it a license to discriminate against its newsroom employees, based on their politics, without any showing of biased journalism, impaired credibility, decreased readership, lost profits, or adverse impact of any kind. Absolutely no authority supports this theory. Neither the First Amendment nor the Washington Constitution may be twisted to restrict the freedom of political speech and association in this manner.

Accordingly, Ms. Nelson respectfully requests that this Court (1) reverse the trial court's summary dismissal of her statutory and constitutional claims; (2) reverse the trial court's denial of her partial summary judgment, and find that the News

Tribune has violated RCW 42.17.680 and Art. 2, § 1, as a matter of law; and (3) award Ms. Nelson reasonable attorney fees under RCW 42.17.400(4).

RESPECTFULLY SUBMITTED this 2nd day of August, 1995.



Paul Chuey, WSBA #23304
William J. Bender, WSBA #06574
James Lobsenz, WSBA #8787
Cooperating Attorneys, American Civil
Liberties Union of Washington,
for Appellant

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDRA S. NELSON,

Appellant,

vs.

McCLATCHY NEWSPAPERS, INC. and
TACOMA NEWS, INC.,

Respondents.

NO. 19615-8-II

CERTIFICATE OF SERVICE

On August 2, 1995, the undersigned commissioned PM Legal Messengers to effect service of **APPELLANT'S BRIEF** and **APPELLANT'S MOTION TO FILE OVERLENGTH BRIEF**, copy attached hereto, to the following-named counsel relative to the above-entitled action, by no later than August 4, 1995:

Cam Devore
Thomas Lemly
Davis Wright Tremaine
1501 Fourth Avenue, Suite 2600
Seattle, WA 98101-1688

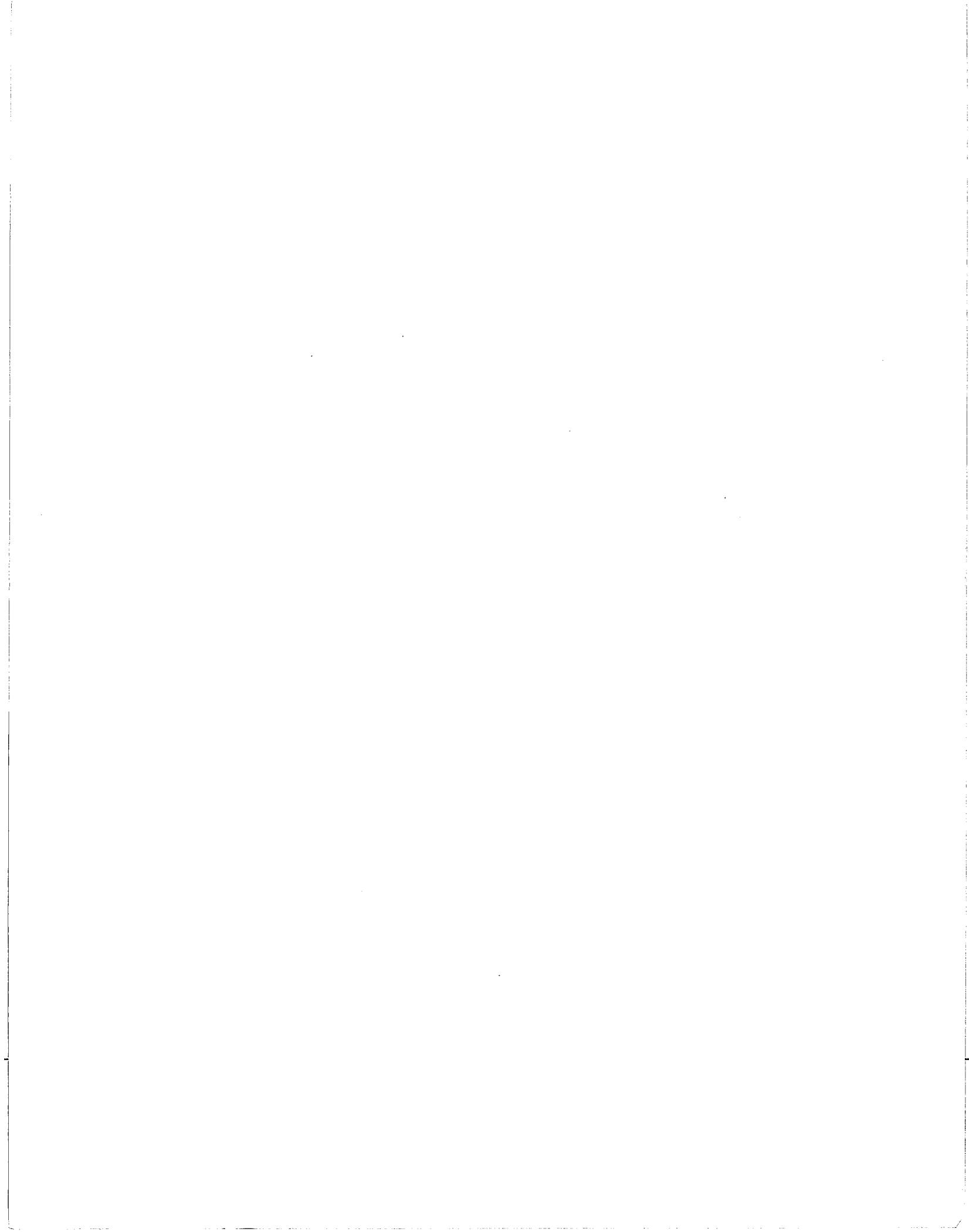
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this 2nd day of August, 1995 at Seattle, Washington.

Stephanie Correia
Stephanie Correia

Skellenger Bender Mathias & Bender, PS
1301 - Fifth Avenue, Suite 3401
Seattle, Washington 98101-2605
(206) 623-6501

Declaration of Service - 1 ORIGINAL



1992 VOTERS PAMPHLET

November 3

GENERAL ELECTION RECEIVED

NOV - 2 1992

OFFICE OF STATE LAW
CARRIAN

State of
Washington



Published by the
Secretary
of State



EDITION 4

Some local governments have ordinances providing the availability of public funds for political campaigns for municipal offices.

The effect of Initiative Measure 134, approved into law:

This initiative would establish maximums for permissible political contributions to campaigns for state legislative offices and the nine statewide elected officers (governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, treasurer, auditor and superintendent of public instruction). The maximum dollar amount an individual, corporation, pac or other group could make is a \$500 contribution to legislative campaigns and \$1,000 for campaigns for statewide offices. Those maximums would separately apply to the primary and general elections. Political parties and legislative caucuses are permitted to make larger contributions with a maximum of \$.50 times each registered voter within the election area.

Legislators, state officials or anyone acting on their behalf would be prohibited from soliciting campaign contributions during the period commencing thirty days before a regular session of the legislature, until thirty days after the adjournment of the regular session. Also, state officials would be prohibited from soliciting

political contributions from employees in the state official's agency.

Contributions would be prohibited from businesses not doing business in Washington and from unions having less than ten members in the state.

There would be restrictions on publicly funded, unsolicited mailings by legislators. Voluntary state payroll deductions for political committees would no longer be permitted and agency shop fees could not be used for political purposes without individual authorization. Campaign contributions could not be used to repay more than \$3,000 of a candidate's loans to the candidate's campaign.

Independent expenditure advertising would have to identify the top five contributors paying for the ad, and further disclosures to the Public Disclosure Commission would be required.

Elected officials and executive state officers would annually be required to file a statement describing any gifts received during the preceding year, but the annual reporting of public office funds would be repealed.

No public funds could be used to finance political campaigns for state or local offices.

The dollar amounts referred to in the initiative would be changed every two years by the Public Disclosure Commission to reflect changes in the inflation index. Penalties would be provided and other changes would be made.

Statement against

REAL CAMPAIGN FINANCE REFORM MUST LIMIT BOTH SPENDING AND CONTRIBUTIONS

• *Effective campaign reform must limit both campaign spending and contributions.* Congress has had contribution limits similar to those in I-134 for years and these limits have done nothing to prevent special interest scandals such as the S&L debacle.

• *Contributions limits alone are a sure-fire incumbent protection plan.* As long as the sky is the limit on spending, a challenger can never hope to keep pace with an incumbent's ability to raise political funds.

• *I-134 doesn't limit how much a candidate can spend on their own campaign* — wealthy individuals are free to spend as much as they like to "buy" an election.

REAL REFORM SHOULD AFFECT ALL POLITICAL PARTIES EQUALLY

• *I-134 is just more of the same old partisan politics. GOP officials admit the initiative was drafted to favor Republicans.* Independent analysis by the Seattle Post-Intelligencer shows that the proposal is specifically designed to hit Democratic candidates harder.

• *I-134 doesn't have grass-roots support.* The signatures that put I-134 on the ballot were not collected by citizen volunteers. Signatures for I-134 were bought and paid for with large contributions from big business interests and powerful politicians.

REAL REFORM SHOULD LIMIT THE INFLUENCE OF PACs

• *I-134 doesn't limit how much a candidate can take from*

PACs, it allows candidates to be 100% special-interest funded. Unless the influence of special interest PACs are limited, the views of the average person will be drowned out.

REAL REFORM SHOULD NOT REPEAL EFFECTIVE LOCAL REFORMS

• *I-134 repeals the popular and highly effective local campaign spending limit laws adopted by citizens in Seattle and King County.* These laws have been nationally acclaimed as models of effective reform.

Rebuttal of Statement for

DON'T BE FOOLED BY FALSE REFORM.

Passing I-134 won't hold down campaign spending or clean up campaigns, but it will relieve the pressure on politicians to accept *real* reform.

I-134 *claims* it will reduce campaign spending, but contribution limits alone have *never* succeeded in holding down campaign spending;

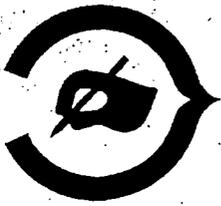
I-134 *claims* it will break the power of special interests, but is actually backed by those same special interests.

VOTE NO ON I-134, FALSE CAMPAIGN FINANCE REFORM.

Voters Pamphlet Statement Prepared by:

LORRAINE HINE, State Representative; MARGARET COLONY, President, League of Women Voters; JIM STREET, Seattle City Councilmember.

Advisory Committee: CAL ANDERSON, State Representative; LAWRENCE KENNEY, President, Washington State Labor Council; RICK BUNCH, Executive Director, WashPirg; DARLENE MADENWALD, President, Washington Environmental Council.



INITIATIVE MEASURE 134

TO THE LEGISLATURE

Note: The ballot title and explanatory statement were written by the Attorney General as required by law. The complete text of Initiative Measure 134 begins on page 11.

Statement for

Ready for a shock? Here's three:

- Spending on political campaigns in Washington skyrocketed to an all-time high of \$12 million in 1990.
- That year, 20 percent of campaign contributions to statewide and legislative candidates came from individual citizens.
- Incredibly, 61 percent of that \$12 million was paid to politicians by political action committees, unions, corporations and other special interests.

Can we really expect our political candidates and public officials to put *our* interests ahead of the special interests when those big corporations, committees and unions can contribute \$10,000, \$20,000 - even \$50,000 at a time?

Initiative 134 will put the average voter on even ground with the special interests, by holding individuals, PAC's, unions and corporations to the same contribution limit: \$500 per legislative candidate per election (\$1,000 per candidate for statewide office). It would also restrict contributions from political parties and caucuses to candidates.

Initiative 134 will help clean up campaigns in Washington. The new law would prohibit political fund raising from 30 days before a legislative session until 30 days after it ends. It would ban the transfer of funds from one candidate to another and strictly limit taxpayer-financed mailings by incumbent legislators.

Importantly, Initiative 134 would reduce overall spending on political campaigns in Washington, while *prohibiting* the use of state tax dollars to fund political campaigns.

Vote for Initiative 134 and you'll help break the power of special interests - and put the elected officials of today and tomorrow back to work for the people of Washington.

Official Ballot Title:

Shall campaign contributions be limited; public funding of state and local campaigns be prohibited; and campaign related activities be restricted?

The law as it now exists:

State law does not limit the amounts which can be contributed to campaigns for statewide elected offices and legislative offices, except during the last 21 days of the general election campaign. Contributions are required to be reported to the Public Disclosure Commission. Elected officials and executive state officers must annually report to the Commission any gifts they received as well as any contributions made to their public office fund.

Rebuttal of Statement against

Don't be misled. I-134 impacts *all* sides. It *equally* limits contributions from PACs, unions and individuals to candidates from *both* political parties.

I-134 strictly prohibits public financing schemes which provide "incumbency insurance" and use tax dollars to help re-elect incumbent lawmakers.

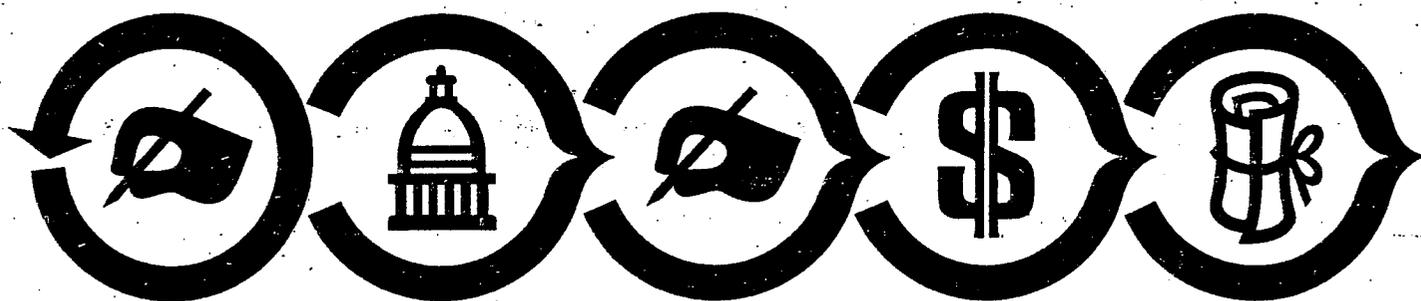
I-134 is our *only* chance to limit campaign influence by special interests and make candidates more accountable to *the people*. I-134 is supported by 40+ independent organizations — and by more than 225,000 Washington citizens.

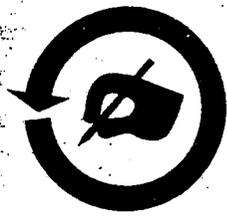
Voters Pamphlet Statement Prepared by:

MIKE WATTERS, President, Washington State Dairy Federation;
GARY SMITH, Executive Director, Independent Business Association;
CAROLYN LOGUE, State Director, National Federation of
Independent Business.

Official Voters Pamphlet

Published by A. Ludlow Kramer, Secretary of State
General Election Tuesday, November 7, 1972





Initiative Measure 276

NOTE: New special toll-free telephone service offered to voters requesting in-depth information on state measures. See page 5 for details.

Disclosure—Campaign Finances —Lobbying—Records

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.

Statement for

The People Have the Right to Know . . .

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental institutions is at an all time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision making. Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves.

Where Campaign Money Comes From and Where it Goes!!

Initiative 276 requires public disclosure of where campaign money comes from, who gets it and how much. All candidates and political committees are required to make regular, detailed reports of contributions and expenditures. Small contributions need not be reported by name. And, spending in any election campaign is limited to whichever is larger: ten cents per registered voter; \$5,000; or a sum equal to the total salary for the term of the office sought.

Which Lobbyists Spend How Much For What Purposes!!

Initiative 276 allows the public to know which special interests are spending how much to influence decisions made by the legislature and various state agencies. Professional lobbyists must register and report year-round (not just during legislative sessions) their terms of employment, legislation to which employment relates, itemized expenditures made, and

financial transactions with legislators and public employees. Expenditures of state funds for lobbying are prohibited.

Where Conflicts of Interest Exist!!

Initiative 276 permits the voting public to judge for itself where potential conflicts of interest may lie. All elected officials and candidates are required to disclose directorships and offices held and substantial financial or ownership interests in any business, and in real estate investments.

How Governmental Decisions Are Really Made!!

Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying. Certain records are exempted to protect individual privacy and to safeguard essential governmental functions.

The People Have The Right To Know!! Vote For Initiative 276!!

Committee appointed to compose statement FOR Initiative 276:

BENNETT FEIGENBAUM, Coalition for Open Government, Sponsor; NAT WASHINGTON, State Senator, Ephrata; ART BROWN, State Representative, Seattle.

Advisory Committee: JOCELYN MARCHISIO, President, League of Women Voters of Washington; MARIANNE NOR-
TON, American Association of University Women; JO-
THOMAS, President, Washington Environmental Council
LOREN ARNETT, Washington State Council of Churches.

The Law as it now exists:

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. However, present law applies only to primaries and not to general elections; additionally, the present law relates only to campaign expenditures and not to contributions.

Legislative lobbying is now regulated by a 1967 law under which any person who is hired for the purpose of influencing legislation must register with each house of the legislature. In addition, registered lobbyists must file periodic reports of their lobbying expenses, but these reports are not required to be itemized or detailed.

State officers but not those of local governmental units are presently required to file periodic reports of certain of their private financial affairs in January of each year; and candidates for state offices are required to file these same reports at the time they file their declarations of candidacy.

Access to public records is largely governed, under present law, by court decisions under which members of the public having a legitimate interest therein are entitled to examine all records in the custody of a public official which that official is required by law to maintain. However, in the case of records which the official having custody is not required by law to maintain, the disclosure or nondisclosure of information contained therein is largely within the discretion of this official.

Effect of Initiative Measure No. 276 if approved into Law:

This initiative is divided into four basic parts:

The first part relates to the financing of electoral campaigns involving both ballot propositions and candidates for most state and local governmental offices (except precinct committeemen and offices in cities or in other less than county-wide local governmental units inhabited by fewer than 5,000 registered voters). This part would require periodic reports from all groups or individuals who attempt to influence the election of candidates or passage of measures. Such reports would disclose the sources and amounts of all campaign contributions in excess of \$5.00 and the objects and amounts of all campaign expenditures in excess of \$25.00.

In addition, this part of the initiative would limit the total amounts which may be expended in connection with electoral campaigns which it would cover. Expenditures paid in connection with state-wide ballot measures would be limited to \$10,000, and in connection with other ballot measures to 10 cents for every registered voter who votes on the proposition. In the case of campaigns for public offices, the initiative would impose a limitation of 10 cents per registered voter, or \$5,000, or a figure based upon the salary of the office sought, whichever is the greater. Anonymous contributions in excess of \$1.00 from any individual or in excess of 1% of total accumulated contributions would be prohibited—as would be the use of public office facilities in electoral campaigns.

(Continued on Page 108)

NOTE: Ballot title and the above explanatory comment were written by the Attorney General as required by state law. Complete text of Initiative Measure No. 276 starts on Page 55.

Statement against

Initiative 276 is well-intentioned but certainly over-enthusiastic legislation. It tries to cleanse all evils of our political process by limiting campaign expenditures and requiring disclosure of campaign and lobbying expenditures. But it goes far beyond that.

How Far Does 276 Go?

Initiative 276 threatens individual privacy. For instance—276 requires public identification of everyone making a political contribution of \$5.00 or more; such personal support then becomes a matter of public records, before the election!

What Will 276 Cost?

276 doesn't tell the taxpayer about added cost of government. Virtually every office of State and Local Government will incur added expenses—staff, office space, files, supplies and computer time—at a conservatively estimated cost of more than \$2 million dollars annually. Every office holder and candidate will be subjected to countless hours of useless record keeping—thousands of hours of wasted time—merely to fill more filing cabinets in Olympia. It is impossible to estimate the potential cost to State, County and City Government of making all public records available for inspection and copying.

276 Discourages Individual Participation in the Political Process.

The reporting burdens of Initiative 276 and constant threat of frivolous or acrimonious citizen suits because of personal, political or business differences, will discourage many people from participating in politics, either as candidates or volun-

teers. It will definitely destroy incentive for anyone to run and serve in low-paying part-time offices.

Referendum Bills Nos. 24 and 25 far More Practical.

There is real need to place some limits on skyrocketing costs of political campaigns. There is also need for realistic campaign contribution reporting. It should not be aimed at the \$5.00 contribution of individuals, but rather to prevent undue influence on the part of special interest groups. These needs are met in Referendums 24 and 25—strict laws that totally respect individual privacy and freedom of choice, while meeting the reporting and expenditure goals.

Committee appointed to compose statement AGAINST Initiative Measure No. 276:

CHARLES E. NEWSCHWANDER, State Senator; JAMES P. KUEHNLE, State Representative.

Initiative Measure No. 276

(Continued from Page 11)

The second part of this initiative would replace the existing law regulating lobbying activities. Like the present law, it would require lobbyists (with certain exceptions) to register before doing any lobbying. The term "lobbying," however, would be expanded to include activities in connection with all state regulatory agencies as well as the legislature, and also to include lobbying between legislative sessions. Unlike the present law, the initiative would require lobbyists to file itemized and detailed quarterly reports of their lobbying activities as well as weekly reports during legislative sessions. Employers of lobbyists would be required to file additional annual reports concerning their employment or compensating of state officials, and legislators would also file written reports concerning persons employed by them. The use of state funds for lobbying would be prohibited unless expressly authorized by law. All state agencies whose employees communicate with the legislators in accordance with the act would be required to file detailed quarterly reports concerning such employees and communications.

The third part of the initiative pertains to the financial affairs of candidates and elected officials at both the state and local levels. This part would require such candidates and officials to file periodic reports of a number of designated matters relating to their financial and business affairs, and would excuse any persons filing these reports from also filing the financial disclosure reports required by the existing statute pertaining to state officers.

The fourth major part of the initiative relates to "public records," a term which would be defined as including "... any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." The initiative would require all such "public records" of both state and local agencies to be made available for public inspection and copying by any person asking to see or copy a particular record—subject only to certain exceptions relating to individual rights of privacy or other situations where the act deems the public interest would not be best served by open disclosure—regardless of whether or not the particular record is one which the official having custody is required by law to maintain. This part of the initiative would also impose upon all state and local governmental agencies a great number of detailed requirements with respect to the maintenance and indexing of all their records.

The initiative would also establish a "public disclosure commission" to administer and enforce its provisions and would prescribe several procedures and penalties for its enforcement. And finally, the last section of the initiative states that if approved the initiative would repeal the provisions of Referendum Bills 24 and 25 in the event that these measures are also approved at this election. Those measures are discussed on pages 12 and 14 of this pamphlet.

Referendum Bill No. 24

(Continued from Page 13)

voke lobbyist registration, enjoin lobbying activities, require filing of reports and recover treble damages for failure to file accurate reports. The boards could employ attorneys other than the attorney general. Individuals could also bring suit for damages.

The present law must be strictly construed because of its criminal penalties; however Referendum 24 expressly declares that its provisions shall be liberally interpreted in order to carry out its purposes.

Finally, this act should be compared with Initiative Measure No. 276, as described on page 10 of this voters' pamphlet, a portion of which also covers this same general subject.

Referendum Bill No. 25

(Continued from Page 15)

scribe to a code of fair campaign practices by which he would promise to uphold the principles of decency, honesty and fair play.

Persons violating the act would be guilty of misdemeanors and in most cases would be punishable by a fine of not more than \$500.

Finally, this act should be compared with Initiative Measure No. 276, as described on page 10 of this voters' pamphlet, a portion of which also covers this same general subject.

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Initiative Measure No. 43

(Continued from Page 33)

lowed to operate a permit system for developments which are not substantial upon delegation of such authority by the department of ecology.

This act would prohibit the issuance of any permits to drill for oil in Puget Sound, or (with certain exceptions) to construct any buildings of more than 35 feet above average grade level on shorelines which obstruct the view of a substantial number of residences on areas adjoining the shoreline. It would also limit commercial timber harvesting in shoreline areas. The initiative further would require a consumer protection notice of the applicability of its provisions to be given in connection with certain transactions pertaining to lands or waters subject to the act's provisions.

Both Initiative Measure 43 and Alternative Measure 43B provide for comprehensive land planning and management programs. The principal differences between the two measures pertain to the relationships of state and local governments in the implementation of the respective acts and to the degree of geographical coverage. Alternative Measure 43B places a greater degree of responsibility and participation in local government than would Initiative Measure 43. Geographically, Initiative Measure 43 would be applicable to all lakes and streams, while Alternative Measure 43B does not apply to lakes of less than 20 acres or (with minor exceptions) to portions of streams with a mean annual flow of 20 cubic feet per second or less. In addition, the initiative would apply to a 500 foot strip of lands adjacent to all waters covered thereby and their underlying beds, whereas the alternative measure applies to a 200 foot strip of such lands together with (in certain instances) other adjacent low lying areas.

Finally, the general consent of the state to the impairment of public navigational rights by the retention of certain existing improvements which is contained in Alternative Measure 43B is not included in Initiative Measure 43. Instead, the initiative states that, except as permitted by it, "... there shall be no interference with or obstruction of the navigational rights of the public pursuant to common law as stated in such cases as the Washington Supreme Court decision in Wilbour v. Gallagher, 77 Wn. 2d 306 (1969)."

Alternative Measure No. 43B

(Continued from Page 35)

high water mark. Other activities expressly limited by the act include commercial timber harvesting on designated shoreline areas of state-wide significance and (with certain exceptions) the erection of structures over 35 feet in height above average grade level on shorelines where adjacent residential views on areas adjoining shorelines would be impaired.

This measure also grants the consent of the state to the impairment of the public rights of navigation and corollary rights caused by the retention of any structures, improvements, docks, fills or developments placed in navigable waters prior to December 4, 1969, except where they were placed in navigable waters in violation of state statutes or are in trespass.

Both Initiative Measure 43 and Alternative Measure 43B provide for comprehensive land planning and management programs. The principal differences between the two measures pertain to the relationships of state and local government in the implementation of the respective acts and to the degree of geographical coverage. Alternative Measure 43B places a greater degree of responsibility and participation in local government than would Initiative Measure 43. Geographically, Initiative Measure 43 would be applicable to all lakes and streams, while Alternative Measure 43B does not apply to lakes of less than 20 acres or (with minor exceptions) to portions of streams with a mean annual flow of 20 cubic feet per second or less. In addition, the initiative would apply to a 500 foot strip of lands adjacent to all waters covered thereby and their underlying beds, whereas the alternative measure applies to a 200 foot strip of such lands together with (in certain instances) other adjacent low lying areas.

Finally, the general consent to the impairment of public navigational rights by the retention of certain existing improvements which is contained in Alternative Measure 43B is not included in Initiative Measure 43. Instead, the initiative states that, except as permitted by it, "... there shall be no interference with or obstruction of the navigational rights of the public pursuant to common law as stated in such cases as the Washington Supreme Court decision in Wilbour v. Gallagher, 77 Wn. 2d 306 (1969)."

CERTIFICATION

As Secretary of State of the State of Washington, I hereby certify that I have caused the text of all laws, proposed measures, ballot titles, official explanations, etc. that appear within this publication to be carefully compared with the original such instruments now on file in my office and find them to be a full and true copy of said originals.

Witness my hand and the seal of the State of Washington this 20th day of September, 1972.



A. LUDLOW KRAMER
Secretary of State

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

WASHINGTON EDUCATION
ASSOCIATION,

Appellant,

v.

GARY DAVENPORT, MARTHA
LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY
WOLCOT,

Respondents,
individually and on
behalf of all other
nonmembers similarly
situated.

NO. 28375-1-II

CERTIFICATE OF
SERVICE

I hereby certify that I served a true and correct copy of **REPLY
BRIEF ON BEHALF OF APPELLANT, WASHINGTON
EDUCATION ASSOCIATION and CERTIFICATE OF SERVICE**
on the following:

Steven O'Ban, Esq.
Ellis Li & McKinstry
601 Union Street, Ste 4900
Seattle, WA 98101

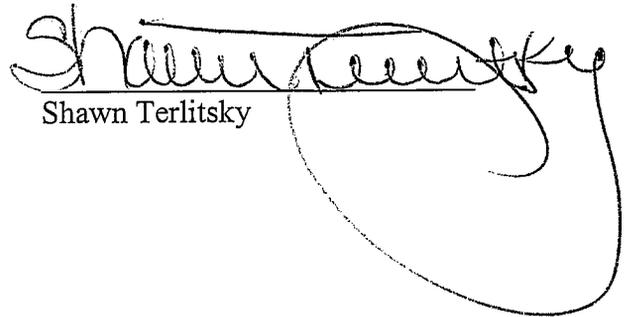
Via U.S. Mail

Milton Chappell, Esq.
National Right to Work Legal Defense Foundation
8001 Braddock Road, Ste 600
Springfield, VA 22160

Via U.S. Mail

ORIGINAL

Dated this 30th day of September, 2002.



Shawn Terlitsky