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STATE OF WASHINGTON
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NO. 95013-0

SUPREME COURT OF THE STATE OF WASHINGTON

OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM;
CLALLAM COUNTY SHERIFF BILL BENEDICT;
CLALLAM COUNTY SHERIFF'S DEPARTMENT; AND
CLALLAM COUNTY

Appellants,

v.

REAL PROPERTY KNOWN AS
(1) JUNCTION CITY LOTS 1 - 12 INCLUSIVE, BLOCK 35;
(2) LOT 2 OF THE NELSON SHORT PLAT LOCATED IN
JEFFERSON COUNTY; AND
ALL APPURTANCES AND IMPROVEMENTS THEREON, OR
PROCEEDS THERE FROM

Respondents *in rem*,

STEVEN L. FAGER;
DBVWC, INC.; AND
LUCILLE M BROWN LIVING TRUST
Interested Parties.

ANSWER TO AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON

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I. ARGUMENT

A. THE *AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON DOES NOT PROVIDE THIS COURT WITH FURTHER GUIDANCE

1. The Approach of the American Civil Liberties Union of Washington is Contrary to the Principles of Statutory Construction

Here, the American Civil Liberties Union of Washington (ACLU) unabashedly argues that RCW 69.50.505(6) “allows for recovery of attorney fees in a civil forfeiture action accrued as part of a related criminal matter.” (Amicus Brief at 6). Without any recognition of the plain language of RCW 69.50.505(6), the ACLU argues that “recovery is based on the reasonableness of the costs more broadly.” (Amicus Brief at 7). Otherwise, as the ACLU argues, recovery of attorney fees would be “severely restrict[ed].” (Amicus Brief at 7). But the ACLU’s approach is utterly contrary to the principles of statutory construction.

First, the ACLU’s interpretation of RCW 69.50.505(6) cannot be harmonized with the plain language of the statute. On its face, RCW 69.50.505(6) does not include, or even refer to, costs “*reasonably related* to the forfeiture action.” (Amicus Brief at 1) (emphasis added). On its face, RCW 69.505.505(6) does not include, or even refer to, any requirement that a seizing law enforcement agency, administrative law judge, or court must evaluate legal work performed in a criminal proceeding and determine if it was “‘reasonably incurred.’” (Amicus Brief at 9).

This Court should assume that the Legislature meant exactly what it said. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Had the Legislature intended to broaden the scope of attorney’s fees to be recovered under RCW 69.50.505(6), the Legislature could have included any of the following phrases to support the ACLU’s strained interpretation:

- “in any proceeding to forfeit property under this title and in any proceeding reasonably related thereto”;
- “in any criminal proceeding and related proceeding to forfeit property under this title”; or
- “in any proceeding to forfeit property under this title and in any criminal proceeding that is directly tied to a proceeding to forfeit property under this title.”

But the Legislature chose not to do so, and “plain words do not require construction.” *Keller*, 143 Wn.2d at 276.¹

Second, contrary to what the ACLU argues, (Amicus Brief at 6-9), this Court ““must not add words where the legislature has chosen not to include them.”” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). While the ACLU relies heavily on arguments of reasonableness and judicial economy to support its

¹ In fact, if the statute is unambiguous after a review of the plain meaning, then this Court’s inquiry is at an end. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

interpretation of RCW 69.50.505(6), (Amicus Brief at 7-9), this Court simply may not read into the statute matters that are not in it. *Keller*, 143 Wn.2d at 276; *see also Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993) (“We are obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh.”).

Third, contrary to what the ACLU argues, (Amicus Brief at 10), a statute is not ambiguous simply because different interpretations are conceivable. *Keller*, 143 Wn.2d at 277. In fact, this Court is not obliged to discern an ambiguity by imaging a variety of alternative interpretations, as argued by the ACLU. *Keller*, 143 Wn.2d at 276-77. And the ACLU, other than arguing that RCW 59.60.505(6) does not comport with its sense of what is reasonable and responsible, (Amicus Brief at 9), has failed to show that the language of RCW 69.50.505(6) is actually ambiguous.

Finally, and most importantly, this Court must construe RCW 69.50.505(6) so that all its language is given effect, with no portion rendered meaningless or superfluous. *Keller*, 143 Wn.2d at 277. Each provision must be viewed in relation to other provisions, and the statute should be considered as a whole. *State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988). RCW 69.50.505(6) unambiguously provides that “the *claimant* is entitled to reasonable attorney fees incurred by the *claimant*.” (Emphasis added.) A claimant is a person who notifies the seizing law enforcement agency of the person’s claim of ownership or right to possession of personal and/or real property. *See* RCW

69.50.505(5). And RCW 69.50.505(6) only refers to a claimant, not a defendant.

Again, had the Legislature intended for RCW 69.50.505(6) to apply to defendants (criminal) as well as claimants (civil), it could have done so explicitly. The Legislature could have used any number of phrases to indicate that RCW 69.50.505(6) applies to both defendants (criminal) as well as claimants (civil). But the Legislature chose not to do so. The Legislature intentionally chose to use the term “claimant” throughout RCW 69.50.505(5) and (6). Thus, to accept the ACLU’s argument would make the Legislature’s choice of words meaningless or superfluous, something this Court should be unwilling to do. *See Keller*, 143 Wn.2d at 277.

2. The Legislative History of RCW 69.50.505(6) Does Not Support the Argument of the American Civil Liberties Union of Washington

The ACLU argues that the legislative history of RCW 69.50.505(6) supports the recovery of attorney fees incurred in a related criminal matter. (Amicus Brief at 8, 10-12). In doing so, the ACLU relies almost exclusively on 2001 legislative changes to RCW 69.50.505. (Amicus Brief at 10-12). But the ACLU fails to recognize that the legislative history of RCW 69.50.505, *see* Final Bill Report, 2SHB 1793 (1989), along with decisions of this Court and the United States Supreme Court, actually does not support the ACLU’s argument. *See State v. Catlett*, 133 Wn.2d 355, 364-67, 945 P.2d 700 (1997); *Rozner v. City of*

Bellevue, 116 Wn.2d 342, 351, 804 P.2d 24 (1991); *see also United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984) (“the forfeiture remedy cannot be said to be co-extensive with the criminal penalty”); *Various Items of Pers. Prop. v. United States*, 282 U.S. 577, 581-82, 51 S. Ct. 282, 75 L. Ed. 558 (1931).

The ACLU fails to address anywhere in its *amicus curiae* brief that the United States Supreme Court has explained that criminal proceedings are *in personam*, while forfeiture proceedings against property are *in rem*. *Ursery*, 518 U.S. at 289. “In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished.” *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring) (quoting *Various Items*, 282 U.S. at 581).² In a forfeiture proceeding, “[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.” *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring) (quoting *Various Items*, 282 U.S. at 581).

In other words, *in personam* criminal proceedings are distinct from *in rem* forfeiture proceedings. *Ursery*, 518 U.S. at 288-89. And the

² *See also United States v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, AL*, 579 F.3d 1315, 1323 (2009) (“The purpose of defending a criminal prosecution is not to recover property, but to defend the accused’s freedom.”).

United States Supreme Court has had little trouble in ruling that *in rem* forfeiture proceedings, like those under RCW 69.50.505, are civil—not criminal—in nature. See *Ursery*, 518 U.S. at 288-89; *89 Firearms*, 465 U.S. at 366 (“the forfeiture mechanism ... is not an additional penalty for the commission of a criminal act, but rather a separate civil sanction, remedial in nature”).³

The ACLU fails to address anywhere in its *amicus curiae* brief that this Court has ruled that the plain language of RCW 69.50.505 and its legislative history attest to its civil nature. *Catlett*, 133 Wn.2d at 366. In 1989, among other things, the Legislature added real property to the types of property that could be seized and forfeited under the Uniform Controlled Substance Act (chapter 69.50 RCW). See Final Bill Report, 2SHB 1793 (1989). In amending the statute, the Legislature clearly announced, “*Seizure and forfeiture are civil processes and are independent of the outcome of any criminal charges that might be brought against the owner of the property.*” See Final Bill Report, 2SHB 1793 (1989) (emphasis added).⁴ In fact, this Court has stated, “With respect to

³ Washington courts frequently look to federal civil forfeiture law to interpret state civil forfeiture law. *Guillen*, 169 Wn.2d at 778 n.5; *City of Bellevue v. Cashier’s Check for \$51,000.00 & \$1,130.00 in U.S. Currency*, 70 Wn. App. 697, 701, 855 P.2d 330 (1993) (citing *Rozner*, 116 Wn.2d at 351).

⁴ The Legislature’s statement reflects the United States Supreme Court’s long-held understanding that civil *in rem* forfeitures are independent of criminal *in personam* punishments. See *Ursery*, 518 U.S. at 293-96 (Kennedy, J., concurring).

the property itself, *forfeiture is strictly a civil proceeding in rem.*” *Rozner*, 116 Wn.2d at 351 (emphasis added).

The ACLU argues that, “in crafting the attorney fee provision of the 2001 bill, the legislature would have known that it was common for parts of a related criminal case to be dealt with first, while the forfeiture action was stayed.” (Amicus Brief at 12). Yet the ACLU fails to address anywhere in its *amicus curiae* brief that the attorney fee provision at issue in RCW 69.50.505(6) was not enacted until almost 12 years after⁵ the Legislature first announced that “[s]eizure and forfeiture are civil processes,” *see* Final Bill Report, 2SHB 1793 (1989), or almost 10 years after this Court stated that “forfeiture is strictly a civil proceeding in rem,” *Rozner*, 116 Wn.2d at 351, or almost four years after this Court ruled that “the plain language of RCW 69.50.505 and its legislative history attest to its civil nature.” *Catlett*, 133 Wn.2d at 366.

The ACLU fails to address anywhere in its *amicus curiae* brief that this Court has stated, “[T]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has *clearly expressed* its intention to vary it.” *Price v. Kitsap Transit*, 125 Wn. 2d 456, 463-64, 886 P.2d 556 (1994) (emphasis added). Here, the language of RCW 69.50.505(6) contains no expression of intent to override the Legislature’s own view from 1989 that “[s]eizure and

⁵ Laws of 2001, chapter 168, § 1(f); *see also Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010).

forfeiture are civil processes.” *Compare* Final Bill Report, 2SHB 1793 (1989) *with* Final Bill Report, ESHB 1995 (2001).

But even more importantly, and contrary to what the ACLU argues, (Amicus Brief at 9, 12), the language of RCW 69.50.505(6) contains no expression of intent to replace the “American Rule”⁶ as it pertains to attorney fees incurred in criminal proceedings. *See* Final Bill Report, ESHB 1995 (2001). Had the Legislature intended to replace the “American Rule” as it pertains to attorney fees incurred in criminal proceedings, it could have done so explicitly. But without clear expression of intent from the Legislature, there is no basis for this Court to interpret RCW 69.50.505(6) as replacing the “American Rule” as it pertains to attorney fees incurred in criminal proceedings. *See Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 303, 149 P.3d 666 (2006); *Sherman v. Kissinger*, 146 Wn. App. 855, 869, 195 P.3d 539 (2008) (“We also do not assume that the legislature intended to significantly change the law by implication.”); *Schumacher v. Williams*, 107 Wn. App. 793, 28 P.3d 792, 796 (2001) (“we will not assume that the Legislature intended to effect a significant change in the law by implication”), *review denied*, 145 Wn.2d 1025 (2002); *see also*

⁶ Under the “American Rule,” attorney fees are not recoverable by the prevailing party as costs of litigation unless permitted by contract, statute, or some recognized ground in equity. *Panorama Vill. Condo. Owners Ass’n Bd. v. Allstate Ins. Co.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 191, 692 P.2d 867 (1984).

State v. Strauss, 119 Wn.2d 401, 418, 832 P.2d 78 (1992) (“The court will not assume that the Legislature would attempt to effect a significant change in the law by mere implication.”); *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984).

For all its rhetoric about what may be “reasonable” or “responsible,” (Amicus Brief at 9), the ACLU fails to acknowledge anywhere in its *amicus curiae* brief that the legislative history of RCW 69.50.505(6) contains no expression of intent to expand the applicability of RCW 69.50.505(6) to criminal *in personam* proceedings—regardless of how related they may be to civil *in rem* forfeiture proceedings and regardless of issues such as “collateral estoppel” or “judicial economy.” (Amicus Brief at 8-9).

3. A Departure from the Plain Meaning of a Statute is Not Justified by a Consideration of Public Policy

Relying on *Guillen v. Contreras* 169 Wn.2d 769, 238 P.3d 1168 (2010), the ACLU argues that this Court should liberally construe RCW 69.50.505(6).⁷ (Amicus Brief at 12-13). But liberal construction of a statute does not mean that this Court may read into the statute language that is not there. See *Klossner v. San Juan County*, 93 Wn.2d 42, 47, 605 P.2d 330 (1980); *King County v. City of Seattle*, 70 Wn.2d 968, 991, 425

⁷ Interestingly, the ACLU admits that, in *Guillen*, this Court read RCW 69.50.505(6) liberally “in the context of deciding who is a prevailing party.” (Amicus Brief at 12). The issue of who is a prevailing party is something that is not at dispute in this case.

P.2d 887 (1967); *Lowry v. Dep't of Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) (“We are not unmindful of the rule that the workmen’s compensation act shall be liberally construed in favor of its beneficiaries, but, where the language of the act is not ambiguous and exhibits a clear and reasonable meaning, there is no room for construction.”); *Shum v. Dep't of Labor & Indus.*, 63 Wn. App. 405, 409, 819 P.2d 399 (1991).

Of course, the ACLU argues that this Court should ignore what the Legislature unambiguously said in RCW 69.50.505(6) and side with it because RCW 69.50.505(6) should be “read liberally,” *Guillen*, 169 Wn.2d at 777, and “forfeitures are not favored,” *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn. App. 387, 392, 208 P.3d 1189 (2009). (Amicus Brief at 12-13, 15). In other words, the ACLU argues that this Court should agree with it simply as a matter of public policy.

“But it is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction.” *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44 (2000) (quoting *Johnson v. Dep't of Labor & Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949)); *see also Lowry*, 21 Wn.2d at 542. “It is a well-settled rule that ‘so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.’” *DeLong v. Parmelee*, 157 Wn. App.

119, 146, 236 P.3d 936 (2010) (quoting *State v. Miller*, 72 Wn. 154, 158, 129 P. 100 (1913)).

The ACLU also argues that this Court should apply “the rule of lenity” in interpreting RCW 69.50.505(6), as it is “intertwined with a related criminal matter.” (Amicus Brief at 14-15).⁸ But the rule of lenity is inapplicable when a statute is clear on its face. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999); *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996) (a court may not consider nontextual considerations such as equity or the rule of lenity where the statute is clear). In fact, this Court has summarized the correct application of the rule of lenity as follows:

[T]he rule of lenity does not require forced, narrow or overstrict construction if it defeats the intent of the Legislature. *State v. Carter*, 89 Wn.2d 236, 242, 570 P.2d 1218 (1977). We have explained that the rule only applies when a penal statute⁹ is ambiguous *and* legislative intent

⁸ The ACLU relies on *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 819 (3d Cir. 1994), in support of its argument. (Amicus Brief at 14). Relying on *Austin v. United States*, 509 U.S. 602, 618-19, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), the Third Circuit Court of Appeals explained that the civil forfeiture scheme at issue in *One 1973 Rolls Royce* was “punitive and quasi-criminal in nature,” thus requiring it to apply the rule of lenity. *One 1973 Rolls Royce*, 43 F.3d at 819. But just two years later, the United States Supreme Court clarified that the relevant question in *Austin* was not whether a particular proceeding was criminal or civil, but whether the forfeiture constituted punishment for purposes of the Eighth Amendment. *Ursery*, 518 U.S. at 281. The United States Supreme Court then clarified, “The holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment.” *Ursery*, 518 U.S. at 287. The ACLU’s reliance on *One 1973 Rolls Royce*, therefore, is inapposite.

⁹ The ACLU relies on *United States v. Thompson/Center Arms Co.*, 504 US. 505, 518 n.10, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992), for the proposition that a civil statute having “criminal applications” is subject to

is insufficient to clarify the ambiguity. *In re [Pers. Restraint of] Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); *see also Moskal v. United States*, 498 U.S. 103, 107-08, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990).

In re Post Sentencing Review of Charles, 135 Wn.2d 239, 250 n.4, 955 P.2d 798 (1998), *superseded on other grounds by statute as recognized in State v. Thomas*, 150 Wn.2d 666, 672, 80 P.3d 168 (2003). “If the legislature’s intent can be discerned, it is inappropriate to apply the rule of lenity as an automatic, unconsidered reaction. To this end, ‘the rule of lenity does not preclude ordinary construction.’” *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 468, 219 P.3d 686 (2009) (Madsen, J., concurring) (quoting *State v. Coria*, 146 Wn.2d 631, 639, 48 P.3d 980 (2002)).

“Plain words do not require construction.” *Keller*, 143 Wn.2d at 276. While the ACLU questions the public policy behind RCW 69.50.505(6), (Amicus Brief at 15), this Court cannot, under the guise of construction, substitute its view, the trial court’s view, or the ACLU’s view for that of the Legislature. *Courtright v. Sahlberg Equip., Inc.*, 88 Wn.2d 541, 545, 563 P.2d 1257 (1977); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 832 P.2d 489 (1992).

After all, this Court is “not a super legislature.” *Courtright*, 88 Wn.2d at 545. “This Court should resist the temptation to rewrite an unambiguous statute to suit [its] notions of what is good public policy,

the rule of lenity. But the ACLU’s argument is misplaced, as this Court has stated, “With respect to the property itself, *forfeiture is strictly a civil proceeding in rem.*” *Rozner*, 116 Wn.2d at 351 (emphasis added).

recognizing the principle that ‘the drafting of a statute is a legislative, not a judicial, function.’” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (quotations and citations omitted)). Therefore, departure from the unambiguous statutory language of RCW 69.50.505(6) is improper. *See Jackson*, 137 Wn.2d at 725.¹⁰ And the ACLU’s statutory interpretation of RCW 69.50.505(6) must fail.

II. CONCLUSION

The ACLU’s argument, even assuming *arguendo* that it is sound from a policy standpoint, does not reflect the current status of the law in Washington. Essentially, the ACLU invites this Court to engage in a type of judicial activism that this Court has rejected. *See Sedlacek*, 145 Wn.2d at 390 (this Court “must avoid stepping into the role of the Legislature by actively creating the public policy of Washington.”); *Jackson*, 137 Wn.2d at 725. The Legislature, not this Court, is the fundamental source for the definition of this State’s public policy. *Sedlacek*, 145 Wn.2d at 390; *see also Roberts v. Dudley*, 140 Wn.2d 58, 79, 993 P.2d 901 (2000) (Talmadge, J., concurring) (“The specter of judicial activism is unloosed

¹⁰ In fact, as Division Two of the Court of Appeals recently stated, “We do not rewrite unambiguous statutory language under the guise of interpretation And we do not add language to an unambiguous statute even if we believe the legislature ‘intended something else but did not adequately express it.’” *Protect the Peninsula’s Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 970, 344 P.3d 705 (2015) (citations omitted).

and roams free when a court declares, ‘This is what the Legislature meant to do or should have done.’”).

For the foregoing reasons, the ACLU’s arguments in its *amicus curiae* brief must fail. This Court should disregard the ACLU’s *amicus curiae* brief, as it fails to provide this Court with guidance on the issues presented for review in this matter. Finally, this Court should affirm the opinion of the Court of Appeals.

RESPECTFULLY SUBMITTED this 29th day of May, 2018.


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CERTIFICATE OF SERVICE

I, Christopher Moore, hereby certify that I served the foregoing
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I certify under penalty of perjury, under the laws of the State of
Washington, that the foregoing is true and correct.

DATED this 29th day of May, 2018 at Seattle, Washington.



Christopher Moore, Legal Assistant

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