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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

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

Respondent.

BRIEF OF APPELLANT STATE OF WASHINGTON

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I. INTRODUCTION

Cities have become proving grounds for ballot propositions in Washington, as initiatives on topics from the minimum wage to campaign finance reform have been presented to local voters before they take the statewide stage. Understanding who supports a ballot proposition at its early stages is important because it provides the public with insight into which interests most strongly support a measure.

Nonetheless, the superior court here held that the definition of "ballot proposition" in Washington's campaign finance law does not cover local initiatives until they are actually placed on the ballot. This reading effectively allows funding of all *local* ballot propositions to evade transparency for a significant period of time when the local proposition is being debated. Interest groups can spend hundreds of thousands of dollars to gather signatures or build support for a measure without disclosing anything about who is funding the effort. That is not and cannot be the law.

The people adopted Initiative 276[1] in 1972 to ensure that campaign expenditures would be fully disclosed to the public and to give the public access to comprehensive information about who bankrolls efforts to

[1] Laws of 1973, Reg. Sess., ch. 1 (approved Nov. 7, 1972) (I-276).

support or oppose state and local ballot propositions. The superior court's reading of the statutory definition of "ballot proposition" ignores the plain language and stated purpose of Initiative 276 and its subsequent amendments, as well as the overall context of the statutory scheme. The superior court's interpretation is inconsistent with the people's and the Legislature's intent and should be reversed.

II. ASSIGNMENTS OF ERROR

1. The superior court erred when it dismissed the State's enforcement action against the Freedom Foundation.

2. The superior court erred when it interpreted the definition of "ballot proposition" to exclude from campaign finance reporting any money raised or spent to support or oppose a local ballot proposition until it is placed on the ballot.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the people and the legislature intended comprehensive public disclosure of independent expenditures to promote or oppose ballot propositions, did the superior court interpret "ballot proposition" to exclude from campaign finance reporting any money spent to support or oppose a local ballot measure until it is placed on the ballot?

2. Given that courts have recognized a strong public interest in knowing who expends money to support or oppose a ballot proposition, as well as the minimal burden created by disclosure requirements, does the State's enforcement action violate the Freedom Foundation's First Amendment rights of speech or association?[2]

3. Does the State's enforcement action violate the separation of powers doctrine by infringing upon the courts' authority to regulate the practice of law?

IV. STATEMENT OF THE CASE

A. Washington Voters Have Historically Insisted on Transparency for Expenditures to Support or Oppose Ballot Propositions, Including Local Initiatives, Recalls, and Referenda

In 1972, voters in Washington adopted Initiative 276, which was designed, in part, to give the public complete access to information about who funds initiative campaigns and who seeks to influence the initiative process. The people declared that it would be the "policy of the State of Washington: (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided [and] (10) [t]hat the public's right to know of the financing of

[2] Freedom Foundation raised issues 2 and 3 in its answer to the statement of grounds for direct review, presumably as alternative reasons for affirming the superior court. *See* RAP 2.5(a).

political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private." I-276 § 1. By an overwhelming 72 percent,[3] voters adopted Initiative 276 and required financial disclosure for campaigns, including those related to initiatives, referenda, and ballot measures.

Initiative 276 established reporting requirements for anyone supporting or opposing a "ballot proposition." I-276 §§ 3-14 (establishing reporting requirements). For example, an "independent expenditure [is] 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[.]" RCW 42.17A.255. Reporting requirements are triggered once an expenditure amount crosses a threshold, currently $100. RCW 42.17A.255.[4]

Initiative 276 defined "ballot proposition" to mean "any 'measure' as defined by [former] R.C.W. 29.01.110, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of any specific constituency which has been filed with the appropriate election

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[3] *See Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 996 (9th Cir. 2010).

[4] When the people adopted Initiative 276, this provision was worded differently, but it reflects the same intent: "Any person who makes an expenditure in support of or in opposition to any candidate or proposition (except to the extent that a contribution is made directly to a candidate or political committee), in the aggregate amount of one hundred dollars or more during an election campaign, shall file with the commission a report . . . ." I-276 § 10(1).

officer of that constituency." I-276 § 2(2). "Measure" has always been more limited than "ballot proposition" because it does not incorporate proposed initiatives, recalls, and referenda before they are submitted to the voters. In 1972, when Initiative 276 was adopted, "measure" meant: "any proposition or question submitted to the voters of any specific constituency." Laws of 1965, Reg. Sess., ch. 9, § 29.01.110; former RCW 29.01.110 (1972).[5]

In 1975, soon after the adoption of Initiative 276, the Legislature made adjustments to the definition of "ballot proposition" to clarify that the term applied to both statewide and local initiatives, recalls, and referenda:

> "Ballot proposition" means any "measure" as defined by [former] 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). Thus, the 1975 Legislature clarified that "ballot proposition" includes local propositions "from and

[5] In 2003, the Legislature removed the last phrase of the definition of "measure," so that the term now includes "any proposition or question submitted to the voters." Laws of 2003, Reg. Sess., ch. 111, § 117.

after the time when such proposition has been initially filed with the appropriate election officer . . . prior to its circulation for signatures."[6]

B. Washington's Initiative Process at the State and Local Levels

The process for proposing an initiative, recall, or referendum differs at the state and local levels. A sponsor of a statewide initiative must first file the text of the proposed initiative with the Secretary of State. The Attorney General then creates a ballot title, which is printed on the petitions for gathering voter signatures. *See* RCW 29A.72.010-.120; *see also* Laws of 1913, Reg. Sess., ch. 138, §§ 1-6. If an initiative to the people has sufficient valid signatures, it goes on the ballot at the next general election. Const. art. II, § 1. If an initiative to the Legislature has sufficient valid signatures, it is presented to the Legislature first, but if the Legislature declines to adopt it, the initiative appears on the following general election ballot. Const. art. II, § 1.

The process for local initiatives in cities and towns is different from the process for statewide initiatives. RCW 35.17.240-.360 (authorizing cities using the commission form of government to adopt the initiative process); RCW 35A.11.100 (authorizing same process for non-charter code cities); Sequim City Code 1.15 (adopting the initiative power

[6] The definition of "ballot proposition" has since been updated to reflect the current codification of the definition of "measure," and to replace "prior to" with "before," but it otherwise remains the same today. RCW 42.17A.005(4).

and process set forth in RCW 35A11.080-.100); Shelton City Code § 1.24.020 (adopting the initiative process in RCW 35.17). A local initiative petition is generally first filed with the local election officer after registered voter signatures have already been gathered. *See* RCW 35.17.260. If the petition contains the required number of valid signatures, the city's or the town's council or commission must either pass the proposed ordinance or submit the proposition to a vote of the people. RCW 35.17.260.[7]

C. The Local Ballot Propositions in the Cities of Sequim, Chelan, and Shelton

In 2014, Freedom Foundation staff created sample municipal ordinances and ballot propositions for citizens to use to advance certain causes to their local city councils or commissions. CP at 6-7, 15. Local residents in the cities of Sequim, Chelan, and Shelton used those samples to file two ballot propositions in each city, one to require collective bargaining negotiation sessions to be publicly conducted, and the second to prohibit union security clauses in city collective bargaining agreements. CP at 7, 15.

[7] Some cities allow an extended period of signature gathering even after the initiative is initially submitted. For example, under the Chelan Municipal Code, sponsors have a 90-day window within which to gather sufficient valid signatures. Chelan Municipal Code §§ 2.48.060, .070, .080, .090.

Each proponent submitted the proposed measures to their local city clerks along with signatures they had gathered in support of the measures. CP at 7-8, 75, 81, 86-87. They asked their respective city councils or commissions to either pass the measures as local ordinances or, if the councils or commissions did not agree, to alternatively place each measure on the local ballot for a vote. CP at 7-8, 21, 24. None of the cities agreed to pass the measures as ordinances or place the ballot propositions on the local ballots. CP at 7-9, 15, 21-22. 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, 21-22, 35, 81, 86-87. The City of Sequim concluded that it would table the issue until a later meeting, but never acted further. CP at 75.

In response, Freedom Foundation employees who are attorneys participated in lawsuits against each jurisdiction on behalf of the local resident proponents. CP at 7-9, 16, 20, 73-87. Each suit sought a judicial directive to the respective city to put each measure on the local ballot. CP at 72-87. Each lawsuit ended in a superior court dismissing the case because the subject matter was beyond the local initiative power or it conflicted with state law. CP at 21-22; RCW 41.56 (governing collective bargaining); RCW 35A.11.020 (granting the local legislative body the

exclusive power to define the functions, powers, and duties of employees, "to fix the compensation and working conditions of such officers and employees"); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-62, 138 P.3d 943 (2006) (explaining when a proposed local initiative is beyond the scope of the local initiative power).

The Freedom Foundation never filed any campaign finance disclosure reports publicly identifying the value of the legal services it provided to the resident proponents in support of the local ballot propositions. CP at 9-10.

D. The State Received a Citizen Action Complaint Asserting That the Freedom Foundation Failed to Report the Value of Its Legal Services in Support of These Measures

In February 2015, the State received a citizen action complaint about the Freedom Foundation's failure to report the value of legal services it provided in support of these local ballot measures. CP at 64-71. As it typically does when a complaint has been filed, the State conducted an investigation. CP at 61. Following the conclusion of that investigation, the State filed a civil regulatory enforcement action against the Freedom Foundation in Thurston County Superior Court, alleging that the Freedom Foundation failed to report independent expenditures it made in support of these local ballot propositions. CP at 3-10, 62.

When the State receives similar complaints about other people or entities (e.g., complaining that some person or entity failed to report expenditures spent supporting or opposing local ballot measures), such complaints are treated the same way. *E.g.*, *State v. Econ Dev. Bd.*, Pierce County Superior Court No. 16-2-10303-6. The State conducts an investigation and, as appropriate, files a civil enforcement action. CP at 61-62. The Freedom Foundation has filed a number of similar complaints against entities not complying with campaign finance disclosure laws. CP at 47, 62. No other citizen action complaints related to these local ballot propositions have been filed. CP at 62.

E. The Superior Court Dismissed the State's Civil Enforcement Action

The Freedom Foundation moved to dismiss the State's enforcement action. CP at 19-33. The Freedom Foundation asserted that the local propositions were not "ballot propositions" as defined in RCW 42.17A.005. The Freedom Foundation argued that because the local initiative process generally requires signatures to be gathered and submitted before the ballot propositions are filed with the local elections official, the local propositions were not "ballot propositions" under RCW 42.17A.005, and therefore no disclosure was required unless and until the proposition became a "measure" placed on a ballot. CP at 19-33.

The State opposed the motion and the statutory interpretation asserted by the Freedom Foundation. CP at 34-49. The State argued that the Freedom Foundation's reading of the statute would effectively exclude from public disclosure all funds raised and spent on local ballot propositions until they advanced to the ballot, contrary to the clearly stated purpose and intent of the law. CP at 34-49.

The superior court granted dismissal. CP at 102-03. It found "the statutes here to be ambiguous and vague." VRP 23. The superior court further found that the State had not "sufficiently established that this situation involved a ballot measure that gave them the opportunity to require that [expenditures in support or opposition] be reported." VRP 23-24.

The State timely appealed and sought direct review at this Court. CP at 104-05.

V. ARGUMENT

This Court reviews issues of statutory construction like this one de novo. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). In construing a statute, the court's 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) (internal quotation marks omitted) (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 meaning of words in a statute is not gleaned from [the] words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (internal quotation marks omitted). Viewed with this analytical framework in mind, the Freedom Foundation's interpretation of "ballot proposition" is incorrect.

A. The Superior Court's Reading of "Ballot Proposition" Is Inconsistent With the Plain Language of the Statutory Scheme, the Purpose of the Campaign Finance Law, the Legislative History, and the Public Disclosure Commission's Interpretation

1. The fullest disclosure of campaign expenditures is the public policy of the State, and campaign disclosure laws must be liberally construed

"[A]n enacted statement of legislative purpose is included in a plain reading of a statute." *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010). When adopting Initiative 276, the people declared the public policy of the State of Washington to be that

political campaign contributions and expenditures "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)); RCW 42.17A.005(17) (I-276 § 2(11)) (including support or opposition to a ballot proposition within the definition of "election campaign"). 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. Any analysis of individual disclosure provisions and statutory definitions must occur in the context of this strong statement of intent and the liberal construction requirement.

2. The law requires reporting of independent expenditures that support or oppose a ballot proposition

Organizations such as the Freedom Foundation must timely file reports of their "independent expenditures." RCW 42.17A.255. An "independent expenditure" is "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 . . . ." RCW 42.17A.255(1) (emphasis added). The Freedom Foundation has not denied its expenditures, but rather disputes

that those expenditures were made in support of a "ballot proposition" as that term is defined in RCW 42.17A.

Under RCW 42.17A.005(4), "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.

(Emphases added.) The Freedom Foundation's interpretation of this definition, asserting that a local ballot proposition encompasses only local "measures" that have already been submitted to the voters, ignores the people's use of the word "or." Answer to Statement of Grounds at 8-9.

The term "ballot proposition" in RCW 42.17A encompasses two distinct concepts. A ballot proposition may be a "measure," as defined in RCW 29A.04.091 to be "any proposition or question submitted to the voters." Alternatively, a ballot proposition may also be any "initiative, recall, or referendum proposition," expressly including a local proposition "*proposed* to be submitted to the voters . . . ." RCW 42.17A.005(4) (emphasis added). Plainly, a ballot proposition may either be one already submitted to the voters, or one proposed to be submitted to voters. The Freedom Foundation would have this court disregard the latter part of the definition in the context of local propositions.

Under the plain language of RCW 42.17A.005(4), the Legislature expressly intended to include reporting for local ballot propositions well in advance of when those propositions are placed on the ballot and submitted to the voters. The definition applies, at the very least, once a proposition is "initially filed with the appropriate election officer," RCW 42.17A.005(4), which had already occurred as to each of the local propositions at issue here. And while this Court need not reach the question in this case, the people's and the Legislature's intent was also to include the signature-gathering phase for *all* ballot propositions, including local ones. At a minimum, at the time these ballot propositions were filed with their respective local jurisdictions, they were "ballot propositions" within the meaning of the statute.

3. The phrase "before circulation for signatures" reflects intent to incorporate reporting for the signature-gathering stage and to require public disclosure before an initiative qualifies for the ballot

The Freedom Foundation primarily asserts that because RCW 42.17A.005(4) includes the phrase "before its circulation for signatures" the local propositions here could not be "ballot propositions" because the propositions had already been circulated for signature. Relevant here, ballot propositions include:

> [A]ny 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). Put simply, despite RCW 42.17A.001's robust language in favor of disclosure, the Freedom Foundation seeks to circumvent transparency by relying on the procedural differences in how state and local ballot propositions qualify for the ballot.

Under the Freedom Foundation's reading, local propositions can be covered by campaign finance disclosure requirements if they are "measures" appearing on the ballot and thus "submitted to voters." Answer to Statement of Grounds at 7-9. Yet the plain language of the statutory definition goes beyond "measures" appearing on the ballot to include "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*[.]" RCW 42.17A.005(4) (emphasis added). If the people and the legislature intended local initiative propositions to qualify *only* if they were "measures," the reference to local propositions in the definition would have no meaning.

At the state level, ballot propositions are only circulated for signatures after a number of other steps in the process, the first being

the submission of the ballot proposition to the Secretary of State. RCW 29A.72.010-.290. Therefore, as to statewide ballot propositions, the phrase "before its circulation for signatures" serves as a clarification and reminder that reporting requirements apply even before the propositions are circulated for signatures for statewide initiatives.

The Freedom Foundation argues that under the State's reading, "before its circulation for signatures" is surplusage in the context of local ballot propositions, where signature-gathering is often a prerequisite to filing the proposition with the appropriate election official. *See* RCW 35.17.260. But the phrase "before its circulation for signatures" certainly has meaning with respect to state ballot propositions and is not surplusage in that context. The phrase is also not surplusage in the context of local jurisdictions that allow continued signature gathering after the initiative is filed. It should go without saying that words are not surplusage just because they apply in some applications of a statute but not others.

Even if this Court finds that the phrase is superfluous, it should not read "before its circulation for signatures" to eliminate the definition's application to local ballot propositions. "The canon against surplusage is not an absolute rule" and it "'assists only where a competing interpretation gives effect to every clause and word of a statute.'" *Marx v. Gen. Revenue*

Corp., 133 S. Ct. 1166, 1177, 185 L. Ed. 242 (2013) (quoting *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 105, 131 S. Ct. 2238, 180 L. Ed. 2d 141 (2011)).[8] Here, the Freedom Foundation's interpretation of RCW 42.17A.005(4) also fails to give effect to every word in the context of local propositions. The Freedom Foundation's reading would render superfluous the express reference to local jurisdictions in the definition and would frustrate the people's and the Legislature's plain intent to clarify that "ballot propositions" include local propositions before they become "measures."

This Court should instead, at the very least, apply the plain language of the statute to conclude that a local ballot proposition includes "any initiative . . . proposed to be submitted to the 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 . . . ." RCW 42.17A.005(4). This interpretation is consistent with the overall context and purpose of the statute—to accomplish full and complete public disclosure so the public

[8] *See also* 2A Norman J. Singer & J.D. Shambie, *Statutes and Statutory Construction* § 47:37 (7th ed. WL) ("Courts may eliminate or disregard words in a statute to effect legislative intent or meaning."); *Marx v. Gen. Revenue Corp.*, 133 S. Ct. at 1177; *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 859, 774 P.2d 1199, 779 P.2d 697 (1989).

understands who is supporting campaigns, including ballot proposition campaigns. RCW 42.17A.001. It is also consistent with the liberal construction requirement. RCW 42.17A.001. This Court should conclude that, at the very least, reporting must begin for local ballot measures when they are filed. *See* RCW 42.17A.001, .904, .907.

Indeed, though the Court need not go so far to resolve this case, the statutory scheme and legislative intent demonstrate that the reference to "before [a petition's] circulation for signatures" includes the signature-gathering phase, even at the local level. This reading is supported by the Legislature's clarification that local ballot propositions are included within the definition of "ballot proposition" and the purpose section's emphasis on full and complete disclosure. RCW 42.17A.001, .005(4).

A legislative desire to make expenditures disclosable at the signature-gathering phase makes sense in light of the significant resources often expended in signature-gathering campaigns both at the state and local levels. For example, the Seattle Districts Now committee spent $130,162.96 for signature gathering in 2013 at the local level.[9] In that

[9] *See* http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=U0VBVEROIDEwOQ%3D%3D%3D%3D&year=2013&type=single (signature-gathering expenditures paid).

same year, signature gathering expenditures to support Initiative 522 amounted to $315,979.15.[10]

If expenditures in support of local ballot propositions are not subject to regulatory oversight until they become "measures," this would create a significant loophole in the law. Financial activity supporting or opposing local ballot propositions at the early stages would be hidden from the public, potentially shielding the disclosure of vast expenditures in support of or opposition to such propositions. Even 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.[11] To read the statute as the Freedom Foundation suggests would undermine the plain purpose of the statute—to give the public access to information about who is bankrolling such efforts. RCW 42.17A.001. Reading the definition in context with the rest of the chapter as a whole, spending to support or oppose a local ballot proposition should not be exempt from campaign finance regulation before those propositions appear on the ballot.

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[10] *See* http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=TEFCRUlXIDQ2NA%3D%3D%3D%3D&year=2013&type=initiative (signature-gathering services paid by Label It WA, a political committee).

[11] *See* http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=U0VBVEdKIDEwNA%3D%3D%3D%3D&year=2013&type=single (legal services costs spent on local initiative litigation prior to election for Yes! For SeaTac committee support of $15 minimum wage local initiative)

4. RCW 42.17A.255's reference to "election campaign" does not limit the reporting requirement to expenditures on propositions already placed on the ballot

The Freedom Foundation also argues that RCW 42.17A.255(2)'s reference to "election campaign" means that the people and the Legislature did not intend to include reporting of expenditures that occur before an initiative becomes a "measure" and is placed on the ballot. Answer to Statement of Grounds at 8-9. This argument is circular and contrary to the plain language of the statute.

RCW 42.17A.255(1) and (2) require that certain independent expenditures "made in support of or in opposition to any candidate or ballot proposition" must be reported if, when added to all other independent expenditures "made during the same election campaign by the same person [, the total] equals one hundred dollars or more . . . ." But "election campaign" is defined broadly and includes "any campaign in support of, or in opposition to, *a ballot proposition*," and does not exclude signature-gathering efforts or campaigns to place a candidate or measure on the ballot. RCW 42.17A.005(17) (I-276 § 2(11)) (emphasis added). The use of the term "election campaign" in RCW 42.17A.255(2) does not reflect legislative intent to limit the meaning of "ballot proposition," nor does it establish the meaning of "ballot proposition." It is actually

the other way around. The meaning of "election campaign" depends in part on the definition of "ballot proposition." RCW 42.17A.005. RCW 42.17A.255 does not assist in determining what "ballot proposition" means.

The Freedom Foundation's reliance on RCW 42.17A.255(2)'s reference to "election campaign" becomes especially absurd because it does not distinguish between local and state ballot propositions. Under the Freedom Foundation's reading, no ballot proposition, state or local, would be subject to reporting until it is placed on the ballot. But there is clear evidence in the plain language of the definition of "ballot proposition" that neither the people nor the Legislature intended this result. RCW 42.17A.005(4) ("from and after the time when the proposition has been initially filed with the appropriate election officer of [the relevant] constituency before its circulation for signatures").

In sum, neither the language of RCW 42.17A.005(4), nor the language of RCW 42.17A.255 supports excluding local propositions from campaign finance reporting before they are placed on the ballot.

5. Even if this Court resorts to legislative history, that history reflects a legislative intent to cover proposed ballot propositions, including at the local level

The legislative history of RCW 42.17A.005(4) confirms that all proposed ballot propositions are subject to financial disclosure

requirements. "If a statute is ambiguous, we may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305-06, 268 P.3d 892 (2011) (internal quotation marks omitted); *see also Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007) (court may look beyond the language of the act to its legislative history).

The Legislature amended RCW 42.17A.005(4) in 1975, 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 ((~~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). Thus, the phrases "from and after the time" and "prior to its circulation for signatures" were added to the definition of "ballot proposition" a couple of years after the people adopted Initiative 276.[12]

In determining the Legislature's purpose in enacting this amendment, the bill analysis prepared by staff of the House of

[12] In 2010, the statutory phrase "prior to" was stricken by the Legislature and replaced with "before" in RCW 42.17A.005(4) (former RCW 42.17.020(4)). Laws of 2010, ch. 204, § 101.

Representatives is particularly helpful. This Court has looked to such sources to ascertain the legislative intent behind the passage of statutory amendments. *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 behind the 2009 amendment to the law); *Bostain*, 159 Wn.2d at 727 ("Useful legislative history materials may include bill reports."); *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992) (quoting from a Final Legislative Report to ascertain legislative intent).

The bill analysis explains the problem the 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) (emphasis added).

This bill analysis reflects that confusion existed about the scope of the definition of the term "ballot proposition" after the original adoption of Initiative 276. The intent of the Legislature in amending the definition of "ballot proposition" was to clarify that, in fact, the definition (1) included all local ballot propositions and (2) came within the purview of the statute, at the very least, as soon as they are proposed and filed with the appropriate election officer. The bill analysis language also strongly suggests that the Legislature also intended to incorporate propositions "prior to circulation for signatures on petition." H.B. Analysis of Substitute H.B. 827, at 1. While it is possible, or even likely, that there was a misunderstanding about the local ballot process at the time, it is clear what the Legislature was trying to do: clarify that for both state and local ballot propositions, reporting should be required at the earliest stages.

Thus, the phrase "prior to circulation for signatures" was not intended to restrict the application of the definition to local ballot propositions at the time it was added in 1975—instead it was intended as a clarification to ensure the statute was being applied according to the people's purpose. The people and the Legislature intended full and complete public disclosure of expenditures related to ballot propositions, including during the time before a proposition appears on the ballot. This

language certainly should not be viewed as a limitation now, over forty years later. Instead, this Court should read the entire statute, including its purpose section, consistent with the people's and the Legislature's intent.

6. Interpreting RCW 42.17A as applying to local ballot propositions is also consistent with the long-standing view adopted by the Public Disclosure Commission

The superior court's decision stands directly at odds with the interpretation held by the agency charged with administering RCW 42.17A, the Washington State Public Disclosure Commission. The Commission's long-standing guidance supports the view that expenditures made in support of local ballot propositions must be reported, even at the early stages of the election process before a proposition is certified to the ballot and all challenges are resolved. CP at 50-60. Courts give an "agency's interpretation of the law great weight where the statute is within the agency's special expertise." *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015).

The Commission has declared:

> The basic purpose of the Public Disclosure Act is to permit interested citizens to ascertain the source and amount of financial support provided to support or oppose candidates or ballot issues. *We have previously noted that the disclosure of the early money in a campaign may be the most significant and important because it provides insight into those persons and interests who most strongly support a particular position.*

CP at 56 (emphasis added). An "election campaign" includes "any campaign in support of, or in opposition to, a ballot proposition." RCW 42.17A.005(17).

The Commission has also addressed when the disclosure requirements begin within the context of a citizen-initiated ballot proposition to recall certain elected officials. CP at 54-57. Under the statutory recall process, a person desiring to recall a state or local elected official must first file recall charges with the appropriate election officer. RCW 29A.56.110, .120. The prosecutor or the Attorney General then drafts a ballot synopsis and a superior court must find the charges sufficient before signatures can be gathered. RCW 29A.56.130, .140. If sufficient signatures are gathered, then the recall proposition appears on the ballot. RCW 29A.56.210.

The specific question posed to the Commission was whether expenditures in support of a recall effort that consisted entirely of legal fees were reportable. CP at 54-57. The recall proponents argued, in part, that no reporting should be required until "the initial judicial process was complete and the recall charges would be placed on the ballot." CP at 56. The Commission disagreed, finding that a recall action becomes a "ballot

proposition" within the meaning of former RCW 42.17.020(2)[13] "from and after the time when the proposition has been initially filed with the appropriate election officer[.]" RCW 42.17A.005(4).[14]

The Commission has also determined: "Expenditures made by a person or political committee to place a measure on a ballot, to influence the wording of a ballot title or to require that a government agency place a measure on the ballot are campaign expenditures reportable under RCW 42.17A." CP at 59.

At least from the time the citizens in Sequim, Chelan, and Shelton filed their proposed ballot propositions with each respective local election officer, any subsequent legal fees expended by the Freedom Foundation to place those ballot propositions before local voters constituted support and was reportable. That each ballot proposition at issue here was never ultimately placed on the ballot did not and should not affect that reporting obligation.

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[13] The State's campaign finance disclosure laws, formerly located at RCW 42.17, were recodified effective January 2012 to RCW 42.17A. RCW 42.17.020(2) has been recodified as RCW 42.17A.005(4).

[14] The question of how or whether pro bono legal work performed in connection with a federal civil rights complaint filed on behalf of recall proponents has been the subject of recent litigation. The Pierce County Superior Court concluded that the State could not treat such legal assistance as a "contribution" in support of the recall campaign because doing so would implicate a former cap on contributions to support recall campaigns, effectively prohibiting the provision of free legal services on the civil rights case once the cap had been reached. *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012). No federal civil rights case and no contribution cap is implicated here.

By providing legal services in support of the citizens' efforts to place the ballot propositions before the voters, the Freedom Foundation made expenditures to "require that a government agency place a measure on the ballot[.]" CP at 59; *see also* CP at 75, 81-82, 87. In short, under the Commission's interpretations, the Freedom Foundation's expenditures were reportable. This Court should give the Commission's interpretation of the law "great weight" when determining the meaning of RCW 42.17A.005(4). *Cornelius*, 182 Wn.2d at 585.

B. The State's Action Does Not Violate the Freedom Foundation's First Amendment Rights

For the first time on appeal, the Freedom Foundation asserts that the State's action constitutes an improper government regulation of speech that infringes upon the Freedom Foundation's ability to provide pro bono legal services as a form of "political expression" or "political association." *See* Answer to Statement of Grounds at 12-13. It is wrong. The State's action does not affect or chill the Freedom Foundation's ability to provide free legal representation; it simply requires that the value of those legal services be reported to the Commission as financial support for the ballot proposition.

In the electoral context, the United States Supreme Court has drawn a distinction between restrictions on speech and disclosure

requirements. *E.g.*, *Doe v. Reed*, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). A campaign finance law's disclosure requirements are reviewed under less stringent "exacting scrutiny," rather than strict scrutiny. *See, e.g.*, *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) (disclosure requirements are subject to the "less demanding standard of review of exacting scrutiny" (describing *Reed*, 561 U.S. at 196)); *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007) ("disclosure regulations must survive 'exacting scrutiny'"); *Family PAC v. McKenna*, 685 F.3d 800, 805-06 (9th Cir. 2011) (same). For a campaign disclosure law to survive exacting scrutiny, 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).

This Court and the Ninth Circuit Court of Appeals have recognized the important governmental interest in requiring transparency for expenditures related to candidates and ballot propositions. The right to free speech "includes the 'fundamental counterpart' of the right to receive information." *Voters Educ. Comm.*, 161 Wn.2d at 483; *see also Fritz v. Gorton*, 83 Wn.2d 275, 296-97, 517 P.2d 911 (1974) (upholding the constitutionality of various other aspects of Initiative 276). "The constitutional safeguards which shield and protect the communicator,

perhaps more importantly also assure the public the right to *receive* information in an open society." *Fritz*, 83 Wn.2d at 297; *Voters Educ. Comm.*, 161 Wn.2d at 481-83. Disclosure laws inherently "seek[] to enlarge the information based upon which the electorate makes its decisions." *Fritz*, 83 Wn.2d at 298. Similarly, the Ninth Circuit has explained that "by revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention." *Human Life of Wash., Inc.*, 624 F.3d at 1005.

"[T]hese considerations apply just as forcefully, if not more so, for voter-decided ballot measures . . . where voters are responsible for taking positions on some of the day's most contentious . . . issues, [and where] voters act as legislators, while interest groups . . . advocat[e] a measure's defeat or passage act as lobbyists." *Id.* at 1006 (internal quotation marks omitted); *see also State ex rel. Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006) ("Washington State has a substantial interest in providing the electorate with valuable information about who is promoting ballot measures and why they are doing so.").

The need for transparency is evident at every stage of the initiative process, starting when a ballot proposition is first filed with the state or local election official, during any controversy about whether a proposition qualifies for the ballot or what exactly the ballot should say, as well as any time when interest groups are advocating that voters support or oppose a ballot proposition. Voters are entitled to information about an initiative's supporters and opponents because, "[i]f nothing else, knowing who backs or opposes a given initiative will give voters a pretty good idea of who stands to benefit from the legislation." *Human Life of Wash., Inc.*, 624 F.3d at 1007 (internal quotation marks omitted). The public's interest in full disclosure in the ballot initiative context only amplifies as "more and more money is poured into ballot measures nationwide." *Id.* Campaign finance disclosure laws, especially those relating to ballot propositions, "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.

The purpose of disclosure is not to hinder political activity or chill political association, but to ensure that the public has "the facts they need to evaluate the various messages competing for their attention." *Human Life of Wash., Inc.*, 624 F.3d at 1005. Expenditures to support or oppose

ballot propositions often occur before a ballot proposition has been finally certified to the ballot. *E.g.*, *Human Life of Wash., Inc.*, 624 F.3d at 995 (providing an example of an attempt to keep an initiative from advancing to the ballot).[15] If reporting requirements are delayed until a proposition is finally certified to the ballot after all challenges are resolved, a significant amount of expenditures would go unreported and, as a result, would be hidden from public view.

It is also important that the public receive sufficient information about the value of *pro bono* legal services being expended to promote or oppose local ballot propositions. Courtrooms have become a common battleground for getting a proposition on the ballot or for blocking a proposition from appearing on the ballot. *E.g.*, *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015) (litigation over whether a statewide 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 received enough valid signatures to qualify for the ballot). The public has a right to know who is expending sometimes considerable resources to promote or block a proposition.

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[15] *See also* http://web.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=U0VBVEdKIDEwNA%3D%3D%3D%3D&year=2013&type=single (legal services expenditures of $74,530.07 for Yes! For SeaTac ballot challenge prior to November 2013 general election).

Washington's disclosure requirements are "substantially related" to these important interests. *Reed*, 561 U.S. at 196; *Voters Educ. Comm.*, 161 Wn.2d at 482. Washington's disclosure law puts no substantial burden on the Freedom Foundation's rights. *See Marchioro v. Chaney*, 90 Wn.2d 298, 309, 582 P.2d 487 (1978). The crux of the Freedom Foundation's argument seems to be that the State has prosecuted them based on their point of view. They have, however, no evidence to support such a claim, and in fact, the opposite is true. The State investigates citizen complaints and, if appropriate, brings enforcement actions against people and organizations of all political persuasions. *See, e.g.*, *State ex rel. Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 156 Wn.2d 543, 130 P.3d 352 (2007), *judgment vacated by Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2006); *State v. BIAW Member Servs. Corp.*, Thurston County Superior Court No. 08-2-02193-6; *State v. Wash. State Labor Council*, Thurston County Superior Court No. 16-2-00484-34; *State v. Grocery Mfrs. Ass'n*, Thurston County Superior Court No. 13-2-02156-8. Citizen complaints are investigated and evaluated equally, and the Freedom Foundation presents no evidence to the contrary. In fact, the Freedom Foundation is aware that a citizen complaint triggers an investigation. CP at 61-62. Yet no other citizen

complaints have been filed related to these local ballot propositions. CP at 62. As a result, any claim that this enforcement action constitutes impermissible viewpoint-based enforcement must be rejected.

Unlike the cases cited in the Freedom Foundation's answer to the statement of grounds, having to file disclosure reports does not prevent the Freedom Foundation from bringing legal actions. *See Nat'l Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 422-24, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (stricken statute would have prevented the NAACP at and its attorneys from representing clients in Virginia). Nor does disclosure prevent the Freedom Foundation from speaking or politically associating with others. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 620-21, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995). After-the-fact reporting is far less burdensome than an outright prohibition on speech or activity. *Permanent Offense*, 136 Wn. App. at 285; *see also Human Life of Wash., Inc.*, 624 F.3d at 1003 (noting that disclosure requirements appear to be the least restrictive means of curbing the evils of campaign ignorance). In short, the State's action imposes only a minimal disclosure burden on the Freedom Foundation that is narrowly targeted at making public expenditures to support or oppose a ballot proposition in court, without preventing it from bringing any case or

making any argument. *See* WAC 390-16-060 (establishing a single form that can be filed electronically for disclosing independent expenditures).

In sum, the requirement that the Freedom Foundation report the value of legal services expended to support the placement of a ballot proposition on the ballot is substantially related to the government's important interest in ensuring that the public receive such information. There is an important government interest in public disclosure of expenditures to support or oppose state and local ballot propositions at all stages. Significant expenditures occur before the proposition is certified to the ballot, and litigation has become a tool for influencing whether a proposition ultimately succeeds or fails. Requiring expenditures to be reported at all stages is substantially related to the important interest in public disclosure.

C. Requiring Disclosure Does Not Infringe Upon the Power of the Courts To Regulate the Practice of Law

The Freedom Foundation next suggests that the State's action impermissibly threatens the institutional integrity of the judicial branch and violates the separation of powers doctrine. *See* Answer to Statement of Grounds at 13-14. Statutes are presumed to be constitutional and the challenger must prove unconstitutionality beyond a reasonable doubt,

whether the challenge is facial or as applied. *E.g.*, *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006).

The Freedom Foundation's challenge fails. Separation of powers principles are not implicated here because the separation of powers doctrine "serves mainly to ensure that the fundamental functions of each branch remain inviolate." *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (internal quotation marks omitted). The State's action presents no danger of invading the institutional integrity of the judicial branch because it does not seek to regulate who may be admitted to practice law and who may be suspended or disbarred from practice. *See Short v. Demopolis*, 103 Wn.2d 52, 63, 691 P.2d 163 (1984) (holding that application of the Consumer Protection Act to attorneys' legal services does not violate the separation of powers doctrine).

In *Demopolis*, this Court explained that while the judiciary must jealously guard its prerogative to govern the practice of law, the Legislature's broad lawmaking power must also be considered. *Id.* at 65. Even though it provides a remedy for clients outside of the lawyer discipline system, the *Demopolis* Court concluded that the Consumer Protection Act could constitutionally be applied to attorneys. *Id.*; *see also id.* at 68-70 (Pearson, J., concurring in part), 66-67 (Dore, J., concurring). In contrast, each of the cases relied upon by the Freedom Foundation

involves instances of this Court restricting persons from enforcing laws which directly intruded upon the authority of the courts or the regulation of the State Bar Association itself. *See Graham v. State Bar Ass'n*, 86 Wn.2d 624, 548 P.2d 310 (1976) (finding the State Auditor has no authority to regulate the State Bar Association, which is responsible to the Supreme Court and is not a state agency); *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981) (statute could not authorize the practice of law by laypersons where the Supreme Court has exclusive authority to regulate the practice of law); *Wash. State Bar Ass'n v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995) (barring Public Employment Relations Commission from having jurisdiction over labor relations between the State Bar Association and its employees); *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 216 P.3d 374 (2009) (invalidating a statute that conflicted with the judiciary's inherent power to set court procedures).

The State's action here in no way invades this Court's authority to regulate the practice of law. The disclosure requirements merely require the reporting of the value of legal services in certain circumstances. The disclosure laws do not invade the prerogative of the Court by overtaking some regulation of the actual practice of law, nor do they invade the Court's ability to make its own rules or regulate the State Bar

Association. The disclosure laws do not prohibit, or even deter, litigation about whether a ballot proposition should advance to the ballot.

Instead, the disclosure laws treat the Freedom Foundation like any other vendor that supplies free services in support of or opposition to ballot propositions; such services must be reported, regardless of who provides them or what form they take. Thus, this case is akin to *Demopolis* because a separate statutory scheme that governs other people and businesses or entities also applies to attorneys. Like the Consumer Protection Act, the campaign disclosure requirements are "primarily addressed to the pragmatic concerns of the public[.]" *Demopolis*, 103 Wn.2d at 64 (quoting with approval *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 525-26, 461 A.2d 938 (1983)).

The separation of powers doctrine does not require the Legislature to limit its own police and regulatory powers by exempting attorneys from compliance with a lawful statute intended to ensure the public has ample information about the financing of ballot proposition campaigns. The Legislature's definition of ballot proposition, in combination with its reporting requirements, do not overstep a meaningful jurisdictional boundary between two branches of state government. The Freedom Foundation's argument should be rejected.

VI. CONCLUSION

The State respectfully requests that this Court reverse the decision of the superior court. RCW 42.17A does not shield from the public the type of campaign financing that occurred here. It would be an absurd result to allow the undisclosed independent expenditure of funds to support local ballot propositions simply because signatures had already been gathered in support of such propositions.

RESPECTFULLY SUBMITTED this 30th day of September 2016.

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