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STATE OF WASHINGTON
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No. 95281-7

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,

Appellant.

FREEDOM FOUNDATION'S
SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iv
A. INTRODUCTION	1
B. ISSUES PRESENTED FOR REVIEW	2
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT	5
(1) <u>Under This Court’s Principles of Statutory Interpretation, the Foundation Was Not Obligated to Report <i>Pro Bono</i> Legal Services As Independent Expenditures</u>	5
(2) <u>Division II’s Interpretation of an Independent Expenditure Violates the Foundation’s Constitutional Rights</u>	13
(a) <u>The Statutes Are Void for Vagueness</u>	14
(b) <u><i>Pro Bono</i> Legal Services Do Not Involve Electioneering Subject to State Regulation</u>	17
E. CONCLUSION.....	22

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846, cert. denied, 552 U.S. 1040 (2007).....	12
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006)	6
<i>Cockle v. Dep’t of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	6
<i>Dep’t of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	6
<i>Dietz v. Doe</i> , 135 Wn.2d 835, 935 P.2d 611 (1997).....	19
<i>Dot Foods, Inc. v. Wash. Dep’t of Revenue</i> , 166 Wn.2d 912, 215 P.3d 185 (2009).....	6
<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 268 P.3d 892 (2011).....	6
<i>In Matter of Dependency of D.L.B.</i> , 186 Wn.2d 103, 376 P.3d 1099 (2016).....	6
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077 (1998).....	14
<i>Saucedo v. John Hancock Life & Health Ins. Co.</i> , 185 Wn.2d 171, 369 P.3d 150 (2016).....	10
<i>Senate Republican Campaign Comm. v. Pub. Disclosure of State of Wash.</i> , 133 Wn.2d 229, 943 P.2d 1358 (1997).....	12
<i>Utter v. Building Indus. Ass’n of Wash.</i> , 182 Wn.2d 398, 341 P.3d 953, cert. denied, 136 S. Ct. 79 (2015).....	13
<i>Voter Educ. Comm. v. Wash. State Pub. Disclosure Comm’n</i> , 161 Wn.2d 470, 166 P.3d 1174 (2007), cert denied, 553 U.S. 1079 (2008).....	14, 15, 17, 20
<i>Wash. State Republican Party v. Wash. State Pub. Disclosure Comm’n</i> , 141 Wn.2d 245, 4 P.3d 808 (2000).....	10
<u>Federal Cases</u>	
<i>Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett</i> , 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).....	20, 21

<i>Buckley v. Valeo</i> , 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).....	14, 21
<i>Citizens United v. Fed. Election Comm’n</i> , 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).....	19, 20, 22
<i>City of Chicago v. Morales</i> , 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999).....	15, 16
<i>Farris v. Ranade</i> , 584 Fed. Appx. 887 (9th Cir. 2014), <i>cert. denied</i> , 135 S. Ct. 1456 (2015).....	12
<i>Farris v. Seabrook</i> , 677 F.3d 858 (9th Cir. 2012)	12, 20
<i>Fed. Election Comm’n v. Wisconsin Right to Life, Inc.</i> , 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007).....	16, 18, 20, 22
<i>Florida Bar v. Went for It, Inc.</i> , 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).....	18
<i>Human Life of Wash., Inc. v. Brumsickle</i> , 624 F.3d 990 (9th Cir. 2010), <i>cert. denied</i> , 562 U.S. 1217 (2011).....	11
<i>NAACP v. Button</i> , 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).....	16, 18
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).....	16
<i>Sessions v. Dimaya</i> , __ U.S. __, __ S. Ct. __, __ L. Ed. 2d __, 2018 WL 1800371 (2018).....	15
<i>Virginia v. Hicks</i> , 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).....	18-19

Other Cases

<i>Coloradans for a Better Future v. Campaign Integrity Watchdog</i> , 409 P.3d 350 (Colo. 2018).....	11
---	----

Statutes

RCW 29A.04.091.....	6, 7, 9
RCW 29A.72.010.....	8, 9
RCW 29A.72.040.....	8
RCW 29A.72.050-.090	8
RCW 29A.72.100-.250	8
RCW 35.17.240-.360	8, 9

RCW 35.17.260	3, 9
RCW 35A.11.100.....	9
RCW 42.17A.005.....	6
RCW 42.17A.005(4).....	<i>passim</i>
RCW 42.17A.200.....	10
RCW 42.17A.255.....	1, 2, 12
RCW 42.17A.255(1).....	<i>passim</i>
RCW 42.17A.255(2)-(3).....	11
RCW 42.17A.470.....	19
RCW 42.17A.600.....	10
RCW 42.17A.755.....	4
RCW 42.17A.765.....	4

Codes, Rules and Regulations

WAC 390-16-060.....	12
WAC 390-37-020.....	4

Other Authorities

https://www.seattletimes.com/seattle-news/politics/grocery-group-hit-with-18m-campaign-financing-fine-over-food-labeling-measure/	19
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A. INTRODUCTION

This case addresses whether pro bono legal services provided by the Freedom Foundation (“Foundation”) constituted “independent expenditures” under the Fair Campaign Practices Act, RCW 42.17A (“FCPA”)¹ when no campaign or election ever occurred.

This is a straightforward question of statutory interpretation. Indeed, the State of Washington (“State”) concedes that Division II was compelled to ignore the literal language of the statutes at issue here to reach its interpretation. When objectively evaluated, as the trial court did without the State’s political bent,² the plain language of the statutes at issue here makes clear that *pro bono* legal services provided in connection with local ballot proposals that never reach the ballot are not reportable independent political campaign expenditures. But the Court of Appeals, Division II, instead adopted the State’s misreading of those ambiguous statutes, disregarding their language to suit its intended outcome.

Division II failed to acknowledge that the applicable statutes’ lack of clarity and potential for arbitrary enforcement meant that the statutes are void for vagueness; its interpretation of RCW 42.17A.005(4)/RCW

¹ RCW 42.17A.005(4)/RCW 42.17A.255.

² The trial court had a strong sense that the State’s efforts were politically-motivated. RP (5/13/16):7-8.

42.17A.255 resulted in the violation of the Foundation's First Amendment rights. As the State concedes, the First Amendment subjects *all* campaign finance regulations to exacting scrutiny, a standard that the State's actions here cannot survive given the absence of any actual campaign, much less an election.

B. ISSUES PRESENTED FOR REVIEW

1. Under RCW 42.17A.005(4)/RCW 42.17A.255, do *pro bono* legal services constitute a reportable independent campaign expenditure in connection with local ballot proposals that never actually reach the ballot and for which there is no campaign or traditional electioneering?

2. If those statutes apply to *pro bono* legal services provided in connection with legal issues relating to proposals that never reach the ballot, were the Foundation's due process rights violated because the statutes are void for vagueness, given the First Amendment implications of the statutes for the Foundation's exercise of its right of free speech?

C. STATEMENT OF THE CASE

Division II's opinion largely was correct in its recitation of the facts and procedures here. Op. at 3-4. However, certain facts bear emphasis. It is undisputed that the Foundation provided *pro bono* legal services to residents in three Washington municipalities (Sequim, Shelton, and Chelan) who sought to protect their First Amendment right to petition government through the local initiative process. CP 29.

The general outline of that local initiative process is as follows: petitioners gather a certain number of municipal voter signatures supporting

a proposed ordinance; once the petitioner collects enough signatures, that petitioner then submits the signed petitions to the city clerk, who certifies whether the petition has garnered the requisite number of signatures. Upon certification, the city governing bodies (city councils in Sequim and Chelan, a city commission in Shelton) must either enact the petition as a regular city ordinance, or submit it to the voters at the next ballot opportunity as a proposed initiative. *See* RCW 35.17.260.³

It is further undisputed that in all three cities, the city governing bodies refused to either adopt the petitions or place them on the ballot. Legal efforts to compel placement of the proposals on the ballot failed. Accordingly, the propositions never reached the ballot nor did a campaign ever occur. *See* CP 21-22. Rather, the Foundation simply provided *pro bono* legal services in pending legal actions. CP 8-9, 16-17, 21, 22.

Division II's opinion is devoid of the real reason the State of Washington ("State") filed the present action against the Foundation. The Foundation's union opponents in those jurisdictions filed complaints

³ The parties represented *pro bono* by the Foundation all requested that the local legislative bodies either adopt the ordinance or place it on the ballot; the former activity (lobbying a local legislative body) is entirely *unregulated* by RCW 42.17A.

against the Foundation.⁴ The State, in turn, claimed that the Foundation should have reported the *pro bono* legal services as “independent expenditures,” even though the respective city governing bodies and unions succeeded in court in preventing the Foundation’s clients’ petitions from ever becoming actual ballot propositions upon which the voters could act. Although the State sued the Foundation, CP 5-10, it never took action against the unions that also provided *pro bono* litigation support for the various municipalities in the very cases referenced above.⁵ The trial court

⁴ The State asserted below in its brief at 9 that its enforcement action was prompted by a “citizen complaint.” The complaint was filed by legal counsel for an entity called the Committee for Transparency in Elections, an organization fronting for unions who are allies of the Foundation’s opponents in the local initiative fights. CP 64-71. The Public Disclosure Commission (“PDC”) filing for this committee is exceedingly sketchy as to its membership or financial support. There is considerable irony in the fact that the complaint by this committee against the Foundation was filed in February 2015, but its own PDC reports show no expenses until August and then November of that same year. Essentially, the work this “transparency” committee put into filing the complaint was never reported to the public.

In Chelan, the Washington Council of County and City Employees Local Union 846 (AFL-CIO) appeared; in Shelton, the International Association of Machinists & Aerospace Workers, Woodworkers local lodge W-38 participated; in Sequim, it was International Brotherhood of Teamsters, Local 589. All unions were represented by the law firm of Reid, McCarthy, Ballew & Leahy, LLP. CP 29.

⁵ The State justifies its failure to take action against the unions for the very same conduct in the very same cases by claiming that it prosecutes misconduct by entities of all political stripes and contending that no other “citizen complaints” were made in connection with these local ballot campaigns and the expenditures in them. Br. of Appellant at 10, 34-35. The State’s arguments are self-serving and flatly misrepresent the PDC’s and the Attorney General’s broad authority to investigate and prosecute campaign finance reporting violations. *Nothing* in law required a “citizen complaint” before either agency could act. Under WAC 390-37-020, the PDC could act on its own; RCW 42.17A.755 confers explicit authority upon the Commission to investigate and punish RCW 42.17A violations. Moreover, RCW 42.17A.765 confers authority upon the Attorney General to investigate RCW 42.17A violations and to file civil enforcement actions in court. The State was not powerless to act against the Foundation’s opponents here; it made a conscious

dismissed the State's action, CP 102-03, and described its rationale for its decision. *See* Appendix.

D. ARGUMENT

This case addresses whether the Foundation's provision of legal *pro bono* services in connection with litigation on whether certain local ballot proposals could even reach the ballot constituted "independent expenditures" under RCW 42.17A.005(4)/RCW 42.17A.255(1) that must be reported to the PDC. Those statutes relate only to expenditures made in connection with actual "electioneering," if they are to be constitutional.

Were this Court to adopt Division II's erroneous interpretation of RCW 42.17A.005(4)/RCW 42.17A.255(1), applying those statutes far afield from actual electioneering, the Foundation's due process and First Amendment rights would be violated. This Court should avoid any constitutional invalidity of the statutes at issue by adhering to the statutes' plain language, as the Foundation advocates.

- (1) Under This Court's Principles of Statutory Interpretation, the Foundation Was Not Obligated to Report *Pro Bono* Legal Services As Independent Expenditures

Division II here acknowledges that it added language to a statute that the Legislature did not enact. Op. at 12-15. That violates this Court's

choice to prosecute only the Foundation even though *pro bono* legal services were provided on the other side of the very same case.

well-understood statutory interpretation protocol.⁶ It is up to the Legislature, not the courts, to write the statutes. Courts are not free to rewrite legislative language in the guise of interpreting it.

The plain language of RCW 42.17A.005(4)/RCW 42.17A.255(1) controls, and does not require the Foundation to report *pro bono* legal services as independent expenditures; the *specific language* of the statutes and the attendant definitional provisions in RCW 29A.04.091 and 42.17A.005 make clear that the State’s interpretation is unsupported.

First, RCW 42.17A.255(1) itself defines an “independent expenditure” as “any expenditure that is made in support of or in opposition to any candidate *or ballot proposition...*” (emphasis added). The term

⁶ The core requirement of this Court’s statutory interpretation regimen is that courts must execute the intent of the Legislature by implementing the plain language of a statute. *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep’t of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the courts’ role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006). Division II bends these traditional rules to claim that it may ignore statutory language or avoid what it claims is an “inconsistency” or “strained results.” Op. at 9. But in doing so, it ignores this Court’s precedent. *See Five Corners Family Farmers v. State*, 173 Wn.2d 296, 310-11, 268 P.3d 892 (2011) (Court directs that canon about unlikely or absurd results be applied “sparingly” because it refuses to give effect to language Legislature actually used and adds language by courts to statute; separation of powers concerns are implicated); *In Matter of Dependency of D.L.B.*, 186 Wn.2d 103, 119, 376 P.3d 1099 (2016) (“We may not invoke that canon just because we question the wisdom of the legislature’s policy choice.”).

“ballot proposition” is a legal term of art under RCW 42.17A. RCW 42.17A.005(4) specifically defines a “ballot proposition.” *See* Appendix.

By its terms, RCW 42.17A.005(4) requires a “ballot proposition” to be a “measure.” That term is further defined in RCW 29A.04.091 which states: “‘Measure’ includes any proposition submitted to the voters.” Thus, a measure must actually be one *submitted to the voters* (and the statute contemplates that is to the voters *statewide*, not the voters in a municipality, as here).

The petitions submitted to the governing bodies of the cities of Sequim, Shelton, and Chelan were not “ballot propositions” under that aspect of RCW 42.17.005(4) because the petitions were not submitted to the voters and were never “measures” as defined in RCW 42.17A.005(4)/RCW 29A.04.091. Because all of the petitions were precluded from reaching the ballot, they were never referred to the voters and, accordingly, never became “measures.” RCW 29A.04.091. In other words, as the trial court noted, RP (5/13/16):3-4, submission to the voters is a statutory condition precedent to becoming a “measure” such that the reporting requirements under RCW 42.17A were not and are not applicable where the local ballot questions were never submitted to the voters.

Division II notes the second facet of the definition of ballot proposition in RCW 42.17A.005(4). Op. at 11-16. It states that a local ballot proposition encompasses any local initiative, recall, or referendum *proposed* to be submitted to the voters. But that second facet only applies the definition “from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures.”

The petitions were not “ballot propositions” under RCW 42.17A.005(4) because the signatures for a local ballot initiative are gathered *prior* to submission to the local official, making the statute at the heart of the State’s complaint clearly inapplicable to the facts of this case.⁷ None of the state-wide measure procedures apply to the local initiative process. *See* RCW 35.17.240-360. Those procedures require initial submission to the State *prior* to circulation of petitions for signatures. By contrast, for local ballot proposal, signatures are gathered to support an

⁷ By contrast, state ballot initiatives follow the procedures described in RCW 29A.72: filing of a proposed question with the state election official (RCW 29A.72.010), assignment of a proposition number (RCW 29A.72.040), and development of a ballot title (RCW 29A.72.050-.090), *followed by* circulation of petitions for signature (RCW 29A.72.100-.250). The statutory definition of “ballot proposition” in RCW 42.17A.005(4) fits within this statewide initiative framework, wherein a “ballot proposition” *may circulate for signatures only after* the state code reviser has certified review and provided suggested revisions to the sponsor, *after* the Secretary of State gives the proposed measure a serial number, *after* the Attorney General creates a ballot title, *after* interested parties have disputed and adjudicated the ballot title, but *before* the sponsor/petitioner begins gathering signatures. *Accord* RCW 42.17A.005(4) *with* RCW 29A.72.010 *et seq.*

ordinance petition *before* it is submitted to a local official.⁸ Following the submission of the signatures on the petition, upon confirmation of the sufficiency of signatures, the petition is referred to the city governing body which may then either adopt the proposal as an ordinance or refer the petition to the citizens at an election. *See* RCW 35.17.260. Because a “ballot proposition” is defined under RCW 42.17A.005(4) as an issue which is submitted to the secretary of state prior to the gathering of signatures (RCW 29A.72.010), the local initiative can never qualify as a “proposition.” Because there was never a “ballot proposition” as defined in RCW 42.17A.255(1), independent campaign expenditures reporting is not triggered. Only when the petition is submitted to the voters does it become a “measure” under RCW 29A.04.091. That is the plain language of the statute. Instead, Division II disregarded these very different procedures to invoke reporting requirements that were never intended to apply to the facts here.

Moreover, *pro bono* legal services are not an independent political campaign expenditure in the absence of any political campaign. They are

⁸ The statutes governing the power of local initiative vary slightly depending upon whether the local jurisdiction is a non-charter code city, a commission city, a first class city or a charter country. *See* RCW 35.17.240-.360; RCW 35A.11.100. However, in all cases, signatures were gathered on petitions *prior* to submission to the local official responsible under the statute for receiving and processing local initiatives.

pro bono legal services offered in connection with matters in litigation. Rather than follow the language of the statute that contemplated reporting of electioneering expenses as independent expenditures, Division II made a *normative decision* as to what is or is not a reasonable decision by the Legislature. Op. at 11-16.⁹ It decided that the statutes must apply to all independent expenditures in local ballot cases and then worked backward to fulfill its objective. In doing so, Division II effectively (and unconstitutionally) rewrote RCW 42.17A.005(4)/RCW 42.17A.255(1), something this Court does not permit.¹⁰

The Foundation's interpretation of RCW 42.17A.255(1) is further reinforced by the statute itself, the PDC's own interpretation of it, and constitutional mandates that statutes on independent expenditures focus on

⁹ It is equally "reasonable" that the Legislature declined to apply the FCPA to expenditures made on local proposals that never reached the ballot, given the fact that such proposals might be enacted by local legislative bodies and lobbying of those bodies is *unregulated*, and the constitutional imperative that independent expenditure reporting is confined to electioneering. Indeed, the FCPA is replete with situations in which campaign finance activity is treated differently at state and municipal level – there is a no regulation whatsoever of municipal lobbying, either grassroots or direct (RCW 42.17A.600 *et seq.*) and the law completely exempts from *all* of its provisions cities smaller than 5,000 people (RCW 42.17A.200).

¹⁰ *Saucedo v. John Hancock Life & Health Ins. Co.*, 185 Wn.2d 171, 180, 369 P.3d 150 (2016) ("We have no authority to read a new exception into the statute on policy grounds."). *See also, Wash. State Republican Party v. Wash. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 280-81, 4 P.3d 808 (2000) (courts must not strain to interpret statute to save its constitutionality; rather, they must interpret statute reasonably and not imply language not found in the statute). The State essentially conceded in its brief at 25 that the Legislature did not enact the language it now asks this Court to insert into the statutes at issue. It suggests that "it is clear what the Legislature was trying to do..." *Id.*

actual electioneering. RCW 42.17A.255(2)-(3) make clear that expenditures must relate to a *campaign*, i.e. electioneering. Part (2) of the statute specifically indicates that the expenditures must be made in the “election campaign.” Part (3) sets out time deadlines for reporting focused on *election day*.

Federal courts have determined that RCW 42.17A.005(4)/RCW 42.17A.255(1) apply only to *electioneering*. Those statutes’ “[d]isclosure requirements are triggered only if, *in a given election*, such an expenditure equals more than \$100 or if its value cannot reasonably be estimated.” *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 998 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011) (emphasis added). Thus, the Ninth Circuit concluded that reporting requirements are triggered only if an entity makes independent expenditures *during an election campaign*. In each of these three cities, there was never an election campaign.

The analysis the Foundation advocates was adopted by the Colorado Supreme Court in *Coloradans for a Better Future v. Campaign Integrity Watchdog*, 409 P.3d 350 (Colo. 2018) with regard to Colorado’s campaign laws that are analogous to Washington’s. There, the court ruled unanimously that pro bono legal services are not contributions under Colorado’s campaign reporting law that is analogous to Washington’s.

The State contended below that courts should give great weight to

the PDC’s “position” on local ballot propositions, br. of appellant at 26-29, but this contention is flawed.¹¹ First, apart from general pronouncements the State cites, it appears that the PDC has not issued any regulation, pertaining to RCW 42.17A.005(4)/RCW 42.17A.255(1). The State’s reference to a PDC ruling on a recall action as somehow being relevant to this case, CP 54-57, is belied by a court decision barring enforcement of the RCW 42.17A contribution limits as to recall committees in *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012) (granting preliminary injunction invalidating \$800 statutory contribution limit in recall campaigns on First Amendment grounds).¹² Further, the PDC’s own reporting requirements support the Foundation’s view.¹³

¹¹ An agency’s erroneous interpretation of a statute is not entitled to any deference by this Court, whose statutory interpretation responsibilities are plenary. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715-16, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007). In *Senate Republican Campaign Comm. v. Pub. Disclosure of State of Wash.*, 133 Wn.2d 229, 240-41, 244, 943 P.2d 1358 (1997), this Court rejected a prior determination of the PDC on a statute’s interpretation. It also rejected an argument in favor of broad reading of the FCPA, holding that narrow interpretation better comports with voter intent.

¹² The Ninth Circuit there granted a preliminary injunction holding the statute limiting contributions by independent committees in a recall campaign was likely unconstitutional under the First Amendment. *Id.* at 866-67. The Ninth Circuit subsequently affirmed a district court ruling concluding that the statute was unconstitutional as applied. *Farris v. Ranade*, 584 Fed. Appx. 887 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1456 (2015).

¹³ The PDC’s reporting form (“Forms for report of independent expenditures and electioneering communications”), WAC 390-16-060, implementing RCW 42.17A.255, provides that a proposition *number* must be included on the C-6 independent expenditures reporting form. Here, because the ballot questions were never submitted to the voters, no proposition numbers were ever issued for any of the citizens’ petitions. The very form the State insisted that the Foundation should have filed would be incomplete because essential information required on the Form C-6 – the ballot proposition numbers – were never issued

In short, the trial court properly dismissed the State’s complaint because the statutes upon which it is based are inapplicable to the facts of this case; Division II’s interpretation of the applicable statutes applied them outside the electioneering context and that is improper. *Pro bono* legal services to place a measure on the ballot do not constitute an independent *campaign* expenditure when the measure never reaches the ballot. Division II’s determination that *pro bono* legal services are an independent *campaign* expenditure will chill their provision.

(2) Division II’s Interpretation of an Independent Expenditure Violates the Foundation’s Constitutional Rights

If Division II’s statutory interpretation is allowed to stand, then the statutes at issue are constitutionally defective.¹⁴ Its interpretation makes clear that the statutes at issue violate the Foundation’s constitutional right to due process because they are vague. When an appellate court must insert language into a statute that purports to regulate First Amendment activity in order to reach its conclusion about its interpretation, the statute is vague, and violates the First Amendment. Moreover, Division II’s interpretation

and never existed. Even the instructions to the C-6 form demonstrate that the report was inapplicable to the Foundation.

¹⁴ This Court must construe the statutes here to avoid such constitutional problems. *Utter v. Building Indus. Ass’n of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953, *cert. denied*, 136 S. Ct. 79 (2015) (“We construe statutes to avoid constitutional doubt.”).

violates the First Amendment by allowing government regulation of activity unrelated to actual campaigns and electioneering.

(a) The Statutes Are Void for Vagueness

The trial court noted that the statutes were difficult to work through as they were “ambiguous and vague.” RP (5/13/16):23. Division II erred in not agreeing. Op. at 22-24. Ultimately, Division II’s interpretation of those statutes is convoluted.¹⁵ Indeed, Division II concedes that the second facet of RCW 42.17A.005(4) is “ambiguous,” but then proceeds to interpret it, discerning its “only reasonable interpretation” by ignoring express statutory language. Op. at 12-15.

In the First Amendment setting, the State bears the burden of justifying restrictions on speech. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 522 U.S. 1077 (1998). Compelled disclosure statutes, as here, are subject to “exacting scrutiny” and there must be a “relevant correlation” or “substantial relationship between the ostensible government interest and the information to be disclosed. *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *Voter Educ. Comm. v. Wash. State Pub. Disclosure*

¹⁵ The State itself concedes in its brief at 25 that the Legislature betrayed an erroneous understanding of the law of local government ballot measures in enacting the statutes at issue here.

Comm'n, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007), *cert denied*, 553 U.S. 1079 (2008).¹⁶ The State cannot meet this burden.

RCW 42.17A.005(4)/RCW 42.17A.255(1) are constitutionally vague where they cannot be reasonably understood by persons allegedly subject to their provisions. A statute can be impermissibly vague for either of two independent reasons. First, it fails to provide people of ordinary intelligence a reasonable opportunity to understand what it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” (Prosecution under a loitering ordinance held invalid). *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). Both facets of the *Morales* void-for-vagueness analysis are implicated here. With regard to the capacity for arbitrary enforcement of a vague statute, Justice Gorsuch recently noted in *Sessions v. Dimaya*, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___, 2018 WL 1800371 (2018) at *16: “Vague laws invite arbitrary power.”

This Court in *Voters Educ. Committee*, 161 Wn.2d at 484-85, affirmed that statutes are unenforceable on due process grounds under the Fourteenth Amendment if persons of common intelligence differ at their application or must guess at their meaning. Even greater specificity is

¹⁶ The State conceded in its answer to the Foundation’s petition for review that exacting scrutiny is the applicable standard here. Answer at 18.

necessary if First Amendment rights are at stake. In this political context, the First Amendment dictates that there be a precision of regulation and any ambiguities in the statutes must “be resolved in favor of adequate protection of First Amendment rights.” *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) and that the Court “must give the benefit of any doubt to protecting rather than stifling speech.” *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)).

Moreover, given the second facet of the First Amendment vagueness test discussed in *Morales* – the encouragement of arbitrary enforcement – that problem is present here where the PDC arbitrarily enforced the FCPA, applying it *only* to the Foundation.¹⁷

Simply put, RCW 42.17A.005(4)/RCW 42.17A.255(1) are unconstitutionally vague and unenforceable as the trial court concluded. At a minimum, the Foundation and the State offered reasonable competing interpretations of those statutes. No reasonable person can know how to

¹⁷ The State has a bias against the Foundation, ignoring the plain statutory language, and singling out the Foundation for an enforcement action while refusing to take any action against the unions that were in opposition to the Foundation in litigation involving local ballot proposals *who did the exact same thing as the Foundation in the very same cases*. The State’s claim of its universal commitment to “transparency” is undermined by its prosecution of a non-profit Foundation supporting *pro bono* lawyers with one point of view while refusing to prosecute identical behavior by unions holding the opposite view.

conform to the applicable statutory requirements. Where an able and experienced trial judge believed the statutes at issue to be “confusing” and vague, and it was necessary for Division II to spend 11 pages of its opinion explaining why its statutory interpretation that ignored express language must control, the statute is void for vagueness under due process principles, given First Amendment implications of the statutes.

(b) *Pro Bono Legal Services Do Not Involve Electioneering Subject to State Regulation*

An equally compelling reason as to why Division II’s decision on the Foundation’s First Amendment rights was erroneous is that the court misapplied the requisite test for a statute purporting to regulate political speech. Op. at 16-21.

Applying United States Supreme Court precedent, this Court has acknowledged that a disclosure statute is analyzed to determine if disclosure has a relevant relationship to the governmental interest at issue. *Voters Educ. Comm.*, 161 Wn.2d at 482. But the public policy that the State asserts as the basis for its interpretation of RCW 42.17A.005(4)/RCW 42.17A.255(1) is *vastly* outweighed by countervailing public policy principles. Division II’s interpretation of the statutes inevitably intrudes upon the Foundation’s free speech rights under the First Amendment.

First, government regulation of speech, and, in particular, speech in the exercise of *pro bono* legal services, is highly disfavored even when it is content neutral; the United States Supreme Court has long held enhanced First Amendment protections for public interest law firms or organizations supporting *pro bono* lawyers for whom, “litigation is not a technique for resolving private differences” but a “form of political expression” and “political association.” *NAACP*, 371 U.S. at 429, 431.¹⁸

Division II asserted that reporting *pro bono* legal services to the PDC will allegedly not prevent the Foundation from bringing legal actions. Op. at 20-21. But (even if this were a constitutionally supported justification for the Statute, which it is not) the court overlooks the fact that the reporting requirements of RCW Title 42.17A applied to *pro bono* legal services will chill *pro bono* advocacy for groups seeking to secure a place on the ballot for local proposals.¹⁹ Division II’s interpretation will likely

¹⁸ See also, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 634, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (“There are circumstances in which we will afford speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer.”). The specific application of the First Amendment to public interest law firms is but a specific application of the larger First Amendment principle that campaign finance regulations must be clear and unambiguous to survive the strict scrutiny applied to all government restrictions on speech. *Wisconsin Right to Life*, 551 U.S. at 469 (courts must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect and give the benefit of any doubt to protecting rather than stifling speech.).

¹⁹ “Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119,

ultimately mandate disclosure not only of the entity making the “contribution” of *pro bono* legal services, but would require reporting by contributors to the entity making independent expenditures. RCW 42.17A.470.²⁰ Division II’s interpretation of RCW 42.17A.005(4)/RCW 42.17A.255(1) is more potentially intrusive upon the practice of law and attorney-client privilege than it would appear at first blush.²¹

More critically, Division II misstates the governmental interest at stake here. Op. at 18-19. First, as noted *supra*, regulation of independent *campaign* expenditures burden political activity are subject, at a minimum, to exacting scrutiny by the courts. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 338-39, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753

123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (enforcement of an overbroad law may chill constitutionally-protected speech). In particular, the requirement of reporting independent expenditures may necessarily require a breach of the attorney-client privilege. In some instances, a client may not wish to publicly reveal its relationship with counsel. *See, e.g., Dietz v. Doe*, 135 Wn.2d 835, 935 P.2d 611 (1997).

²⁰ *See* Jim Brunner, *Grocery group fined \$18M in fight against GMO food-labeling initiative*, SEATTLE TIMES, November 2, 2016, <https://www.seattletimes.com/seattle-news/politics/grocery-group-hit-with-18m-campaign-financing-fine-over-food-labeling-measure/> (last visited Nov 4, 2016) (noting imposition of \$18 million fine against for not revealing contributions by various organizations to trade association opposing a ballot measure).

²¹ The offer of *pro bono* legal services in connection with pending litigation is straightforward. But what if the services were offered pre-litigation? If the Foundation had undertaken legal research on the local ballot processes in the three cities at issue here before the litigation was filed, Division II’s opinion would require the revelation of such an “independent campaign expenditure.” But the mere reporting of such an expenditure would have revealed key privileged information of the Foundation’s taxpayer clients to the cities and unions – the possibility that litigation was contemplated. The court’s interpretation offers too many opportunities for mischief.

(2010); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734-35, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011). The burden was on the State to justify such a restriction on speech. *Voters Educ. Comm.*, 161 Wn.2d at 481.

Second, notwithstanding any interest in “transparency” as Division II conceives of it, the State’s regulatory authority over political speech under the First Amendment by truly independent political organizations is profoundly limited. Under *Citizens United*, the government may not ban independent expenditures and under *Farris v. Seabrook*, it may not even impose dollar limits on such expenditures. Moreover, although *Citizens United* recognized that disclosure and reporting requirements may not violate First Amendment standards, 558 U.S. at 368-71, such requirements may apply *only* to electioneering communications, speech that is the functional equivalent of express political advocacy. *Id.* at 368; *Wisconsin Right to Life, Inc.*, 551 U.S. at 469-71. *Pro bono* legal services relating to whether an election campaign may occur, far from being “electioneering,” certainly do not constitute express political advocacy allowing the State to regulate it.

Further, “transparency” is not a sufficiently significant government interest, such as the avoidance of corruption or educating voters in an election, to allow state regulation of *pro bono* legal services when no

campaign or election occurs. *Arizona Free Enterprise Club PAC*, 564 U.S. at 754; *Buckley*, 424 U.S. at 64-68 (reporting requirements may infringe on free speech, privacy of association and are subject to “exacting scrutiny” requiring a substantial government interest to justify regulation). In the foundational campaign finance case in American jurisprudence, the *Buckley* Court identified three interests of sufficient “magnitude” which would permit a campaign finance regulation to survive exacting scrutiny; none of which are present in the instant case and only one of which is worth discussing. “First, disclosure provides the *electorate* with information” that assists *voters* in “plac[ing] each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches [and]. .. alert[ing] the *voter* to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” (emphasis added). As there is no election in this case there is, by definition, no electorate nor voters to educate. The State’s enforcement action impermissibly infringes on the Foundation’s free speech and privacy of association rights and the State has demonstrated by its own selective enforcement in this case that the government “interest” is weak and cannot survive exacting scrutiny.

Pro bono legal services simply are not electioneering communications precisely because there was no “election” in any of three

municipalities here. Division II did not cite to a single case that holds *pro bono* legal services to be the functional equivalent of express political advocacy subject to regulation; it did not establish the essential predicate for regulation established in *Citizens United* and *Wisconsin Right to Life*.

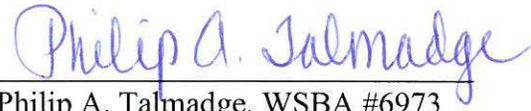
E. CONCLUSION

Misapplying this Court's statutory interpretation principles, Division II improperly interpreted RCW 42.17A.005(4)/RCW 42.17A.255(1). The Foundation's expenditure for *pro bono* legal services on local ballot proposals that never reached the ballot were not independent political campaign expenditures as contemplated by those statutes. Division II's strained statutory interpretation of RCW 42.17A.005(4)/RCW 42.17A.255(1) also violates the Foundation's due process and First Amendment rights in providing the *pro bono* legal services at issue here.

The trial court correctly dismissed the State's politically-motivated complaint that failed to meet the requirements of RCW 42.17A.005(4)/42.17A.255(1). This Court should affirm the trial court's decision and award costs on appeal to the Foundation.

DATED this 20th day of April, 2018.

Respectfully submitted,



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APPENDIX

I've determined that 12(b)(6) appears to apply. I am going to grant Evergreen Freedom Foundation's motion to dismiss. My bases for doing so is I find the statutes here to be ambiguous and vague, and I had difficulty working through these and understanding the position of the parties' because there is not a clearly stated policy regarding this kind of a situation which involves municipal courts. I do not find that the State has sufficiently established that this situation involved a ballot measure that gave them the opportunity to require that such be reported. And when I say "such," I'm talking about legal services that were provided on a pro bono basis before the matter ever went to any kind of vote.

I believe that campaign finance regulations are important. It is clear that there has been a great deal of litigation over the last years in regard to campaign finance. It's an important topic for the people of this state and this court, and others like it are often involved in litigation involving campaign financing regulations; nevertheless, I believe that unless there is clear and unambiguous guidance in the statutes that people cannot be held to have violated those regulations. I'm simply not convinced that the statute means what the State says that it does in regard to this particular type of situation.

RP (5/13/16):23-24.

RCW 42.17A.005(4):

"Ballot proposition" means any "measure" as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures."

RCW 42.17A.255(1):

For the purpose of this section the term “independent expenditure” means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17A.200, 42.17A.235, and 42.17A.240. “Independent expenditure” does not include: An internal political communication primarily limited to the contributors to a political party organization or political action committee, or the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. “Volunteer services,” for the purposes of this section, means services or labor for which the individual is not compensated by any person.

November 7, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

EVERGREEN FREEDOM FOUNDATION,
d/b/a FREEDOM FOUNDATION,

Respondent.

No. 50224-1-II

PART PUBLISHED OPINION

MAXA, J. – The State of Washington appeals the CR 12(b)(6) dismissal of its regulatory enforcement action against the Evergreen Freedom Foundation (the Foundation). The State filed suit after learning from a citizen complaint that the Foundation had provided pro bono legal services in support of local initiatives in Sequim, Chelan, and Shelton without reporting the value of those services to the Public Disclosure Commission (PDC).

RCW 42.17A.255(2) requires a person to report to the PDC certain “independent expenditures,” defined in RCW 42.17A.255(1) to include any expenditure made in support of a “ballot proposition.” RCW 42.17A.005(4) defines “ballot proposition” to include any initiative proposed to be submitted to any state or local voting constituency “from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures.”

The language of RCW 42.17A.005(4) tracks the procedure for statewide initiatives, in which a proposition must be filed with election officials before any signatures are solicited. However, in many local jurisdictions – including in Sequim, Chelan, and Shelton – the initiative procedure requires that the appropriate number of signatures be obtained before a proposition is filed with election officials.

Here, the Foundation’s pro bono legal services were provided after the Sequim, Chelan, and Shelton initiatives had been filed with local election officials but also after the initiatives had been circulated for signatures. The State argues that these initiatives were “ballot propositions” under the RCW 42.17A.005(4) definition. The Foundation argues, and the trial court ruled, that the initiatives were not “ballot propositions” when the legal services were provided because the initiatives already had been circulated for signatures. Under the Foundation’s argument and the trial court’s ruling, a local initiative filed in a jurisdiction where signatures must be obtained before filing could never constitute a “ballot proposition.”

We hold that (1) under the only reasonable interpretation of RCW 42.17A.005(4), the Sequim, Chelan, and Shelton initiatives qualified as “ballot propositions” because the Foundation provided services after the initiatives had been filed with the local election officials, regardless of the additional qualification that the proposition had to be filed before its circulation for signatures; and (2) the disclosure requirement for independent expenditures under RCW 42.17A.255(2) does not violate the Foundation’s First Amendment right to free speech. In the unpublished portion of this opinion, we reject the Foundation’s additional arguments.

Accordingly, we reverse the trial court's dismissal of the State's regulatory enforcement action regarding the Sequim, Chelan, and Shelton initiatives, and we remand for further proceedings.

FACTS

Proposition Proposals

In 2014, groups of citizens in Sequim, Chelan, and Shelton prepared initiatives concerning collective bargaining between municipalities and the bargaining representatives of their employees, circulated the initiatives, and obtained signatures in their communities. The proponents then submitted the initiatives and signatures to all three cities. The Sequim city council failed to take any action. The Chelan city council directed its city attorney to file an action to determine the initiative's validity. The Shelton city commission declared the initiatives invalid and took no further action.

In response, the proponents of each initiative filed a lawsuit against their respective cities. The lawsuits requested that the initiatives be placed on the ballot to be voted on by city residents. In each case, the proponents were represented by attorney staff members of the Foundation. Apparently, attorneys representing various labor unions opposed each lawsuit. All three lawsuits were dismissed and none were appealed.

The State's Lawsuit

In October 2015, the State filed a complaint against the Foundation. The complaint alleged that RCW 42.17A.255 required the Foundation to report to the PDC the legal services provided by its staff in support of the initiatives. The State sought the imposition of a civil penalty as well as temporary and permanent injunctive relief.

The Foundation moved to dismiss under CR 12(b)(6) for failure to state a claim. The trial court granted the Foundation's motion and dismissed the State's complaint. The court reasoned that the applicable statutes were ambiguous and vague as to whether the Foundation was obligated to report its legal services.

The State appeals the trial court's dismissal order.

ANALYSIS

A. STANDARD OF REVIEW

The Foundation filed its motion to dismiss the State's complaint under CR 12(b)(6), which provides that a complaint may be dismissed if it fails to state a claim upon which relief can be granted. We review a trial court's CR 12(b)(6) order dismissing a claim de novo. *J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wn.2d 95, 100, 359 P.3d 714 (2015). We accept as true all facts alleged in the plaintiff's complaint and all reasonable inferences from those facts. *Id.* Dismissal under CR 12(b)(6) is appropriate if the plaintiff cannot allege any set of facts that would justify recovery. *Id.*

B. STATUTORY BACKGROUND

1. Fair Campaign Practices Act Reporting Requirements

In 1972, Washington citizens passed Initiative 276, which established the PDC and formed the basis of Washington's campaign finance laws. *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 479, 166 P.3d 1174 (2007). Initiative 276 is codified in portions of Chapter 42.17A RCW, which is known as the Fair Campaign Practices Act (FCPA).

RCW 42.17A.001 sets forth the declaration of policy of the FCPA. The public policy of the state includes:

(1) That *political campaign* and *lobbying contributions and expenditures* be fully disclosed to the public and that secrecy is to be avoided.

.....

(5) That public confidence in government *at all levels* is essential and must be promoted by all possible means.

.....

(10) That the *public's right to know of the financing of political campaigns* and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

RCW 42.17A.001 (emphasis added). In addition, RCW 42.17A.001 states that “[t]he provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying.”

The FCPA requires candidates and political committees to report to the PDC all contributions received and expenditures made. RCW 42.17A.235(1). A “political committee” includes any organization receiving donations or making expenditures in support of or in opposition to a ballot proposition. RCW 42.17A.005(37).

A person who violates any provision in chapter 42.17A RCW may be subject to a civil penalty of not more than \$10,000 for each violation. RCW 42.17A.750(1)(c). In addition, a court may compel the performance of any reporting requirement. RCW 42.17A.750(1)(h). The attorney general and local prosecuting authorities “may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17A.750.” RCW 42.17A.765(1). The PDC also may refer certain violations for criminal prosecution. RCW 42.17A.750(2).

2. Statewide and Local Initiative Process

The requirements for reporting expenditures under chapter 42.17A RCW involve the processes for submitting ballot initiatives at the statewide and local levels. The initiative processes at each level are established by state law and involve somewhat different requirements.

At the state level, chapter 29A.72 RCW governs the process for submitting initiatives to the voters. A person who desires to submit a “proposed initiative measure” to the people must file a copy of the proposed measure with the secretary of state. RCW 29A.72.010. After review by the office of the code reviser, the proponent must file the proposed measure along with a certificate of review with the secretary of state for assignment of a serial number. RCW 29A.72.020. The attorney general also formulates a ballot title for the proposed initiative. RCW 29A.72.060.

After the proposed initiative has been filed with the secretary of state and a ballot title has been prepared, the proponent can prepare petitions for signature. RCW 29A.72.100, .120. The proponent must obtain a certain number of signatures from legal voters, after which the petitions are “submitted to the secretary of state for filing.” RCW 29A.72.150. The secretary of state then verifies the signatures. RCW 29A.72.230. If the petition is sufficient, the secretary of state places the proposed initiative on the ballot. RCW 29A.72.250.

At the local level, RCW 35.17.260 allows ordinances to be initiated by petition of a city’s registered voters filed with the city commission. But the initiative must receive a certain number of signatures from registered voters before being filed. RCW 35.17.260. The city clerk ascertains whether the petition is signed by a sufficient number of registered voters. RCW

35.17.280. The commission must decide whether to pass the proposed ordinance or submit the proposed ordinance to a vote of the people. RCW 35.17.260(1)-(2).

Chapter 35.17 RCW applies to cities incorporated under a commission form of government. *See* RCW 35.17.010. Although Sequim, Chelan, and Shelton are noncharter “code cities” subject to title 35A RCW,¹ RCW 35A.11.100 provides that, with a few exceptions, the initiative process set forth in chapter 35.17 RCW also applies to code cities.²

Under the statutes discussed above, the procedure for submitting statewide and local proposed initiatives is similar, but the first two preliminary steps are reversed. For a statewide initiative, the proponent must file the proposed measure and then circulate the measure for signatures. For a local initiative, the proponent must circulate the proposed measure for signatures and then file the measure.

C. REPORTING OF INDEPENDENT EXPENDITURES

The State argues that the trial court erred in dismissing its complaint for failure to state a claim because the Sequim, Chelan, and Shelton proposed initiatives qualified as “ballot propositions” under RCW 42.17A.005(4), and therefore the Foundation was required to report to the PDC its independent expenditures in support of the initiatives. We agree and hold that the

¹ Sequim Municipal Code 1.16.010; Chelan Municipal Code 1.08.010; Shelton Municipal Code (SMC) 1.24.010. Shelton also operates under a commission form of government. SMC 1.24.020.

² First class cities that have adopted a charter may elect to follow a different process as provided in the charter. RCW 35.22.200. For example, the initiative process in Seattle mirrors the statewide requirement and requires an initial filing with the city clerk before signatures are collected. *See* SEATTLE CITY CHARTER art. IV, § 1(B); Seattle Municipal Code 2.08.010.

local initiatives qualified as “ballot propositions” once they were filed with the appropriate election officials.

1. Statutory Interpretation Principles

Statutory interpretation is a matter of law that we review de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislature’s intent. *Id.* at 762. To determine legislative intent, we first look to the plain language of the statute. *Id.* We consider the language of the provision in question, the context of the statute in which the provision is found, and related statutes. *Ass’n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015).

If the statute defines a term, we must apply the definition provided. *Nelson v. Duvall*, 197 Wn. App. 441, 452, 387 P.3d 1158 (2017). To discern the plain meaning of undefined statutory language, we give words their usual and ordinary meaning and interpret them in the context of the statute in which they appear. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014). And “[r]elated statutory provisions must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statute.” *Koenig v. City of Des Moines*, 158 Wn.2d 173, 184, 142 P.3d 162 (2006).

If a statute is unambiguous, we apply the statute’s plain meaning as an expression of legislative intent without considering other sources of such intent. *Jametsky*, 179 Wn.2d at 762. If the language of the statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. *Id.* We resolve ambiguity by considering other indications of legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Id.*

We generally assume that the legislature meant precisely what it said and intended to apply the statute as it was written. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). When interpreting a statute, each word should be given meaning. *Id.* And when possible, statutes should be construed so that no clause, sentence, or word is made superfluous, void, or insignificant. *Id.* However, in special cases we can ignore statutory language that appears to be surplusage when necessary for a proper understanding of the provision. *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 859, 774 P.2d 1199, 779 P.2d 697 (1989); *see also Am. Disc. Corp. v. Shepherd*, 160 Wn.2d 93, 103, 156 P.3d 858 (2007).

In addition, when construing two statutes, we assume that the legislature did not intend to create an inconsistency. *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 793, 357 P.3d 1040 (2015). Whenever possible, we read statutes together to create a harmonious statutory scheme that maintains each statute's integrity. *Id.* at 792.

Finally, we can avoid a literal reading of a statute if it leads to strained, unlikely, or absurd consequences. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 443, 395 P.3d 1031 (2017). "We may resist a plain meaning interpretation that would lead to absurd results." *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 834, 399 P.3d 519 (2017); *see also Chelan Basin Conservancy v. GBI Holding Co.*, 188 Wn.2d 692, 705-08, 399 P.3d 493 (2017) (avoiding an absurd interpretation that would render a statute practically meaningless).

2. Statutory Language

RCW 42.17A.255(2) requires any person who makes an "independent expenditure" to file a report with the PDC if the expenditure by itself or added to all other such expenditures

No. 50224-1-II

made during the same “election campaign” equals \$100 or more. RCW 42.17A.255(1) defines the term “independent expenditure” as “any expenditure that is made in support of or in opposition to any candidate or *ballot proposition* and is not otherwise required to be reported” under other provisions, with certain exceptions. (Emphasis added).

RCW 42.17A.005(4) defines “ballot proposition” to mean

any “measure” as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and *after the time when the proposition has been initially filed* with the appropriate election officer of that constituency *before its circulation for signatures*.

(Emphasis added.) RCW 29A.04.091 defines “measure” to include “any proposition or question submitted to the voters.”

RCW 42.17A.255(2) also refers to an “election campaign.” RCW 42.17A.005(17) defines “election campaign” to include “any campaign in support of, or in opposition to . . . , a ballot proposition.”

3. Interpretation of RCW 42.17A.005(4)

a. Two Prongs of “Ballot Proposition” Definition

Under RCW 42.17A.005(4), there are two separate prongs of the definition of “ballot proposition.” First, a ballot proposition is a “measure,” RCW 42.17A.005(4), which under RCW 29A.04.091 is “any proposition or question submitted to the voters.” In other words, under this prong an initiative becomes a “ballot proposition” only after it is actually placed on the ballot. The parties agree that the first prong does not apply here because none of the initiatives at issue were submitted to the voters.

Second, a ballot proposition is a proposition that is “proposed to be submitted to the voters” of any state or local voting constituency, but only “from and after the time when the proposition [1] has been initially filed with the appropriate election officer of that constituency [2] before its circulation for signatures.” RCW 42.17A.005(4). The question here is whether this second prong applies to the Sequim, Chelan, and Shelton local initiatives.

b. Application to State Initiatives

For statewide initiatives, application of the second prong of the “ballot initiative” definition is straightforward and unambiguous. A state initiative must be submitted to the secretary of state both before signature collection can begin, RCW 29A.72.010, and again after the required number of signatures are collected. RCW 29A.72.150. Because there are two points at which “filing” must occur, the phrase “before its circulation for signatures” clarifies when an initiative becomes a “ballot proposition” – from and after the first filing, which is the one that occurs before circulation for signatures.

c. Application to Local Initiatives

For local initiatives, the second prong of the definition of “ballot initiative” is confusing. Unlike for statewide initiatives, in many local jurisdictions signatures must be gathered before any filing occurs. RCW 35.17.260. Therefore, for those local initiatives there can be no period that is both after filing but before circulation for signatures.

The Foundation argues that under the plain language of RCW 42.17A.005(4), the phrase “before circulation for signatures” means that the second prong of the “ballot initiative” definition can never apply to local initiatives in those jurisdictions – including in Sequim, Chelan, and Shelton – where obtaining signatures is required before a proposition can be filed.

Therefore, the Foundation asserts that only the first prong of the definition could possibly apply to the local initiatives here, and the first prong clearly is inapplicable.

The State argues that the phrase “before its circulation for signatures” in RCW 42.17A.005(4) applies only to statewide initiatives and does not limit the second prong of the definition for local initiatives where obtaining signatures is required before a proposition can be filed. According to the State, the second prong *at least* applies to a proposition that “has been initially filed with the appropriate election officer.” RCW 42.17A.005(4). Otherwise, the second prong’s express application to local jurisdictions would be meaningless.³

d. Analysis

On initial review, the second prong of RCW 42.17A.005(4) is ambiguous. However, we conclude that the only reasonable interpretation is the State’s position that a local initiative becomes a “ballot proposition” once it is filed with the appropriate election official.

As noted above, applying the phrase “before its circulation for signatures” in RCW 42.17A.005(4) literally would mean that the second prong of the definition of “ballot proposition” could never apply to initiatives in many local jurisdictions. But that result is inconsistent with other language of RCW 42.17A.005(4), which expressly applies the second

³ The State also proposes an interpretation under which the second prong would apply to the signature-gathering phase of a local initiative, even before the initiative has been filed with the appropriate election official. Under this interpretation, the second prong would apply completely different requirements for statewide initiatives (beginning after filing) and local initiatives (beginning before circulation for signatures). However, as the State concedes, we need not address this interpretation because here the local initiatives had been filed when the Foundation provided legal services.

prong to an initiative submitted not just to state voters, but also to the voters of “*any* municipal corporation, political subdivision, or other voting constituency.” (Emphasis added.)

Further, the legislature amended RCW 42.17A.005(4) in 1975 to clarify that the second prong of the definition of “ballot proposition” applied to all jurisdictions, not just to statewide initiatives, and at the same time added the phrase “before its circulation for signatures.” The language of Initiative 276 and the original language of RCW 42.17A.005(4) stated that the second prong applied to an initiative submitted to “any specific constituency which has been filed with the appropriate election officer of that constituency.” LAWS OF 1973, ch. 1, § 2(2).

The 1975 amendment changed the language as follows:

“Ballot proposition” means any “measure” as defined by RCW 29.01.110, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of ~~((any specific))~~ the state or any municipal corporation, political subdivision or other voting constituency ((which)) from and after the time when such proposition has been initially filed with the appropriate election officer of that constituency prior to its circulation for signatures.

LAWS OF 1975, 1st Ex. Sess., ch. 294, § 2(2).⁴

We avoid a literal interpretation of a statute that would lead to unlikely or absurd results. *Columbia Riverkeeper*, 188 Wn.2d at 443. The Foundation’s interpretation of RCW 42.17A.005(4) would lead to an absurd result. It would make no sense for the legislature to expressly extend the second prong to *all* local initiatives while *at the same time* adopting a requirement that precluded the application of the second prong to local initiatives where signatures must be collected before filing.

⁴ The phrasing “prior to its circulation” was later changed to “before its circulation.” LAWS OF 2010, ch. 204, § 101(4).

The Foundation argues that we cannot adopt an interpretation of RCW 42.17A.005(4) that ignores the phrase “before its circulation for signatures” because we must give effect to all the statutory language. In general, we must adopt an interpretation of a statute that does not render certain language superfluous. *HomeStreet*, 166 Wn.2d at 452. But this principle does not require adoption of the Foundation’s position.

First, the Foundation fails to acknowledge that its interpretation ignores the part of RCW 42.17A.005(4) stating that the second prong applies to an initiative submitted to the voters of “any municipal corporation, political subdivision, or other voting constituency.” The Foundation’s position – that the second prong can never apply to most local initiatives – would render this language completely superfluous. But under the State’s interpretation, the phrase “before its circulation for signatures” applies to and provides clarification for statewide initiatives, even though it does not apply to local initiatives.

Second, we can and must ignore statutory language when necessary for a proper understanding of the provision. *Am. Disc.*, 160 Wn.2d at 103. Here, the only way we can apply the second prong of the definition of “ballot proposition” to all local initiatives – which the legislature clearly intended – is if we disregard the phrase “before its circulation for signatures” in the context of local initiatives where signatures must be obtained before filing.

Third, we must be mindful of the directive in RCW 42.17A.001 that the provision of the FCPA “be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns.” And relevant here, RCW 42.17A.001(5) states that “public confidence in government *at all levels* is essential and must be promoted by all possible means.” (Emphasis added.) As the State points out, adopting the Foundation’s position would create a

large loophole in the FCPA's reporting requirements. The public would be precluded from receiving information regarding the financing of local initiatives at the most critical time – when signatures in support of the initiatives are being collected. On the other hand, the State's position is consistent with the primary purpose of the FCPA – to fully disclose to the public political campaign contributions and expenditures. RCW 42.17A.001(1).

We hold that the only reasonable interpretation of RCW 42.17A.005(4) is that the second prong of the definition of “ballot proposition” applies after a local initiative has been filed with the appropriate election official even though signatures already have been collected in support of that initiative. The phrase “before its circulation for signatures” applies only to statewide initiatives or to local jurisdictions that follow the statewide procedure.

4. Application of RCW 42.17A.005(4)

Here, the State's complaint alleged that the Foundation provided pro bono legal support for each of the Sequim, Chelan, and Shelton initiatives after those initiatives had been filed with the respective cities. The State further alleged that the Foundation failed to report that support as an independent expenditure in support of a ballot proposition. For purposes of CR 12(b)(6), we must assume that these allegations are true. *J.S.*, 184 Wn.2d at 100.

Based on our interpretation above, each initiative qualified as a “ballot proposition” under RCW 42.17A.005(4) once it was filed with the cities. As a result, under RCW 42.17A.255(2) the Foundation was required to file a report disclosing any independent expenditure that, alone or in combination with all other independent expenditures, equaled \$100

or more.⁵ If the State demonstrates that the Foundation violated RCW 42.17A.255(2), the Foundation will be subject to a civil penalty under RCW 42.17A.750.

The Foundation argues that any reporting obligations in this case could not be triggered because RCW 42.17A.255(2) requires that an independent expenditure was made “during [an] election campaign.” The Foundation claims that there was never an election campaign in this case because the initiatives were never submitted to the voters. But an “election campaign” is defined in RCW 42.17A.005(17) to include “any campaign in support of, or in opposition to, a ballot proposition.” The Foundation’s pro bono legal services were rendered in support of the local initiatives – to assist their placement on the ballot. Therefore, because we conclude that the initiatives at issue here qualified as “ballot propositions,” the Foundation’s support occurred during an “election campaign.”

By alleging that the Foundation failed to report its legal support of the Sequim, Chelan, and Shelton initiatives, the State stated a claim upon which relief could be granted. Accordingly, we hold that the trial court erred in dismissing the State’s claim under CR 12(b)(6).

D. FIRST AMENDMENT RIGHT TO FREE SPEECH

The Foundation argues that if we interpret RCW 42.17A.255 to require disclosure here, the statute would impermissibly infringe on the Foundation’s right of free speech under the First Amendment to the United States Constitution. We disagree.

⁵ The Foundation does not contest that its pro bono legal services constitute an “independent expenditure,” as defined by RCW 42.17A.255(1).

1. Legal Standard

Generally, a statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving it to be unconstitutional beyond a reasonable doubt. *Voters Educ. Comm.*, 161 Wn.2d at 481. However, in the First Amendment context the State typically has the burden to justify a restriction on speech. *Id.* at 482.

The applicable standard of review differs depending on whether a law limits speech outright or merely imposes disclosure requirements on the speaker. *Id.* Statutes that regulate speech based on its content must survive strict scrutiny. *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 848, 168 P.3d 826 (2007). By contrast, disclosure requirements, although potentially a burden on the ability to speak, impose no ceiling on campaign-related activity and do not prevent speech. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

Therefore, laws that impose disclosure requirements must survive the less stringent “ ‘exacting scrutiny’ ” test, which requires disclosure requirements to have a “ ‘relevant correlation’ or ‘substantial relation’ ” to a governmental interest.⁶ *Voters Educ. Comm.*, 161 Wn.2d at 482 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)); *see also Citizens United*, 558 U.S. at 366. We must determine whether (1) the disclosure requirements promote a sufficiently important government interest and (2) there is a substantial

⁶ The Foundation argues that strict scrutiny review applies. But as the Ninth Circuit recently explained in detail, exacting scrutiny is the appropriate standard of review for disclosure requirements. *See Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1004-05 (9th Cir. 2010).

relation between the disclosure requirements and that interest. *See Voters Educ. Comm.*, 161 Wn.2d at 482; *Citizens United*, 558 U.S. at 366.

2. Governmental Interest

Disclosure requirements can further multiple governmental interests, including providing information to the public, deterring corruption and the appearance of corruption, and gathering the data necessary to enforce substantive election restrictions. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 196, 124 S. Ct. 619, 690, 157 L. Ed. 2d 491 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310; *see also Voters Educ. Comm.*, 161 Wn.2d at 482. On that basis, courts that have addressed disclosure requirements and have consistently determined that they sufficiently further a governmental interest. And courts have done so when specifically addressing chapter 42.17A RCW.

For example, the Ninth Circuit in *Human Life of Washington Inc. v. Brumsickle* addressed the same “independent expenditure” disclosure requirement at issue here. 624 F.3d 990, 998 (9th Cir. 2010). The court stated that disclosure laws help shed light on contributors to and participants in public debate, providing voters with the facts necessary to evaluate the messages competing for their attention. *Id.* at 1005. In the context of voter-decided ballot measures, the voters act as legislators, making it important that they know who is lobbying for their vote. *Id.* at 1007. Therefore, the court concluded that finance disclosure requirements “advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas.” *Id.* at 1008.

Washington courts have reached the same conclusion. In *Voters Education Committee*, the Supreme Court noted as important the governmental interests in providing the electorate with information and deterring corruption. 161 Wn.2d at 482. The court acknowledged that the right to free speech held by organizations who engage in political speech includes a “fundamental counterpart” that is the public’s right to receive information. *Id.* at 483 (quotation marks and citation omitted). The court explained that constitutional safeguards that protect the organization also apply to ensure that the public receives information, thereby encouraging uninhibited, robust, and wide-open political speech. *Id.*

Similarly, Division One of this court has determined that the state has a substantial interest in the disclosure of information to promote the integrity of its elections and prevent concealment that could mislead voters. *State ex rel. Pub. Disclosure Comm’n v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006).

The same governmental interests in those cases apply here. As the legislature expressly stated, chapter 42.17A adopted the policy of fully disclosing contributions and expenditures for political campaigns and lobbying. RCW 42.17A.001(1). The goal of disclosure was intended to improve public confidence in the fairness of elections and government processes and to protect the public interest. *See generally* RCW 42.17A.001(1)-(11). In addition to those express goals, the governmental interests in educating voters and preventing concealment noted by other courts apply with equal strength here.

3. Substantial Relationship

Under the second exacting scrutiny prong, our Supreme Court has stated that in most cases, disclosure requirements “ ‘appear to be the least restrictive means of curbing the evils of

campaign ignorance and corruption.’ ” *Voters Educ. Comm.*, 161 Wn.2d at 483 (quoting *Buckley*, 424 U.S. at 68). The United States Supreme Court in *Citizens United* emphasized that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.” 558 U.S. at 369. Disclosure requirements operate by requiring organizations to reveal their identity to allow the public to identify the source of funding that influences elections without actually limiting that funding. *Voters Educ. Comm.*, 161 Wn.2d at 483.

The reports required under RCW 42.17A.255 are substantially related to the government’s interest in disclosure. The reports themselves include only the name and address of the person who provided an independent expenditure, the name and address of the person who received the independent expenditure, the amount and date of the independent expenditure, its purpose, and the sum of all independent expenditures during the campaign. RCW 42.17A.255(5). This information is consistent with the government’s interests in providing the public with information, preventing corruption, and collecting data. In addition, by emphasizing disclosure, the reporting requirement imposes significantly less of a burden than spending limitations. *Permanent Offense*, 136 Wn. App. at 285. As a result, the requirement’s relationship to the relevant governmental interests is sufficiently close to be valid.

The Foundation argues that the disclosure requirement is invalid because disclosure in this case violates the attorney-client privilege. For support, the Foundation cites RCW 5.60.060(2)(a), which privileges communication made by the client to an attorney or the attorney’s advice given in the course of his or her professional employment. The privilege exists to allow a client to freely communicate with an attorney without a fear of compulsory discovery. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997). Generally, the privilege does not

protect the name of a client because that information is not a confidential communication. *Id.* at 846. A limited “legal advice” exception may privilege a client’s identity where disclosure of the client’s name would implicate the client in criminal activity. *Id.*

But the Foundation has not shown that disclosure of pro bono legal services violates its attorney-client privilege. The fact that the Foundation provided pro bono legal services is not itself a confidential communication. Disclosing the value of those services also does not reveal any confidential information. And the Foundation does not argue that the legal advice exception applies.

The Foundation also argues that under *Citizens United*, disclosure and reporting requirements are valid only if they are limited to speech that is functionally equivalent to express political advocacy. But *Citizens United* holds the opposite. The Court noted that it had previously limited restrictions on independent expenditures to express advocacy. *Citizens United*, 558 U.S. at 368. It then expressly “reject[ed] Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.” *Id.* at 369.

The disclosure requirement in RCW 42.17A.255(2) satisfies the exacting scrutiny standard and is not otherwise invalid as applied in this case. Accordingly, we hold that the Foundation has not shown that the FCPA violates the First Amendment either facially or as applied.

CONCLUSION

We reverse the trial court’s dismissal of the State’s regulatory enforcement action regarding the Sequim, Chelan, and Shelton initiatives, and we remand for further proceedings.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL ANALYSIS

In the unpublished portion of the opinion, we address the Foundation’s arguments that (1) RCW 42.17A.255(2) is unenforceable because (a) the definition of “ballot proposition” is unconstitutionally vague and (b) the disclosure requirement improperly infringes on the judiciary’s authority to regulate the practice of law, and (2) the State’s complaint should be dismissed because the State failed to join certain unions also involved with the local initiatives as indispensable parties under CR 19.

A. VAGUENESS CHALLENGE

The Foundation argues that the statutes applicable here – the definition of “ballot proposition” in RCW 42.17A.005(4) and the reporting requirement in RCW 42.17A.255 – are unconstitutionally vague and therefore cannot be enforced. We disagree.

Under the Fourteenth Amendment to the United States Constitution, a statute may be void for vagueness if it is framed in terms so vague that persons of common intelligence must guess at its meaning and cannot agree on its application. *Voters Educ. Comm.*, 161 Wn.2d at 484. The doctrine has two goals: to provide fair notice as to what conduct is prohibited and to protect against arbitrary enforcement. *Postema v. Pollution Control Hr’gs Bd.*, 142 Wn.2d 68, 114, 11 P.3d 726 (2000).

To determine whether a statute is sufficiently definite, we look to the provision in question within the context of the enactment, giving language a sensible, meaningful, and

No. 50224-1-II

practical interpretation. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 613, 192 P.3d 306 (2008). A statute is not invalid simply because it could have been drafted with greater precision. *Id.* A statute's language is sufficiently clear when it provides explicit standards for those who apply them and provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Voters Educ. Comm.*, 161 Wn.2d at 488.

Statutes are presumed to be constitutional. *Id.* at 481. The party asserting that a statute is unconstitutionally vague must prove its vagueness beyond a reasonable doubt. *Id.* In the First Amendment context, the asserting party may allege that a statute is either facially invalid or invalid as applied. *See Am. Legion Post No. 149*, 164 Wn.2d at 612. A facial challenge asserts that the statute cannot be properly applied in any context. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182 n.7, 795 P.2d 693 (1990). In an as applied challenge, the statute must be considered in light of the facts of the specific case before the court. *Am. Legion Post No. 149*, 164 Wn.2d at 612.

Here, the Foundation argues that the definition of "ballot proposition" in RCW 42.17A.005(4) is impermissibly vague. The core of the Foundation's argument appears to be that the statute is inconsistent with the local initiative process, not that the statute itself or any of its terms are too vague.

But as our interpretation above establishes, RCW 42.17A.005(4) presents a single, clearly delineated definition for what constitutes a "ballot proposition." As we explained, the Foundation's argument that the definition cannot apply to local jurisdictions is not supported by the statute's express language or its statement that it is to be liberally construed in favor of disclosure. RCW 42.17A.001. The text also does not support the Foundation's suggestion that

the statute imposes a reporting requirement only “before its circulation for signatures,” which when applied to local jurisdictions creates a nonexistent reporting period. As a result, RCW 42.17A.005(4) applies to a clearly defined period, beginning “from and after the proposition has been initially filed.”

That language is not unconstitutionally vague as applied to this case. Whether the Foundation reported its independent expenditures in support of the initiatives in Sequim, Chelan, and Shelton after those initiatives were initially filed is clearly identifiable as a matter of fact. Likewise, the language is not facially invalid because it establishes a clear course of conduct, requiring persons to report their independent expenditures. Therefore, the Foundation has not shown that there are no set of facts, including the ones here, in which the statute could not be constitutionally applied. *Douglass*, 115 Wn.2d at 182 n.7.

Accordingly, we hold that RCW 42.17A.005(4) and RCW 42.17A.255 are not void for being unconstitutionally vague.

B. INFRINGEMENT ON SEPARATION OF POWERS

The Foundation argues that requiring disclosure of the provision of legal services infringes on the judicial branch’s authority to regulate the practice of law. We disagree.

Authority to regulate the practice of law in Washington lies within the inherent power of the Supreme Court. *Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 838, 374 P.3d 193, *review denied*, 186 Wn.2d 1013 (2016). This regulatory authority includes the authority to regulate admission to the practice of law, to oversee conduct of attorneys as officers of the courts, and to control and supervise the practice of law as a general matter. *Wash. State Bar Ass’n v. State*, 125 Wn.2d 901, 908, 890 P.2d 1047 (1995). This power lies exclusively with the

judiciary. *Id.* at 909. The other branches of government cannot impair the judiciary's functioning or encroach on its power to administer its own affairs. *Id.* at 908-09.

But the judiciary's exclusive authority in overseeing the practice of law does not exempt attorneys from application of other laws. *See Short v. Demopolis*, 103 Wn.2d 52, 62-66, 691 P.2d 163 (1984); *Porter Law Ctr., LLC v. Dep't of Fin. Insts.*, 196 Wn. App. 1, 20, 385 P.3d 146 (2016). A law that applies to attorneys in their legal practice does not violate separation of powers principles as long as it does not usurp the judiciary's authority.

In *Short*, the plaintiffs were attorneys who sought to recover legal fees allegedly owed by the defendant. 103 Wn.2d at 53-54. In a counterclaim, the defendant alleged among other things that the attorneys had violated the Consumer Protection Act (CPA). *Id.* at 54-55. The trial court dismissed the defendant's CPA claims, in part on the basis that regulation of the legal profession through the CPA would unconstitutionally infringe on the judiciary's authority to regulate the practice of law. *Id.* at 55.

The Supreme Court reversed, holding that application of the CPA did not violate separation of powers principles. *Id.* at 65-66. It stated that the judiciary's power over the legal profession included the exclusive authority to admit, enroll, discipline, and disbar attorneys. *Id.* at 62. But this authority does not create an impenetrable barrier against the legislature. *Id.* at 63. Instead, legislation is proper as long as it does not infringe on the court's power over the practice of law, specifically to admit, suspend, or disbar attorneys. *Id.* This authority was not encroached on by the CPA, which addressed public concerns distinct from the judiciary's role in overseeing the practice of law. *Id.* at 64. The court concluded that the CPA could apply to the

entrepreneurial aspects of legal practice, but not claims that an attorney had engaged in legal malpractice or otherwise acted negligently in his role as an attorney. *Id.* at 65-66.

The court in *Porter Law Center* reached the same conclusion in the context of the Mortgage Broker Practices Act (MBPA). 196 Wn. App. at 20. There, the Department of Financial Institutions claimed that an Ohio attorney had provided mortgage modification services to several Washington residents in violation of the MBPA. *Id.* at 5-7. The MBPA required persons who engage in certain mortgage-related services to first obtain a license, but contained an exemption for attorneys licensed in Washington. *Id.* at 14-15.

The defendant argued that the MBPA infringed on the Supreme Court's authority to regulate the practice of law. *Id.* at 20. The court disagreed, stating that "application of consumer protection laws such as the MBPA to attorneys 'does not trench upon the constitutional powers of the court to regulate the practice of law.'" *Id.* (quoting *Short*, 103 Wn.2d at 65).

Under *Short* and *Porter Law Center*, laws may apply to attorneys acting in the practice of law without violating separation of powers principles. The question is whether the law properly regulates the entrepreneurial aspects of legal practice or improperly infringes on the judiciary's exclusive right to oversee legal practice in areas like admission, suspension, or disbarment of attorneys.

Here, the disclosure requirements do not improperly regulate the practice of law. Their purpose is to encourage transparency in political campaign and lobbying contributions and expenditures. RCW 42.17A.001(1). To do this, they require persons, including attorneys, to disclose their independent expenditures made in the support or opposition to ballot propositions. RCW 42.17A.255(2). Following the distinction drawn by *Short*, these requirements regulate the

entrepreneurial aspects of legal practice without imposing on the judiciary's oversight of the practice of law. 103 Wn.3d at 65-66.

Further, as a disclosure requirement instead of a substantive obligation, RCW 42.17A.255 does less to impose on the judiciary's role than the laws at issue in *Short and Porter Law Center*. Unlike with the CPA and MBPA, which establish limits on how attorneys are able to practice law, the requirements at issue here do not restrict the Foundation's legal practice. Instead, requiring disclosure obligates the Foundation, like any other person who makes an independent expenditure, to report its actions.

Accordingly, we hold that application of RCW 42.17A.255(2) to the Foundation does not improperly violate separation of powers principles.

C. JOINDER UNDER CR 19

The Foundation argues that the State's complaint should have been dismissed because the State failed to join the unions that opposed the ballot initiatives. The Foundation claims that the unions were indispensable parties under CR 19.⁷ We disagree.

CR 19 concerns the joinder of persons needed for a just adjudication. Under CR 19(a), a person shall be joined in an action if

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

⁷ In the trial court, the Foundation moved to dismiss under CR 12(b)(7) for failure to join an indispensable party. The trial court stated that it did not need to reach that issue, but that it would have denied the Foundation's motion because the State's decision to bring a regulatory claim was a matter of discretion that should not be interfered with.

Under CR 19(b),

If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

The rule provides four factors for the court to consider in making that determination.

A court reviewing a claim under CR 19 applies a three-step process. First, under CR 19(a), the court identifies whether absent persons are “necessary” to a just adjudication. *Lundgren v. Upper Skagit Indian Tribe*, 187 Wn.2d 857, 868, 389 P.3d 569 (2017), *petition for cert. filed*, No. 17-387 (U.S. Sept. 13, 2017). Second, if the person is necessary, the court determines whether it is feasible to order joinder of the absentees. *Id.* at 868-69. Third, if joinder is not feasible, the court must consider whether in equity and good conscience the action should proceed without the absent persons. *Id.* at 869.

The burden of persuasion is on the party seeking dismissal. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 222, 285 P.3d 52 (2012). Dismissal for failure to properly join a party, although allowed under CR 12(b)(7), is a drastic remedy. *Lundgren*, 187 Wn.2d at 869.

Therefore, dismissal is appropriate only when the defect cannot be cured and the absent persons will face significant prejudice should the case continue. *Id.*

Here, the Foundation asserts that the unions are necessary parties for two reasons.⁸ First, the Foundation argues under CR 19(a)(1) that in the absence of the unions, the trial court could

⁸ The Foundation also suggests that it was prejudiced by the unions’ absence because the State is seeking attorney fees and costs, which the Foundation and the unions could have split. But it does not attempt to relate this argument to CR 19 or provide support showing that the cost of defending litigation makes an absent person a necessary party. Accordingly, we do not address this issue. RAP 10.3(a)(6); *Linth v. Gay*, 190 Wn. App. 331, 339 n.5, 360 P.3d 844 (2015), *review denied*, 185 Wn.2d 1012 (2016).

not provide complete relief among persons who are already parties. The Foundation claims that any judgment in this action will necessarily affect the status of the unions. But the Foundation does not demonstrate how, in the unions' absence, the trial court will be unable to resolve whether the Foundation violated the RCW 42.17A.255(2) disclosure requirements. The unions' involvement opposing the Foundation's lawsuits is simply not relevant to the Foundation's obligation to report its independent expenditures. The unions are therefore not necessary parties under CR 19(a)(1).

Second, the Foundation argues under CR 19(a)(2)(B) that the State's decision to bring this lawsuit but not a similar one against the unions creates inconsistent obligations because the unions also did not comply with RCW 42.17A.255(2). But CR 19 does not address the risk that similar actions taken by different parties could result in different outcomes. Rather, as the Ninth Circuit explained regarding the federal rule,

“ ‘[i]nconsistent obligations’ are not . . . the same as inconsistent adjudications or results. Inconsistent obligations occur when a party is unable to comply with one court’s order without breaching another court’s order concerning the same incident. Inconsistent adjudications or results, by contrast, occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum.”

Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 547 F.3d 962, 976 (9th Cir. 2008) (alterations in original) (quoting *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998)).⁹

⁹ Because Washington's CR 19 is so similar to the federal rule, this court may look to federal cases for guidance. *Auto. United Trades Org.*, 175 Wn.2d at 223.

In addition, the Foundation's argument is not relevant here because CR 19(a)(2)(B) asks whether any person *already a party* to the lawsuit would be subject to inconsistent obligations. The rule looks to whether the Foundation itself would be subject to inconsistent obligations, not whether the obligations on the Foundation and the unions would be inconsistent.

The Foundation has not demonstrated that, in the unions' absence, the trial court could not afford complete relief under CR 19(a)(1) or that the Foundation would be subject to inconsistent obligations under CR 19(a)(2)(B). Accordingly, we hold that the unions are not necessary parties and that CR 19 does not require dismissal of the State's lawsuit.

CONCLUSION

We reverse the trial court's dismissal of the State's regulatory enforcement action regarding the Sequim, Chelan, and Shelton initiatives, and we remand for further proceedings.

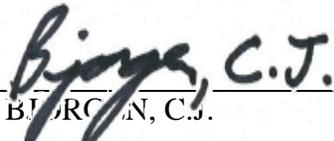


MAXA, J.

We concur:



WORSWICK, J.



BJORGE, C.J.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Freedom Foundation's Supplemental Brief* in Supreme Court Cause No. 95281-7 to the following parties:

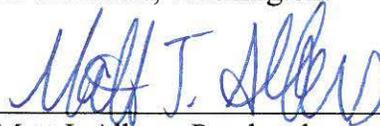
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 20, 2018 at Seattle, Washington.



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Appellate Court Case Title: State of Washington v. Evergreen Freedom Foundation
Superior Court Case Number: 15-2-01936-5

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