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**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,

Petitioner.

# STATE OF WASHINGTON'S SUPPLEMENTAL BRIEF

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## I. INTRODUCTION

Under the Fair Campaign Practices Act, the public is entitled to know who supports a local ballot proposition at its earliest stages, including during signature gathering. Through this information, the public can gain insight into which interest groups most strongly support a local initiative.

The Freedom Foundation admits that its reading of the FCPA would effectively allow funding of most *local* ballot propositions to evade transparency while signatures are gathered and while the local government or the courts determine whether the proposition will appear on the ballot. Interest groups would be able to spend hundreds of thousands of dollars to gather signatures, litigate about the initiative or the ballot language, or build support for the proposition, all while withholding from the public who is funding those efforts. This result would be wholly inconsistent with the people's and the legislature's purpose in adopting and amending the FCPA: full and complete transparency in Washington elections.

This Court should affirm the Court of Appeals, concluding that the FCPA requires reporting of *any* independent expenditures supporting or opposing a local ballot proposition that do not fit within an express exception. Expenditures made during signature gathering and any expenditures made on litigation to determine whether or how a local initiative is presented to voters must be reported.

## II. STATEMENT OF THE CASE

Local residents in the Cities of Sequim, Chelan, and Shelton proposed two ballot propositions that the Freedom Foundation had drafted

and promoted. One proposition would require collective bargaining sessions to be conducted publicly, and the second would prohibit union security clauses in city collective bargaining agreements. CP at 6-8, 15.

The process for proposing ballot propositions differs at the state and local levels. A sponsor of a statewide initiative must file the text of the proposed initiative and obtain a ballot title, which is then printed on the petitions for gathering signatures. *See* RCW 29A.72.010-.120. In contrast, most local initiative petitions are first filed with the local election officer after signatures have already been gathered. *See* RCW 35.17.260. If the petition contains the required number of valid signatures, the local government's council or commission must either pass the proposed ordinance or submit it to a vote of the people. RCW 35.17.260.[1]

Here, each proponent submitted the proposed initiatives to the local city clerk along with signatures gathered in support of the propositions. CP at 7-8, 75, 81, 86-87. They asked their respective city councils or commissions to either adopt the propositions or place them on the ballot for a vote. CP at 7-9, 21, 24. The Cities of Chelan and Shelton voted unanimously to neither adopt the propositions nor place them on the ballot. CP at 8-9, 16-17, 81, 86-87. The City of Sequim concluded that it would table the issue until a later meeting, but acted no further. CP at 75.

In response, the Freedom Foundation's attorneys brought lawsuits

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[1] *See also* RCW 35.17.240-.360; RCW 35A.11.100; Sequim City Code 1.15 (adopting the initiative power and process set forth in RCW 35A.11.080-.100); Shelton City Code § 1.24.010 (adopting all rights, powers, and duties under RCW Title 35A, including RCW 35A.11); Chelan Municipal Code §§ 2.48.060, .070, .080, .090.

against each jurisdiction on behalf of the local resident proponents. CP at 73-87. Each suit sought a court order directing that each local initiative be placed on the local ballot. CP at 73-87. In each case, the superior court dismissed because the subject matter was beyond the local initiative power or it conflicted with state law. *See* CP at 21-22.[2]

It is undisputed that the Freedom Foundation never filed any campaign finance disclosure reports publicly identifying the value of the legal services it provided in support of these local ballot propositions. CP at 9-10. The Attorney General received a complaint on behalf of a "Committee for Transparency in Elections," alleging that the Freedom Foundation had violated the FCPA. CP at 64.[3]

The State filed a civil enforcement action in superior court against the Freedom Foundation and the Freedom Foundation moved to dismiss. CP at 5-10, 19-33. The Freedom Foundation argued that under the FCPA, no disclosure was required unless and until the proposition was placed on a ballot. CP at 21-22. The superior court agreed and dismissed. CP at 102-03.

The Court of Appeals reversed, holding in a partially published opinion that "under the only reasonable interpretation" of the definition of

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[2] *See also* RCW 41.56 (collective bargaining); RCW 35A.11.020 (granting the local legislative body certain exclusive powers related to employees); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-62, 138 P.3d 943 (2006).

[3] The Freedom Foundation complains that no enforcement action has been brought against any other organization involved in the litigation over these local initiatives. In part to prioritize because of limited resources, the State has not typically investigated or brought actions under the FCPA absent a complaint. *See* CP at 61-62. To date, the State has received no additional complaints related to these 2014 local initiatives. But the Freedom Foundation or some other entity could bring a new complaint and the State could bring additional enforcement actions until the expiration of the five-year statute of limitations under RCW 42.17A.770.

"ballot proposition" in the FCPA, the local initiatives qualified as ballot propositions at the time the Freedom Foundation provided legal services because the initiatives had been filed with local election officials. *State v. Evergreen Freedom Found.*, 1 Wn. App. 2d 288, 292-93, 404 P.3d 618 (2017) (published in part). The Court of Appeals also rejected the Freedom Foundation's argument that reporting requirements could only apply to electioneering that occurs once a proposition has been placed on the ballot. *Id.* at 306. The Court concluded that RCW 42.17A.255 does not violate the Freedom Foundation's First Amendment rights *Evergreen Freedom Found.*, 1 Wn. App. 2d at 307. In the unpublished portion of the opinion, the Court of Appeals rejected the Freedom Foundation's other arguments, including that the statute is unconstitutionally vague. *State v. Evergreen Freedom Found.*, No. 50224-1-II, slip op. (unpublished portion) at 21-24. This Court granted review.

## III. STATEMENT OF THE ISSUES

1. Do RCW 42.17A.255 and RCW 42.17A.005(4) exclude from campaign finance reporting money spent to support or oppose a local ballot proposition before it is placed on the ballot, even though the people and the legislature intended comprehensive public disclosure of independent expenditures made to support or oppose local ballot propositions?

2. Given that courts have recognized a compelling public interest in transparency about who expends resources to support or oppose a ballot proposition, as well as the minimal burden created by disclosure requirements, is the statutory scheme so vague as to be unconstitutional or does the State's enforcement action violate free speech protections?

## IV. ARGUMENT

This Court reviews issues of statutory construction and constitutionality de novo. *E.g.*, *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). In construing a statute, the fundamental objective is to ascertain and carry out the people's or the legislature's intent. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). This Court looks to the entire " ' context of the statute in which the provision is found, [as well as] related provisions, amendments to the provision, and the statutory scheme as a whole.' " *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (quoting *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015)). The "enacted statement of . . . purpose is included in a plain reading of a statute." *See G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 311, 237 P.3d 256 (2010). Here, the text, context, and history of the FCPA show that the people and the legislature intended reporting at the earliest stages of a local initiative campaign.

### A. The FCPA Requires Transparency at the Earliest Stages for Any Expenditures to Support or Oppose a Ballot Proposition, Including Local Ballot Propositions

The FCPA establishes that the fullest disclosure of campaign expenditures is the public policy of the State and campaign disclosure laws must be liberally construed in favor of transparency. RCW 42.17A.001. First enacted by voters in 1972, the FCPA was designed in part to give the public complete access to information about who funds campaigns,

including initiative campaigns, and who seeks to influence the outcome of the initiative process. It is the public policy of the State that political campaign contributions and expenditures must "be fully disclosed to the public" and that the public has a "right to know of the financing of political campaigns." RCW 42.17A.001(1), (10) (I-276 § 1(1), (10)). The people also provided that the campaign finance statutes "shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns . . . so as to assure continuing public confidence of fairness of elections and governmental processes, and . . . that the public interest will be fully protected." RCW 42.17A.001 (Declaration of Policy), .904, .907. The concept of "election campaign," by definition, includes support of or opposition to a ballot proposition. RCW 42.17A.005(17). This Court's analysis of the FCPA must incorporate this strong statement of intent and the broad liberal construction requirement.

**1. The text and history of the FCPA establish that the obligation to report expenditures made to support local initiatives begins before signature gathering**

The FCPA requires "any . . . organization or group of persons, however organized" to timely file reports of "independent expenditures." RCW 42.17A.005(35), .255.[4] "Independent expenditure," for purposes of RCW 42.17A.255, includes "*any* expenditure that is *made in support of or in opposition to any . . . ballot proposition* and is not otherwise required to be reported. . . ." RCW 42.17A.255(1) (emphases added). Internal

[4] The FCPA was amended twice this legislative session. Laws of 2018, ch. 304 takes effect June 7, 2018, but the amendments to RCW 42.17A.255 in that bill were vetoed. Laws of 2018, ch. 111 does not take effect until January 1, 2019.

organizational communications, services commonly performed by volunteer campaign workers, and incidental volunteer expenses are exempt. RCW 42.17A.255(1). Disclosure is triggered when expenditures amount to more than $100. RCW 42.17A.255(2). Required disclosures include an initial report, periodic updates if expenditures continue, and three required updates at specific stages. RCW 42.17A.255(2), (3), (5). Thus, organizations like the Freedom Foundation must file timely reports of their non-exempt expenditures supporting any "ballot proposition."

"Ballot proposition" is defined as

> 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.005(4) (emphases added).

The original definition of "ballot proposition" in the FCPA included "any initiative . . . proposed to be submitted to the voters of any specific constituency which has been filed with the appropriate election officer of that constituency." I-276, §2(2). For statewide initiatives, this definition already incorporated the signature-gathering phase because, for a statewide initiative, the sponsor must file the proposed initiative before circulating it for signatures. *See* RCW 29A.72.010-.120.

The 1975 legislature added the language in the definition that refers specifically to "any municipal corporation, political subdivision, or other

voting constituency." Laws of 1975, 1st Ex. Sess., ch. 294, § 2(2). It simultaneously added "prior to its circulation for signatures." *Id.*[5]

In determining the 1975 legislature's purpose, the House Bill Analysis is particularly helpful. This Court has looked to such sources to ascertain legislative intent. *See State v. Medina*, 180 Wn.2d 282, 291, 324 P.3d 682 (2014) (quoting from a 2009 bill report to show the legislature's intent); *State v. Reding*, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992).

The bill analysis explains the problem the 1975 legislature intended to solve:

> Problem No. 1 Present language is unclear regarding the voting constituencies to which a measure must be proposed to be submitted to be considered a "ballot proposition" and the time frame during which a proposal becomes such a "ballot proposition". This causes confusion as to when reporting obligations are incurred by committees supporting or opposing such measures.
> Solution The bill clarifies that "ballot proposition" includes measures which are proposed to be submitted to the voters of the state or any municipal corporation, political subdivision or other voting constituency from and after the initial filing date but prior to circulation for signatures on petitions to place such measures on the ballot.

H.B. Analysis of Substitute H.B. 827, at 1, 44th Leg., 1st Ex. Sess. (Wash. Mar. 24, 1975). This bill analysis reflects that confusion existed about the scope of the definition of the term "ballot proposition" after its original adoption by initiative. The legislature intended to clarify that the definition (1) included all local ballot propositions and (2) incorporated propositions

[5] The definition has since replaced "prior to" with "before." RCW 42.17A.005(4).

"prior to circulation for signatures on petitions." H.B. Analysis of Substitute H.B. 827, at 1, 44th Leg., 1st Ex. Sess. (Wash. Mar. 24, 1975)

Pre-amendment, the definition already incorporated propositions as soon as they were filed and it already incorporated signature gathering for state initiatives, so there was no need to add the phrase "prior to circulation for signatures" unless the legislature intended to clarify that the definition also covers the signature-gathering period for local propositions. The amendment ensured the statute would be applied according to the people's purpose: full and complete public disclosure of expenditures related to ballot propositions, including those made before a proposition appears on the ballot. This Court should take this opportunity to confirm that expenditures made during local signature gathering must be reported.

The Freedom Foundation instead argues for a large loophole in the law for local ballot propositions. It contends that in most jurisdictions where signatures are gathered before a local initiative is filed, the definition of "ballot proposition" does not fit and a local proposition can never become a "ballot proposition" under the FCPA until it is placed on the ballot. Pet. For Review at 9-10. The Court of Appeals correctly rejected this argument.

As the Court of Appeals recognized, the definition of "ballot proposition" has two prongs. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 301. The first incorporates "any proposition or question submitted to the voters." RCW 29A.04.091 (defining "measure"). The second prong incorporates additional propositions: those "proposed to be submitted to the voters," including voters of "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.005(4). While the Freedom Foundation insists that because signatures were already gathered, the second prong of the definition cannot apply in these circumstances, or in any circumstances where a local initiative is filed after signature gathering, its position ignores the second prong's express application to local initiatives.

The Freedom Foundation also argues that the State's interpretation of the definition of "ballot proposition" renders language superfluous, but that is not the case. "[A]fter the time when the proposition has been initially filed with the appropriate election officer" is appropriate for statewide initiatives, while "before its circulation for signatures" clarifies that the legislature intended to incorporate signature gathering in all circumstances, including for local propositions. RCW 42.17A.005(4).

To read the statute as the Freedom Foundation suggests would undermine the people's and the legislature's intent—to give the public access to information about who is bankrolling efforts to get an initiative on the ballot or keep it off. RCW 42.17A.001. Significant resources are often expended in signature gathering campaigns at the local level. For example, the Seattle Districts Now committee spent $130,162.96 for signature gathering in 2013.[6] Moreover, cities have become proving grounds for

[6] https://www.pdc.wa.gov/browse/campaign-explorer/committee?filer_id= SEATDN%20109&election_year=2013 (signature-gathering expenditures paid).

ballot propositions in Washington, as initiatives on topics from the minimum wage to campaign finance reform have been presented to local voters before sponsors attempt a statewide version. Understanding who supports a local ballot proposition at its earliest stages provides the public with insight into which interests most strongly support a measure. This Court should not allow the Freedom Foundation to create this loophole and defeat the very transparency that is the FCPA's primary purpose.

**2. Even if reporting of independent expenditures for local initiatives were required only after filing, the expenditures here occurred after filing**

Here, the local initiatives were filed with county auditors and clerks for signature checking, and then the local legislative bodies declined to put the initiatives on the ballot and the Freedom Foundation sued. CP at 74-75, 79-81, 85-87. The Freedom Foundation provided pro bono legal services after the local initiatives were "initially filed" with local officials. RCW 42.17A.005(4). The Court of Appeals correctly concluded that, at the very least, the Freedom Foundation's expenditures to get these local initiatives onto the ballot were reportable because the expenditures in support of the propositions occurred after the propositions were filed. *Evergreen Freedom Found.*, 1 Wn. App. 2d at 292-93. But this Court should take this opportunity to also clarify that local initiatives become "ballot propositions" before signature gathering, and thus any expenditures to support or oppose local signature-gathering activities are also reportable.

### 3. The FCPA plainly contemplates reporting for expenditures on activities that are broader than just "electioneering" or communications with voters

The Freedom Foundation is also wrong when it asserts that to be reportable, independent expenditures must be related to "electioneering" or communications with voters about a proposition that is on the ballot. Pet. for Review at 11. The people and the legislature said that "*any* expenditure that is made in support of or opposition to *any . . . ballot proposition*" must be reported, unless it fits within limited exceptions. RCW 42.17A.255(1) (emphases added). Where the legislature intended to limit disclosure to "electioneering" or "advertising" within the FCPA, it used those more limited terms, which are specifically defined in the Act. RCW 42.17A.005(19) (defining "electioneering" to mean a broadcast, transmission, mailing, billboard, newspaper, or periodical about a candidate), (36) (defining "political advertising" to mean any mass communication for the purpose of appealing for votes or for other support or opposition). Neither the term "electioneering" nor "political advertising" appears in RCW 42.17A.255.

Moreover, there is a separate reporting requirement for expenditures for electioneering communications and political advertising, including mail and voice communications with voters in the form of brochures and letters. *E.g.*, RCW 42.17A.005(19), (36), .305, .335, .260. Had the people and the legislature intended reporting only on expenditures for electioneering or communication with voters, they would not have needed to include the independent expenditure requirement at all because reporting for

electioneering communications and political advertising are already covered in other provisions of the FCPA.

The Freedom Foundation relies on the term "election campaign" in RCW 42.17A.255(2) to support its theory. While colloquially the concept of "election campaign" might connote activity once a proposition is on the ballot, that is not how the FCPA defines the term. Instead, "election campaign" includes any campaign "in support of or opposition to" a "ballot proposition." RCW 42.17A.005(17). In turn, the definition of "ballot proposition" incorporates "proposed" initiatives before signature gathering, plainly before a proposition is on the ballot. RCW 42.17A.005(4).

The Freedom Foundation's legal services were rendered "in support of" local initiatives—it litigated to force the initiatives onto the ballot. If the people and the legislature intended "campaign" to encompass only convincing voters to vote for or against a proposition, they would not have expressly incorporated initiatives that are "*proposed to be submitted* to the voters" within the coverage of "ballot proposition," nor would that term include signature gathering. RCW 42.17A.005(4). The Freedom Foundation's insistence that a "campaign" encompasses only communication with voters once a proposition is on the ballot ignores the plain language of RCW 42.17A.005(4) and .255.

The Freedom Foundation also suggests that litigation cannot be an independent expenditure in support of a ballot proposition. Pet. for Review at 10-11. But whether successful or not, litigation is now a common means of blocking adoption of an initiative or forcing an initiative onto the

ballot. *E.g.*, *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015) (litigation brought by initiative opponents over whether an initiative could be placed on the ballot); *Filo Foods, LLC v. City of SeaTac*, 179 Wn. App. 401, 319 P.3d 817 (2014) (litigation over whether a local minimum wage initiative qualified for the ballot). In 2017 alone, there were two significant cases about local initiatives, a Spokane anti-sanctuary initiative and a Seattle initiative regarding safe injection sites. *Global Neigh. v. Respect Wash.*, Spokane County Superior Court No. 17-201621-1; *Protect Pub. Health v. Freed*, King County Superior Court No. 17-2-21919-3 SEA. The uncontestable purpose of litigation efforts like these is to support or oppose the ballot propositions by forcing them onto or blocking them from the ballot. Expenditures on litigation to determine whether a proposition goes on the ballot or to determine the appropriate ballot language can cost tens of thousands of dollars.[7] To read the statute as the Freedom Foundation suggests would undermine the plain purpose of campaign finance law, which is to give the public access to information about who is working to support or defeat initiatives. RCW 42.17A.001.

The Freedom Foundation next relies on one phrase in *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 998 (9th Cir. 2010): "Disclosure requirements are triggered if, *in a given election*, such an expenditure equals more than $100 or if its value cannot reasonably be

[7] *See* https://www.pdc.wa.gov/browse/campaign-explorer/committee? filer_id= SEATGJ%20104&election_year=2013 (expenditures for local initiative litigation prior to election for Yes! For SeaTac committee support of $15 minimum wage local initiative)

estimated." (emphasis added). This single reference to an election does not get the Freedom Foundation where it wants to go. The Ninth Circuit was not called upon to decide, nor did that court discuss, the meaning of "ballot proposition" or when reporting must begin on independent expenditures supporting *local* ballot propositions. *Human Life of Wash.*, 624 F.3d 990. Contrary to the Freedom Foundation's contention, the Ninth Circuit did not conclude anything with regard to this issue. Br. Resp't at 15; *Human Life of Wash.*, 624 F.3d at 998-99.[8]

In sum, adoption of the Freedom Foundation's reading of the FCPA would ignore the plain text of the statute, which requires reporting of expenditures to support or oppose a proposed local initiative. It would ignore the overall context of the FCPA, which includes the strong statement of purpose to promote transparency and the liberal construction provisions. And it would ignore the statute's history, which was amended specifically to clarify the FCPA's application to local initiatives before they are placed on the ballot. This Court should instead take this opportunity to state clearly that independent expenditures to support or oppose local initiatives must be reported at the earliest stages, including during signature gathering.

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[8] The Freedom Foundation also refers to cases involving contribution limits as applied to pro bono services. Pet. for Review at 12-13, 19; *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012). But the law applicable to contribution limits is different. *Id.* at 868. Limits create a cap on available funds for expenditures. Here, there is no cap that would limit the extent of legal services that can be provided without charge—there is only a reporting requirement. The Freedom Foundation also points to *Coloradans for a Better Future v. Campaign Integrity Watchdog*, 409 P.3d 350 (Colo. 2018), but in that case, the court addressed statutory language that is different from Washington's. *Id.* at 355-56.

## B. The FCPA Is Not Unconstitutionally Vague

As the Court of Appeals explained a statute is not void for vagueness "simply because it could have been drafted with greater precision *Evergreen Freedom Found.*, No. 50224-1-II, slip op. (unpublished portion) at 22-23 (citing *Am. Legion Post 149 v. Dep't of Health*, 164 Wn.2d 570, 613, 192 P.3d 306 (2008)). Even where a statute is ambiguous, if it is subject to a constitutional construction it is not vague, because ambiguity and vagueness are not the same thing. *See, e.g.*, *In re Contested Election of Schoessler*, 140 Wn.2d 368, 389, 998 P.2d 818 (2000) (even if ambiguous, the word "resident" was not unconstitutionally vague). A statute is sufficiently clear when it provides explicit standards and a person of ordinary intelligence can have a reasonable opportunity to know what is required or prohibited. *Id.* at 388.

Here, the Freedom Foundation argues that the definition of "ballot proposition" cannot apply to local initiatives and the obligation to report independent expenditures cannot apply to activities beyond electioneering. Both of those assertions are belied by the statutory language as explained above. A local initiative becomes a ballot proposition, at the very least, when it is filed with local elections officials, and it is clear that all of the initiatives in question were filed before the Freedom Foundation expended resources to support them. RCW 42.17A.005(4); CP at 73-87. *Any* non-exempt independent expenditures in support of a ballot proposition plainly must be reported under RCW 42.17A.255. The statutory language is not unconstitutionally vague either facially or as applied here.

### C. The FCPA's Reporting Requirements Do Not Infringe on the Freedom Foundation's First Amendment Rights

This Court has recognized that full and vigorous discussion of political issues is a cornerstone of our democracy. *See Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 479, 166 P.3d 1174 (2007). Yet for purposes of a First Amendment analysis, the United States Supreme Court, the Ninth Circuit, and this Court have distinguished between contribution limits, which necessarily reduce the quantity of important political expression, and disclosure or reporting requirements, which "' impose no ceiling on campaign-related activities,'" and instead increase information available to the electorate. *Human Life of Wash.*, 624 F.3d at 1005 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)); *see also Voters Educ. Comm.*, 161 Wn.2d at 482. Thus, cases addressing contribution limits or bans on certain speech or activities are inapposite.[9]

Campaign disclosure requirements are reviewed under less stringent "exacting scrutiny," rather than strict scrutiny. *See, e.g.*, *Human Life of Wash.*, 624 F.3d at 1005 (describing *Doe v. Reed*, 561 U.S. 186, 196, 130

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[9] *See NAACP v. Button*, 371 U.S. 415, 419-20, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (analyzing ban on "improper solicitation of any legal or professional business" as applied to NAACP); *City of Chicago v. Morales*, 527 U.S. 41, 45-46, 50-64, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (analyzing ordinance prohibiting loitering in any public place); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320-21, 366-67, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (invalidating prohibition on corporation and union contributions to or express advocacy for or against a candidate in certain federal elections, but distinguishing disclaimer and disclosure requirements); *Ariz. Free Enter. v. Bennett*, 564 U.S. 721, 729-30, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) (analyzing a matching public funds system, not a disclosure requirement).

S. Ct. 2811, 177 L. Ed. 2d. 493 (2010)); *Voters Educ. Comm.*, 161 Wn.2d at 482. There must only be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Reed*, 561 U.S. at 196 (internal quotation marks omitted).

Here there is a substantial relationship between the State's interest in transparency and the information to be disclosed. Campaign disclosure requirements provide the electorate with critical information about the supporters and opponents of issues before them, an "extremely compelling" interest. *Human Life of Wash.*, 624 F.3d at 1005-07. The informational interest is especially important in this context where "following the money" allows voters to determine for themselves whether an interest group's involvement signals alignment with a voter's interest. *Id.* The public has a right to know which interest groups are an initiative's most ardent supporters, expending sometimes significant resources to promote or block proposed initiatives in the earliest stages. *State v. Permanent Offense*, 136 Wn. App. 277, 284-85, 150 P.3d 568 (2006) (describing the electorate's interest). Finally, because the State's disclosure requirement is not a ban, cap, or limitation on speech, it is "the least restrictive means" of "curbing the evils of campaign ignorance and corruption." *Human Life of Wash.*, 624 F.3d at 1003 (internal quotations marks omitted); *Voters Educ. Comm.*, 161 Wn.2d at 482-83.

Applying campaign disclosure requirements will not chill free legal representation in support of or opposition to local initiatives or risk violating the attorney-client privilege. Both this Court and the Ninth Circuit have

explained that generally, the identity of the client, the amount of a bill or fee, and the general purpose of the work performed are not protected from disclosure by the attorney-client privilege. *E.g.*, *Dietz v. Doe*, 131 Wn.2d 835, 846, 935 P.2d 611 (1997); *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129-30 (9th Cir. 1992) (bills that contained identity of client, case name, amount of fee, and general nature of services performed, but not litigation strategy or specific legal research, were not privileged). The Freedom Foundation has offered no facts to suggest disclosure of the value of legal services that occurred in the context of litigation—without more—would somehow reveal client confidences or chill pro bono participation.

Relying on *Citizens United*, the Freedom Foundation also claims that disclosure requirements can constitutionally apply only to electioneering communications that are the functional equivalent of express political advocacy, not pro bono activities or other expenditures. Pet. for Review at 19. But as the Court of Appeals explained, the *Citizens United* decision held the opposite: "we *reject* Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (emphasis added); RCW 42.17A.005(19)(a) (defining electioneering). Disclosure requirements are not constitutionally limited to electioneering. *Citizens United*, 558 U.S. at 369 (listing non-electioneering disclosure requirements that have been upheld including disclosure of independent expenditures and lobbying). Although the factual underpinning of *Citizens United* involved

electioneering communications, the Supreme Court recognized that disclosure requirements could constitutionally apply to more than just the functional equivalent of express advocacy and beyond just electioneering. *Citizens United*, 558 U.S. at 368-69.

The First Amendment requires only that campaign disclosure requirements show a substantial relation between the requirement and an important government interest. Here, the disclosure requirement is the "least restrictive means" of achieving the compelling interest in transparency for local voters. *Human Life of Wash.*, 624 F.3d at 1003, 1005-08; *Voters Educ. Comm.*, 161 Wn.2d at 482-83.

## V. CONCLUSION

This Court should affirm because the Court of Appeals analysis is correct, but also make clear that the reporting obligation for activities supporting or opposing local initiatives includes expenditures made during signature gathering.

RESPECTFULLY SUBMITTED this 20th day of April 2018.

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