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No. 95281-7

COA NO. 50224-1
No. 93232-8

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,

Respondent.

BRIEF OF RESPONDENT

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A. INTRODUCTION

This case addresses whether the provision of legal pro bono services by the Freedom Foundation (“Foundation”) in connection with litigation as to whether certain local ballot measures could even reach the ballot constituted “independent expenditures” under RCW 42.17A.005(4)/RCW 42.17A.255 that must be reported to the State’s Public Disclosure Commission (“PDC”).

This is a straightforward question of statutory interpretation. However, the State of Washington (“State”) has a bias against the Foundation, ignoring the plain statutory language, and singling out the Foundation for an enforcement action, ignoring the fact that the unions that were in opposition to the Foundation in litigation involving local ballot measures *did the exact same thing as the Foundation in the very same cases*; the State took no action against those unions, undercutting the State’s claim of its universal commitment to “transparency.”¹

When objectively evaluated, as the trial court did without the State’s political bent,² the plain language of the statutes at issue here

¹ In its brief at 1, 12-13, the State trumpets its commitment to “transparency” in the political process as a basis for overcoming the plain language of RCW 42.17A.005(4)/RCW 42.17A.255, but that self-righteous assertion is a red herring. The State’s theoretical transparency policy is not actually implicated in this case. No elections were conducted. The Foundation’s pro bono legal services were provided to determine if elections were to be held at all.

makes clear that pro bono legal services provided in connection with local ballot measures that never reach the ballot are not independent political campaign contributions. To adopt the State's interpretation of those statutes would require this Court to abandon its statutory interpretation principles and insert language into those statutes that was never enacted by the Legislature.

At a minimum, as the trial court noted, the statutes at issue here are not a picture of clarity; that very lack of clarity means that the statutes are void for vagueness.

Moreover, were the Court to adopt the State's erroneous interpretation of RCW 42.17A.005(4)/RCW 42.17A.255, the Foundation's First Amendment rights would be violated and this Court's prerogative to regulate the practice of law would be invaded. This Court can avoid any constitutional invalidity of the statutes at issue by adhering to the statutes' plain language, as the Foundation advocates.

Simply put, the trial court got it right and its decision should be affirmed.

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

B. STATEMENT OF THE CASE³

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.

In Sequim⁴ and Shelton,⁵ RCW 35.17.240-35.17.360 govern the process for their *local* initiatives and referenda. Chelan's local initiative process was governed by its municipal code, but its municipal code substantially mirrors and incorporates by reference the relevant portions of RCW 35.17.⁶

³ The State's Statement of the Case violates RAP 10.3(a)(5). It is far from a fair recitation of the facts and procedure in this case. It is argument, pure and simple. It should be disregarded.

⁴ Sequim adopted the power of local initiative and referenda afforded to noncharter code cities set forth in RCW 35A.11.080 through RCW 35A.11.100. *See* Sequim Municipal Code 1.15.010. RCW 35A.11.100 states that "the powers of initiative and referendum in noncharter code cities shall be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through 35.17.360, as now or hereafter amended.

It is also noteworthy that in the Sequim litigation, the actual relief sought in court by the citizens was to place the measure on the ballot or, in the alternative, for the city council to adopt the legislation directly. This is important because at least some of the requested relief would not be regulated under any reading of 42.17A; municipal lobbying is not regulated by the PDC. This makes even clearer the Foundation's point that it was supporting citizen efforts to petition their local governments.

⁵ Shelton has retained the commission form of government, and is therefore subject to the local initiative and referendum rights and regulations set forth in RCW 35.17.240 through RCW 35.17.360.

⁶ *See* Chelan Municipal Code 2.48 *et seq.*

The general outline of the local initiative process at issue in this case 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.

After certification of the petitions in all three cities, the city governing bodies refused to either adopt the petitions or place them on the ballot. Taxpayers in each of the three cities then sued to "procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance[.]" *See* RCW 35.17.290. In each case, the taxpayer plaintiffs received the Foundation's pro bono legal representation, but those legal efforts failed. Accordingly, the propositions were never sent to the ballots nor did a campaign ever occur. *See* CP 21-22. Rather, the Foundation simply provided legal services in pending legal actions. CP 8-9, 16-17, 21, 22.

Prompted by complaints by the Foundation's union opponents in those jurisdictions,⁷ the State claimed that the Foundation should have reported the expenses of providing this *pro bono* legal representation as "independent expenditures," even though the respective city governing bodies and unions succeeded in preventing the Foundation's clients' petitions from ever becoming ballot propositions; it instituted this action in the Thurston County Superior Court in October 2015 seeking civil penalties for the alleged violation of the Fair Campaign Practices Act ("FCPA"), RCW 42.17A, and injunctive relief. CP 5-10. Moreover, the State never took action against the unions that provided pro bono litigation support for the various municipalities in the cases referenced above.⁸

⁷ The State *misleads* the Court when it asserts 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, likely an organization fronting for unions who are allies of the Foundation's opponents in the local initiative fights. CP 64-71. The 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.

⁸ 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 Foundation filed a motion to dismiss the State's action. CP 19-33. Despite the fact that none of the citizen petitions were ever submitted to the voters of the three cities, the State argued that the free legal representation the Foundation provided to the taxpayers who brought the lawsuits constituted an independent campaign expenditure under RCW 42.17A.255 that should have been reported on the PDC's Form C-6. CP 39-45. The trial court concluded, however, that the statutes on which the State's complaint is based did not mandate reporting by the Foundation and dismissed the State's complaint. CR 12(b)(6). CP 102-03. The trial court described its rationale for its decision:

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

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 FCPA violations. Moreover, RCW 42.17A.765 confers authority upon the Attorney General to investigate FCPA violations and to file FCPA civil enforcement actions in court. The State was not powerless to act against the unions here; it made a conscious choice to prosecute only the Foundation even though pro bono legal services were provided on the other side of the very same case.

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. The State appealed the trial court's decision. CP 104-05.

C. SUMMARY OF ARGUMENT

Under the plain language of RCW 42.17A.005(4)/RCW 42.17A.255, the provision of pro bono legal services by an organization in connection with a local ballot measure that does not make it to the ballot does not constitute an independent campaign expenditure subject to reporting to the PDC.

The State's interpretation of the statutes at issue here only demonstrates that the trial court was correct in noting that the statutes were vague.

The Foundation's interpretation of RCW 42.17A.005(4)/RCW 42.17A.255, based on their plain language, avoids constitutional

infirmities in those statutes. To the extent that the State mandates the reporting of pro bono legal services as an independent campaign expenditure, it violates the Foundation's First Amendment rights because those expenditures do not constitute electioneering activity or the functional equivalent of express political advocacy. Legal services are far removed from such advocacy. Moreover, such reporting would intrude upon this Court's regulation of the practice of law and violate separation of powers principles.

Because the State engaged in highly selective enforcement of the independent campaign expenditure reporting requirements as to pro bono legal services, the State's complaint neglected to join indispensable parties under CR 19 – other organizations providing legal services without reporting them as independent campaign expenditures. The State's complaint should have been dismissed on that basis.

D. ARGUMENT⁹

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

⁹ Below, the State attempted to argue that there were factual issues for the trial court to address and a CR 12(b) motion to dismiss was an inappropriate vehicle for the trial court's decision. CP 38. The State apparently does not now argue as much on appeal.

This case involves a straightforward statutory interpretation issue, one that the trial court correctly decided. But the State misstates the standards this Court employs for statutory construction. Br. of Appellant at 4-5, 11-13. In effect, recognizing that the *plain language* of the statutes in question does not favor its position, the State falls back on the liberal interpretation imperative in the FCPA, statutory statements of intent, and a “context” rule¹⁰ to overcome the plain statutory language. Those concepts simply do not permit a court to add language to a statute that the Legislature did not enact.

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

¹⁰ In citing *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015) in support of its “context” approach, the State vastly overstates the importance of context. *Conover’s* analysis was derived from this Court’s decision in *State Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) where it stated: “the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all the Legislature has said in the statute and related statutes which disclose legislative intent about the provisions in question.” The focus for statutory interpretation must still be on the statutory language.

in the statute and related statutes to determine if the Legislature's intent is plain. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9-10. 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). Here, the plain language of RCW 42.17A.005(4) and RCW 42.17A.255 controls.¹¹

The State's claim is that the Foundation was obliged to report as an "independent expenditure" under RCW 42.17A.255 its pro bono legal services expended to attempt to get the local initiative measures at issue here to the ballot. Br. of Appellant at 2.¹² But the *specific language* of

¹¹ The State's attempt in its brief at 22-26 to tease out a meaning different than the plain language of RCW 42.17A.005(4) from the statute's legislative history is unavailing to it. The plain language controls. The State even *concedes* the Legislature may not have understood the local ballot process in enacting the statute. Br. of Appellant at 25.

¹² The State argues in its brief at 19-20 that public policy reasons support its statutory argument, notwithstanding the plain language of RCW 42.17A.005(4)/RCW 42.17A.255. It points to the experience of a local initiative campaign in Seattle, a municipality that has its own campaign finance ordinance. However, its public policy arguments are better directed to the Legislature to amend the statutes at issue here to expressly address local ballot measures.

Moreover, the Seattle local initiative campaign to which it cites for the first time on appeal offers no support for its argument. Seattle is a charter city and its initiative process actually mirrors the State process where the City Attorney must approve ballot language prior to the circulation (*see* SMC 2.08.020 and RCW 29A.36.071), unlike the process in the cities where there is no government contact while signatures are being circulated. Br. of Appellant at 19-20. Second, the State references the legal fees incurred in the Yes! For SeaTac campaign for the proposition that "[e]ven just expenditures on litigation to determine the appropriate ballot language or whether a proposition goes on the ballot can cost tens of thousands of dollars." Br. of Appellant at 20. This is a sleight of hand ignoring the actual events in that election. The legal fees were all reported and incurred in September of that election year *after* the initiative was placed on the ballot for a defense against a business-funded effort to remove the initiative from the ballot that was initially successful. <http://q13fox.com/2013/08/28/lawsuit-filed-over-removal-of-seatac-minimum-wage-initiative-from-ballot/>.

that statute 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 itself states:

(1) For the purposes 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...* (emphasis added.)

The term "ballot proposition" is a legal term of art under RCW 42.17A. RCW 42.17A.005(4) specifically defines "ballot proposition" as follows:

"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.005(4) (emphasis added). By the terms of RCW 42.17A.005(4), a "ballot proposition" must 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 cities of Sequim, Shelton, and Chelan were not "ballot propositions" under that aspect of RCW 42.17.005(4) because the petitions submitted to the city councils of

Sequim and Chelan and the city commission of Shelton 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.

In its brief at 14, the State decries the Foundation's alleged disregard of the second facet of the definition of ballot proposition in RCW 42.17A.005(4). It contends that a local ballot proposition encompasses any local initiative, recall, or referendum *proposed* to be submitted to the voters. Br. of Appellant at 14-15. But the State neglects to read all of that second facet, applying 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.¹³ 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 measures, signatures are gathered to support an ordinance petition *before* it is submitted to a local official.¹⁴ 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

¹³ 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.*

¹⁴ 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 35.17.240-35.17.360; 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.

to the gathering of signatures (RCW 29A.72.010), the local initiative can never qualify as a “proposition.” 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, the State asked the trial court, and now is asking this Court, to disregard these very different procedures, to ignore the plain language of the statutes and to invoke reporting requirements that were never intended to apply to the facts here.

Because there was never a “ballot proposition” as defined in RCW 42.17A.255, the independent campaign expenditures reporting is not triggered. Pro bono legal services are not an independent political campaign expenditure in the absence of any political campaign. They are pro bono legal services offered in connection with matters in litigation. To adopt the State’s position would require this Court to insert language into RCW 42.17A.005/.255 that is not there, something this Court will not do. *Saucedo v. John Hancock 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.”).¹⁵

The interpretation of RCW 42.17A.255 offered by the Foundation is further reinforced by the statute itself and the PDC’s own interpretation

¹⁵ The State essentially concedes 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.* The State is making a blatant request of this Court to imply language into the statutes that is not there.

of it. RCW 42.17A.255 itself clearly envisions that a ballot proposition is one that is submitted to the voters for consideration because the reporting described in the statute relates specifically to an “election campaign:”

(2) Within five days after the date of making an independent expenditure that by itself or when added to all other such independent expenditures made *during the same election campaign* by the same person equals one hundred dollars or more...”

RCW 42.17A.255(2) (emphasis added).

RCW 42.17A.005(4)/RCW 42.17A.255 have not been addressed by Washington appellate courts, but they have been interpreted by federal courts. *But see*, CP 99, 105-07. The Ninth Circuit essentially confirmed the trial court’s statutory interpretation when it stated that the statute’s “[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 Washington, Inc. v. Brumsickle*, 624 F.3d 990, 998 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011) (emphasis added). Thus, in the only case to construe this statute, the court 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. Because the petitions were never submitted to the voters, there was no “campaign.”

The State also contends that this Court should give great weight to

the PDC's "position" on local ballot propositions. Br. of Appellant at 26-29. This contention is flawed. 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. 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 in barring enforcement of the FCPA 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).¹⁶

Further, 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).

Additionally, the PDC's own requirements indicate that the trial court's statutory interpretation is proper. The reporting form ("Forms for report of independent expenditures and electioneering communications")

¹⁶ The State tries to downplay the significance of *Farris* by mentioning it only in passing in a footnote. Br. of Appellant at 28 n.14. 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).

adopted by the PDC, 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 insists the Foundation should have filed earlier would be incomplete because essential information required on the Form C-6 – the ballot proposition numbers – were never issued and never existed because there are and were no “ballot propositions.” Even the instructions to the C-6 form demonstrate that the report was inapplicable to the Foundation here.¹⁷

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. In all three of the cases at issue here, there were *no* ballot measures, because the ‘proposition or question’ was not submitted to the voters, which is required under RCW 29A.04.091 for a ‘measure’ to exist, or for a report of ‘independent expenditures’ to be required. The

¹⁷ The PDC instructions to the Form C-6 state:

- **“Who Must Report.** Any individual, business, union, organization or other person who makes independent expenditures totaling \$100 or more supporting or opposing a candidate or ballot *measure* and does not file C3 and C4 reports as a political committee.”

Foundation had no legal obligation to file a Form C-6 for the *pro bono* legal services it provided to local taxpayers engaged in an unsuccessful effort to vindicate their civil right to petition the government through direct legislation or local initiative. The trial court correctly construed the statute.

(2) The State's Proposed Statutory Interpretation Implicates the Foundation's First Amendment Rights and Intrudes Upon This Court's Authority to Regulate the Practice of Law

If the State's statutory interpretation is adopted, then the statutes at issue are constitutionally defective. This Court must construe the statutes here to avoid such constitutional problems. *Utter v. Building Industry of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015) ("We construe statutes to avoid constitutional doubt.").

(a) First Amendment

(i) Void for Vagueness

A distinct reason for this Court to decline to enforce RCW 42.17A.005(4)/RCW 42.17A.255 here is that they 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. Ultimately, the State's interpretation of those statutes is convoluted. The State seemingly concedes in its brief at 25 that the Legislature betrayed an erroneous

understanding of the law of local government ballot measures in enacting them.

RCW 42.17A.005(4)/RCW 42.17A.255 are constitutionally vague where they cannot be reasonably understood by persons allegedly subject to their provisions or encourages the type of arbitrary enforcement seen here. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). As this Court stated in *Voters Educ. Committee v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d, 470, 484-85, 166 P.3d 1174 (2007), *cert. denied*, 553 U.S. 1079 (2008), statutes are unenforceable if persons of common intelligence differ at their application or guess at their meaning. Even greater specificity is necessary if First Amendment rights are at stake.

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

(ii) Pro Bono Legal Services Here Are Not Subject to State Regulation

The public policy that the State asserts is a basis for its interpretation of RCW 42.17A.005(4)/RCW 42.17A.255 is *vastly* outweighed by countervailing public policy principles that the State continues to ignore. The State's interpretation of the FCPA inevitably intrudes upon the Foundation's free speech rights under the First Amendment. Indeed, the State vastly oversimplifies the First Amendment implications of its attempted regulation of pro bono legal services as independent campaign expenditures in its discussion of that issue. Br. of Appellant at 29-36.

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 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; *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. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007), the United States Supreme Court stated:

“The freedom of speech...guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” To safeguard this liberty, the proper standard for an as-applied challenge to BCRA §203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. And it must eschew “the open-ended rough-and-tumble of factors,” which “invi[te] complex argument in a trial court and a virtually inevitable appeal.” In short, it must give the benefit of any doubt to protecting rather than stifling speech.

(citations omitted).

The State claims that these authorities have no relevance because reporting pro bono legal services to the PDC will allegedly not prevent the Foundation from bringing legal actions. Br. of Appellant at 35-36. Clearly overlooked by the State, the reporting requirements of the FCPA that the State now wishes to apply to pro bono legal services will chill pro

bono advocacy by groups seeking to secure a place on the ballot for local measures.¹⁸ In particular, the requirement of reporting independent expenditures will 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). The FCPA interpretation sought by the State would mandate disclosure not only of the entity making the “contribution” of pro bono legal services, but may also require reporting of contributions by contributors to the contributor. RCW 42.17A.470. *See* Jim Brunner, *Grocery group fined \$18M in fight against GMO food-labeling initiative*, SEATTLE TIMES, November 3, 2016, www.seattletimes.com/seattle-news/politics/grocery-group-hit-with-18m-campaign (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). The upshot of the State’s demand is that treatment of pro bono legal services as an independent expenditure under RCW 42.17A.255 may lead to the breach of the attorney-client privilege of RCW 5.60.060(2).

¹⁸ “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, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (enforcement of an overbroad law may chill constitutionally-protected speech).

The State also attempts to claim that its reporting requirements for independent campaign expenditures under RCW 42.17A.255 will not have an impact on the Foundation's First Amendment rights at all, claiming that this Court should analyze the issue with lesser scrutiny and that the alleged need for "transparency" trumps the free speech rights of the Foundation.¹⁹

However, the State's First Amendment argument is simply wrong, a patchwork quilt of points that ignores the core First Amendment rulings of the United States Supreme Court.

First, the State itself argues that the pro bono legal services provided by the Foundation are independent *campaign* expenditures. As such, any laws burdening such political activity are subject to strict scrutiny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 338-39, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (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). There is little question that the burden is on the State to justify such a restriction on speech. *Voters Educ. Committee*, 161 Wn.2d at 470. Even if the level of scrutiny to be applied here is only "exacting scrutiny" as the State suggests, br. of appellant at

¹⁹ Of course, in this case, as will be documented *infra*, the State has demonstrated that its alleged commitment to transparency with regard to the provision of pro bono legal services in a local ballot campaign is a fraud, when it chooses not to enforce such an alleged policy with respect to entities providing exactly the same services in the very same campaigns, albeit taking a position that the State *favours*.

29-30, rather than strict scrutiny, that burden is exceedingly daunting for the State.

Second, notwithstanding any interest in “transparency” as the State argues in its brief at 30-34, 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*, 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, to allow state regulation of pro bono legal services. *Arizona Free Enterprise Club PAC*, 564 U.S. at 754; *Buckley v. Valeo*, 424 U.S. 1, 64-68, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (reporting requirements may impinge on free speech, association; a

government interest must be substantial to justify regulation). Here, the State has demonstrated by its own selective enforcement in this case that the government interest is weak.

Pro bono legal services simply are not electioneering communications precisely because there was no “election” in any of three municipalities here. The State fails to point to a single case that holds pro bono legal services to be the functional equivalent of express political advocacy subject to regulation; it cannot establish the essential predicate for regulation established in *Citizens United* and *Wisconsin Right to Life*.²⁰

In sum, were the Court to adopt the State’s strained statutory interpretation of RCW 42.17A.005(4)/RCW 42.17A.255, such an interpretation violates the Foundation’s First Amendment rights as applied to the provision of pro bono legal services here.

(b) Intrusion Upon the Practice of Law

The State’s incorrect statutory interpretation would also subject the practice of law to executive branch regulation forbidden under this Court’s separation of powers principles.

Under cases like *Graham v. Wash. State Bar Ass’n*, 86 Wn.2d 624, 548 P.2d 310 (1976) (prohibiting State Auditor from auditing Bar

²⁰ By contrast, the signature of a person on a referendum petition was a political expression that allowed government regulation, notwithstanding First Amendment privacy interests of those signers. *Doe v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010).

Association); *Bennon, Van Camp, Hagen & Ruhl v. Kessler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981) (escrow agents doing real estate closings were engaged in authorized practice of law); *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995) (barring PERC jurisdiction over labor dispute between Bar and its employees); *Putnam v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009) (statute providing for certificate of merit in medical negligence cases violated separation of powers as it intruded upon court rule), executive branch intrusion upon the separate constitutional responsibility of this Court to regulate the practice of law is prohibited.

In general terms, separation of powers principles are designed to ensure that the fundamental functions of each branch of our government remain “inviolable.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009); *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The core analytical question for a separation of powers discussion is whether the particular action threatens the independence or integrity of another branch.

Here, there is little question that the regulation of pro bono services generally and amicus or other intervenor legal services in specific cases fall within the regulatory responsibilities of the judicial branch. This Court has promulgated rules relating to the provision of pro bono services

as part of attorneys' continuing legal education requirements. APR 8(e); APR 11(e)(7). Indeed, attorneys are asked to voluntarily disclose pro bono activities to the WSBA each year upon re-licensure. Court rules govern intervention in litigation. CR 24. Court rules govern amicus curiae participation in litigation. RAP 10.6.

The involvement of the executive branch in these areas governed by court rule is intrusive and contrary to judicial policy. For example, as noted *supra*, the public reporting of pro bono legal services as independent campaign expenditures may result in a breach of attorney-client privilege as to the identity of the client. This Court has not chosen to adopt a civil rule or a rule of appellate procedure that requires the disclosure of those groups funding an amicus curiae brief. *See* RAP 10.6(b).²¹

The State's proposed interpretation of RCW 42.17A.005(4)/RCW 42.17A.255, however, is even more potentially intrusive upon the practice of law and attorney-client privilege than it would appear on first blush. 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, the State's

²¹ Amicus briefs are also permissible in the trial court setting by case law. *Parsons v. State Dep't of Soc. & Health Servs.*, 129 Wn. App. 293, 302, 118 P.3d 930 (2005), *review denied*, 157 Wn.2d 1004 (2006).

position 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 State’s position offers too many opportunities for mischief and the breach of privilege.

For the State’s executive branch to impose a disclosure requirement as to the funders of pro bono briefs and other support not mandated by this Court is an unwarranted intrusion upon the Court’s authority, violating separation of powers principles. To the extent that the PDC seeks to regulate the provision of pro bono legal services, it intrudes directly upon this Court’s constitutional responsibility to regulate the practice of law. The trial court’s decision *avoids* such a constitutional confrontation.

(3) The State’s Complaint Was Procedurally Defective under CR 19 and Should Have Been Dismissed

In order to render an appropriate judgment, all parties with an interest in the matter must be before the court; under CR 19, Washington courts undertake a three-step analysis to determine whether an action must be dismissed if it is not feasible to join a required party. *Automotive United Trades Organization v. State*, 175 Wn.2d 214, 221-22, 285 P.3d 52

(2012).²² First, a court must determine if the nonparty is required in order for the court to hear the action. CR 19(a)(1). If so, it must order the required party to be joined. CR 19(a)(2). If the court concludes that it is not feasible to join the required party, then it must examine whether, “in equity and good conscience,” the action can proceed among the existing parties. CR 19(b). If it determines it cannot, the court may dismiss the action. CR 12(b)(7). The latter aspect of the test is necessarily case-specific. A court must consider whether “in equity and good conscience” the action may proceed or must be dismissed by applying the factors set forth in CR 19(b) in light of the particular interests present in each case. *Aungst v. Roberts Construction Co., Inc.*, 95 Wn.2d 439, 625 P.2d 167 (1981).

With respect to the first step of the CR 19 test, a party is necessary if:

- (1) in his absence complete relief cannot be accorded among those already parties, or
- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of

²² CR 19 is not jurisdictional, but the rule is founded on equitable considerations. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 503-04, 145 P.3d 1196 (2006). Generally, Washington appellate courts review decisions under CR 19 on an abuse of discretion standard of review, although legal decisions inherent in such a ruling are reviewed *de novo*. *Id.* at 492.

incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

CR 19(a). As the *AUTO* court observed, the party's interest must be "sufficiently weighty." 175 Wn.2d at 223. A mere financial interest in the outcome of a case or a concern about future events that may or may not take place is not enough. *Id.* at 223-24. In *AUTO*, our Supreme Court held that Native American tribes were necessary parties to an action brought by a trade organization challenging on state constitutional grounds state payments made to the tribes under fuel tax compacts between the State and those tribes. As the Court noted: "... as a practical matter, the tribes' bargained-for contractual interest in receiving payments is at risk should *AUTO* prevail. This is all that is required to make their presence 'necessary.'" *Id.* at 224. *See also, Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168 (W.D. Wash. 2014) (tribe brought action against State Commissioner of Public Lands regarding rights to hunt and gather roots and berries on certain state lands; court held that other tribes who were signatories to treaty under which tribe claimed rights were necessary parties).

Here, the unions provided pro bono legal services intervening in the actions in support of the decisions of the various municipalities to prevent measures from reaching the ballot; they were necessary parties to

this case under CR 19. Because the State chose to selectively enforce the statutes it seeks to invoke against the Foundation, these other organizations are CR 19 indispensable parties. The State advocates the prosecution of behavior by a non-profit organization with one point of view while refusing to prosecute identical behavior by a for profit firm with the opposite view. This it cannot do.

As the federal court in *Skokomish Indian Tribe* noted, the core test for whether a party is “necessary” boils down to whether a court can award complete relief to the parties without joining the non-party. Put another way, the court must assess if the non-party has a legal interest in the issues at stake in the case such that its absence will (1) impair or impede its ability to protect that interest or (2) expose the named parties to the risk of multiple or inconsistent obligations. 994 F. Supp. 2d at 1187.

Here, the absent parties were necessary parties. The central legal issue of this case is whether legal expenses made by a private party in these three cases are, as the State argues, reportable as independent campaign expenditures to nonexistent ballot measures. There cannot be a judgment on this legal question that does not affect (or leave unresolved) the status of the unions who argued the opposite side of the Foundation in each and every case on precisely the same issues. The State cannot bring a prosecution to require one side of a legal dispute to report its

expenditures as political while not even investigating, much less prosecuting, the opposing side in the very same cases.

The three cases at issue are akin to a dispute over single piece of property where various parties have divergent but overlapping interests in that property. Where several persons have overlapping interests such that the disposition of the action could result in inconsistent obligations, joinder of all of the parties to the property is appropriate. CR 19(a)(2)(B) provides in relevant part that joinder is appropriate if the absence of an interested party would: “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. *See also, Mayo v. Jones*, 8 Wn. App. 140, 505 P.2d 157 (1972) (partner and divorced wife had chosen in action as tenants in common; wife was necessary party to partnership accounting action).

Although the unions and the Foundation were on directly opposite sides of the legal cases at the center of this prosecution, neither of them believed that their legal representation in these cases constituted an independent campaign expenditure as to the non-existent ballot measures; *none* of the parties involved reported their legal work as independent campaign expenditures. In this sense, both Foundation and the unions have an overlapping interest in the State’s characterization of their legal

work as independent campaign expenditures to opposite sides of a non-existent political campaign. The absence of unions would in fact create a substantial risk of inconsistent obligations for identical conduct by the Foundation.

Because the State seeks injunctive relief against the Foundation, CP 10, without the unions who appeared in the very same cases as the Foundation, such relief would create inconsistent obligations by burdening the Foundation completely and the opposing side of the same case not at all. Presumably, the State seeks to enjoin the provision of pro bono legal services that are not reported as independent campaign expenditures in the future; but the State cannot enjoin the activity at issue in this case if the other side of the exact same case is not present – as the trial court lacked the authority to impose an injunction on a party that is not properly before it. Moreover, considering the State’s position that legal services provided in the context of these cases are a political scourge that must be met with equitable relief, the State should welcome the opportunity to bring all culpable parties before the trial court so that the equitable remedies it seeks may be equitably applied. Indeed, the very reason for CR 19 is to provide all parties with an interest in an action to be heard in one proceeding thereby avoiding duplicative litigation.

Just as it is inconceivable that the outcome of this case would not affect the interest of the unions on the opposite side, their absence is certainly prejudicial to the Foundation because the State is seeking to recover attorney fees and cost of trial. CP 10. If the unions are joined these costs could be halved and borne equitably among the parties found to have violated this new-found reporting obligation. Even if the State were to counter that it could later pursue an action or investigate the unions at issue, this expense (once incurred) cannot be shared with a party who is not part of this legal proceeding under RCW 42.17A.765(5) which provides the state may recover, “all costs of investigation and trial, including reasonable attorneys’ fees to be fixed by the court.” This is the inherent inequity of allowing the case to proceed against one side of a legal dispute and not the other: it would lead to inconsistent obligations, and would fail the equity and good conscience test by punishing one point of view and not the other. The absence of the unions on the other side of the same cases will similarly hamper Foundation’s ability to defend itself as it cannot compel discovery from the unions if they are non-parties and will be left without adequate opportunity to defend itself against a prosecution that is selective on its face.

Simply put, the unions here were indispensable parties under CR 19. Moreover, under the second aspect of the CR 19 test, the State has not

disclosed an inability to join those union organizations in this action. The trial court here erred in failing to join the union-intervenors under CR 19 or dismissing the State's action entirely because those groups were indispensable to the complete and proper litigation of the issues here.

E. CONCLUSION

The Foundation is being prosecuted by the State for its alleged failure to report as independent campaign expenditures the value of pro bono legal services provided to defend the civil rights of Washington citizens. The statutes at issue here are vague, as the trial court noted. Although by their plain language the statutes do not apply to the Foundation's provision of pro bono legal services, the State's misreading of RCW 42.17A.005(4)/RCW 42.17A.255 compels this Court to address constitutional infirmities in these statutes occasioned by its strained statutory interpretation. But, the Court need not do so if it adopts the Foundation's statutory interpretation.

Further, the State prosecutes this claim despite the fact that no campaign or election ever occurred; it has declined to prosecute (or even investigate) those providing legal services on the other side of the exact same cases.

The trial court correctly dismissed the State's politically-motivated complaint that fails to meet the requirements of RCW

42.17A.005(4)/42.17A.255. This Court should affirm the trial court's decision and award costs on appeal to the Foundation.

DATED this ~~5th~~ day of December, 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Brief of Respondent in Supreme Court Cause No. 93232-8 to the following parties:

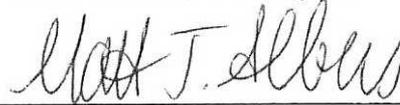
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 5, 2016 at Seattle, Washington.



Matt J. Albers, Paralegal
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