STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

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M E M O R A N D U M

Date: March 17, 2017

To: Public Disclosure Commission Members

From: Phil Stutzman, Sr. Compliance Officer

Subject: 45-Day Citizen Action Complaint
Port of Tacoma Officials (John Wolfe, CEO, and Commissioners Don Johnson, Connie Bacon, Dick Marzano, Don Meyer, and Clare Petrich), Case 11701
Economic Development Board for Tacoma-Pierce County, Case 11702
Tacoma-Pierce County Chamber, Case 11703

I. Background, Complaint Allegations, Request for PDC Review, and Statutes/Rules

Background: (Related Citizen Action Complaint filed by Arthur West on June 16, 2016) On February 19, 2016, a group calling itself Save Tacoma Water (STW) filed a Committee Registration (C1-pc) with the PDC for the stated purpose of supporting a ballot proposition on the November 8, 2016 general election ballot. The registration listed Sherry Bockwinkel as its campaign manager and Donna Walters as its treasurer.

On March 7, 2016, Save Tacoma Water filed Charter Initiative 5 with the Tacoma City Clerk, and on March 11, 2016, they filed Code Initiative 6 with the Tacoma City Clerk. Both initiatives were approved as to form, and on June 30, 2016, Save Tacoma Water submitted its signatures to the Tacoma City Clerk.

Code Initiative 6 sought to have the City Council enact changes to the Tacoma Municipal Code by imposing a requirement that any land use proposal requiring water consumption of one million gallons of water or more daily from Tacoma be submitted to a public vote prior to the City providing water service for such a project. A companion measure, Charter Initiative 5, repeated all the same provisions as Code Initiative 6.

On June 6, 2016, the Port of Tacoma (Port), the Economic Development Board for Tacoma-Pierce County (EDB), and the Tacoma-Pierce County Chamber (Chamber) brought a declaratory judgment action in the Superior Court of Pierce County to determine whether the two initiatives exceeded the scope of local initiative power. On June 8, 2016, the City of Tacoma, named as a

defendant, agreed with the plaintiffs that the initiatives exceeded the scope of the City's authority.

On June 16, 2016, Arthur West filed a Citizen Action Complaint (Complaint) under RCW 42.17A.765(4) alleging that Port of Tacoma Officials violated RCW 42.17A.555 by using or authorizing the use of public facilities to oppose Tacoma Code Initiative 6 and Tacoma Charter Initiative 5. The Complaint also alleged that the Port of Tacoma, the Economic Development Board for Tacoma-Pierce County, and the Tacoma-Pierce County Chamber violated RCW 42.17A.205, .235, and .240 individually, and as a group, by failing to register and report their expenditures for legal services to oppose Initiatives 5 and 6, as political committees. Mr. West alleged that Port of Tacoma officials used the Port's facilities, and the EDB and Chamber used their respective resources, to oppose Initiatives 5 and 6 by making expenditures to file a lawsuit to keep the initiatives off the ballot.

On June 18, 2016, the Port Commission held a public meeting, and provided advance notice that it intended to take up a vote to ratify the Port's action of filing a Declaratory Judgment and Injunctive challenge of Tacoma Code Initiative 6 and Tacoma Charter Initiative 5. Port staff provided a Commission Memo which was publicly available. The Commission heard public comment, and then voted unanimously to ratify the legal action it had taken.

On July 1, 2016, Superior Court Judge Jack Nevin agreed with the Plaintiffs, enjoining placement of the initiatives on the ballot. The initiatives did not appear on the ballot.

On July 13, 2016, the Attorney General's Office (AGO) sent a letter to the Public Disclosure Commission (PDC) asking staff to review the complaint, and as appropriate, investigate the allegations. The AGO asked that the PDC send with its recommendation a complete copy of any report of investigation or materials the Commission staff compiles.

On August 8, 2016, PDC staff reported to the Commission at a Special Commission Meeting, providing a Report of Investigation with Exhibits and an Executive Summary and Staff Analysis, detailing its findings and making a recommendation to the Commission. Staff concluded that: (1) Port of Tacoma CEO John Wolfe did not violate RCW 42.17A.555 by authorizing expenditures for legal services in seeking a declaratory judgement that Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 exceeded the scope of local initiative power; and (2) The Port of Tacoma, the EDB, and the Chamber did not violate RCW 42.17A.205, .235, and .240 by failing to register and report as political committees, individually, or collectively, and disclose their respective expenses for legal services.

Staff recommended that the Commission recommend to the Attorney General that that office take no further action with respect to the allegations in the Complaint. Although not alleged in the Complaint, staff concluded that the EDB's and the Chamber's legal expenses incurred in challenging Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 were reportable under RCW 42.17A.255 as independent expenditure activity opposing a ballot proposition. Staff recommended that the Commission recommend to the Attorney General that that office take appropriate action concerning the EDB's and the Chamber's apparent failure to disclose those expenses on C-6 reports of independent expenditure activity.

As reflected in staff's August 9, 2016 letter to Attorney General Ferguson, the Commission, having received staff's report and recommendation, unanimously adopted a motion to return this matter to the Attorney General with no recommendation for legal action, both concerning the two alleged violations that were set out in Arthur West's June 16, 2016 complaint, and the separate additional potential violations that were raised in the staff report. In adopting this motion, Commission members stated that the Commission has noted the issues raised by the petitioner and the respondents in this matter, and discussed the need for rulemaking to provide clearer guidance to the regulated community and the public regarding what actions constitute reportable activity under RCW 42.17A concerning ballot propositions, as they are considered for placement on the ballot and at each stage thereafter. The commission expressed its intention to work with PDC staff to pursue such rulemaking, and asked that all parties to this matter plan to participate and offer input.

The Attorney General filed a lawsuit in Pierce County Superior Court against the Port of Tacoma, the EDB, and the Chamber. The lawsuit was based on the assertion that paying legal fees to determine the legality of a local ballot measure is an expenditure made in support of or in opposition to a ballot proposition. The Attorney General alleged that the EDB and the Chamber violated RCW 42.17A.255 by failing to report legal fees to challenge Initiatives 5 and 6 as independent expenditures opposing ballot propositions, and that Port of Tacoma officials violated RCW 42.17A.555 by expending public funds to challenge Initiatives 5 and 6 to oppose ballot propositions. On December 23, 2016, Pierce County Superior Court issued a ruling granting the Port, EDB, and Chamber motion to dismiss the Attorney General's complaint. On January 26, 2017, the Attorney General appealed the Court's decision.

For additional details concerning Arthur West's Complaint filed June 16, 2016, PDC Cases 6626, 6627, and 6628, please see staff's Report of Investigation **(Exhibit 1)** and staff's Executive Summary and Staff Analysis **(Exhibit 2)**.

Background: (Arthur West's December 20, 2016 complaint) Arthur West requested public records from the Port of Tacoma concerning activities related to the Port's declaratory judgement action in Pierce County Superior Court that sought a ruling on whether Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 exceeded the scope of local initiative power. Following receipt and review of the requested records, Mr. West filed a second Citizen Action Complaint on December 20, 2016, based on what he described as new information obtained from his public records request. In his December 20, 2016 Complaint, Mr. West alleged that the same Respondents violated the same statutes as in his June 16, 2016 Complaint, except that he based the alleged violations on what he described as "a media communications and public relations campaign," rather than on the lawsuit filed by the Respondents on June 16, 2016 **(Exhibit 3)**.

Complaint Allegations: Arthur West filed a Citizen Action Complaint (Complaint) with the Attorney General and the Pierce County Prosecutor under RCW 42.17A.765(4) on December 19, 2016. He then hand-delivered a slightly amended complaint on December 20, 2016. Mr. West provided a copy of his Complaint to the PDC. His Complaint alleged that:

1. Port of Tacoma officials (John Wolfe, CEO, and Commissioners Don Johnson, Connie Bacon, Dick Marzano, Don Meyer, and Clare Petrich) violated RCW 42.17A.555 by

using the Port's facilities to oppose Tacoma Code Initiative 6 and Tacoma Charter Initiative 5. The complaint alleged that the Port officials engaged in a previously unknown media communications and public relations "Campaign" that was in addition to, and separate from, a lawsuit initiated by the Port of Tacoma, the Economic Development Board of Tacoma-Pierce County and the Tacoma-Pierce County Chamber on June 6, 2016 to request a declaratory judgment in Pierce County Superior Court to determine whether the two initiatives exceeded the scope of local initiative power.

2. The Port, the EDB, and the Chamber violated RCW 42.17A.255 by failing to report these media communications and public relations "Campaign" expenditures as Independent Expenditures on PDC form C-6; and

3. The Port, the EDB, and the Chamber violated RCW 42.17A.205, .235, and .240 by failing to register and report these expenditures as a political committee.

Request for PDC Review: On January 5, 2017, the Attorney General's Office asked PDC staff to review and possibly investigate the allegations as needed, and provide any recommendation the Commission may have.

Statutes/Rules:

RCW 42.17A.555 states, in part: "No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities: … (3) Activities which are part of the normal and regular conduct of the office or agency."

WAC 390-05-273 states: Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17A.555, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

RCW 42.17A.005(4) "Ballot proposition" means any "measure" as defined by RCW **29A.04.091**, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures.

RCW 29A.04.091 "Measure" includes any proposition or question submitted to the voters.

RCW 42.17A.005(37) defines "political committee" as “any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.”

Interpretation 07-02 “Primary Purpose Test” Guidelines The Act sets forth two alternative prongs under which an individual or organization may become a political committee and subject to the Act's reporting requirements. "'Political committee' means any person ... having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005(37) Thus, a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals. [Footnote: We use the phrases "electoral political goals" and "electoral political activity" to convey the statutory language "support of, or opposition to, any candidate or any ballot proposition."]

A requirement of the “making expenditures” prong states that the organization making expenditures must have as its “primary or one of the primary purposes … to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions …”

In addition, the Interpretation states that an appropriate framework for determining whether electoral political activity is one of the organization’s primary purposes should include an examination of the stated goals and mission of the organization and whether electoral political activity is a primary means of achieving the stated goals and mission during the period in question.

A nonexclusive list of analytical tools that may be used to evaluate the evidence includes:

1. The content of the stated goals and mission of the organization;
2. Whether the organization’s actions further its stated goals and mission;
3. Whether the stated goals and mission of the organization would be substantially achieved by a favorable outcome in any upcoming election; and
4. Whether the organization uses means other than electoral political activity to achieve its stated goals.

RCW 42.17A.205 – Statement of organization by political committees. States in part: Every political committee shall file a statement of organization with the commission. The statement must be filed within two weeks after organization or within two weeks after the date the committee first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier.

RCW 42.17A.235 and **240** require continuing political committees to file timely, accurate reports of contributions and expenditures. Under the full reporting option, until five months before the general election, C-4 reports are required monthly when contributions or expenditures exceed $200 since the last report.

RCW 42.17A.255, states in part: (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 and is not otherwise required to be reported pursuant to RCW 42.17A.220, 42.17A.235, and 42.17A.240. … (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, or within five days after the date of making an independent expenditure for which no reasonable estimate of monetary value is practicable, whichever occurs first, the person who made the independent expenditure shall file with the commission an initial report of all independent expenditures made during the campaign prior to and including such date.

II. Staff Investigative Review, Analysis and Conclusions

A. Staff Review of Complaint

PDC staff reviewed the following documents:

- PDC Cases 6626, 6627, and 6628 (Port of Tacoma Officials, EDB, and Chamber) for Arthur West's related Citizen Action Complaint filed June 16, 2016.
- Arthur West's December 20, 2016 Citizen Action Complaint.
- Responses received from the Port of Tacoma, the EDB, and the Chamber to Arthur West's December 20, 2016 Citizen Action Complaint.

B. PDC Staff Investigative Review Findings, Analysis, and Conclusions

First Allegation: That Port of Tacoma officials (John Wolfe, CEO, and Commissioners Don Johnson, Connie Bacon, Dick Marzano, Don Meyer, and Clare Petrich) violated RCW 42.17A.555 by using the Port's facilities to oppose Tacoma Code Initiative 6 and Tacoma Charter Initiative 5. The complaint alleged that Port officials engaged in a previously unknown media communications and public relations campaign that was in addition to, and separate from, a lawsuit initiated by the Port of Tacoma, the Economic Development Board of Tacoma-Pierce County and the Tacoma-Pierce County Chamber on June 6, 2016 to request a declaratory judgment in Pierce County Superior Court to determine whether the two initiatives exceeded the scope of local initiative power.

On February 6, 2017, Carolyn Lake responded to the December 20, 2016 Complaint on behalf of the Port of Tacoma **(Exhibit 4 – Port Response)**[1]. Ms. Lake stated that when the Port, along with Co-Plaintiffs the EDB and the Chamber, decided to seek a judicial determination that both Charter Initiative 5 and Code Initiative 6 were beyond the proper scope of local initiative power, and thus invalid, they decided to develop talking points and press materials to explain to the public that the lawsuit was being filed, and why it was being filed. She said the Port also

[1] In addition to "Exhibit 4 – Port Response," this memo includes 22 additional exhibits provided by the Port with its response that are also marked Exhibit 4, but with an additional number corresponding to an exhibit reference included in the Port's response.

decided to meet with the Tacoma News Tribune to explain that a lawsuit was being filed, and why it was being filed.

Staff found that the Port developed a one-page Water Ballot Initiative Communications Plan, a two-page Water Ballot Initiative Backgrounder, one set of talking points called Potential Questions, and a one-page News Release **(Exhibit 3, Pages 7-14)**. The Port also held one meeting with the Tacoma News Tribune Editorial Board on June 6, 2016, the date the judicial challenge was filed in Pierce County Superior Court. The Port's Water Ballot Initiative Communications Plan covered a one-week period, and included materials related to the judicial challenge. Its purpose was to inform the public that the Port was participating in the Declaratory Judgement lawsuit, and to explain why the Port was participating in the lawsuit.

The Water Ballot Initiative Communications Plan was one-page and stated its objective as "To communicate our request that Pierce County Superior Court declare invalid two initiatives seeking to amend the Tacoma city charter and municipal code to require a public vote on any development using 1 million or more gallons of water per day." Its key messages included:

1. The Port of Tacoma has filed a lawsuit in Pierce County Superior Court to invalidate two initiatives currently gathering signatures.

2. The two ballot initiatives seek a public vote on potential developments that would use 1 million gallons of water or more per day.

3. These initiatives, similar to ones declared invalid in other parts of the state and country, are aimed at requiring public votes on industrial developments that create economic opportunities and family-wage jobs for our community.

The Communications Plan also included a section entitled, "Situation" which stated, "A political action committee is gathering signatures to put two separate initiatives on the fall 2016 ballot. The initiatives seek to amend the Tacoma city charter and municipal code to require a public vote on any new development using 1 million gallons or more of water each day. These initiatives were in response to Northwest Innovation Works' now-canceled natural gas-to-methanol facility, but they would have much broader consequences to manufacturing, industrial and technological developments within and outside Tacoma city limits. The initiatives and the hurdles they seek to impose send a bad message to economic investors that Tacoma/Pierce County no longer welcomes economic investors and new jobs."

The Port's two-page Water Ballot Initiative Backgrounder **(Exhibit 3, Pages 9-10)** included three statements under the heading Key Points that are identical to the three statements listed in the Water Ballot Initiative Communications Plan **(Exhibit 3, Page 8)** under the heading Key Messages. The Backgrounder listed three "Legal Arguments" for filing the declaratory judgement action, and six Port objections to the initiatives. Finally, the Backgrounder included three statements about Tacoma Public Utilities, its obligation to serve water and power demand in its service territories, its supply source availability, and its average available water supply and usage per day.

The talking points, called Potential Questions, **(Exhibit 3, Pages 11-12)** provided background information, three potential questions, and three suggested responses to those questions. The three potential questions were:

1. Why doesn't the Port want a public vote on the issue?

2. Tacoma Public Utilities asked residents last summer to conserve water because of a drought. Why shouldn't industry have to cut back on its water use as well?

3. Some say Tacoma should move past its industrial history and embrace a new future.

The News Release **(Exhibit 3, Page 13)** was released on June 6, 2016 and announced the filing of the judicial challenge. Its opening paragraph stated, "**Port, EDB and Chamber file lawsuit to invalidate proposed water initiatives.** The Port of Tacoma filed a lawsuit Monday asking Pierce County Superior Court to declare invalid two proposed initiatives currently gathering signatures." The News Release also included information from the Water Ballot Initiative Communications Plan, the Water Ballot Initiative Backgrounder, and the talking points for potential questions to explain why the Port, the EDB, and the Chamber joined together to file a lawsuit "to keep the legally flawed initiatives off the ballot."

The last three points of the News Release go beyond stating that a lawsuit has been filed, and attempt to explain why the Port, EDB, and Chamber had concluded that the proposed initiatives were a flawed attempt to implement policy detrimental to Pierce County. The three points were:

1. These initiatives attempt to thwart the missions of the Port, Economic Development Board and Chamber to create jobs and economic opportunity for Pierce County.

2. More than 29,000 jobs are generated by Port activity, which also provides $195 million per year in state and local taxes to support education, roads and police and fire protection for our community.

3. The Tacoma-Puyallup industrial subarea's 21,300 jobs make up 4 percent of the region's industrial employment. These jobs pay an average $80,000 per year.

The Port has a history of preparing communication plans to advise the public of significant Port actions. The Port supplied several examples of Port issued press releases and "backgrounders," many of which announced the Port's role in litigation matters **(Exhibit 4, Port Response, Page 24)**.

The Port's creation of a communication plan for its judicial action concerning Tacoma Initiatives 5 and 6 was consistent with its normal and regular conduct for communicating to the public significant action it undertakes.

In Case 6626, Arthur West's June 16, 2016 Complaint against Port officials, PDC staff concluded that seeking a judicial declaration concerning the validity of Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 was not a prohibited use of public facilities by Port of Tacoma officials in violation of RCW 42.17A.555 because the Port's expenditures were "normal and

regular" in that that they were lawful, and usual and customary. On December 23, 2016, when Pierce County Superior Court issued its ruling granting the Port, EDB, and Chamber motion to dismiss the Attorney General's complaint, the Court found that action to seek a judicial declaration of invalidity of proposed Tacoma Initiatives 5 and 6 was not in opposition to a campaign or ballot issues as meant in RCW 42.17A.255 or RCW 42.17A.555. The Court also found that the prohibition in RCW 42.17A.555 concerning the use of public facilities for campaign purposes (to promote or oppose a ballot proposition) does not apply to the pursuit of a judicial Declaratory Judgement Action over the validity of Tacoma Initiatives 5 and 6. The Court ruling also stated that pursuing a judicial Declaratory Judgement Action over the validity of Tacoma Initiatives 5 and 6 does not trigger the campaign reporting requirements of RCW 42.17A.255, and that Defendants Port, Chamber, and EDB did not violate the Fair Campaign Practices Act **(Exhibit 4, Port Response, Page 9)** and **(Exhibit 4 – Port Exh 1.)**.

If staff had been asked by the Port to review its Water Ballot Initiative Communications Plan before it was implemented, including its Water Ballot Initiative Backgrounder, Potential Questions, News Release, and proposed visit with the Tacoma News Tribune, we may have suggested that the Port refrain from commenting on the policy merits of the proposed initiatives, including its impact on the local economy, if implemented. However, because the Communications Plan (1) focused on explaining that a lawsuit had been filed and why it had been filed, and (2) was short in duration (one week), and because, although on appeal by the Attorney General, Pierce County Superior Court has ruled that seeking a declaratory judgement challenging the validity of a ballot proposition is not a violation under RCW 42.17A.555 and the expenses of such a challenge are not reportable under RCW 42.17A.255, staff does not believe the Port's Water Ballot Initiative Communications Plan, including its Water Ballot Initiative Backgrounder, Potential Questions, News Release, and visit with the Tacoma News Tribune, warrants enforcement action under RCW 42.17A.555 or RCW 42.17A.255.

The critical question is whether the Port's communication plan documents went beyond stating that a lawsuit had been filed and why it had been filed, in a manner or to a degree that constituted a prohibited use of public facilities to oppose Tacoma Initiatives 5 and 6. As in Case 6626, in Case 11701, Mr. West's December 20, 2016 Complaint against Port officials, staff has likewise concluded that creating the communication plan documents at issue in the Complaint, to explain to the public the Port's expenditures to seek a judicial declaration concerning the validity of Tacoma Initiatives 5 and 6, including the creation of related emails, did not constitute a prohibited use of public facilities by Port of Tacoma officials in violation of RCW 42.17A.555. Staff has concluded that the Port's expenditures to create and implement its communication plan, in this instance, were "normal and regular" in that they were lawful, and usual and customary.

Second Allegation: That the Port, the EDB, and the Chamber violated RCW 42.17A.255 by failing to report these media communications and public relations "campaign expenditures" as Independent Expenditures on PDC form C-6.

On February 7, 2017, Jason Whalen responded on behalf of the EDB **(Exhibit 5)**. He stated that while the EDB was a Co-Plaintiff with the Port of Tacoma and the Chamber in seeking a judicial declaration of invalidity of proposed Tacoma Initiatives 5 and 6, the EDB did not prepare or distribute the documents included in Mr. West's Complaint that were described as a

communication plan. Mr. Whalen stated that while the EDB ultimately received a copy of the Port's "Water Ballot Initiative Communications Plan", the "Backgrounder," explaining the basis for the legal action, and the "Water Ballot Initiative" documents in the form of emails, the EDB did not participate or engage in a "communications campaign" separate and apart from its participation in the Pierce County Legal Action. Mr. Whalen stated that no resources, other than internal staff time, were expended on internal or external communications about the lawsuit filing. Mr. Whalen acknowledged that EDB's CEO, Bruce Kendall, attended a Tacoma News Tribune editorial board briefing when the legal action was commenced, but stated that this EDB activity was solely to communicate to the public and its investors the fact of the EDB's involvement in the lawsuit, and why the lawsuit had been filed.

On February 8, 2017, Valarie Zeeck responded on behalf of the Chamber **(Exhibit 6)**. She stated that her response incorporated by reference all arguments presented by the Port and the EDB. In addition, Ms. Zeeck noted that the Chamber did not make any expenditures related to the alleged media campaign, nor did it participate in the development, drafting, or editing of any of the documents attached to Mr. West's December 20, 2016 Complaint that he described as a communication plan, with the possible exception of one email that appears to be directly related to the June 6, 2016 lawsuit requesting a declaratory judgement that Tacoma Initiatives 5 and 6 were invalid.

Consistent with staff's analysis that the Port's expenditures to create and implement the communication plan at issue in the Complaint was not a prohibited use of public facilities in opposition to a campaign or ballot issue in violation of RCW 42.17A.555, staff has concluded that in Case 11701 (Port of Tacoma), the communication plan was not in opposition to a campaign or ballot issue as meant in RCW 42.17A.255, and was therefore not reportable by the Port as an Independent Expenditure under RCW 42.17A.255.

For Cases 11702 (EDB) and 11703 (Chamber), staff has concluded that because neither the EDB nor the Chamber participated in the development, drafting, or editing of any of the documents described by Mr. West as a communication plan, and because neither the EDB nor the Chamber expended any resources for the development of the communication plan, and because staff has concluded that the communication plan was not in opposition to a campaign or ballot issue as meant in RCW 42.17A.255, neither the EDB nor the Chamber have any reporting requirements under RCW 42.17A.255.

Third Allegation: That the Port, the EDB, and the Chamber violated RCW 42.17A.205, .235, and .240 by failing to register and report the communication plan expenditures as a political committee.

For the same reason that the Port is not required to report its communication plan expenditures as Independent Expenditures under RCW 42.17A.255, it has no requirement to register and report these expenditures as a political committee under RCW 42.17A.205, .235, and .240. Likewise, because the EDB and the Chamber have no reporting requirement under RCW 42.17A.255, they have no requirement to register and report as a political committee under RCW 42.17A.205, .235, and .240.

The Port of Tacoma, the EDB, and the Chamber do not meet the definition of a political committee because they are not a "receiver of contributions" in support of or in opposition to candidates or ballot propositions, and because making expenditures to support or oppose candidates or ballot propositions is not one of the primary purposes for these entities. The Port of Tacoma's primary purpose is to operate as a special purpose public port district under Title 53 of the Revised Code of Washington, the EDB's mission is to retain and recruit existing primary businesses in Tacoma-Pierce County, and the Chamber's vision and goal is to secure the economic future of the local business community, and to become the go-to-organization when there are tough issues that need to be addressed locally, statewide, and nationally.

No evidence was found that the Port of Tacoma, the EDB or the Chamber has, or could, substantially achieve its stated goals and mission through a favorable outcome of an election. The Port of Tacoma does not engage in campaign activity, and the EDB and the Chamber clearly use means other than electoral political activity to achieve their respective stated goals.

III. Summary of Conclusions

A review of Mr. West's December 20, 2016 complaint, and documentation provided by respondents Port of Tacoma, the Economic Development Board for Tacoma-Pierce County, and the Tacoma-Pierce County Chamber, did not show evidence that the Port violated RCW 42.17A.555 by using public facilities to oppose Tacoma Initiatives 5 and 6. Likewise, no evidence was found that the Port, the EDB, or the Chamber violated RCW 42.17A.255 by failing to report Independent Expenditures, or that the Port, the EDB, or the Chamber violated RCW 42.17A.205, .235, or .240 by failing to register and report as a political committee.

Based on the factors identified in staff's investigative review and described above, staff has determined that enforcement action would not be appropriate concerning the allegations in the complaint.

IV. Recommendation

For the reasons described above, staff recommends that:

For Port of Tacoma Officials (John Wolfe, CEO, and Commissioners Don Johnson, Connie Bacon, Dick Marzano, Don Meyer, and Clare Petrich), Case 11701, the Commission find there is no apparent violation of RCW 42.17A.555 by using or authorizing the use of public facilities to create a communication plan that opposed Tacoma Initiatives 5 and 6, and recommend to the Washington Attorney General that that office take no further action with respect to this allegation in the Complaint.

Staff recognizes that the Attorney General has appealed Pierce County Superior Court's decision to grant the Port, EDB, and Chamber motion to dismiss the Attorney General's complaint, and that because the communication plan at issue in this complaint is part and parcel of the activities at issue in the Attorney General's complaint against the Port, if the Attorney General's appeal is

successful and its complaint is litigated, the Attorney General could decide to include in its lawsuit the relevant factors concerning the Port of Tacoma's communication plan.

For the Port of Tacoma, Case 11701, the Economic Development Board for Tacoma-Pierce County, Case 11702, and the Tacoma-Pierce County Chamber, Case 11703, the Commission find there is no apparent violation of RCW 42.17A.255, by failing to report the cost of a communication plan as an independent expenditure in opposition to Tacoma Initiatives 5 and 6, and recommend to the Washington Attorney General that that office take no further action with respect to this allegation in the Complaint.

For the Port of Tacoma, Case 11701, the Economic Development Board for Tacoma-Pierce County, Case 11702, and the Tacoma-Pierce County Chamber, Case 11703, the Commission find there is no apparent violation of RCW 42.17A.205, .235, and .240 by failing to register and report the cost of a communication plan as political committee expenditures in opposition to Tacoma Initiatives 5 and 6, and recommend to the Washington Attorney General that that office take no further action with respect to these allegations in the Complaint.

Investigative Review Exhibits

Exhibit 1 Report of Investigation, PDC Cases 6626, 6627, and 6628.

Exhibit 2 Executive Summary and Staff Analysis, PDC Cases 6626, 6627, and 6628.

Exhibit 3 Arthur West December 20, 2016 Complaint

Exhibit 4 Port of Tacoma Response to December 20, 2016 Complaint

Exhibit 4 – Port Exh 1. Order Granting Summary Judgement

Exhibit 4 – Port Exh 2. Transcript of EFF Thurs County Dismissal

Exhibit 4 – Port Exh 3 & 4. Institute for Justice Order Granting Motion for Summ Judgement

Exhibit 4 – Port Exh 5 Port of Tacoma 6/16/16 Agenda for Water Initiative Committee Meeting

Exhibit 4 – Port Exh 6. Port of Tacoma Ratification of Port Legal Challenge

Exhibit 4 – Port Exh 7. Port of Tacoma 6/16/16 Commission Meeting Minutes

Exhibit 4 – Port Exh 8. Port of Tacoma 7/1/16 Order Granting Declaratory Judgement

Exhibit 4 – Port Exh 9. Arthur West 6/16/16 Citizen Action Complaint

Exhibit 4 – Port Exh 10. PDC Staff Executive Summary, Report and Exhibits (6626,6627,6628)

Exhibit 4 – Port Exh 10. Fu Port of Tacoma Overview

Exhibit 4 – Port Exh 10. Fu Part 2 Port of Tacoma History, Part II

Exhibit 4 – Port Exh 11. 8/9/16 PDC staff letter to AG Robert Ferguson (6626,6627,6628)

Exhibit 4 – Port Exh 12. AG lawsuit against Port, EDB & Chamber (6626,6627,6628)

Exhibit 4 – Port Exh 13. Defendants' Motion to Dismiss

Exhibit 4 – Port Exh 14. Defendants' Motion to Dismiss

Exhibit 4 – Port Exh 15. Reply of Defendants in support of Motion to Dismiss

Exhibit 4 – Port Exh 16. Port Reply in Support of Port Motion to Dismiss

Exhibit 4 – Port Exh 17. Port of Tacoma Strategic Plan

Exhibit 4 – Port Exh 18. Port of Tacoma – Frederickson Industrial Area

Exhibit 4 – Port Exh 19. Port of Tacoma – Frederickson-Gateway-Winter 1988

Exhibit 4 – Port Exh 20. Port of Tacoma History, Part II

Exhibit 4 – Port Exh 21. Press Materials

Exhibit 5 EDB Response to December 20, 2016 Complaint

Exhibit 6 Chamber Response to December 20, 2016 Complaint

2003 aerial view of the Blair Waterway

Milestones

- Kaiser closes its Tacoma plant
- The Port of Tacoma Commission approved a contract with Kaiser Aluminum to purchase the company's closed aluminum smelter located on 96 acres
- Port invested in the establishment of the University of Washington Tacoma Institute of Technology and creates the Port of Tacoma Endowed Chair
- The $12 million terminal expansion TOTE terminal is completed, making room for the line’s two new ships that entered service in 2003
- Port and Auto Warehousing Company (AWC) opened the new $40 million, 144-acre Marshall Avenue Auto Facility
- Port dedicates the ‘Auto Bridge’, connecting the Blair Terminal to the Marshall Avenue Auto Facility

2004 arrival of Pierce County Terminal's first four cranes

Milestones

- The Port and the Puyallup Tribe of Indians signed a cooperative economic development agreement
- Port industrial building space under lease broke the 1,000,000 square foot threshold
- Four of the world's largest container cranes destined for Pierce County Terminal arrive fully assembled
- Operational gridlock strikes LA/LB ports as vessels stack up at anchor and steamship lines seek alternative gateways
- The Comprehensive Tideflats Transportation Study is finalized, providing road and rail infrastructure recommendations for capital improvements to the rail and roadway systems that will meet the Port's capacity and future growth needs

"By taking care of our customers, building a foundation for growth and most importantly, being a good neighbor to our surrounding communities, the Port of Tacoma has succeeded in its mission of job creation, economic development and environmental stewardship. I am optimistic that the best is yet to come."

~Jack Fabulich, Port Commissioner, 2006 Annual Report

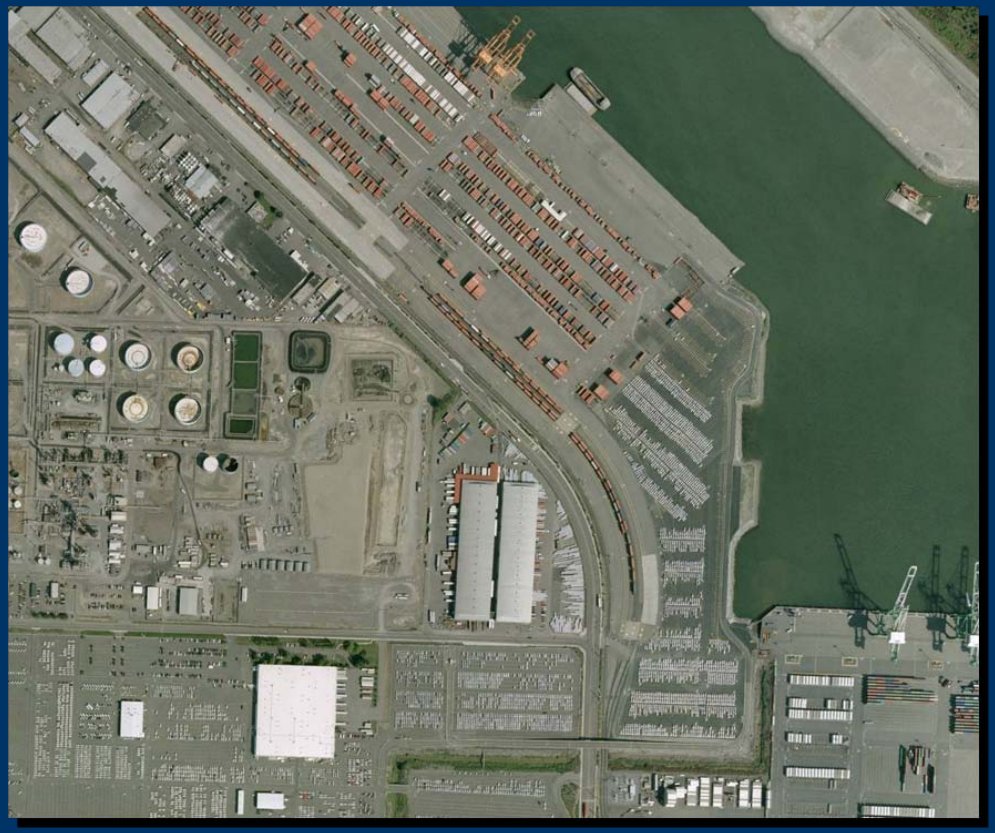
2007 aerial view of the Blair Waterway

2007

Revenues	Port Assets	Port Liabilities
$97,800,000	$1,038,800,000	$590,100,000

Milestones

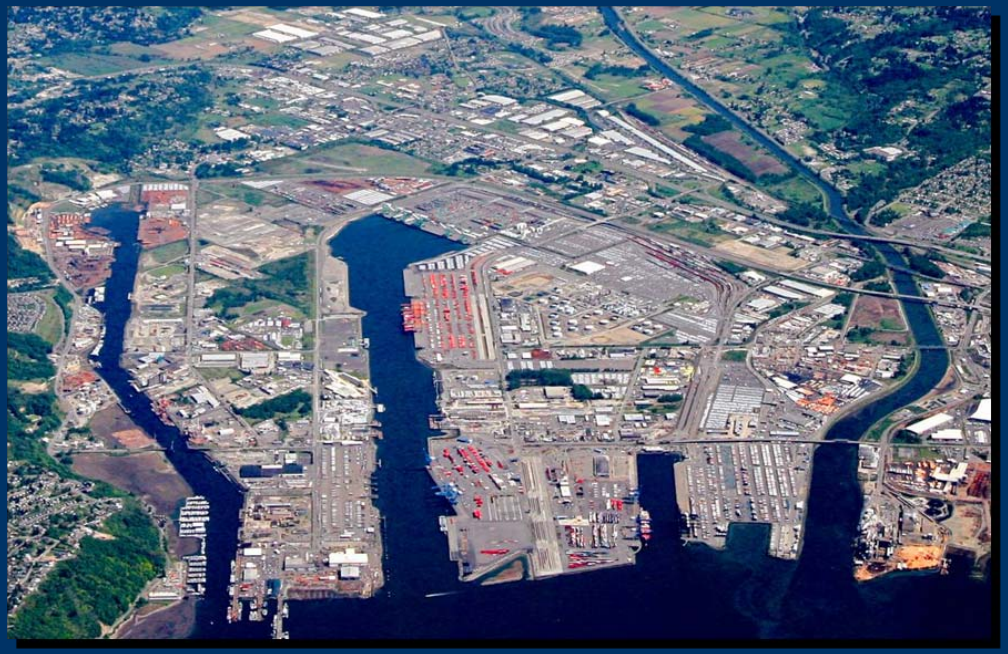
- Pierce County Terminal opened as a 171-acre container terminal featuring on-dock rail and two berths at the head of the Blair Waterway
- International Transportation Service, Inc (ITS) moved from Terminal 7 to a refurbished Husky Terminal 93-acre facility on Terminals 3-4
- Olympic Container Terminal opened for Yang Ming Lines on the Sitcum Waterway's Terminal 7, with 54 acres and on-dock intermodal at the Port's North Intermodal Yard
- Slip One was filled and capped with Hylebos Waterway dredge material
- Carlile Transportation Systems, one of Alaska's largest trucking companies, moved to the Port



2007 Washington United Terminal's 20-acre expansion near the Blair Waterway Turning Basin

Milestones

- The Port Commission directed that all Port-operated terminal activity use ultra-low sulfur diesel fuel (ULSD).
- The Port of Tacoma breaks the 2-million TEU milestone.
- Capacity improvements at Bullfrog Junction and Chilcote Junction completed.
- Washington United Terminals exercises their 20 acre expansion, but upon its delivery subleases the expansion area for auto storage.
- The Tribe's economic development arm, Marine View Ventures (MVV) announces a partnership with SSA; a terminal operating company that had previously purchased the Reichhold property.



2007 aerial view of the Port of Tacoma

Milestones

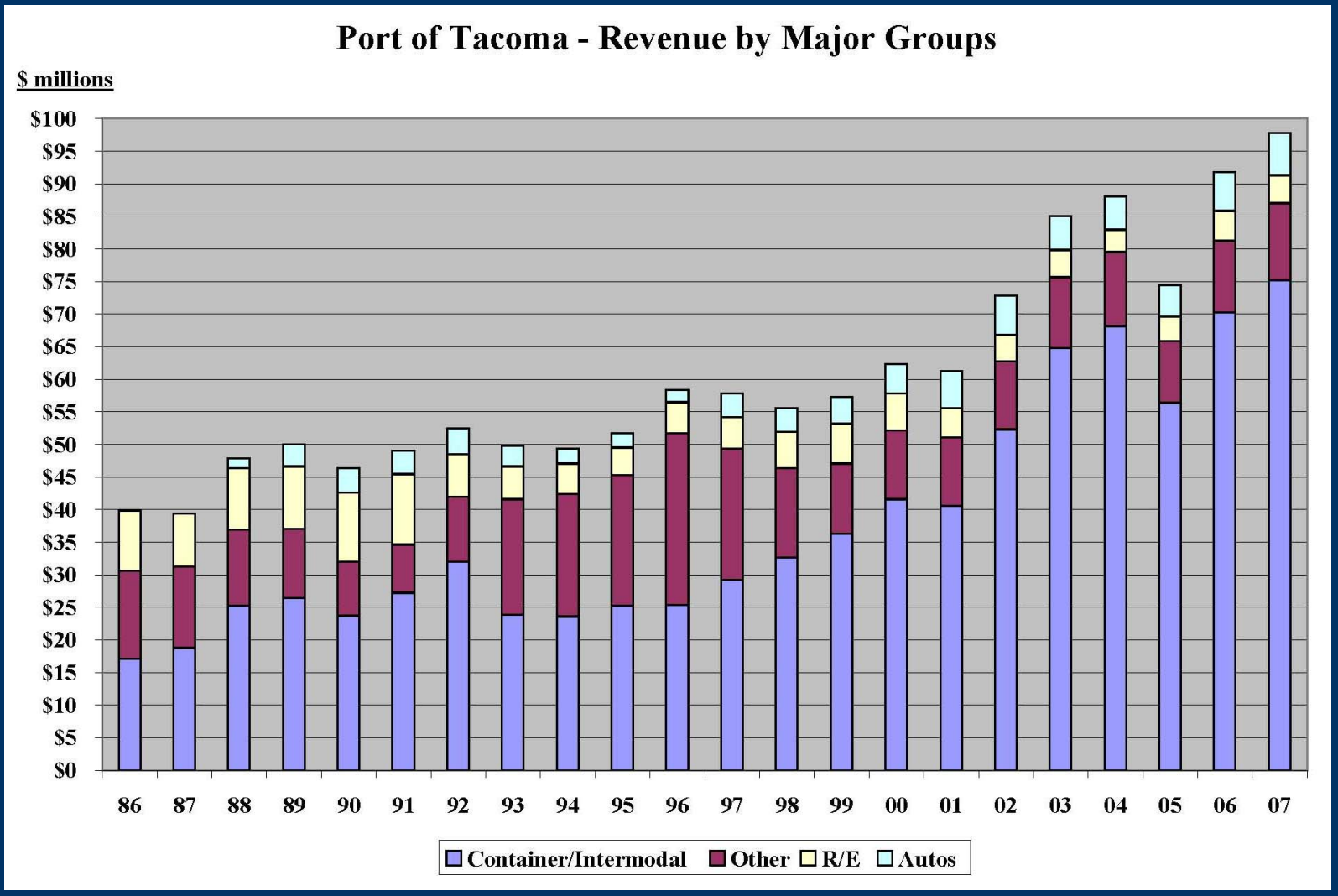
- WUT announces purchase of a 7th crane triggering a 1000' non-preferential wharf extension under their lease option. The Port and WUT subsequently agree on a 600' preferential berth extension.
- Port announces the NYK Lines lease for the YTTI Terminal.
- The Port Commission authorizes eminent domain action as respects 22 property owners on the Blair Hylebos Peninsula
- Port announces the TOTE lease for the expanded and relocated terminal at the northern end of the Blair-Hylebos Peninsula.
- Port, Puyallup Tribe of Indians, Marine View Ventures, and SSA announce four agreements focusing on cooperation and coordination of marine terminal development on the Blair-Hylebos Peninsula.

2008 opening of the D Street Overpass

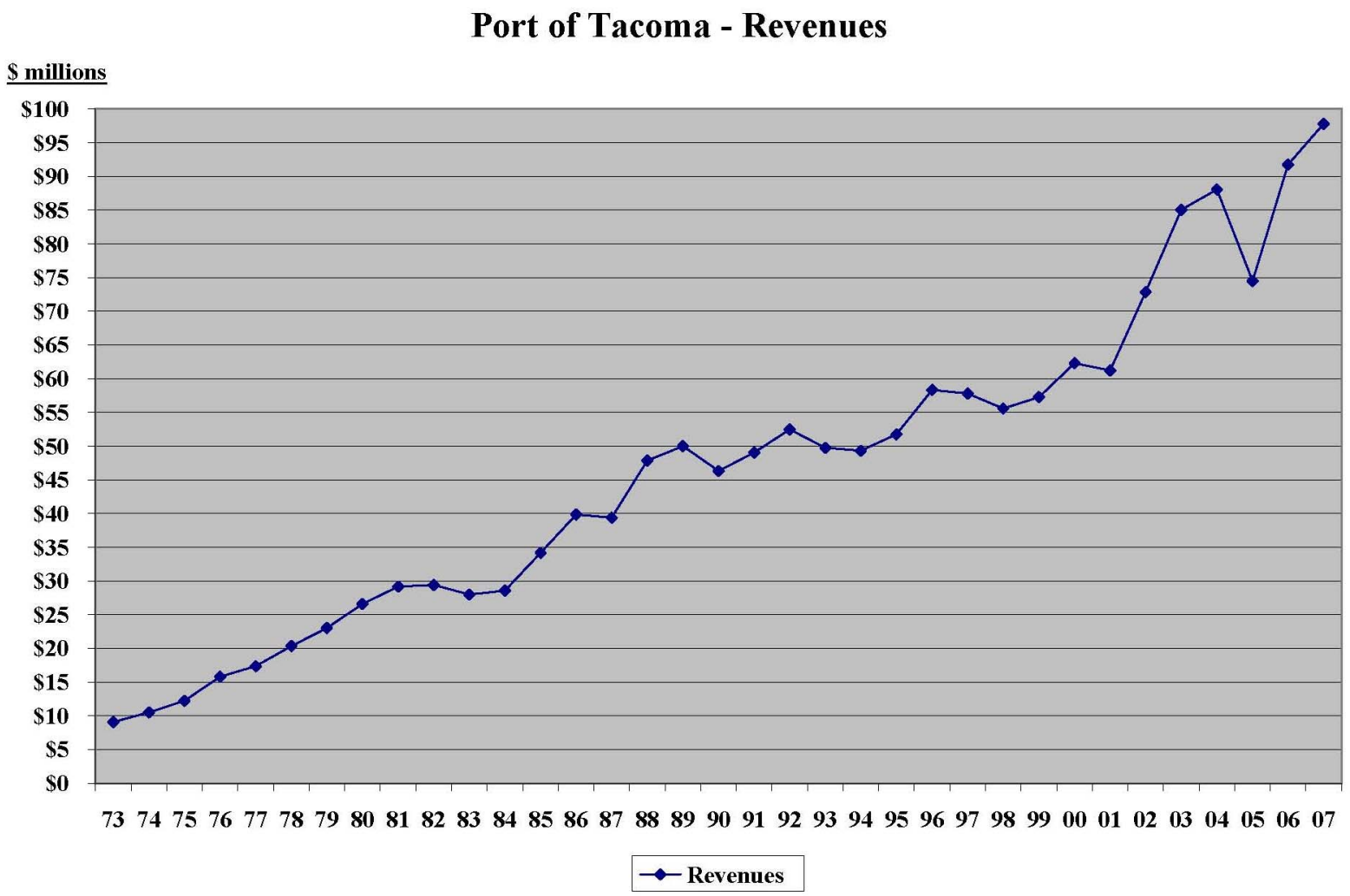
Milestones

- Initial 30% cost estimates for the Blair-Hylebos redevelopment program are delivered in mid April 2008. The refined estimates are substantially higher than anticipated.
- Environmental review under a SEPA EIS begins for the Blair Hylebos redevelopment program
- The D Street Overpass opens, de-conflicting the at-grade rail crossing at the southern end of the Foss Waterway and opening up the Foss Peninsula to unimpeded traffic.

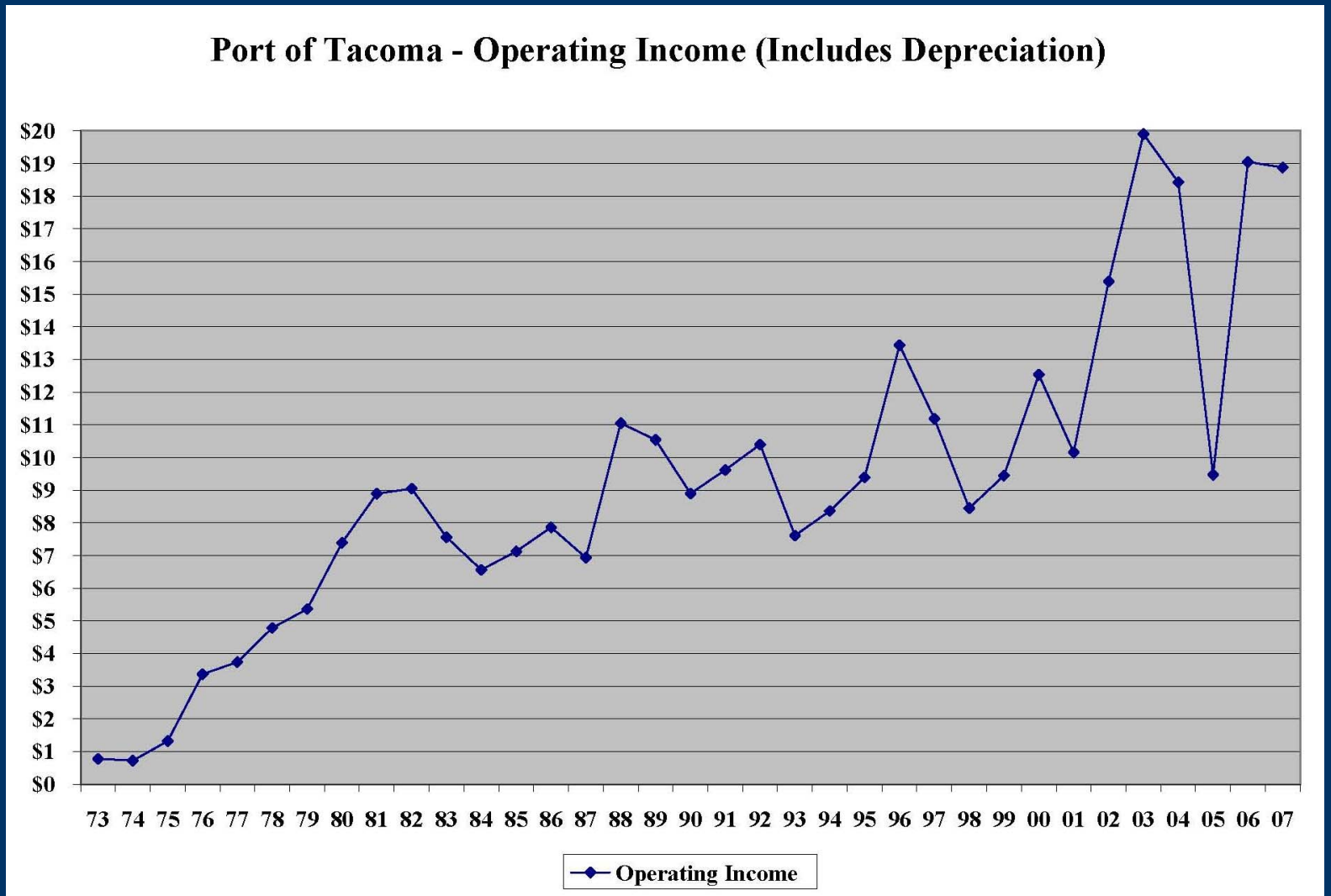
Port of Tacoma Financial History



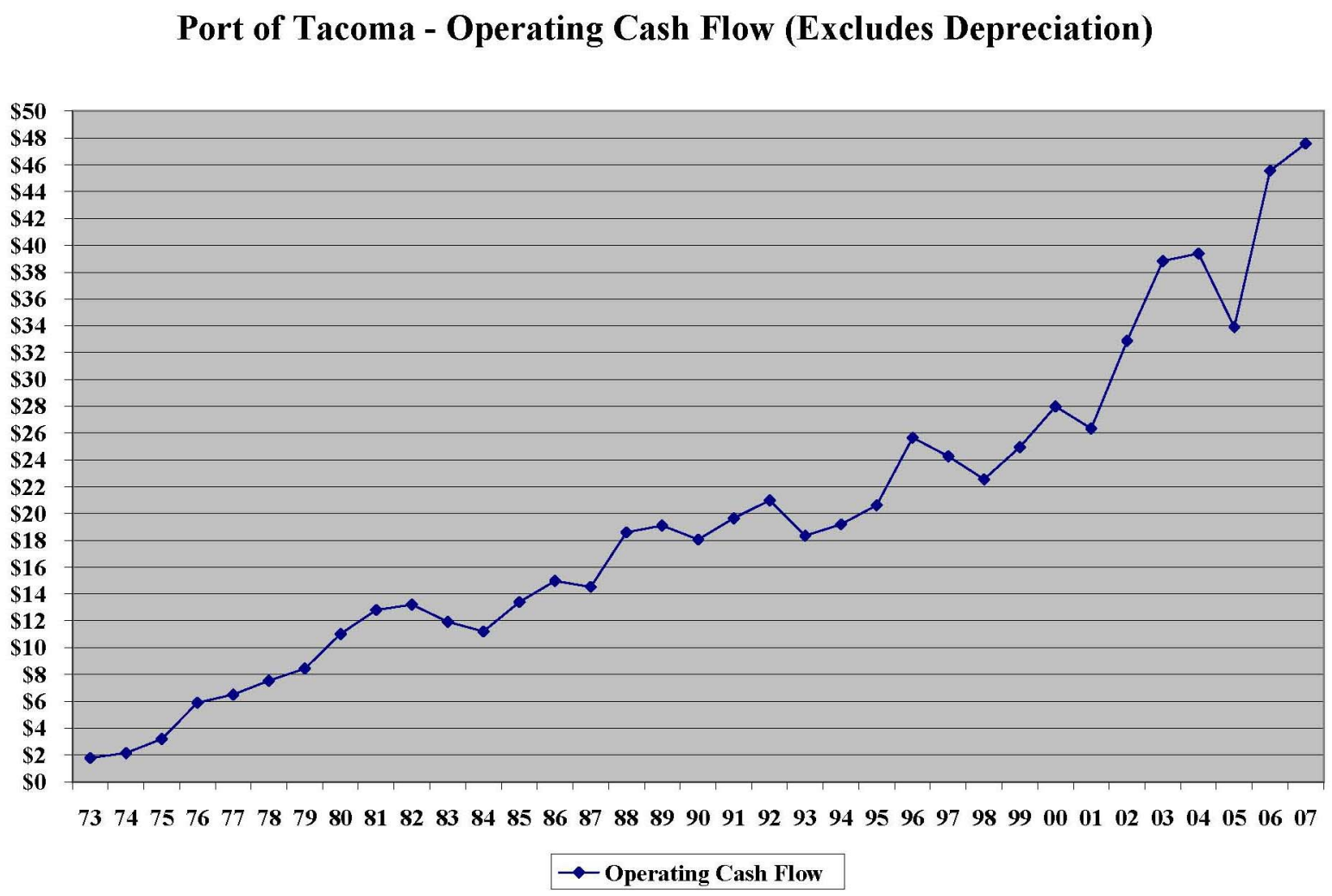
Port of Tacoma Financial History



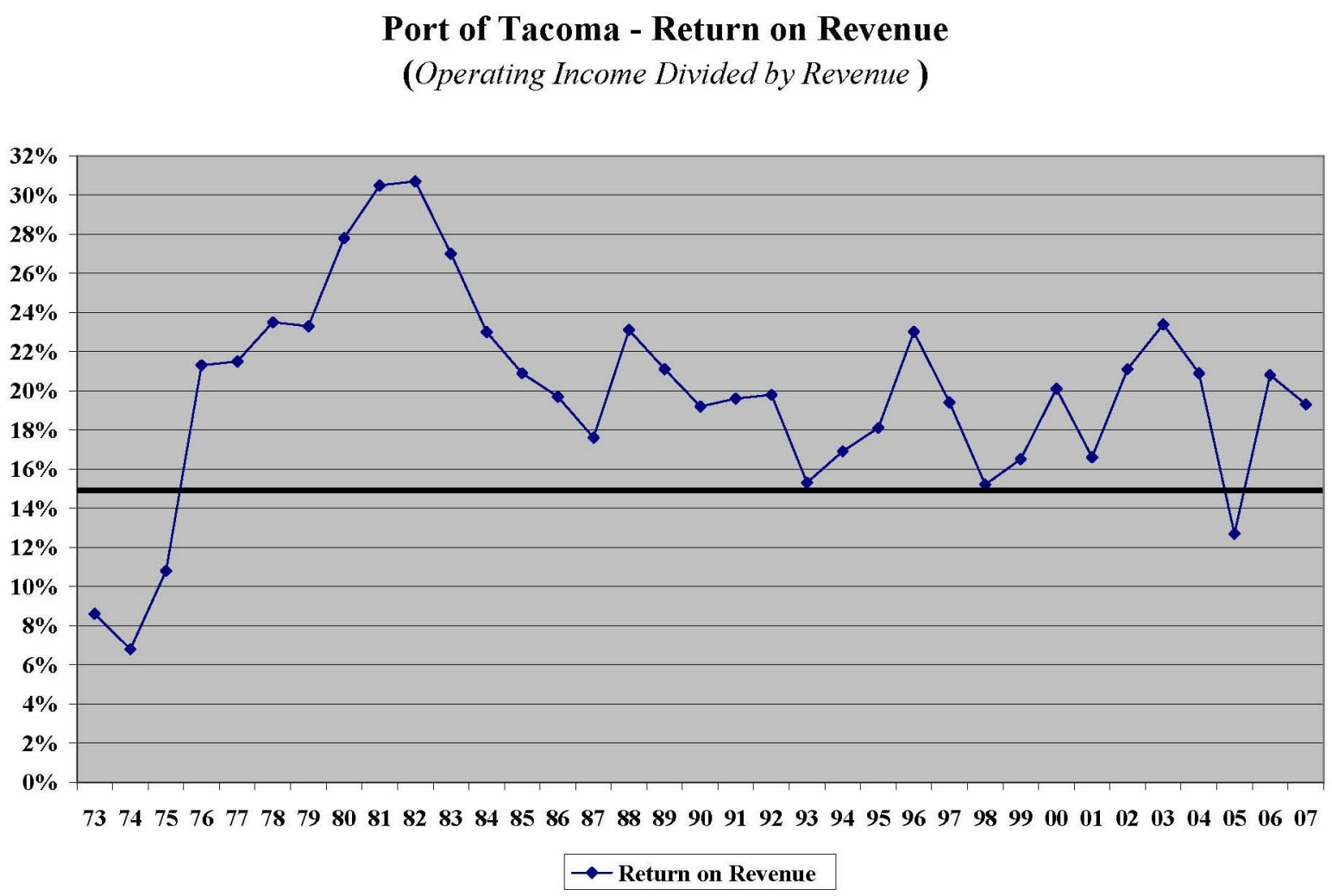
Port of Tacoma Financial History



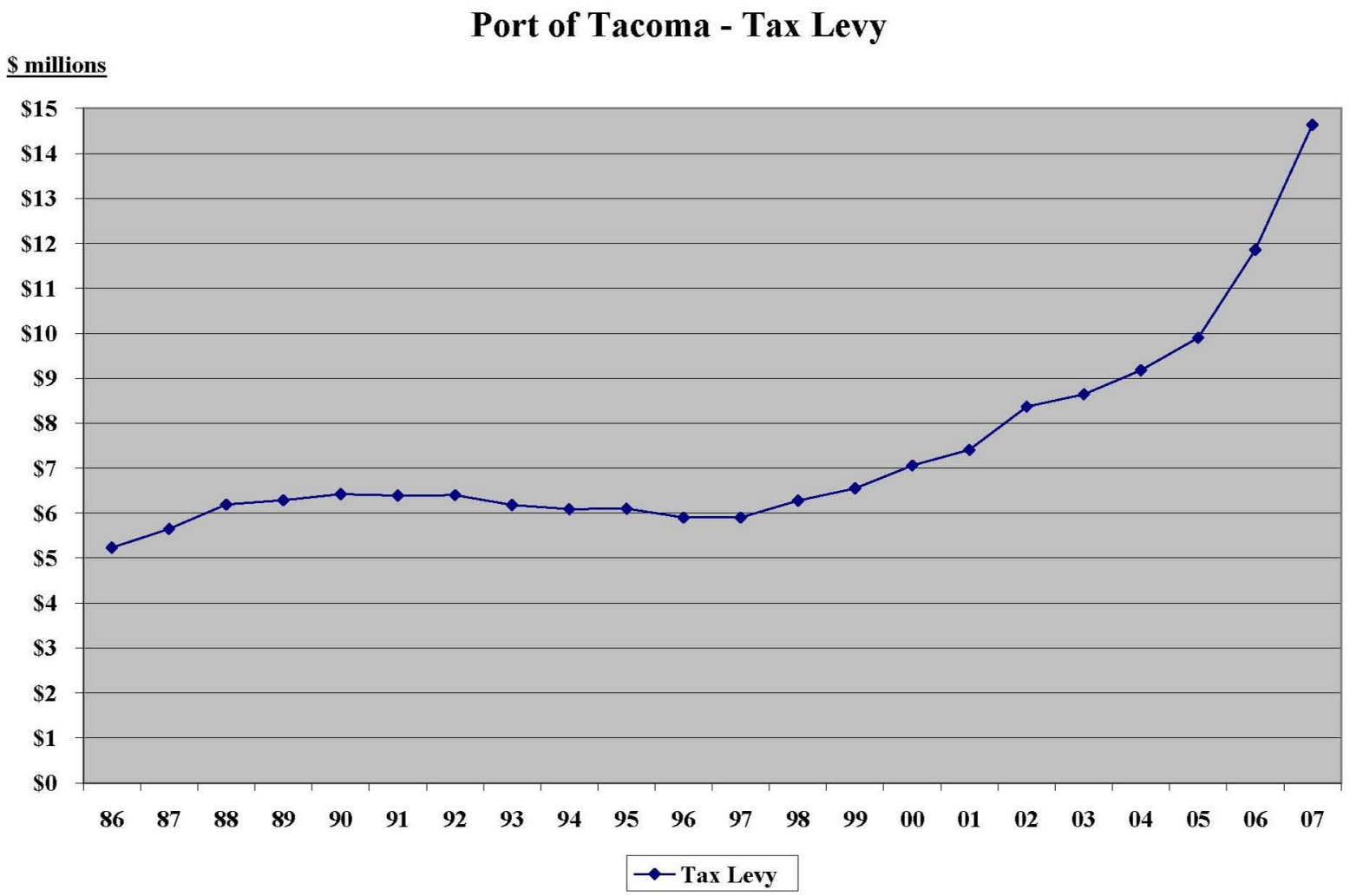
Port of Tacoma Financial History



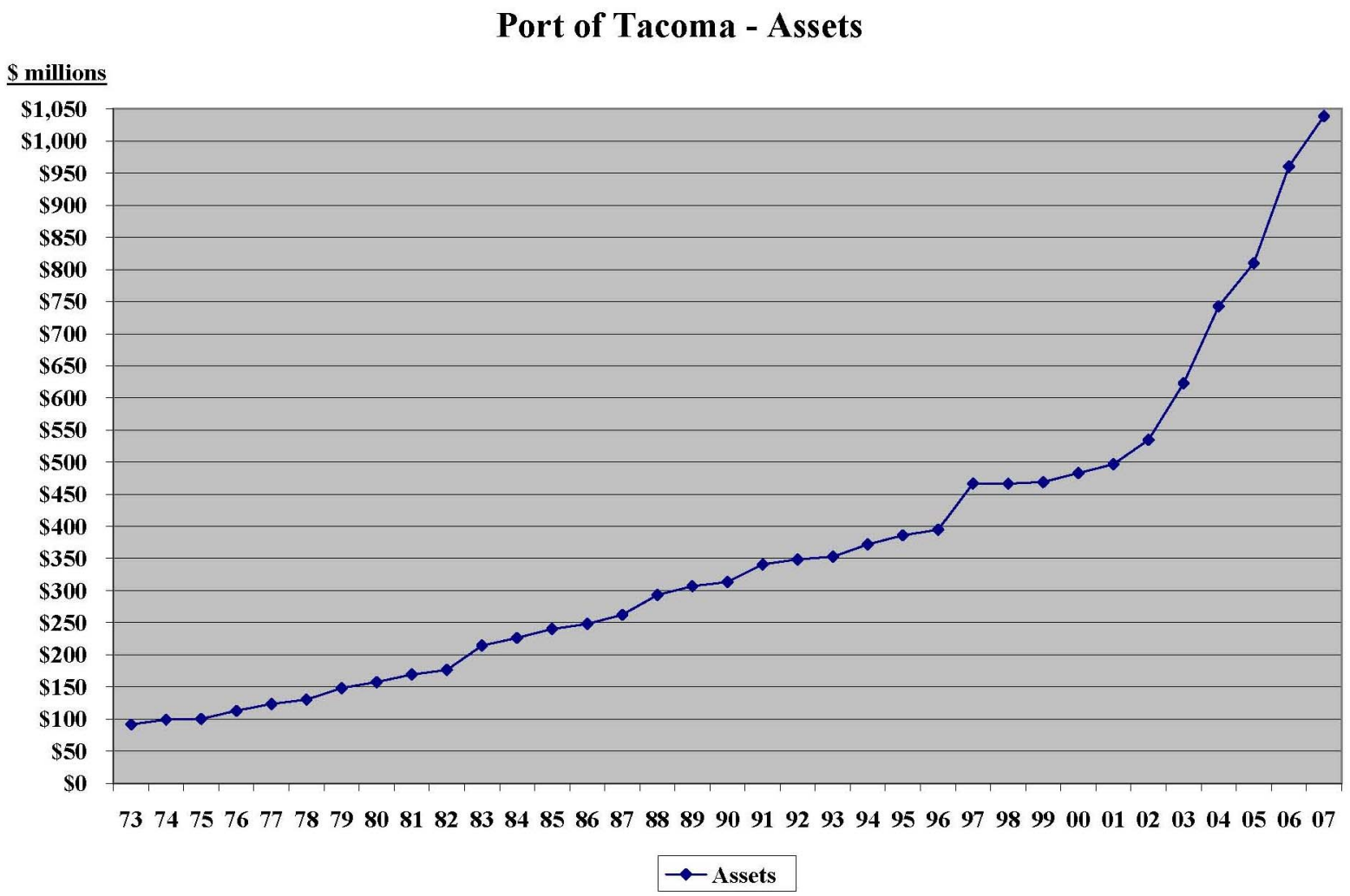
Port of Tacoma Financial History



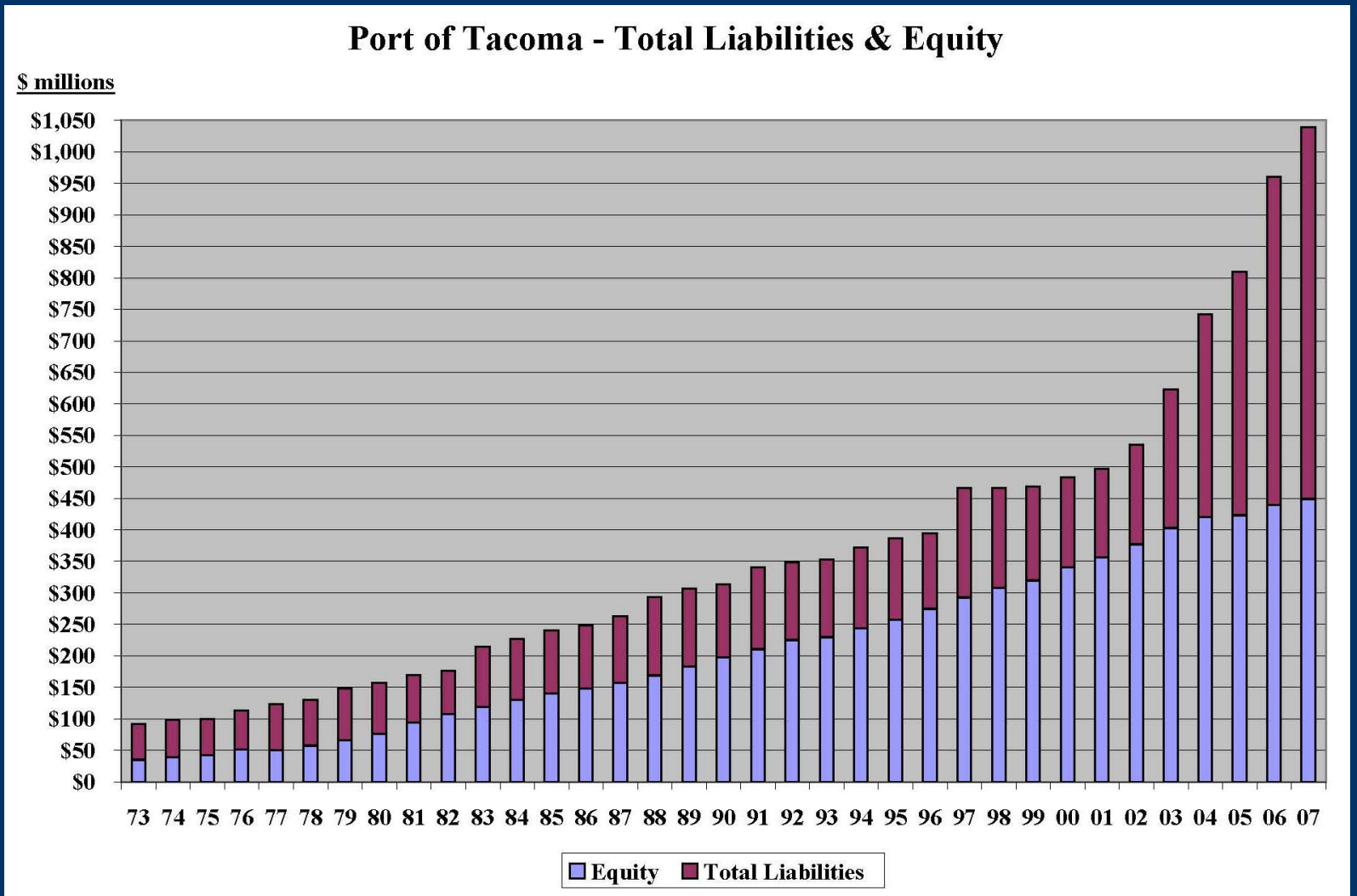
Port of Tacoma Financial History



Port of Tacoma Financial History



Port of Tacoma Financial History



LEDGER SQUARE LAW, P.S.
ATTORNEYS & COUNSELORS

JASON M. WHALEN
Direct Dial: (253) 327-1701
jason@ledgersquarelaw.com

July 21, 2016

Via email: william.lemp@pdc.wa.gov

William A. Lemp, III
Lead Political Finance Investigator
State of Washington
Public Disclosure Commission
PO Box 40908
Olympia, WA 98504-0908

Re: EDB's Response to 45-Day Citizens Action Complaint filed by Arthur West
PDC Case 6627

Dear Mr. Lemp:

This firm represents the Economic Development Board For Tacoma-Pierce County ("EDB"). This letter serves as the EDB's response to your letter of July 14, requesting a response to the Citizens Action Complaint filed by Arthur West, under PDC Case No. 6627. For the reasons set forth below, there is no legal or factual basis for the Complaint filed by Mr. West and the EDB respectfully requests that the PDC close its investigation.

The EDB is Not a Public Office or Agency.

As an initial response to your letter, the EDB is not a public office or agency subject to the restrictions of RCW 42.17A.555. RCW 42.17A.005 (2) defines "Agency" as including all state agencies and all local agencies. A "state agency" is defined to include "every state office, department, division, bureau, board, commission, or other state agency. A "local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

By definition, the EDB is not a public agency, subject to the restrictions of RCW 42.17A.555. To the contrary, the EDB is a private Washington non-profit corporation, actively incorporated in the State of Washington since 1977. See *Corporations Registration Detail provided by Washington Secretary of State, attached as Exhibit "A."* As plainly stated on the front page of the EDB website (www.edbtacomapierce.org), the EDB has a two prong mission: retention and recruitment of existing primary businesses in Tacoma-Pierce County. The EDB's work plan to accomplish its stated mission is developed by a volunteer board of directors. The work plan is executed by private staff members. The EDB's work plan for business recruitment

and retention is funded by its member investors, both private and public. The EDB does not seek, as its primary or one of its primary purposes, to affect, directly or indirectly, governmental decision-making by supporting or opposing candidates or ballot propositions.

The EDB Sought a Legal Determination of the Propriety of a Proposed Local Initiative.

Because the EDB's stated mission is to recruit and retain primary businesses in Tacoma-Pierce County, the EDB had the requisite legal standing to pursue a *pre-election review* of the legal sufficiency of the proposed local initiatives, identified in your letter as Tacoma Citizen's Initiatives 5 and 6 ("Initiatives"). As such, the EDB was a Co-Plaintiff in the legal action ("Complaint") filed in the Pierce County Superior Court under Case No. 16-2-08477-5, which sought declaratory and injunctive relief given that the Initiatives were beyond the proper scope of the initiative power (the "Pierce County Legal Action"). On July 1, 2016, the Honorable Jack Nevin concurred and granted the Plaintiffs' (and the City of Tacoma's) requested declaratory and injunctive relief, which precluded placement of the Initiatives on the ballot.

The Washington Supreme Court has held that pre-election review is proper to determine whether such local initiatives are beyond the scope of the initiative power. See e.g., City of Port Angeles v. Our Water—Our Choice!, 170 Wn.2d 1, 239 P.3d 589 (2010). This exact issue (pre-election review of local initiatives involving water rights) was recently reaffirmed by the Washington Supreme Court in February 2016 in Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution, 185 Wn.2d 97; 369 P.3d 140 (2016). As the Court noted, the petitioners who filed the declaratory judgment action challenging the validity of the Spokane initiatives included Spokane County, individual residents of Spokane, for-profit corporations and companies in Spokane, and nonprofit associations, including the Spokane Association of Realtors, the Spokane Building Owners and Managers Association, the Spokane Home Builders Association and the local chambers of commerce. Spokane Entrepreneurial, 185 Wn.2d at 101-102.

Like the EDB, the Spokane Entrepreneurial petitioners had legal standing to challenge the initiatives in the context of a pre-election declaratory judgment action in the superior court. Ultimately, the Washington Supreme Court agreed with the petitioners in that case and held that the proposed initiative exceeded the scope of local legislative authority and thus "should not be put on the ballot." Id., at 110.

In the pursuit of a legal determination of the validity of the Initiatives in this case, the EDB paid for legal services directly to this firm, as its legal counsel, from its operating budget. The EDB has not received, nor does it expect to receive, "contributions" toward any "electoral goals" as its focus was solely to obtain a pre-election legal ruling on the merits of the proposed Tacoma Citizen's Initiatives.

The EDB's Participation as a Co-Plaintiff in the Pierce County Legal Action was not tantamount to action as a "Political Committee."

Your letter also references Mr. West's alleged violations of RCW 42.17A.205, .235, and .240 by failing to register and report "campaign expenditures as a political committee." As you

are well aware, those referenced sections of the Act are dependent on a determination that the EDB was a "political committee."

The EDB's pursuit of a legal determination, as a Co-Plaintiff with the Port of Tacoma and the Tacoma-Pierce County Chamber of Commerce, does not make the EDB part of a "political committee" subject to the Fair Campaign Practices Act.

RCW 42.17A.005(37) defines a "political committee" as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." See also Utter v. Building Industry Ass'n of Washington, 182 Wn.2d 398, 416, 341 P.3d 953 (2015)(discussing the "contribution" prong as requiring evidence that an organization "expects to receive or receives contributions toward electoral goals.").

"Expenditure," as defined in RCW 42.17A.005(20), includes a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a promise to pay, a payment, or a transfer of anything of value in exchange for goods, services, property, facilities, or anything of value for the purpose of assisting, benefitting, or honoring any public official or candidate, or assisting in furthering or opposing any election campaign.

Pursuing legal rights (and paying legal fees to do so), under established Washington Supreme Court precedent does not fall within any reasonable definition of an "expenditure" by a "political committee." As the Court of Appeals held in State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n., 111 Wn. App. 586, 599, 49 P.3d 894 (Div. II 2002), in determining whether an organization is a "political committee," the organization making the expenditures must have as its "primary or one of the primary purposes . . . to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." As the Court noted in this case, ". . . if electoral political activity is merely one means the organization uses to achieve its legitimate broad nonpolitical goals, electoral political activity cannot be said to be one of the organization's primary purposes." Id. At 600.

It is undisputed that the EDB was a Co-Plaintiff in the Pierce County Legal Action. The EDB's stated mission is to recruit and retain primary businesses in Tacoma and Pierce County. While the EDB was concerned that the Initiatives, if passed, would irreparably harm the EDB's work plan and efforts to attract business in our region, seeking a legal determination on a purely legal issue in which the EDB (and the other Co-Plaintiffs) had legal standing, is a far cry from the requisite electoral political activity necessary to be deemed a "political committee" with the other Co-Plaintiffs.

In sum, the EDB participated in a legal process, and incurred legal fees, to bring an action for declaratory relief before the Pierce County Superior Court on the sole issue as to whether the Tacoma Citizens Initiatives were beyond the proper scope of local initiative power. The Superior Court found that the EDB and the other Co-Plaintiffs had standing and were entitled to the declaratory relief requested. Clearly, the lawful pursuit of declaratory relief in the Superior Court is not the kind of activity that is subject to the restrictions of RCW 42.17A.555.

The EDB Expects an Impartial Investigation of the Citizen's Action Complaint.

As referenced in your July 14 letter, the EDB understands that the PDC has opened a "formal investigation." From our review of the applicable provisions of the Washington Administrative Code, the initiation of a formal investigation is at the direction and discretion of the executive director of the PDC. WAC 390-37-060(1)(a)-(d). As indicated in subpart (d): "The director shall initiate a formal investigation whenever an initial review of a complaint indicates that a material violation of chapter 42.17A RCW may have occurred." We also understand, based on the cited WAC, that the executive director "shall initiate" an adjudicative proceeding or provide a report to the commission "whenever a formal investigation reveals facts ***that the executive director has reason to believe*** are a material violation of chapter 42.17A RCW and do not constitute substantial compliance." WAC 390-37-060(3).

Because the executive director retains significant discretion in these matters, we ask that the formal investigation include the EDB's concerns over the executive director's appearance of fairness in this matter.

Evelyn Fielding Lopez currently serves as Executive Director of the Public Disclosure Commission. In this capacity, it appears that Ms. Lopez has exercised her discretion under the WACs and has initiated this formal investigation.

Unfortunately, based on the EDB's review of public comments made by Ms. Lopez to the media and on her own social media (Facebook), it appears that Ms. Lopez cannot exercise her discretion in a fair and impartial manner. For instance, as recently as January 22, 2016, as indicated in the attached documentation, Ms. Lopez publicly commented (on a discussion of the recent methanol issue) that ***"... we can't let the venal and irresponsible Port and Chamber continue with this nonsense—time for the real people of Tacoma to decide what is in the best interest of our city."***

The EDB takes exception to being the subject of a formal investigation by the Executive Director of the Public Disclosure Commission where the Executive Director has clearly stated her bias toward members of the business community, including the Port, the Chamber, and, in our case, the EDB with the initiation of this formal investigation on a Citizens Complaint that facially lacks legal or factual merit.

Asserting one's opinion in the public forum is a matter of free speech. However, where one acts in the capacity of an executive director of an agency charged with discretionary review of allegations that may or may not rise to the level of a "formal investigation," we believe the appearance of fairness doctrine (RCW 34.05.425(3)) demands transparency and an unbiased review, analysis and determination of the issues.

Because the EDB does not believe Ms. Lopez can participate in this matter in an unbiased manner, we ask that the Commission exclude her from any further participation in the formal investigation or in the determination of any findings.

We trust that the information presented addresses the concerns and complaints alleged. As you will likely receive similar responses from the Port of Tacoma and the Pierce County Chamber of Commerce, we ask that you view the facts and analysis provided in their entirety and conclude that there is no merit to the Citizen's Action Complaint filed by Mr. West. We look forward to notification that the "formal investigation" has been closed with no findings.

Reservation of Rights. Because of the limited time the EDB was provided to respond to this Citizen's Complaint, the EDB reserves the right to provide additional authority with respect to all issues involved. Additionally, the EDB intends to join in any Request for Recusal and/or Motion for Disqualification which may be filed by any other party to this formal investigation under Case Nos. 6626, 6627, or 6628.

If you have any further questions or need further information, please feel free to call me.

Sincerely,

LEDGER SQUARE LAW, P.S.

Jason M. Whalen

JMW:mjr
Encls

cc: Client
Carolyn Lake, Counsel for Port of Tacoma
Valerie Zeeck, Counsel for Tacoma-Pierce County Chamber of Commerce

Due to technical difficulties some search results may not be current or reflect the most recent filing. We are hoping to have this corrected shortly.

ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY

UBI Number	601168742
Category	REG
Profit/Nonprofit	Nonprofit
Active/Inactive	Active
State Of Incorporation	WA
WA Filing Date	10/11/1977
Expiration Date	10/31/2016
Inactive Date	
Duration	Perpetual
Charity	This corporation is also a charity. View Info » (http://www.sos.wa.gov/charities/search_detail.aspx?charity_id=36760)
Registered Agent Information	
Agent Name	Rebecca Ray
Address	950 PACIFIC AVE #410
City	TACOMA
State	WA
ZIP	98401
Special Address Information	
Address	PO BOX 1555
City	TACOMA
State	WA
Zip	98401

Governing Persons

Title	Name	Address
President	KENDALL, BRUCE	PO BOX 1555 TACOMA, WA 98401
Secretary	McCARTHY, PAT	PO Box 1555 TACOMA, WA 98401
Vice President	SUESS, SUSAN M	PO BOX 1555 TACOMA, WA 98401

EXHIBIT A

Justin D. Leighton · Executive Director at Washington State Transit Association

I am certain we could use less of this "key incredient" in our lives. https://www.washingtonpost.com/.../by-2050-there-will-be.../

Like · Reply · 3 · Jan 22, 2016 4:14pm

Wade Neal · Assistant Executive Director at The Grand Cinema

If the writer does not know "the facts" why is he clearly for the plant?

Like · Reply · 8 · Jan 22, 2016 3:50pm

Evelyn Fielding Lopez · Tacoma, Washington

This may be the most ridiculous explanation I've read lately: "It's new because it's environmentally advanced." Talk about Wyle E. Coyote and Acme products--that line is right out of an Acme products advertisement! Tacoma, we can't let the venal and irresponsible Port and Chamber continue with this nonsense--time for the real people of Tacoma to decide what is in the best interest of our city.

Like · Reply · 7 · Jan 22, 2016 3:01pm

Ladymae Walters

If environmental agencies permit this catastrophic disaster in the making they are not doing their job .
They are the first ones to shout about climate change , less snow cap , receding glaciers .
Warm water low water in our rivers .
If they permit this in the heart of a city .
They've been bought !
It's not rocket science to know it's not a good idea ...
Save Our Water says recall Port Commissioners asap .

Like · Reply · 5 · Jan 19, 2016 9:20pm

Kathlyn Neal · Psychotherapist, Clinical Social Worker at Kathlyn Neal LICSW

In addition to the health and safety concerns of the proposed methanol plant to current Tacoma residents and the depletion of our natural resources, I wonder how many corporations/businesses will pass over Tacoma as their future home should it be built. This is not an effective way to attract future commerce. In fact, it seems contrary to attracting future business. I hear a lot of talk about how cutting edge and less polluting this plant would be...compared to what? Older, more polluting technology? FACT: This methanol plant will cause more pollution to our land and waters and people than if it were not built.

Like · Reply · 9 · Jan 18, 2016 9:19pm

Ladymae Walters

Look at the big players involved with Northwest innovations ..
It says it all .
Sad day for Tacoma if this is approved .

Like · Reply · 5 · Jan 18, 2016 8:29am

Nancy McFarland · Tacoma Community College

I've read about this methanol plant to to understand why there is so much public outcry; this is really not a good deal for Tacoma. Let's not lose sight of the enironmental concerns because we are excited about desparately needed jobs. Yes, we need more jobs in Tacoma, but we do not need this methanol plant! I am sure there are many other corporations in the United States that would be interested in Tacoma if they were given some incentives.

COMMENTS

7 Comments Sort by **Newest**

Add a comment...

Gavin Guss

i'm pleased to see all the good ideas and intelligent comments on this thread. it still confounds me how opaque our elected representatives remain when the issue requires direct and immediate dialog.

Like · Reply · 3 · Feb 2, 2016 2:17pm

Brett Ogin · Works at Westcoastbiasedsports.com

warehouses, manufacturing, giant hotel and casino (sorry that's me being selfish) all sound better to me than toxic gas emitting
time bomb.

Like · Reply · 3 · Feb 1, 2016 10:30am

Evelyn Fielding Lopez · Tacoma, Washington

The idea of placing warehouses on the Tideflats is interesting. If freeway access were improved, that might be a better option than converting good farmlands into warehouses in Fife and Puyallup. There should be a comprehensive discussion about what we want the future of Tacoma to look like--rather than leasing land to the first suitor without any critical thought or discussion. I remain deeply disappointed in the Port Commissioners, but maybe we can use the scoping and EIS process to have those critical discussions. I expect our City leaders to participate as well--what is the point of having vision exercises like Tacoma 2025 if you don't do anything to help those positive goals and visions become reality?

Like · Reply · 3 · Feb 1, 2016 9:30am

Ladymae Walters

The visions project ...
About $ 225 , 000 another waste of tax dollars ....

Like · Reply · Feb 2, 2016 7:24pm

Alvarita Allen · Tacoma, Washington

Read the article in Time Magazine on methanol facilities. They are leaking in many locations throughout the world, including the U.S.A. Will Tacoma and the Port guarantee to buy my home at the "former" value when the methanol facility here leaks? If NOT, then this plant should not be built.

Like · Reply · 4 · Feb 1, 2016 8:22am

Pamela Taylor · Works at CEO Taylor Household

Anyone remember the superfund clean up!? Such a colossal waste of money and time to only turn around and do this. Oh and whoever is operating here. They should know that in the event of an earthquake 6.8 or higher, break out the surfboard and prepare for the 12 foot high wall of water that will be coming for them
https://en.m.wikipedia.org/wiki/Tacoma_Fault

POLITICS & GOVERNMENT MARCH 10, 2016 5:58 PM

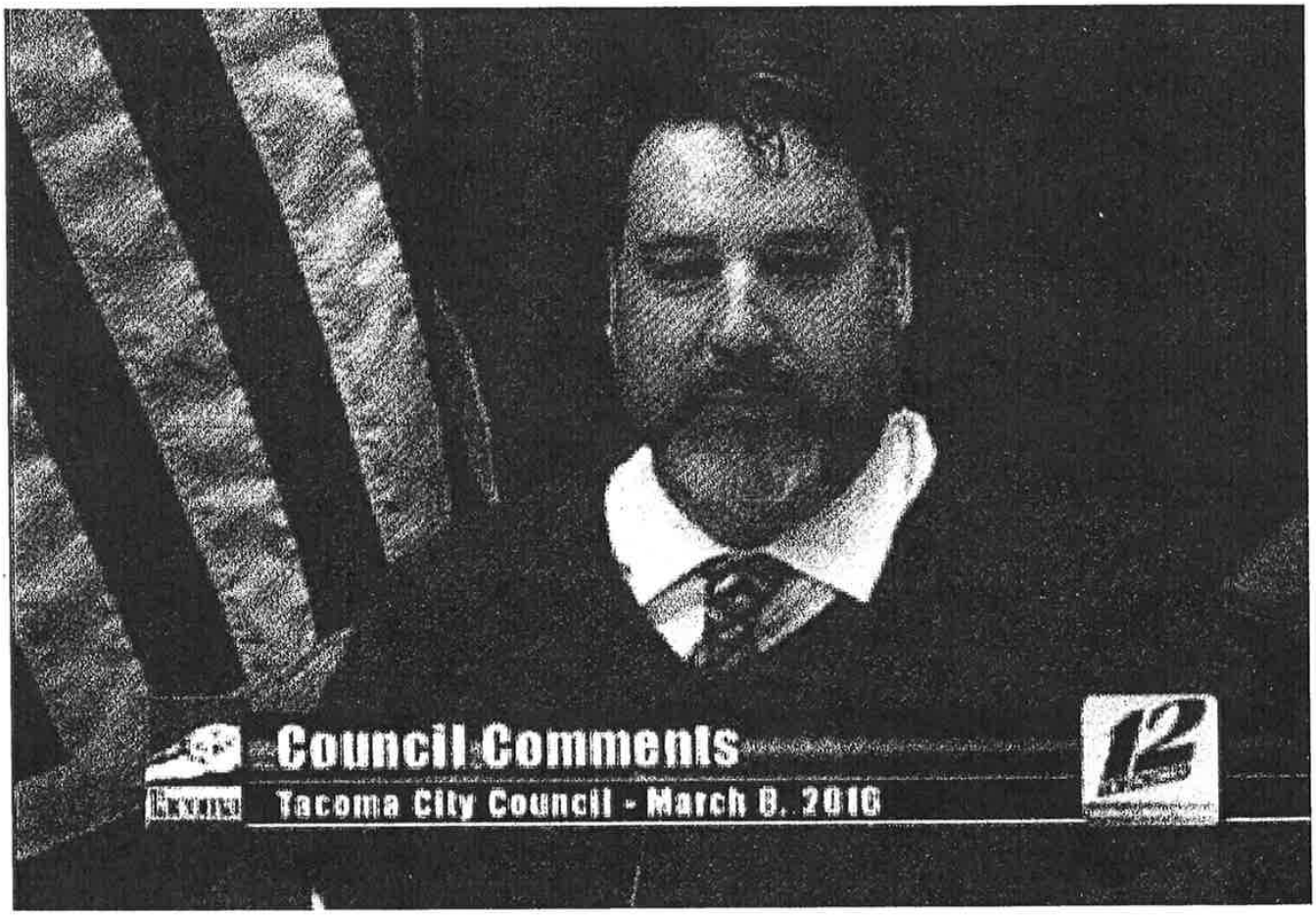
Fashion statement or political message? Tacoma councilman's sweater joins methanol debate

HIGHLIGHTS

Dozens of methanol plant opponents wore red at City Council meeting

Protesters viewed Councilman Campbell's sweater as a sign of solidarity

Council members say they want to raise questions, but not influence study



Her caution made sense to her colleagues, who seconded her remarks at last month's meeting. Some of them have raised questions about the project, including Councilman Ryan Mello, who submitted a two-page letter detailing the issues he hopes the city planning department will consider in its review.

Not present at last month's meeting was Councilman Robert Thoms, who wrote a guest column in Sunday's News Tribune that advocated for a less industrial future at the port.

"My vision is of a city that is less industrial than its past," Thoms wrote. "We can have jobs and commerce and quality of life, but we also must have a better understanding of what the parcels in the port and surrounding area are able to handle, and what are the right projects and zoning to create the future we want."

To some outside city government, that was the first sign that the council was breaking its perceived silence on the project.

Evelyn Fielding Lopez, an attorney and chairwoman of the state Public Disclosure Commission who lives in Tacoma, said she thought the council was being too cautious with the stance its members articulated last month.

"They have a really important role because they represent the citizens of the city, and if they engage, great, but to stand on the sidelines and say 'We can't be involved whatsoever,' that's not great," Lopez said.

Three council members reached by The News Tribune this week would not describe the legal advice they received regarding how they could talk about the methanol proposal.

They said their decisions were informed both by their experiences navigating past controversial projects and by the regular guidance they receive on maintaining the appearance of fairness as elected officials.

City Attorney Elizabeth Pauli also declined to describe the advice she gave to the council regarding the project. But she did say no law or precedent prohibits council members from discussing a topic like the methanol plant.

"There's no such thing," Pauli said. "There are some different concepts that have probably led to caution with regard to what they can and can't say and when."

Other elected bodies in the state have opened themselves to pricey lawsuits when they've either taken gifts from a project applicant or abruptly put up obstacles to projects that otherwise would have complied with local zoning rules. In one case, the city of Spokane had to pay hundreds of

sell it back to the US at a profit.
5. No one has addressed the possible explosion hazard.
6. All this for 250 jobs?
And the TNT appears to support this?

Like · Reply · 7 · Apr 24, 2016 9:18am

Evelyn Fielding Lopez · Tacoma, Washington

City and Port leaders should embrace the notion that they are elected to serve the people. Yes, use social media. Yes, ask the community what their vision for Tacoma and the Port might be. Yes, find out what industrial use is forward looking and resource appropriate. Yes, have a public discussion before the lease is signed. More asking, more consulting, less telling. Be respectful of the people you serve. This is not easy--but we will all benefit. It is a very good thing to have an engaged and active community--use that resource.

Like · Reply · 6 · Apr 24, 2016 9:10am

Jerry Bauer

"If you have a community that's against everything, it's awfully hard to recruit businesses that want to come here," Port Commissioner Don Johnson

I'm pretty sure no one would have been against either of the other two options you guys nixed

Like · Reply · 5 · Apr 24, 2016 8:53am

Debby Herbert

The politicking has already begun for the next boondoggle, "If you have a community that's against everything, it's awfully hard to recruit businesses that want to come here," Port Commissioner Don Johnson said

The issue was the largest methanol plant in the world being built in the middle of town. Obvious twisting of the conversation. Hundreds and thousands of residents have sent letters to the port and officials insisting on sustainable jobs and industry. Selling off our limited natural resources of barely breathable air, water and power to the highest bidder is not sound in any way, including economically, when all acounted for. We just barely dodged a bullet and we have to stay involved to not let this happen again.

Like · Reply · 10 · Apr 24, 2016 10:23pm · Edited

Ladymae Walters

Save Tacoma Water
Amendment 5 Initiative 6
The People's Right to Water Protection Ordinance .
Will not get to the ballot box without City of Tacoma registered voters signing the petitions .
SaveTacomaWater.org.

Like · Reply · 4 · Apr 24, 2016 8:17am

Marba Armstrong Cowan · St. Martin's University

Hemp production for biodegradable plastics and earth friendly textiles. Who knows what other petroleum based products could be replaced?

Like · Reply · 3 · Apr 24, 2016 6:51am

Veronica Niechajczyk

GORDON THOMAS HONEYWELL

Valarie S. Zeeck
Direct: (253) 620-6427
E-mail: vzeeck@gth-law.com

July 21, 2016

VIA EMAIL

William A. Lemp, III
(William.lemp@pdc.wa.gov)
Lead Political Finance Investigator
State of Washington
Public Disclosure Commission
PO Box 40908
Olympia, WA 98504-0908

RE: Case 6628 - Tacoma-Pierce County Chamber Response to Complaint

Dear Mr. Lemp:

I represent the Tacoma-Pierce County Chamber ("Chamber"). This letter is the Chamber's response to the letter from the Public Disclosure Commission ("PDC") dated July 14, 2016, regarding the complaint referenced above ("Complaint").

OBJECTION TO PARTICIPATION IN FORMAL INVESTIGATION

The Chamber assumes that the PDC opened a "formal investigation" based on an determination by the Executive Director of the Public Disclosure Commission, Evelyn Lopez, that a material violation of RCW 42.17A may have occurred.[1] If that is inaccurate, please advise immediately. If the Chamber's assumption is accurate, the Chamber objects to participating in this investigation because it has information which raises questions about Ms. Lopez' ability to fairly make such an initial determination. The Chamber requests that this investigation be suspended until the full Commission can determine whether it should proceed based on Ms. Lopez' initial determination. As will be more fully set out in documents to be filed shortly, Ms.

[1]WAC 390-37-060(d) states: "the director shall initiate a formal investigation whenever an initial review of the complaint indicates that a material violation of chapter 42.17A RCW may have occurred.

Lopez should recuse herself or be disqualified from this case (and related cases 6627 and 6626) based on personal bias with respect to the subject matter of the complaint. The Executive Director has on multiple occasions publicly voiced support for proponents of the STW Initiatives (as defined below) and related actions by a small group of citizens in the City of Tacoma. Related to these issues, Ms. Lopez has referred to the Chamber and the Port of Tacoma as "venal and irresponsible." At a minimum, her conduct raises the appearance that she cannot be fair in the handling of this case. The Executive Director has additional duties related to the ultimate resolution of the Complaint, as set out in WAC 390-37-060, without limitation. The Chamber objects to any participation by Evelyn Lopez in this matter, and further requests that the Commission investigate her conduct with regard to the Complaint to date.

Without waiver and reserving all rights to challenge any determination by the Commission, including without limitation, the validity of the Executive Director's initial determination that a "formal investigation" was warranted, the Chamber submits the following response to the PDC's request for information.

FACTS

On March 7, 2016, a citizens' group called Save Tacoma Water filed two initiatives (the "SWT Initiatives") with the Tacoma City Clerk. The STW initiatives were flagrantly and facially illegal, at least in part, because, by their own language, they asserted that they were superior to the Federal and Washington State Constitutions and to Washington State law. They further stated that no state or federal court could determine they were illegal.

The Chamber, with other plaintiffs, brought a declaratory judgment action in the Superior Court of Pierce County to determine whether the STW Initiatives exceeded the scope of local initiative power. The City of Tacoma, named as a defendant, agreed with the plaintiffs that the STW Initiatives could never become part of the Tacoma City Code and City Charter, because they were facially illegal in that they exceeded the scope of any authority the City of Tacoma has. The Court agreed with the plaintiffs and the City. It determined that, in fact, the STW Initiatives were illegal, and permanently enjoined their placement on the ballot.

SUMMARY OF RESPONSE

The complaint asserts the Chamber violated Washington's Fair Campaign Practices Act (FCPA)[2] by failing to register as a political committee and report contributions and expenditures related to the lawsuit testing the STW Initiatives. The complaint should be dismissed because

[2] RCW Ch. 42.17A

the Chamber is not a public agency, filing a lawsuit to determine whether an initiative is legal is not political activity contemplated by the FCPA, and the STW Initiatives were not "ballot propositions" as defined by the FCPA.

A. The Chamber cannot violate RCW 42.17A.555, which by its terms applies only to "elective officials," public agencies, their employees and public resources.

In relevant part, RCW 42.17A.555 prohibits elected officials or public employees from using public facilities and resources to promote or oppose any ballot proposition. The Chamber is a private, not public, organization, and thus it cannot have violated the statute.

The Chamber is Washington non-profit corporation. It's President and Board of Directors are not elected by a public vote, but rather are selected by process outlined in its duly adopted bylaws. Its resources are not public resources, but are rather private in nature, consisting of membership dues, event admission fees, etc. As a result, the PDC must dismiss the complaint asserting that the Chamber has violated this statute.

The complaint either misapprehends the legal status of the Chamber or erroneously believes that filing a lawsuit as a plaintiff with other entities converts the Chamber to a "public agency." This is facially absurd. No legal authority can be cited in support of such a proposition.

B. The Chamber did not otherwise violate the FCPA.

The complaint also alleges the Chamber violated RCW 42.17A.205, 235, and 240 by failing to register as a political committee and report its campaign contributions and expenditures. The Chamber is not a "political committee" as defined by the FCPA, and the STW Initiatives are not "ballot propositions" as defined by the FCPA.

1. The Chamber is not a political committee and as a result, cannot violate RCW 42.17A.205, and .235.

By their plain language, RCW 42.17A.205 and .235 apply only to "political committees" as defined at RCW 42.17A.005(37):

> Political committee means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

The Chamber does not meet the definition of a political committee with respect to the STW Initiatives for at least two reasons. First, it was not acting (receiving contributions or

making expenditures) "in support of, or opposition to" political activity as contemplated by the FCPA. Second, the STW Initiatives were not "ballot propositions" as defined by the FCPA.

a. The Chamber was not acting "in support of, or opposition to" political activity as contemplated by the FCPA.

Providing further definition of the term "political committee," the Washington Court of Appeals has held that "an organization is considered a political committee under the FCPA by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to ***further electoral political goals***." *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n,* 111 Wn. App. 586, 599, 49 P.3d 894 (2002) (Emphasis added). Notably, the organization must have as "its primary or one of the primary purposes" to affect governmental decision making "by supporting or opposing candidates or ballot propositions." *Id.* at 599.

The Chamber filed a lawsuit not to "further electoral political goals," but rather to obtain a neutral judicial determination as to whether the STW Initiatives were lawful. Simply, the Chamber engaged in "legal activity," not "political activity" or "campaign activity." Nothing in the language of the FCPA requires reporting costs or contributions related to filing a legal challenge to an illegal ballot measure. If the legislature had intended to make legal activity subject to the public disclosure laws, it would have included language to that effect. No reported Washington case has held that seeking a judicial determination of the validity of a ballot measure is "political" activity" or constitutes "promoting an electoral political goal." In this case, the Pierce County Superior Court followed a recent decision of the Washington Supreme Court and found the STW Initiatives exceeded the scope of local initiative power and were thus illegal.

In *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 488, 166 P.3d 1174 (2007), the Washington State Supreme Court upheld the FCPA in the face of a vagueness challenge. In doing so, the court held that a person of ordinary intelligence would have a reasonable opportunity to understand the meaning of "in support of, or opposition to" in the definition of in the "political committee." In reaching this conclusion, the Court relied upon a decision of the United States Supreme Court[3] which defined the terms "oppose" and "support" in terms of *communications* that refer to a candidate and promote or attack that candidate. *Id.* at 488 n.9. In other words, as the Court acknowledged, the statute is only constitutional insofar as a reasonable person would understand what "oppose" and "support" mean, and a reasonable person would understand those terms to refer to *communications or advertisements* in support of

[3] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

or opposing a candidate or ballot measure. Filing a lawsuit does not fit within this definition, no reasonable person would understand these terms to so mean, and the term would render the statute unconstitutional if so interpreted.

The purpose of the FCPA is to ensure that the financing of *political campaigns and lobbying* are fully disclosed to the public. RCW 42.17A.001. The FCPA only applies to organizations that have a "primary purpose" of campaigning, lobbying, or electioneering in favor or against a candidate or ballot proposition. The law is designed to let the voters know who is trying to sway their vote.[4] Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering.

Because the Chamber engaged in legal activity – seeking a neutral, judicial decision of a Washington State Judicial Officer – rather than attempting to sway voters or promote or oppose an issue electorally, the PDC should dismiss the Complaint.

b. Even if the Chamber was engaging in support of or opposition to the STW Initiatives (it was not), it would still not meet the definition of a "political committee" because the STW Initiatives are not "ballot propositions" as defined in the FCPA.

As the Ninth Circuit held in *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), the FCPA is constitutional because it is narrow, and its requirements are substantially related to an important government interest. The *Brumsickle* court explained that the FCPA only applies to "expenditures and advertisements made in conjunction with *an ongoing election or vote*. . . . By definition, disclosure obligations do not apply *absent a pending election or ballot initiative campaign.*" *Id.* at 1018 (emphasis added).[5] Here, any purported expenditures were made prior to any ballot initiative campaign, and were in fact related to challenging the initiation of such a campaign on the grounds that the ordinance was facially unconstitutional and beyond the scope of the local initiative power. There was no "ballot initiative campaign," because the measure was never submitted to the voters because it was unconstitutional and beyond the scope of the local initiative power. *See, e.g.,* RCW 29A.04.091 (defining "Measure" as "any proposition or question ***submitted to the voters***") (emphasis added).

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[4] *Voters Educ. Comm., supra*

[5] Moreover, if a proposed local initiative is facially beyond the local initiative power and unconstitutional, it can logically never become part of a legitimate "ballot initiative campaign." *See also id.* at 1019 ("An organization engaging in issue advocacy like Human Life may avoid disclosure requirements any time that the issue about which it is speaking is not the subject of a ballot initiative or other public vote. Once the issue becomes the subject of a ballot initiative campaign, Human Life may continue to advocate all it wants; the only difference is that it must provide certain disclosures at times tied to the date of the vote.").

This precise issue was addressed by a Washington court, and in *State of Washington v. Evergreen Freedom Foundation*, No 15-2-01936 (Thurston Cnty. Sup. Ct. 2015),[6] the court dismissed an FCPA suit premised on legal expenditures related to challenged proposed ballot initiatives.[7] As the court explained in dismissing the suit, "unless there is clear and unambiguous guidance in the statutes, that people cannot be held to have violated these regulations." In *Evergreen,* the court held that the FCPA does not clearly encompass legal expenditures "before the matter ever went to any kind of vote." The same result should be reached here. *Order Granting Defendant's Motion to Dismiss*, *State of Washington v. Evergreen Freedom Foundation*, No. 15-2-01936-4 (filed May 17, 2016) (attached).

FURTHER RESERVATION OF RIGHTS

Although the statutory process for responding to a citizen complaint provides 45 days for a determination to be made as to whether legal action will be taken, the Chamber was required to respond to the complaint within five business days. The Chamber objects to the minimal time provided by the Commission, and reserves the right to provide additional authority with respect to all issues involved.

As a second reservation of rights, the Chamber believes that, as a matter of law, it is not required to disclose to the Commission 1.) whether it paid for legal services with respect to the declaratory judgment action and 2) if it did pay for legal services, how much was spent. It respectfully declines to answer those questions at this time. The Chamber also believes that it is not required to respond to the remainder of the questions at the top of page two of your letter dated July 14, 2016. The Chamber voluntarily, however, responds that any work related to the declaratory judgment action referenced herein was taken to determine the legal validity of facially and flagrantly unconstitutional local ballot initiatives, and for no other purpose. The Chamber voluntarily responds that it denies working with the Port of Tacoma and the Economic Development Board of Tacoma-Pierce County as a political committee to oppose the STW Initiatives.

With respect to its objection to the Executive Director's participation in this matter, the Chamber will file additional information or join in filings by other respondents within the near future.

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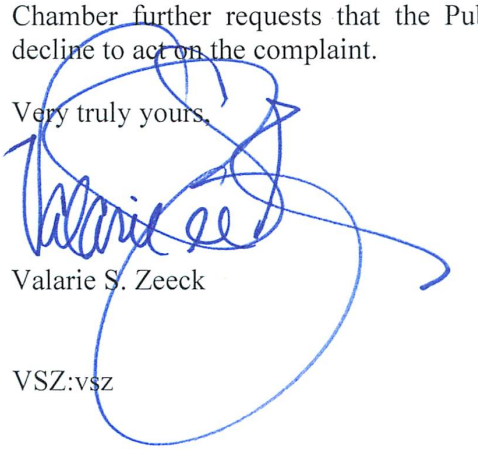
[6] *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981 (2008) ("Insofar as the analysis in another trial judge's decision might be helpful, there is no rule or precedent that bars its consideration by a trial judge. Further, trial judges can be presumed to know that other trial court rulings are not precedential.").

[7] *See* Defendant's Motion to Dismiss, *State of Washington v. Evergreen Freedom Foundation*, No 15-2-01936 (Filed April 4, 2016) (attached).

CONCLUSION

For the reasons stated herein, the Chamber denies that it was or is required to register as a political committee and disclose contributions and expenditures related to filing a lawsuit in which the STW Initiatives were found to be illegal as in excess of local initiative power. The Chamber further requests that the Public Disclosure Commission and the Attorney General decline to act on the complaint.

Very truly yours,



Valarie S. Zeeck

VSZ:vsz

[4834-3701-3557]

PORT OF TACOMA LITIGATION MATTTERS
2000-2016

			PIERCE COUNTY SUPERIOR COURT		
LITIGANT	**CAUSE NUMBER**	**TYPE**	**CASE TITLE**	**FILE DATE**	**TYPE**
PORT OF TACOMA	**09-2-14216-1**	RSP	ARTHUR WEST VS. CONNIE BACON	10/06/09	Public Records Act (PRA)
PORT OF TACOMA	**08-2-04312-1**	DEF	ARTHUR WEST VS. PORT OF TACOMA	01/14/08	PRA
PORT OF TACOMA	**09-2-07119-1**	DEF	ARTHUR WEST VS. PORT OF TACOMA	03/19/09	PRA
PORT OF TACOMA	**15-2-06420-2**	DEF	ARTHUR WEST VS. PORT OF TACOMA	03/02/15	PRA
PORT OF TACOMA	**16-2-07446-0**	DEF	ARTHUR WEST VS. PORT OF TACOMA	04/29/16	PRA
PORT OF TACOMA	**07-2-08366-4**	DEF	CUTTER INC VS. EVERGREEN AMERICA CORPORATION	05/23/07	FORECLOSURE
PORT OF TACOMA	**07-2-11292-3**	DEF	CUTTER INC VS. PRIME ELECTRIC INC	08/20/07	FORECLOSURE
PORT OF TACOMA	**00-2-13763-5**	DEF	DAVID A MILLER ET AL VS PORT OF TACOMA ET AL	12/06/00	COMMERCIAL
PORT OF TACOMA	**04-2-08681-2**	DEF	DAVID GARCIA VS. AMERICAN FAST FREIGHT INC	06/09/04	PERSONAL INJURY
PORT OF TACOMA	**13-2-11281-2**	DEF	E3 ENERGY PARTNERS LLC VS. G R SILICATE NANO-FIBERS AND CARBONATES LLC	07/19/13	UNLAWFUL DETAINER
PORT OF TACOMA	**12-2-09647-9**	DEF	GENERAL METALS OF TACOMA INC VS. TACOMA INDUSTRIAL PROPERTIES LP	06/04/12	ENVIRO
PORT OF TACOMA	**11-2-15815-8**	DEF	HD FOWLER CO INC VS. OMA CONSTRUCTION INC	11/17/11	COMMERCIAL BOND
PORT OF TACOMA	**03-2-08407-2**	DEF	HERTZ EQUIPMENT RENTAL CORPORATION VS. FIDELITY & DEPOSIT COMPANY OF MA	06/09/03	COMMERCIAL BOND

PORT OF TACOMA LITIGATION MATTTERS
2000-2016

PORT OF TACOMA	**08-2-09832-5**	DEF	INTERNATIONAL LONGSHORE & WAREHOUSE UNION LOCAL 23 VS. PORT OF TACOMA	06/30/08	COLLECTIVE BARGAINING
PORT OF TACOMA	**00-2-09246-1**	DEF	JOHN E MEEK DBA VS PORT OF TACOMA	06/30/00	COMMERCIAL
PORT OF TACOMA	**08-2-15032-7**	DEF	JOHN T LOVETT VS. PORT OF TACOMA	12/01/08	PERSONAL INJURY
PORT OF TACOMA	**04-2-11351-8**	DEF	JR SWIGART COMPANY INC VS. LYDIG CONSTRUCTION INC	09/03/04	COMMERCIAL CONSTRUCTION
PORT OF TACOMA	**09-2-06959-5**	DEF	KEY DEVELOPMENT INVESTMENT VS. PORT OF TACOMA	03/16/09	TORT/ CONTRACT
PORT OF TACOMA	**14-2-06561-8**	DEF	KEY DEVELOPMENT INVESTMENT VS. PORT OF TACOMA	02/28/14	TORT/ CONTRACT
PORT OF TACOMA	**04-2-05982-3**	DEF	LEGACY INVESTMENTS ADVISORS LLC VS. PORT OF TACOMA	03/15/04	PROPERTY DAMAGE
PORT OF TACOMA	**12-2-06071-7**	3DF	LEO KARYAVYY VS. TACOMA RAIL	02/08/12	PERSONAL INJURY
PORT OF TACOMA	**07-2-06744-8**	DEF	NEXANS DEUTSCHLAND INDUSTRIES GMBH & CO KG VS. POTELCO INC	04/03/07	FORECLOSURE
PORT OF TACOMA	**14-2-09106-6**	DEF	PETROLEUM RECLAIMING SERVICE INC VS. PORT OF TACOMA	05/28/14	TORT/ CONTRACT
PORT OF TACOMA	**14-2-11856-8**	DEF	PETROLEUM RECLAIMING SERVICE INC VS. PORT OF TACOMA	08/26/14	TORT/ CONTRACT
PORT OF TACOMA	**05-2-08464-8**	DEF	PIERCE COUNTY VS. 16117 KESTERSON LAND TRUST	06/03/05	FORECLOSURE
PORT OF TACOMA	**09-2-09730-1**	DEF	PIERCE COUNTY VS. VARIOUS PARCELS	06/05/09	EMINENT DOMAIN
PORT OF	**07-2-08713-9**	PET	PORT OF TACOMA VS. A H POWERS	06/01/07	EMINENT DOMAIN

TACOMA					
PORT OF TACOMA	**07-2-10864-1**	PET	PORT OF TACOMA VS. EMERALD TACOMA LLC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**11-2-08324-7**	PLA	PORT OF TACOMA VS. GUADALUPE MARTINEZ	04/13/11	EMINENT DOMAIN
PORT OF TACOMA	**07-2-08715-5**	PET	PORT OF TACOMA VS. PACIFIC PAPER PRODUCTS	06/01/07	EMINENT DOMAIN
PORT OF TACOMA	**03-2-06999-5**	PET	PORT OF TACOMA VS. PUGET SOUND TRUCK LINES INC	04/25/03	EMINENT DOMAIN
PORT OF TACOMA	**07-2-08714-7**	PET	PORT OF TACOMA VS. ROGER W MOLT	06/01/07	EMINENT DOMAIN
PORT OF TACOMA	**04-2-11532-4**	PLA	PORT OF TACOMA VS. WEYERHAEUSER COMPANY	09/10/04	EMINENT DOMAIN
PORT OF TACOMA	**15-2-13754-4**	PLA	PORT OF TACOMA VS. ECO BUILDING PRODUCTS INC	11/16/15	UNLAWFUL DETAINER
PORT OF TACOMA	**06-2-14061-9**	PET	PORT OF TACOMA VS. ARKEMA INC	12/19/06	EMINENT DOMAIN
PORT OF TACOMA	**14-2-07812-4**	PLA	PORT OF TACOMA VS. AT&T CORP	04/14/14	QUIET TITLE
PORT OF TACOMA	**07-2-10861-6**	PET	PORT OF TACOMA VS. BUFFELEN WOODWORKING CO	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10874-8**	PET	PORT OF TACOMA VS. CHEMICAL PROCESSORS INC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**08-2-11889-0**	PLA	PORT OF TACOMA VS. CLEAN CARE CORPORATION	08/27/08	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10870-5**	PET	PORT OF TACOMA VS. CONTINENTAL LIME INC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**11-2-15993-6**	PLA	PORT OF TACOMA VS. EDWARD D CAMPBELL	11/23/11	CONTRACT

PORT OF TACOMA LITIGATION MATTTERS
2000-2016

PORT OF TACOMA	**07-2-10869-1**	PET	PORT OF TACOMA VS. EVA NARS	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10862-4**	PET	PORT OF TACOMA VS. GARDNER TACOMA LLC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**14-2-08893-6**	PLA	PORT OF TACOMA VS. GR SILICATE NANO-FIBERS AND CARBONATES LLC	05/19/14	EMINENT DOMAIN
PORT OF TACOMA	**02-2-07805-8**	PLA	PORT OF TACOMA VS. KALMAR INDUSTRIES AB	05/20/02	PERSONAL INJURY
PORT OF TACOMA	**07-2-10867-5**	PET	PORT OF TACOMA VS. MARIANA PROPERTIES INC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10871-3**	PET	PORT OF TACOMA VS. PATRICIA A DUCOLON	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10863-2**	PET	PORT OF TACOMA VS. PETROLEUM RECLAIMING SERVICES INC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10868-3**	PET	PORT OF TACOMA VS. PHILADELPHIA QUARTZ COMPANY	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10860-8**	PET	PORT OF TACOMA VS. RANGAR WEST ONE LLC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**07-2-10865-9**	PET	PORT OF TACOMA VS. RTH TACOMA LLC	08/08/07	EMINENT DOMAIN
PORT OF TACOMA	**16-2-08477-5**	PLA	PORT OF TACOMA VS. SAVE TACOMA WATER	06/06/16	DECLARATORY JUDGEMENT
PORT OF TACOMA	**16-2-08637-9**	PLA	PORT OF TACOMA VS. SOUND MATTRESS & FELT COMPANY	06/13/16	EMINENT DOMAIN
PORT OF TACOMA	**07-2-08712-1**	PET	PORT OF TACOMA VS. W A SILVA	06/01/07	EMINENT DOMAIN
PORT OF TACOMA	**06-2-12214-9**	DEF	POTELCO INC VS. PORT OF TACOMA	10/12/06	CONTRACT

PORT OF TACOMA LITIGATION MATTTERS
2000-2016

PORT OF TACOMA	**15-2-14604-7**	RSP	PUYALLUP TRIBE OF INDIANS VS. CITY OF TACOMA	12/17/15	LUPA
PORT OF TACOMA	**00-2-04578-1**	DEF	RICHARD CASTANEDA ET AL VS PORT OF TACOMA ET AL	01/24/00	PERSONAL INJURY
PORT OF TACOMA	**03-2-12994-7**	DEF	ROBERT A BONNER VS. PORT OF TACOMA	11/06/03	PERSONAL INJURY
PORT OF TACOMA	**04-2-05239-0**	DEF	ROBERT A BONNER VS. PORT OF TACOMA	02/18/04	PERSONAL INJURY
PORT OF TACOMA	**10-2-05149-5**	DEF	SCS REFRIGERATED SERVICES VS. PORT OF TACOMA	01/07/10	LUPA
PORT OF TACOMA	**12-2-06401-1**	DEF	SOUND MATTRESS & FELT CO VS. PORT OF TACOMA	02/21/12	ENVIRO
PORT OF TACOMA	**07-2-12243-1**	DEF	SSA MARINE INC VS. PORT OF TACOMA	09/18/07	PRA
PORT OF TACOMA	**01-2-13020-5**	DEF	TIMOTHY EDWARD LINCOLN VS JOHN E THOMSON ET AL	10/29/01	TORT MOTOR VEHICLE
PORT OF TACOMA	**07-2-05330-7**	DEF	WALDNER CONSULTING INC VS. MILLER CONTRACTING INC	02/15/07	COMMERCIAL
PORT OF TACOMA	**11-2-13808-4**	DEF	WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC VS. PORT OF TACOMA	09/22/11	PRA
PORT OF TACOMA (ENGINEERING)	**06-2-06320-7**	DEF	MORSE DISTRIBUTION INC VS. PACIFIC CARGO COMPANY LLC	03/24/06	COMMERCIAL BOND

PORT OF TACOMA LITIGATION MATTTERS
2000-2016

KING COUNTY SUPERIOR COURT

LITIGANT	CAUSE NUMBER	TYPE	CASE TITLE	FILE DATE	TYPE
PORT OF TACOMA	00-2-01097-4	PLA	PORT OF WHITMAN COUNTY ET AL VS WASHINGTON STATE OF ET ANO	01-12-00	MISCELLANEOUS
PORT OF TACOMA	04-2-29621-8	GAR DEF	PSC INC VS MCKEOUGH	02-20-04	COLLECTION
PORT OF TACOMA	05-2-03787-3	GAR DEF	ELLIOTT BAY ADJUSTMENT CO INC VS LEVITON	01-27-05	TRANSCRIPT OF JUDGMENT
PORT OF TACOMA	08-2-37522-6	DEF		10-30-08	TORT-OTHER
PORT OF TACOMA	12-2-39446-6	PLA	PORT OF TACOMA VS CAMPBELL	12-11-12	ABSTRACT OF JUDGMENT
PORT OF TACOMA	4-2-26791-6	DEF	WEST VS SEATTLE PORT COMMISSION ET AL	09-26-14	WRIT OF MANDAMUS

THURSTON COUNTY SUPERIOR COURT

LITIGANT	CAUSE NUMBER	TYPE	CASE TITLE	FILE DATE	TYPE
PORT OF TACOMA	11-2-01660-6	DEF	FRIENDS OF ROCKY PRAIRIE VS THURSTON COUNTY ET AL	07/28/2011	LUPA LAND USE PETITION ACT
PORT OF TACOMA	08-2-01381-0	DEF	MARINE VIEW INC ET AL VS PORT OF TACOMA	06/09/2008	COMMERCIAL
PORT OF TACOMA	00-2-02068-3	DEF	CITY OF BURIEN ET AL VS STATE REVENUE ET AL	11/09/2000	INJUNCTION

PORT OF TACOMA LITIGATION MATTTERS
2000-2016

LEWIS COUNTY SUPERIOR COURT

LITIGANT	CAUSE NUMBER	TYPE	CASE TITLE	FILE DATE	TYPE
PORT OF TACOMA	11-2-00396-3	PLA	PORT OF TACOMA VS THURSTON COUNTY, BLACK HILLS AUDUBON SOCIETY ET AL	03/31/2011	LUPA LAND USE PETITION ACT
PORT OF TACOMA	11-2-00395-5	PLA	MAYTOWN SAND AND GRAVEL LLC VS THURSTON COUNTY ET AL	03/31/2011	LUPA LAND USE PETITION ACT

U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

LITIGANT	CAUSE NUMBER	TYPE	CASE TITLE	FILE DATE	TYPE
PORT OF TACOMA	3:2007-CV-05294	(DFT)	CAREFREE CARTAGE INC ET AL V. HUSKY TERMINAL & STEVEDORING INC ET AL	06/12/2007	ENVIRONMENTAL MATTERS
PORT OF TACOMA	3:2005-CV-05103	(DFT)	UNITED STATES OF AMERICA V. PORT OF TACOMA ET AL	02/07/2005	ENVIRONMENTAL MATTERS
PORT OF TACOMA	3:2004-CV-05473	(DFT)	YOUNG V. PORT OF TACOMA ET AL	08/10/2004	CIVIL RIGHTS: JOBS
PORT OF TACOMA	3:2004-CV-05056	(DFT)	CUBITT ET AL V. MAERSK INC ET AL	02/05/2004	P.I.: OTHER
PORT OF TACOMA	3:2010-CV-05547	(DFT)	WEST V. CHUSHKOFF ET AL	08/05/2010	MANDAMUS & OTHER
PORT OF TACOMA	2:2000-CV-01950	(DFT)	BETHEL V. PORT OF SEATTLE, ET AL	11/16/2000	PRISONER: CIVIL RIGHTS

PORT OF TACOMA LITIGATION MATTTERS
2000-2016

LITIGANT	CAUSE NUMBER	TYPE	CASE TITLE	FILE DATE	TYPE
PORT OF TACOMA	3:2006-CV-05008	(3PD)	HOFFMAN V. CITY OF TACOMA ET AL	01/09/2006	FEDERAL EMPLOYER'S LIABILITY
PORT OF TACOMA	3:2011-CV-05205	(DFT)	WEST V. PORT OF TACOMA ET AL	03/16/2011	CIVIL RIGHTS: OTHER
PORT OF TACOMA	3:2016-CV-05340	(CLM)	IN THE MATTER OF THE COMPLAINT OF NORTHWEST ROCK PRODUCTS, INC., ET AL	05/06/2016	OTHER STATUTORY ACTIONS
PORT OF TACOMA	2:2014-CV-01518	(DFT)	WEST V. SEATTLE PORT COMMISSION ET AL	09/29/2014	OTHER STATUTORY ACTIONS
PORT OF TACOMA	3:2002-CV-05130	(DFT)	RINKS V. PORT OF TACOMA, ET AL	03/15/2002	CIVIL RIGHTS: JOBS
PORT OF TACOMA	3:2011-CV-05253	(DFT)	UNITED STATES OF AMERICA V. PORT OF TACOMA ET AL	04/01/2011	ENVIRONMENTAL MATTERS
PORT OF TACOMA	3:2008-CV-05132	(PLA)	PORT OF TACOMA V. TODD SHIPYARDS CORPORATION ET AL	03/05/2008	ENVIRONMENTAL MATTERS
PORT OF TACOMA	3:2003-CV-05117	(DFT)	USA V. ADVANCE ROSS SUB CO, ET AL	03/03/2003	ENVIRONMENTAL MATTERS
PORT OF TACOMA	3:2014-CV-05775	(DFT)	ARTHUR S WEST V. SEATTLE PORT COMMISSION ET AL	09/29/2014	OTHER STATUTORY ACTIONS

Phil Stutzman

From: Jason Whalen <jason@ledgersquarelaw.com>
Sent: Thursday, July 28, 2016 2:31 PM
To: William Lemp
Cc: Phil Stutzman
Subject: RE: 45-Day Citizen Action Complaint - Port of Tacoma, Economic Development Board of Tacoma-Pierce County and the Tacoma-Pierce County Chamber

Mr. Lemp,

Now that I am back in the office, I can do something better than text you an estimated $ number.

The EDB incurred legal fees to our firm in the amount of $9993.55 for the legal work on the lawsuit through the hearing. I understand this was funded from the EDB's operating budget; no contributions were made specific to this legal action, nor were any contributions sought.

Let me know if you need further information.

Jason

Jason M. Whalen
Attorney
Ledger Square Law, P.S. | www.ledgersquarelaw.com
710 Market Street, Tacoma, WA 98402
Direct: (253) 327-1701
Main: (253) 327-1900
Fax: (253) 327-1700

From: William Lemp [mailto:william.lemp@pdc.wa.gov]
Sent: Thursday, July 28, 2016 9:06 AM
To: Jason Whalen <jason@ledgersquarelaw.com>; Zeeck, Valarie <VZeeck@gth-law.com>
Cc: Phil Stutzman <phil.stutzman@pdc.wa.gov>
Subject: 45-Day Citizen Action Complaint - Port of Tacoma, Economic Development Board of Tacoma-Pierce County and the Tacoma-Pierce County Chamber

Good Morning All

As part of our on-going investigation I am requesting information on how much was spent by both of your organizations for the court action against Tacoma Initiatives 5 and 6.

Your assistance will be greatly appreciated.

Respectfully

William A. Lemp III
Lead Political Financial Investigator
Public Disclosure Commission
Shining Light on Washington Politics Since 1972

Phil Stutzman

From: Zeeck, Valarie <VZeeck@gth-law.com>
Sent: Thursday, July 28, 2016 2:55 PM
To: William Lemp
Cc: Phil Stutzman
Subject: RE: 45-Day Citizen Action Complaint - Port of Tacoma, Economic Development Board of Tacoma-Pierce County and the Tacoma-Pierce County Chamber

Mr. Lemp,

The Chamber maintains its position that it is not required to provide this information to the PDC.

Without waiving that objection, in answering your question below, the Chamber responds that the billing is not yet finalized in the declaratory judgment matter, but the Chamber has spent approximately $10,000 in legal fees on the court action. The Chamber used funds from its normal operating budget to pay the fees. It did not seek contributions for this purpose, nor did it have an "expectation" of making expenditures for this purpose until the illegality of the STW initiatives became apparent.

Valarie S. Zeeck
Attorney at Law
T 253 620 6427
F 253 620 6565

From: William Lemp [mailto:william.lemp@pdc.wa.gov]
Sent: Thursday, July 28, 2016 9:06 AM
To: Jason Whalen; Zeeck, Valarie
Cc: Phil Stutzman
Subject: 45-Day Citizen Action Complaint - Port of Tacoma, Economic Development Board of Tacoma-Pierce County and the Tacoma-Pierce County Chamber

Good Morning All

As part of our on-going investigation I am requesting information on how much was spent by both of your organizations for the court action against Tacoma Initiatives 5 and 6.

Your assistance will be greatly appreciated.

Respectfully

William A. Lemp III
Lead Political Financial Investigator
Public Disclosure Commission
Shining Light on Washington Politics Since 1972

Phil Stutzman

From: Carolyn Lake <CLake@goodsteinlaw.com>
Sent: Friday, July 29, 2016 12:50 PM
To: PDC
Cc: jdoremus@nwseaportalliance.com; Phil Stutzman; jwolfe@nwseaportalliance.com
Subject: RE: PDC - Port of Tacoma - Alleged violation of RCW 42.17A.555 using public facilities to oppose a ballot proposition; RCW 42.17A.205, .235, and .240 unreported PAC activities (June 2016)

Mr Lemp:

Thank you for this update. Will the 8/8/2016 meeting be transmitted via live audio feed?
And, by what date will the PDC staff transmit any supporting written material to the Commission in advance of the 8/8 meeting?

In response to your inquiry, the Port did not pool any funds related to the its legal action with anyone, including the EDB or Chamber.
It is our understanding that each Co-Plaintiff in the legal action was responsible for its own fees and costs. The Port authorized a legal budget from its own operating funds.

The Port did not have any expectation to seek contributions, and did not seek contributions for this purpose, nor did it consider payment of legal fees an expenditure in support of, or opposition to, any candidate or any ballot proposition as defined in RCW 42.17A.255 (and in reliance on and consistent with the Thurston County Superior Court's *Order Granting Defendant's Motion to Dismiss* in *State of Washington v. Evergreen Freedom Foundation*, No. 15-2-01936-5, dated May 13, 2016 and Pierce County *Order Granting Plaintiff's Motion for Summary Judgement* in *Institute for Justice et al v. State of Washington*, No. 15-2-01936-5, dated February 20, 2015.

We also offer that the Port's legal payment also does not qualify as an RCW 42.17A.005 (26) "Independent expenditure", as that definition applies solely to expenditures in support of or in opposition to a candidate for office.

Please advise if more is needed.
We reserve our opportunity to provide additional materials for your consideration. Thank you again,

Carolyn A. Lake.
Goodstein Law Group PLLC – **501 South "G" Street - Tacoma, WA 98405**
253.779.4000 office -253.229.6727 cell -253.779.4411 fax

"An appeaser is one who feeds a crocodile, hoping it will eat him last."
Sir Winston Churchill

Frederickson: Community Effort Brings a Hot Property to Market

Wood products are manufactured at the Ostermann & Scheiwe, U.S.A. plant at Frederickson Industrial District.

In order to develop Pierce County to its greatest potential, a cooperative effort is needed between the County, the Port, and the City of Tacoma. This team has been successful in bringing many new businesses to the area, and is currently at work again to develop the Port's Frederickson Industrial District.

The Port purchased 537 acres of the industrially zoned Frederickson property, located 13 miles south of Commencement Bay, in 1968 for use by companies which don't need direct access to marine terminals. Some of the companies currently located in the Frederickson area include Olympic Pipeline, Spanaway Lumber, Ostermann & Scheiwe, U.S.A., Inc., Puget Sound Power, and A.M.A. Timber Products Ltd.

Unlike other Port property, which cannot be sold, the Frederickson area is for sale or lease. Since acquisition by the Port, some 200 acres have been sold.

In order to make the remaining property more attractive to potential businesses, Frederickson is now being improved with water and sewer service. A major County road also is being extended to provide greater access to the property.

The total cost of extending Canyon Road will be $4.7 million, of which the Port will pay 48% and the County will pay the remaining 52%. The project, which extends Canyon Road from 166th Street to 192nd Street, is expected to be completed by the Fall of 1988.

"It is really helpful when public agencies are able to cooperate for the greater good of the community," said Port of Tacoma Commissioner Jack Fabulich. "Improving the Frederickson property benefits everyone: the Port benefits by revenue from selling or leasing the land; the County benefits by taxes paid on such development; and the citizens of Pierce County benefit by the increased job opportunities such developments create."

In addition to the road, the Port is also joining with the County on an $8.2 million sewer project that will include the Frederickson area. It is also cooperating with the City of Tacoma on installing a water line. Puget Sound Bank and another private developer are also involved in the utilities improvements, making the project a public/private partnership as well.

'It is really helpful when public agencies are able to cooperate for the greater good of the community,' said Port of Tacoma Commissioner Jack Fabulich.

"Frederickson is a very important piece of property, because it is the only large industrially zoned area of land in Pierce County," Fabulich said. "Because the Port is interested in creating the kind of development that will be an asset to the County, we belong to the Clover Creek Community Council, which meets monthly to ensure good communication between developers and the local community."

Frederickson has many advantages, he noted. "First of all, it's ready to go; other properties in the area would need to be re-zoned. Another advantage is that a developer has a choice in the size of land parcels. Add to that the fact that Frederickson is serviced by Tacoma City Light, which is the lowest-cost utility in the U.S., and you have one highly attractive piece of property." ■

An aerial view shows portions of Frederickson, with Ostermann & Scheiwe in the foreground and Spanaway Lumber in the background.

EXHIBIT 7

Port History, Part II

1960 - present

EXHIBIT 8

"'Progress' was the word in every aspect of the Port of Tacoma's Industrial development program."

~A.E. Blair, Port Commissioner, 1961 Annual Report

1961 aerial view of the Port

Milestones

- Port Industrial Yard activated (former Tacoma Naval Station, purchased by the Port in 1959 for $2 million from the federal government as surplus property)
- The Port's Industrial Park Addition open for business (60 acres, southwest of Milwaukee Way and Lincoln Ave)
- The pioneer channel for the 3,800-foot extension of the Hylebos Waterway completed. Dredge material used as fill at present day Arkema, Weyerhaeuser Log, and Pony Lumber
- 1,200-foot Sitcum Waterway pier completed (Pier 7), two 45-ton cranes moved from the Port Industrial Yard
- United Grain Terminal pier reconstructed to support new elevator and vessel capacity

1963 aerial view of the Port Industrial Waterway

1962

Revenues	Port Assets	Port Liabilities
$1,400,000	$17,100,000	$7,000,000

Milestones

- Port begins “cutting down” Hylebos Hill for fill material for over 100 acres of industrial development along the expanded Hylebos Waterway
- Hylebos Waterway widening and straightening completed to allow the passage of the Puget Sound’s largest ship ever to enter regular service – the *Argyll*, a 106-foot beamed bulk carrier delivering salt to chemical plants
- Pacific Lime plant operational on the Port-Industrial Waterway (later named the Blair Waterway)
- Port begins negotiations and preliminary engineering with the City of Tacoma for utility relocations anticipating the 6,000-foot extension of the Port Industrial Waterway and the 3,800-foot extension of the Hylebos Waterway

"The Port, with a $5,233,000 budget for 1963, looks forward to continued progress, including the dredging of additional waterways to provide more deep-water frontage for new industry, the filling of more low-lying lands so that industry may find more and better property here, the development of better terminal facilities in order that new industry may receive its raw materials and ship its products across Port of Tacoma piers."

~Conclusion from the 1962 Port of Tacoma Annual Report

Milestones

- Puyallup River dredged to provide enough fill to create a 50-acre tract of land northwest of Lincoln Avenue
- Port of Tacoma Road opened to traffic from Highway 99
- Fire at Terminal 7 results in a "crash" program of repairs on the pier's two berths
- Plans completed for a third berth of 600-feet at Terminal 7 on the Sitcum Waterway
- Federal Government announces it will participate in the extension of the Hylebos and Port Industrial Waterways, adding almost four miles of industrial waterfront to the Port
- The Tacoma Tideflats landfill, a municipal landfill of household and industrial waste north of the Puyallup River between Lincoln Ave and Highway 99, is closed

"In the Port's Industrial Development District, dredging of extensions to the Hylebos and Port-Industrial (Blair) Waterways continued apace…(w)hen the job is done, almost four miles of deepwater industrial frontage will have been added to the district, plus approximately 1,500 acres of highly valued industrial land, reclaimed from sub-marginal areas by filling with dredged material to bring the property up to a suitable grade."

~Maurice Raymond, 1965 Annual Report

1966 aerial view expanding the Port Industrial Waterway

1967

Revenues	Port Assets	Port Liabilities
$4,300,000	$35,400,000	$19,100,000

Milestones

- Comprehensive Scheme of Harbor Improvements modified to include the “Nisqually Flats”, a 2,500-acre site at the Nisqually River delta, where the river meets the Puget Sound, to provide terminal facilities large and deep enough to handle the “ever-growing size of the world’s merchant ships”. This project is later dropped.
- Hylebos and Port Industrial Waterway extensions are completed, creating 1,500 acres of highly valued industrial land reclaimed from “sub-marginal areas by filling with dredged material”
- 80,000 SF of warehouse development occurred on Piers One and Seven
- Bulk Cargo facility at Terminal 7 completed

1967 aerial view of the Sitcum Waterway

Milestones

- Began reclaiming 20 acres of land behind Terminal 7
- The first alumina storage dome completed on Terminal 7 in 1967
- Terminal 4 on the Port Industrial Waterway combination container and general cargo operations completed
- Completed construction of 6.5 miles of new road, 6.75 miles of new storm drainage and water lines underway to promote industrial district growth around the expanded Port Industrial and Hylebos Waterways
- Port establishes the Frederickson Industrial Development District, by purchasing a 510-acre area south of the Tideflats
- Terminal 4 dedicated, featuring a 1,242-foot concrete pier, 150,000 square foot warehouse and 27-acres of paved container storage

1967 aerial view of the expanded Port Industrial Waterway, soon after renamed the Blair Waterway

Milestones

- Capacity at the bulk liquid terminal doubled
- Port Industrial Waterway renamed the “Blair Waterway” in honor of long-time Port Commissioner A.E. “Archie” Blair, who passed away in 1969
- Completed the Port’s 450-car railroad marshalling yard and tracks, totaling over 13.5 miles in length between the Sitcum and Blair Waterways (present day North Intermodal Yard)

"A major asset of the Port of Tacoma is our ownership of prime industrial land adjacent to deep water marine berths. The combination of excellent road and rail access, large vacant industrial tracts, and close proximity to deep water marine berths, gives the Port of Tacoma a competitive advantage in attracting industrial clients…"

~Ernest L. Perry, General Manager, 1974 Annual Report

1973 view of the Pierce County Terminal's construction

1972

Revenues	Port Assets	Port Liabilities
$7,600,000	$81,400,000	$49,000,000

Milestones

- Construction of the second alumina storage dome at Terminal 7 completed
- Container crane at Terminal 4 ("Big Red") completed and goes into active service
- Sold $16 million in Pollution Control bonds. The Port was the first port authority in Washington State to finance an environmental control facility for local industry
- The City-County-Port coordinating coalition was formed to facilitate infrastructure and land development
- The Pierce County Terminal Complex opens at the southeastern end of the Blair Waterway, featuring an 800-foot wharf, 100,000 square foot warehouse, 50,000 square foot manufacturing building and 12 acres of paved cargo area

1973 aerial view of the Port's Sitcum Waterway and Terminal 7

Milestones

- Began the 900-foot extension of Terminal 7's wharf to a 2,700-foot total length. The water depth of the Sitcum is -50 feet at low tide
- Issued $44 million in pollution control bonds to assist Kaiser Aluminum and Chemical Company and the St. Regis Paper Company
- Port purchased 41 acres of waterfront property from the Milwaukee Railroad adjacent to the Sitcum Waterway after eight years of negotiations
- Two high-speed cranes were installed at Terminal 4 on the Blair Waterway capable of handling 20 containers per hour
- The "Big Red" crane was moved from Terminal 4 to Terminal 7's berth D

1976 aerial view of the Port's Sitcum Waterway and Terminal 7

1977

Revenues	Port Assets	Port Liabilities
$17,400,000	$123,500,000	$73,300,000

Milestones

- The Tideflats booms with its industrial connection to the Alaska pipeline project. A barge slip was created in the Blair Waterway turning basin to efficiently load pipe destined for Alaska by barge
- Continental Grain Company Terminal completed on Schuster Parkway– the first shipload sets a world's record for the largest load ever from one facility
- TOTE begins Tacoma operations at Terminal 7
- Chrysler Corporation began importing Dodge Colts and Plymouth Arrows at Pierce County Terminal
- West Coast Orient Lumber Company sets up a facility in Tacoma on 65 acres of land
- Port moves its offices to Slip Two on the Blair Waterway

1976 aerial view of the Port's Blair-Hylebos Peninsula

"The manpower required for this activity, along with the continued progress of shipbuilding in the area, turned the traffic situation into a headache, but one borne easily because of the aspirin of prosperity and high employment".

~from the Port of Tacoma 1975 Annual Report

Milestones

- 1978, Puyallup Tribe of Indians claim title to 12 acres of land occupied by the Port since 1950
- Terminal 7's Berth A and B rehabilitated with pre-stressed concrete
- Port develops the "Alaska Terminal" for TOTE at Terminal 7, featuring a roll-on/roll-off berth and 28 acres of paved yard
- A new container crane was installed at berth D to accommodate containerized cargos at Terminal 7
- Port purchased 114.7 acres of waterfront acres from the Milwaukee Railroad
- Fredrickson land sales were in high demand. Port, City and County began cooperative efforts to provide major road access, water and sewer services to the area

We are ushering in a period of change for the Port of Tacoma

~Richard Dale Smith, Executive Director, 1976 Annual Report

1982 aerial view of the Port's new Administration Building and Sitcum Waterway

1982

Revenues	Port Assets	Port Liabilities
$29,400,000	$176,500,000	$69,200,000

Milestones

- The 52-acre East Blair Terminal was completed, and Mazda began importing vehicles through the Port
- Port Pioneers the intermodal rail concept by opening the North Intermodal Yard, the west coast's first dockside rail facility
- 55-acre terminal backup land was developed at the 128-acre PCT
- Construction completed on a 43,000 square foot Port administrative office building at the head of the Sitcum Waterway
- Slip 2 was filled for Terminal 4 expansion, its moorage relocated
- Port awarded contract for the 47-acre fill west of Milwaukee Way
- ITS leased Terminal 7-D from the Port
- "The Tacoma Advantage" is coined by the Port

"Through a combination of natural advantages, an emphasis on service and careful planning, the versatile Port of Tacoma expects to expand in the 1980s."

~Richard Dale Smith, Executive Director, 1980 Annual Report

1982 aerial view of the Port's new Administration Building and Sitcum Waterway

1982

Revenues	Port Assets	Port Liabilities
$29,400,000	$176,500,000	$69,200,000

Milestones

- The 52-acre East Blair Terminal was completed, and Mazda began importing vehicles through the Port
- Port Pioneers the intermodal rail concept by opening the North Intermodal Yard, the west coast's first dockside rail facility
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- Slip 2 was filled for Terminal 4 expansion, its moorage relocated
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- "The Tacoma Advantage" is coined by the Port

1983 aerial view of Terminal 4

Milestones

- Port established Foreign Trade Zone #86
- Sea-Land (Tacoma Terminals, Inc), signed a 30-year terminal operating and lease agreement with the Port
- TOTE relocated to a 33-acre terminal on the Blair Waterway
- Terminal 4 expanded to 30 acres
- Panasonic begins operations at a new 151,000 square foot warehouse and distribution center
- The Tacoma Dome is completed and the Tacoma-Pierce County Chamber of Commerce launched its “New Beginnings” campaign to aggressively market the area for new business and industry
- EPA declares Commencement Bay a Superfund site
- Cranes arrived for Sea-Land; the first time fully-built cranes were shipped across the Pacific Ocean

"In the last few years, the Port of Tacoma has become a major player in the shipping industry…The Port of Tacoma has accomplished this expansion by its innovativeness and its willingness to provide for its customers' needs, whether those needs are in facilities, services or labor."

~Robert G. Earley, Port Commissioner, 1987 Annual Report

1985 aerial view of the Port

1987

Revenues	Port Assets	Port Liabilities
$39,400,000	$262,400,000	$205,300,000

Milestones

- Sea-Land opened its 76-acre site on the Sitcum Waterway and container growth booms by 495%
- Maersk Line starts calling at the Port
- Port developed the 9.5-acre estuary Gog-le-hi-te in 1985
- North Intermodal Yard expanded
- The South Intermodal Yard opened on 25-acres, adjacent to the Sea-Land site
- Free Trade Zone #86 expanded to 620-acres
- Port opened the World Trade Center (the 38th WTC in the world) to capitalize on the Port's growing opportunities in international markets
- A Port-Private partnership with Northwest Building Corporation builds an industrial park on more than 100 acres of Port property

1987 view of Terminal 3 construction

Milestones

- Maersk Line moved its operations to Terminal 4 from Terminal 7
- Terminal 3 begins construction featuring 950-foot pier, 25-acre container yard and access to the North Intermodal Yard
- Tribal Agreement allowed for construction of Terminal 3, and extension of Sea-Lands' 1,600-foot pier by 1,100-feet
- In 1987, United Grain Terminal demolished to make way for the North Intermodal Yard expansion
- The "Milwaukee Fill" began environmental cleanup and expansion of Sea-Land's terminal
- Four-lane road extension completed to Frederickson Industrial Area completed
- President George H.W. Bush signed the 1988 Puyallup Indian Land Claims Settlement Agreement

"Tacoma and the Puget Sound Region will benefit from a dramatic expansion of the Pacific Rim and perhaps European trade through out region because of the settlement with the Puyallup Tribe of Indians."

~John McCarthy, Port Commissioner, 1991 Winter Pacific Gateway

1992 aerial view of Terminals 3 and 4 on the Blair Waterway

1992

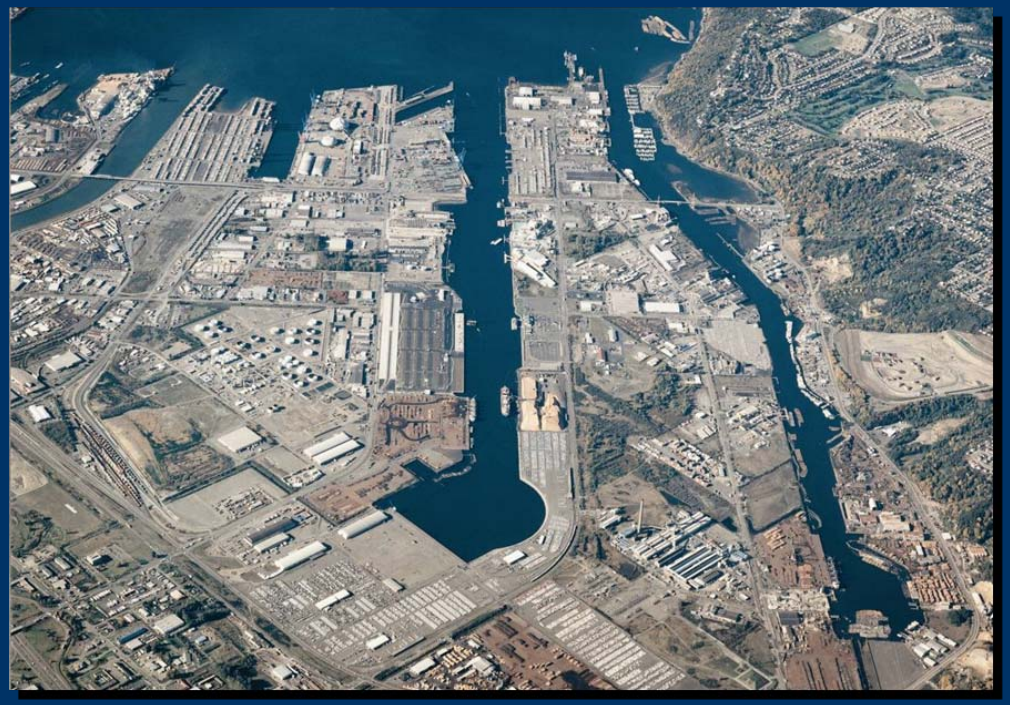
Revenues	Port Assets	Port Liabilities
$52,500,000	$348,500,000	$123,500,000

Milestones

- In 1991, Evergreen Line started calling at the Port's Terminal 4
- Port topped a million TEUs for the first time in 1991
- The Blair Waterway 2010 Plan is finalized and its findings published in the Winter edition of the Port's *Pacific Gateway* magazine. The plan identified opportunities for Port growth along the Blair Waterway, including terminals, waterway modifications, road and rail infrastructure, and other industrial development supporting the Port's mission.

"There are two ways to paint the Port of Tacoma in the dying light of the 20th century: "We're in big trouble," and "The future never looked brighter."

~Tacoma News Tribune, *1999 and Beyond: Port's Vision of 21st century is a double image*, December 26, 1999, Al Gibbs



1999 aerial view of the Port

1997

Revenues	Port Assets	Port Liabilities
$57,800,000	$466,700,000	$174,200,000

Milestones

- 1995, Tacoma became the first port in the United States to launch an Internet web site
- SR 509 route opened in January 1997, and the Blair Bridge was closed two days later marking a milestone for "unlocking" the potential development on the Blair Waterway
- The Puyallup Tribe opened its Emerald Queen Casino on the Blair Waterway in 1996
- Hyundai Merchant Marine signed a 30-year lease with the Port for a new terminal on the upper Blair Waterway. The $100 million, 60-acre terminal, complete with a dockside intermodal yard, was opened in May 1999
- Port completed its Vision 2020 Study in 1999, predicting by the year 2020, containerized cargo volumes through Puget Sound could reach 6 million TEU

"Like the Port, our region is working hard to invent its future. Look no farther than the City of Tacoma's Thea Foss Waterway. Today, the area is emerging as a textbook illustration of urban revitalization…The Port of Tacoma is proud to help shape our region's future as we continue to invent our own."

~Dick Marzano, Port Commissioner, 2002 Annual Report

2001 aerial view of the Port of Tacoma Road Overpass

2002

Revenues	Port Assets	Port Liabilities
$72,900,000	$534,700,000	$157,800,000

Milestones

- Port completed the 20-acre expansion of Washington United Terminals. With the expansion, the terminal is 80-acres and on-dock rail with 52 double-stack car capacity
- The $33 million Port of Tacoma Road Overpass opens—the first FAST Corridor project to be completed
- APM Terminals opened the new $9.2 million pier extension that lengthens the pier by 600 feet--from 1,600 to 2,200 feet
- The Port started clean up under EPA order of about two-thirds of the three-mile long Hylebos Waterway
- The Port completed a $4 million upgrade of its North Intermodal Yard
- The Port began dredging Sitcum Waterway to a depth of 51 feet

STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION
711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112
Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

August 9, 2016

The Honorable Robert Ferguson
Attorney General
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100

RE: Washington State Public Disclosure Commission Recommendation Regarding Citizen Action Notice re: Port of Tacoma Officials (John Wolfe, CEO) & Port of Tacoma (PDC Case 6626), Economic Development Board for Tacoma-Pierce County (PDC Case 6627), and Tacoma-Pierce County Chamber (PDC Case 6628)

Dear Attorney General Ferguson:

This letter concerns the matter that your office referred to the Public Disclosure Commission for review and possible investigation on July 13, 2016 in response to a 45-day Citizen Action Notice Complaint (Complaint) filed with the Attorney General on June 16, 2016 by Arthur West. The Complaint alleged that Port of Tacoma Officials violated RCW 42.17A.555 by using or authorizing the use of public facilities to oppose Tacoma Code Initiative 6 and Tacoma Charter Initiative 5. The complaint also alleged that the Port of Tacoma, the Economic Development Board for Tacoma-Pierce County (EDB), and the Tacoma-Pierce County Chamber (the Chamber) violated RCW 42.17A.205, RCW 42.17A.235, and RCW 42.17A.240 individually, and as a group, by failing to register and report their expenditures for legal services to oppose Initiatives 5 and 6 as political committees.

In reviewing the alleged violations of RCW 42.17A.555 by Port of Tacoma officials, PDC staff identified port CEO John Wolfe as the respondent. Staff reviewed the complaint and prepared a Report of Investigation, Executive Summary, and Staff Analysis concerning the alleged violations by Mr. Wolfe, the Port of Tacoma, the EDB, and the Chamber. The Commission considered the results of staff's investigation at a special Commission meeting held August 8, 2016. At that meeting, PDC Compliance Officers Phil Stutzman and Tony Perkins presented staff's Executive Summary and Analysis which included a recommendation regarding the allegations[1]. Copies of the Report of Investigation, exhibits to the report, Executive Summary and Staff Analysis are enclosed with this letter.

[1] On July 22, 2016, PDC Executive Director Evelyn Lopez notified counsel to the Port of Tacoma that she would absent herself from consideration of the Complaint, and would not review PDC staff's findings or recommendation to the Commission. Ms. Lopez was not present at and did not participate in the August 8, 2016 special meeting.

EXHIBIT 11

Staff Conclusion and Recommendation

As noted in the attached Executive Summary and Staff Analysis, staff concluded that:

- Port of Tacoma CEO John Wolfe did not violate RCW 42.17A.555 by authorizing expenditures for legal services in seeking declaratory judgement that Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 exceeded the scope of local initiative power;
- The Port of Tacoma did not violate RCW 42.17A.205, RCW 42.17A.235, and RCW 42.17A.240 by failing to register as a political committee and disclose the port's expenses for legal services as political committee expenses;
- The Economic Development Board for Tacoma-Pierce County did not violate RCW 42.17A.205, RCW 42.17A.235, and RCW 42.17A.240 by failing to register as a political committee and disclose the EDB's expenses for legal services as political committee expenses;
- The Tacoma-Pierce County Chamber did not violate RCW 42.17A.205, RCW 42.17A.235, and RCW 42.17A.240 by failing to register as a political committee and disclose the Chamber's expenses for legal services as political committee expenses; and
- The Port of Tacoma, the Economic Development Board for Tacoma-Pierce County, and the Tacoma-Pierce County Chamber did not violate RCW 42.17A.205, RCW 42.17A.235, and RCW 42.17A.240 by failing to register collectively as a political committee and report their legal services expenses as political committee activity.

Staff recommended that the Commission recommend to the Attorney General that that office take no further action with respect to the allegations in the Complaint.

Although not alleged in the Citizen Action Notice, staff concluded that the Economic Development Board for Tacoma-Pierce County and the Tacoma-Pierce County Chamber's legal expenses incurred in challenging Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 were reportable under RCW 42.17A.255 as independent expenditure activity opposing a ballot proposition. Staff recommended that the Commission recommend to the Attorney General that that office take appropriate action concerning the EDB and the Chamber's apparent failure to disclose those expenses on C-6 reports of independent expenditure activity.

Commission Recommendation

Having received staff's report and recommendation, the Commission unanimously adopted a motion to return this matter to the Attorney General with no recommendation for legal action, both concerning the two alleged violations that were set out in the Complaint, and the separate additional potential violation that was raised in the staff report.

In adopting this motion, Commission members stated that the Commission has noted the issues raised by the petitioner and the respondents in this matter, and discussed the need for rule making to provide clearer guidance to the regulated community and the public regarding what actions constitute activity reportable under RCW 42.17A for ballot propositions, as they are being considered for placement on the ballot and at each stage thereafter. The Commission expressed its intention to work with PDC staff to pursue such rule making, and asked that all parties to this matter plan to participate and offer input.

If you have questions, please contact me at (360) 586-1042. Thank you.

Sincerely,

Tony Perkins
PDC Compliance Officer

cc: Commissioners
Linda Dalton, Sr. Assistant Attorney General
Carolyn Lake, counsel for Respondents John Wolfe and Port of Tacoma
Jason Whalen, counsel for Respondent Economic Development Board for Tacoma-Pierce County
Valarie Zeeck, counsel for Respondent Tacoma-Pierce County Chamber
Arthur West

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, TACOMA-PIERCE COUNTY CHAMBER, JOHN WOLFE, in his official capacity as Chief Executive Officer for the PORT OF TACOMA, and CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, and CLARE PETRICH, in their official capacities as Commissioners for the PORT OF TACOMA, Defendants.	NO. COMPLAINT FOR CIVIL PENALTIES AND FOR INJUNCTIVE RELIEF FOR VIOLATIONS OF RCW 42.17A

I. NATURE OF ACTION

The STATE OF WASHINGTON (State) brings this action to enforce the State's campaign finance disclosure law, RCW 42.17A. The State alleges that Defendants, the ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY (EDB) and the TACOMA-PIERCE COUNTY CHAMBER (Chamber) violated provisions of RCW 42.17A by failing to properly report independent expenditures they made in opposition to certain local

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ballot propositions. The State further alleges that Defendant JOHN WOLFE, in his official capacity as Chief Executive Officer of the PORT OF TACOMA, and CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, and CLARE PETRICH, in their official capacities as Commissioners for the PORT OF TACOMA, violated provisions of RCW 42.17A by authorizing the use of public facilities in opposition to certain local ballot propositions. The State seeks relief under RCW 42.17A.750 and .765, including penalties, costs and fees, and injunctive relief.

II. PARTIES

1.1 Plaintiff is the State of Washington. Acting through the Washington State Public Disclosure Commission, Attorney General, or local prosecuting attorney, the State enforces the state campaign finance disclosure laws contained in RCW 42.17A.

1.2 Defendant, the EDB, is an active nonprofit corporation with a primary place of business in Pierce County, Washington.

1.3 Defendant, the Chamber, is an active nonprofit corporation with a primary place of business in Pierce County, Washington.

1.4 Defendant, John Wolfe, is the Chief Executive Officer of the Port of Tacoma, which has its primary place of business in Pierce County, Washington.

1.5 Defendant, Connie Bacon, is a Commissioner of the Port of Tacoma, which has its primary place of business in Pierce County, Washington.

1.6 Defendant, Don Johnson, is a Commissioner of the Port of Tacoma, which has its primary place of business in Pierce County, Washington.

1.7. Defendant, Dick Marzano, is a Commissioner of the Port of Tacoma, which has its primary place of business in Pierce County, Washington.

1.8 Defendant, Don Meyer, is a Commissioner of the Port of Tacoma, which has its primary place of business in Pierce County, Washington.

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1.9 Defendant, Clare Petrich, is a Commissioner of the Port of Tacoma, which has its primary place of business in Pierce County, Washington.

III. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over the EDB and the Chamber in accordance with RCW 42.17A. The Attorney General has authority to bring this action pursuant to RCW 42.17A.765.

2.2 The actions of the EDB, the Chamber, John Wolfe, Don Johnson, Connie Bacon, John Marzano, Don Meyer, and Clare Petrich which form the basis for the violations alleged below occurred in whole or in part, in Pierce County, Washington.

2.3 Venue is proper in this Court pursuant to RCW 4.12.

IV. FACTUAL ALLEGATIONS

3.1 RCW 42.17A.005(4) defines a "ballot proposition" to include any initiative, proposed to be submitted to the voters of any municipal corporation, from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency.

3.2 RCW 42.17A.255 defines the term "independent expenditure" to include any expenditure that is made in support of or in opposition to any ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17A.220, .235, and .240. The report is entitled in relevant part, "Reporting Form for: Independent Expenditures" and is designated by the Commission as form C-6, pursuant to WAC 390-16-060.

3.3 On February 19, 2016, "Save Tacoma Water" filed a political committee registration form (C1-pc) with the state Public Disclosure Commission for the stated purpose of supporting a ballot proposition on the November 8, 2016 general election ballot. On March 7, 2016, Save Tacoma Water filed Charter Initiative 5 with the City of Tacoma Clerk, and then on March 11, 2016, it filed Code Initiative 6 with the City of Tacoma Clerk. Both initiatives

were approved as to form, and on June 30, 2016, Save Tacoma Water submitted its signatures to the City of Tacoma Clerk.

3.4 Tacoma Code Initiative 6 sought to amend the Tacoma Municipal Code by imposing a requirement that any land use proposal requiring water consumption of one millions gallons of water or more daily from Tacoma be submitted to a public vote. Charter Initiative 5 was a companion measure that sought to similarly amend the city charter.

3.5 On June 6, 2016, the Port of Tacoma, the EDB, and the Chamber brought a declaratory judgment action in Pierce County Superior Court against the City of Tacoma. Upon information and belief, Defendant Wolfe authorized participation in the lawsuit by the Port of Tacoma. The lawsuit sought to (1) declare that Charter Initiative 5 and Code Initiative 6 exceeded the proper scope of local initiative powers and therefore were invalid, (2) enjoin the Initiatives' signatures from being validated, and (3) enjoin the Initiatives from being placed on the November 2016 ballot, or adopted by the City of Tacoma.

3.6 On June 16, 2016, Port of Tacoma Commissioners Don Johnson, Connie Bacon, John Marzano, Don Meyer, and Clare Petrich unanimously voted to ratify the Port of Tacoma's legal action described in paragraph 3.5.

3.7 On July 1, 2016, the Superior Court enjoined placement of Charter Initiative 5 and Code Initiative 6 on the ballot. On July 29, 2016, Save Tacoma Water appealed.

3.8 Defendant EDB spent at least $9,994 as attorneys' fees in conjunction with its participation in the aforementioned lawsuit.

3.9 Defendant Chamber spent at least $10,000 as attorneys' fees in conjunction with its participation in the aforementioned lawsuit.

3.10 The Port of Tacoma spent at least $45,000 in attorneys' fees in conjunction with its participation in the lawsuit.

3.11 The EDB and the Chamber should have reported, as independent expenditures, the value of what was expended for legal services in opposition to the respective ballot proposition(s).

3.12 The funds spent by the Port of Tacoma in opposition to Charter Initiative 5 and Code Initiative 6 were a prohibited use of a public facility because they were to oppose Charter Initiative 5 and Code Initiative 6 by removing them from the ballot.

V. CLAIM

The State re-alleges and incorporates by reference all the factual allegations contained in the preceding paragraphs, and based on those allegations, makes the following claim:

4.1 First Claim: The State reasserts the factual allegations made above and further asserts that the EDB and the Chamber, in violation of RCW 42.17A.255, failed to properly and timely file reports with the state Public Disclosure Commission of their independent expenditures made for the purpose of opposing ballot propositions filed in the city of Tacoma, to include the disclosure of the value of legal services they paid for in relation to the lawsuit described above.

4.2 Second Claim: State reasserts the factual allegations made above and further asserts that John Wolfe, Don Johnson, Connie Bacon, John Marzano, Don Meyer, and Clare Petrich in violation of RCW 42.17A.555, authorized the use of public facilities for the purpose of opposing ballot propositions filed in the city of Tacoma, to include the disclosure of the value of legal services the Port of Tacoma paid for in relation to the lawsuit described above.

VI. REQUEST FOR RELIEF

WHEREFORE, the State requests the following relief as provided by statute:

5.1 For such remedies as the court may deem appropriate under RCW 42.17A.750, including but not limited to imposition of a civil penalty, all to be determined at trial;

5.2 For all costs of investigation and trial, including reasonable attorneys' fees, as authorized by RCW 42.17A.765(5);

5.3 For temporary and permanent injunctive relief, as authorized by RCW 42.17A.750(1)(h); and

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5.4 For such other legal and equitable relief as this Court deems appropriate.

DATED this 15th day of August, 2016.

ROBERT W. FERGUSON
Attorney General

LINDA A. DALTON, WSBA No. 15467
Senior Assistant Attorney General
CHAD C. STANDIFER, WSBA No. 29724
Assistant Attorney General
Attorneys for Plaintiff State of Washington

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, v. ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY; TACOMA-PIERCE COUNTY CHAMBER; JOHN WOLFE, in his official capacity as Chief Executive Officer for the Port of Tacoma; and CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, and CLARE PETRICH, in their official capacities as Commissioners for the Port of Tacoma, Defendants.	NO. 16-2-10303-6 DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT Assigned Judge: Hon. Ronald E. Culpepper Hearing Date/Time: November 18, 2016, 9:00 a.m.

I. RELIEF REQUESTED

This lawsuit presents the following question: Does the act of filing a legal challenge constitute "supporting or opposing a ballot proposition" under the Fair Campaign Practice Act ("FCPA")? If so, is this application of the FCPA constitutional? The only answer to both of these questions that is consistent with State and Federal Supreme Court precedent is No.

There are numerous statutory interpretation and constitutional infirmities inherent in the State's application of RCW Chapter 42.17A, and all of these infirmities lead to the same

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conclusion: The act of filing a lawsuit is not campaigning or "electioneering" under the FCPA, and thus it is not covered by the disclosure requirements of that Act. Because the expenditures[1] made by Defendants in pursuing the Save Tacoma Water litigation were not expenditures "in support of or opposition to" a ballot proposition, Defendants request that this Court dismiss Plaintiff's suit with prejudice, and award Defendants attorneys' fees pursuant to RCW 42.17A.765(5).[2]

II. BACKGROUND FACTS

In spring 2016,[3] a local political action committee called Save Tacoma Water ("STW") sponsored two local ballot initiatives, Tacoma Charter Initiative 5 and Tacoma Code Initiative 6 (the "STW Initiatives"). Declaration of Valarie Zeeck ("Zeeck Dec."), ¶ 2, Exs. 1 and 2.[4] The STW Initiatives required a public vote prior to approval by Tacoma Public Utilities of any application for water usage of 1,000,000 or more gallons per day. Zeeck Dec. ¶ 1–3, Exs. 1 and 2. By their language, the STW Initiatives stated that (a) they were superior to any state

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[1] The Tacoma Pierce County Chamber ("Chamber"), the Port of Tacoma ("Port") and the Economic Development Board for Tacoma Pierce County (EDB") (collectively the "Defendants") made individual expenditures, and did not combine resources.

[2] The Chamber moves for dismissal under CR 12(c) because the legal issues discussed herein are pure questions of law and no materials outside of the pleadings are necessary for the resolution of the issues discussed herein. However, the Chamber does attach and discuss factual materials by way of background, and to the extend the Court considers these materials and finds them necessary to the resolution of the issues discussed herein, the Chamber requests that the Court convert the present motion into a CR 56 motion for Summary Judgment pursuant to CR 12(c). ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.").

[3] Charter Initiative 5 was filed with the City of Tacoma on March 7, 2016, and Code Initiative 6 was filed on March 11, 2016.

[4] Although attached as Exhibits to the Zeeck Declaration for ease of reference, the Chamber requests that this Court take judicial notice of Exhibits 1–7 of the Zeeck Declaration under ER 201, as these exhibits are all public records not subject to reasonable dispute and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. More specifically, Exhibits 1 and 2 are publically filed initiatives, the contents of which are publically available and verifiable. Exhibit 3 and 4 are publically filed court documents, the contents of which is publically available and verifiable. Exhibit 5 is an official correspondence from the PDC to the attorney general, a publically available document subject to the Public Records Act. Exhibit 6 and 7 are records associated with a public lawsuit, *State of Washington v. Evergreen Freedom Foundation*, No 15-2-01936 (Thurston Cnty. Sup. Ct. 2015), and are publically available and verifiable. Documents subject to judicial notice may be considered in a 12(c) motion for judgment on the pleadings. *See, e.g.*, *Rodriguez v. Loudeye Corp.,* 144 Wn. App. 709, 725, 189 P.3d 168 (2008)

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law that conflicted with them, (b) that no government actor, including the courts, could find them invalid or declare any law superior to them, and (c) that no corporation could possess any other "legal rights, powers, privileges immunities or duties that would interfere with them." Zeeck Dec. ¶ 3. The STW Initiatives were slated for the November 2016 ballot.

On June 6, 2016, the Defendants in this case filed a Complaint for Declaratory Judgment and Injunctive Relief, asking the Pierce County Superior Court to determine whether the STW Initiatives were legal and constitutionally valid.[5] Zeeck Dec. ¶ 4, Ex. 3 The defendants in that action were STW, its Treasurer and board members, the City of Tacoma (because it was charged with approving the ballot language) and the Pierce County Auditor (because it is charged with placing the initiatives on the ballot). *Id.* Although a defendant, the City of Tacoma agreed with the plaintiffs, and supported a determination that the STW Initiatives exceeded local initiative power. *Id.*

On July 1, 2016, the Pierce County Superior Court heard the suit and found in favor of the plaintiffs. Zeeck Dec. ¶ 5, Ex. 4. The Court determined that the Port, the Chamber and the EDB had standing to file the action because they fell "within the zone of interests the STW Initiatives seek to regulate and have demonstrated sufficient injury in fact." *Id.* It further determined that the case involved "significant and continuing issues of public importance that merit judicial resolution." *Id.* It also determined that the STW Initiatives exceeded local initiative power and were invalid in a number of respects, including, without limitation, that their stated efforts to exceed the federal and state constitutions and laws were beyond the power of the local initiative process.[6] *Id.*

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[5] In February 2016, four months before the Port, Chamber and EDB filed their lawsuit, the Washington Supreme Court had rendered an opinion in a case that was virtually identical in all material respects, *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016).

[6] STW has appealed that decision to Division II of the Court of Appeals, Case #: 49263-6-II.

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On June 16, 2016, after the Port, Chamber and EDB filed their complaint, but before the Superior Court's ruling, Arthur West filed a citizen's complaint[7] asserting that Defendants had violated the FCPA by operating as a "political committee" and failing to report contributions and expenditures in violation of the FCPA, RCW 42.17A. Zeeck Dec. ¶ 6. West also claimed the Port had spent public resources on campaign activity in violation of RCW 42.17A.555. *Id.* West filed his complaint with the Attorney General's office, which referred the matter to the Public Disclosure Committee ("PDC"), seeking its expertise in determining whether the Port, Chamber and EDB had violated the FCPA. In a unanimous vote, the Commission recommended that the Attorney General not file suit. Zeeck Decl. ¶ 6; Ex. 5 (also attached as Appendix 1 to the Chamber's Answer). The PDC also noted the vagueness of the FCPA, and discussed the need for, and their intention to undertake, "rulemaking to provide clearer guidance to the regulated community and the public regarding what actions constitute activity reportable under RCW 42.17A for ballot propositions, as they are being considered for placement on the ballot and at each stage thereafter." The PDC expressly asked that all parties (the Chamber, EDB, and Port) participate and offer input.

Nonetheless, the Attorney General ignored the recommendation of the very entity charged with addressing such issues and filed this action against the Chamber, the Port and the EDB. The Attorney General bases its claims for civil penalties and injunctive relief on the assertion that paying legal fees to determine the legality of a local ballot measure is an "**expenditure that is made in support of or in opposition to any . . . ballot proposition,**" and that in failing to report the legal fees expended to challenge the STW Initiatives, the Chamber and EDB violated RCW 42.17A.255. The lawsuit further asserts that, by paying

[7] Pursuant to RCW 42.17A.765(4).

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legal fees to challenge the STW Initiatives, the Port violated RCW 42.17A.555 which prohibits the use of public facilities for the purpose of opposing ballot propositions.

III. AUTHORITY AND ARGUMENT

A. Summary of Argument

This is a long brief containing complex legal arguments.[8] This initial section is a simple summary of those arguments, with section headings cross-referenced for the Court's convenience.

The Defendants and the Attorney General have very different views on the meaning of the phrase "in support of or in opposition to" as used in the FCPA. The Attorney General's position is that the phrase includes filing a lawsuit. The Defendants' position is that the phrase cannot include filing a lawsuit; because, by its plain language, the FCPA is about election campaign practices and not about accessing the courts to determine whether a ballot proposition is legal. If this Court determines that the Defendants' interpretation is correct and that the plain language of the statute does not include filing a lawsuit, this case must be dismissed. *See* Section III.B.1.

If, on the other hand, the Court determines that the statute is ambiguous, that is, if it is susceptible to more than one reasonable interpretation, the Court should use canons of statutory interpretation to determine what the statute means. Defendant's position is that under those canons and the case law discussed in this brief, the only reasonable interpretation of "oppose" or "support" in the FCPA is in the context of campaign or electioneering activity, such as purchasing advertising. *See* Section III.B.2–3.

If the Court were to determine that the canons of interpretation weigh in favor of the State's proposed interpretation, and that "oppose" includes filing a legal challenge,

[8] The Chamber has simultaneously filed a Motion to File Over-Length Brief.

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Plaintiff's claim still fails because such an interpretation would violate the Washington and Federal Constitutions. Because core First Amendment rights are at issue, the Court must examine the statute and the application of the statute to these facts with "exacting scrutiny" *See* Section III.C.1.

The Attorney General's effort to apply the FCPA to the conduct of Defendants is unconstitutional for at least the following four reasons:

1. If the FCPA regulates expenditures made in the course of a legal challenge, the statute violates the state and federal constitutional rights to petition the judiciary and access the courts.

2. The phrase 'support or oppose' is unconstitutionally vague if the term encompasses the act of filing a lawsuit.[9] No reasonable person would interpret this language to apply to the filing of a lawsuit.

3. Campaign finance disclosure laws withstand "exacting scrutiny" only to the extent they further the important government interest of protecting the right of the public to know who is financing campaign communications and advertisements and trying to sway the public's opinions.

4. The FCPA is constitutional only to the extent the constitutional right of free speech is balanced against the constitutional right of the public to act as an informed legislature through the state constitutional initiative mechanism. There is no constitutional right to legislate through the local initiative process. *See* Section III.C.2.a–3.

The Court may avoid this complex constitutional analysis by use of doctrine of constitutional avoidance, which is explained at Section III.D.

[9] As the PDC seems to have recognized.

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B. By its plain language and under other canons of statutory interpretation, the FCPA applies to election campaigns, electioneering and lobbying.

1. This Court's task is to examine the FCPA and determine its meaning as a matter of law, using general rules of statutory construction.

The applicability of a statute to a given set of facts is a question of law. *Sherman v. Kissinger*, 146 Wn. App. 855, 865, 195 P.3d 539 (2008). "The purpose of statutory interpretation is to ascertain and carry out legislative intent." *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). This purpose has been variously described as the court's "primary goal," *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999), or "paramount duty." *State v. Johnson,* 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). Rules of statutory construction apply to initiatives.[10] Thus, in determining the meaning of a statute enacted through the statewide initiative process, a court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure. *Wash. State Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973).

2. There is no language in the FCPA that can reasonably be construed to require disclosure of legal fees expended to challenge the validity of a ballot measure.

In order to determine the meaning of a statute, courts first look to the plain language of the statute. "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155, 158 (2006). If a statute is ambiguous, courts employ tools of statutory construction to ascertain its meaning. A statute is ambiguous if it is "susceptible to two or more reasonable interpretations." *Id.* Here, under either a plain language analysis or through the application

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[10] *Seeber v. Wash. State Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981); *Gibson v. Dep't of Licensing*, 54 Wn. App. 188, 192, 773 P.2d 110 (1989). RCW 42.17.100 was enacted by citizen initiative in 1972. 1975-'76 2nd exs.. c 112 § 4; 1973 c 1 § 10 (Initiative Measure No. 276, approved November 7, 1972). The statute has been amended and renumbered in the interim, but the phrase "in support of or opposition to any . . . ballot proposition," was included in the original citizen initiative and has remained unchanged.

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of tools of statutory construction, the result is the same. "Oppose" means what any reasonable lay or legally trained reader of the statute would understand it to mean: to oppose through political electioneering activity designed to sway the electorate.

The express purpose of the FCPA is to require full disclosure of "political campaign and lobbying contributions and expenditures." RCW 42.17A.001. Each of the eleven public policy statements articulated in the FCPA relates to contributions, expenditures and disclosures related to political activity or "election campaigns"[11] as defined at 42.17A.005.[12] The Washington Supreme Court has explained that a "statement of intent can be crucial to interpretation of a statute." *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 151, 839 P.2d 324 (1992) (citing *Roy v. Everett*, 118 Wn.2d 352, 356, 823 P.2d 1084 (1992)).

There are nearly 100 substantive sections of the FCPA and none of them relate to disclosure or regulation of "legal activity," that is, to challenging the underlying legal validity of a ballot measure or ballot proposition. The Attorney General can point to no language in the FCPA which requires that legal fees expended in filing a legal challenge to the validity of a ballot measure constitutes campaign or political activity. It is clear that the intent of the people in passing the FCPA was to require disclosure of sums received in the course of election campaigns and lobbying, *not* to require disclosures of expenditures for legal fees to challenge the legality of a ballot proposition. Seeking a judicial determination of the constitutionality of an initiative is a very different thing than "campaigning" against it.

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[11] Defined by RCW 42.17A.005(17) as "any campaign in support of or in opposition to a candidate for election to public office and any campaign in support of, or in opposition to, a ballot proposition.").

[12] *E.g.*, "It is hereby declared by the sovereign people to be the public 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 . . . . That the concepts of disclosure and limitation of election campaign financing are established by the passage of the Federal Election Campaign Act . . . . That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private." RCW 42.17A.001 (emphasis added).

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Indeed, in a decision issued shortly after the initial passage of the citizen initiative creating the FCPA, the Washington Supreme Court explicitly held that the purpose of the FCPA is to require disclosure of funds used in political campaigning. In *Young Americans For Freedom, Inc. v. Gorton*, 83 Wn.2d 728, 522 P.2d 189 (1974), the Court explained that "Section 20 must be viewed with the other sections of Initiative 276 (codified as RCW 42.17) as a part of a matrix or program designed to ensure that public officials and the electorate are informed of ***the sponsors of campaigns and lobbying efforts*** which seek to affect, directly or indirectly, governmental decision making." *Id.* at 733. [emphasis added]

The Attorney General has chosen to read the lone phrase "support or oppose" (and linguistic variations of these terms) to include seeking a judicial determination of the validity of a ballot measure as a type of campaigning, electioneering, and political speech, expenditures for which must be limited and/or reported. But these terms must be read in the context of the entire FCPA, and no reasonable reading of the statute permits such a construction of "support and oppose." *See, e.g.*, *State v. Haws,* 118 Wn. App. 36, 41, 74 P.3d 147 (2003). ("[I]n interpreting an act, we must look to the act as a whole and interpret the provision so as to give meaning to all parts.").[13] On the contrary, the unambiguous purpose of the Fair *Campaign* Finance Act is to regulate and require the disclosure of sums spent *campaigning and lobbying*.

[13] *See also In re Estate of Kerr,* 134 Wn.2d 328, 336, 949 P.2d 810 (1998) ("The purpose of reading statutory provisions *in pari materia* with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.").

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3. The activities the Attorney General alleges the Defendants engaged in do not constitute 'supporting or opposing' a ballot measure.

No state or federal court has considered the precise challenge here.[14] But Washington and Ninth Circuit opinions *have* focused on the "support or oppose" language. To a case, these rulings suggest, hold in dicta, or assume that "support or oppose" means supporting or opposing through *communication* or *electioneering*. None even suggest that filing a legal challenge to the validity of a ballot proposition constitutes "supporting or opposing" as those terms are used in the FCPA. Notably, these interpretations are entirely consistent with the statutory scheme of the FCPA as a whole, which throughout purports to regulate only election campaigning and lobbying.

In *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 598, 49 P.3d 894, 902 (2002), the court explicitly equated the phrase "support or oppose" with engaging in *political* activity: "We use the phrases 'electoral political goals' and 'electoral political activity' to convey the statutory language 'support of, or opposition to, any candidate or any ballot proposition' from RCW 42.17.020(33)." *Id.* at 598 n.13. This statement is an unambiguous recognition by the Court of Appeal for Division II that the phrase 'support or oppose' must be interpreted to mean 'support or oppose' through activities in the political sphere, not the legal.

In *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 166 P.3d 1174 (2007), the Court extensively discussed the disclosure requirements of the FCPA, and consistently phrased the disclosure requirements in terms of expenditures made in election campaigns, political campaigning and advertising. For example, in its Conclusion the Court held:

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[14] Whether filing a legal action challenging the constitutionality of a ballot proposition constitutes "supporting or opposing" a ballot proposition under the FCPA.

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> The people have declared that it is the policy of the state of Washington that groups ***who sponsor political advertising*** must disclose their identities, contributions, and expenditures. Contrary to VEC's assertions, these disclosure requirements do not restrict political speech—they merely ensure that the public receives accurate information about who is doing the speaking.

Id. at 498 (emphasis added). In other words, 'supporting or opposing' means engaging in activities analogous to sponsoring political activity. Filing a lawsuit is *not* analogous to such activities.

In *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 997 (9th Cir. 2010), the Ninth Circuit discussed, in the context of a constitutional challenge to the FCPA, Washington's governmental interest in ensuring that citizens know who is trying to sway their vote. *See, e.g.*, *id.* at 1008 ("Campaign finance disclosure requirements thus 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. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another."). The court noted that "[b]allot initiatives present a single issue for public referendum," and thus the only relevant campaign speech that a disclosure requirement could reach is "speech intended to influence the voter's opinion as to the merits of this single issue." Again, the Court assumes that the phrase "support or oppose" refers only to political speech in the form of advertising and other political communications.[15] Filing a lawsuit challenging an initiative does not "influence the voter's opinion." The outcome of a lawsuit, unlike a political campaign, is determined by a court upon review of the facts and legal argument presented, and not by voters.

[15] This assumption permeates the opinion, and given its importance, it is attached for the Court's reference as Exhibit 8.

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The import of these decisions is clear: the phrase "support or oppose" in the context of the FCPA can only be reasonably interpreted to mean "supporting" or "opposing" a ballot measure or candidate *through the electoral political process*, which might include activities such as purchasing commercials or other advertising, or other forms of political communication.

The Defendants were not seeking to sway a single vote for or against the STW Initiatives. To the contrary, they went to the Courts as is their right under the Washington and Federal Constitutions to establish that the STW Initiatives were unlawful *ab initio*. The Defendants filed a lawsuit not to "further electoral political goals" and did not engage in an "election campaign" or the electoral political process, but rather filed suit to obtain a judicial determination as to the legality of the STW Initiatives. Nothing in the language of the FCPA requires reporting costs or contributions related to filing a legal challenge to an illegal ballot measure. No reported Washington case has held that seeking a judicial determination of the validity of a ballot measure is "political activity" or constitutes "promoting an electoral political goal." In the underlying case, the Pierce County Superior Court followed a recent decision of the Washington Supreme Court[16] and found the STW Initiatives exceeded the scope of local initiative power and were thus illegal.

The Attorney General has brought this suit based on the misunderstanding that "support or oppose" also embraces the act of filing a lawsuit. Such an interpretation would render the statute unconstitutionally vague and overbroad.

[16]The recent Supreme Court case is *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 368 P.3d 140 (Feb. 4, 2016).

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C. The Attorney General's attempt to apply the FCPA to these facts would render the statute unconstitutional as applied.

1. This Court must review the State's effort to burden Defendants' First Amendment rights and constitutional right to access the Courts with "exacting scrutiny." The burden to prove constitutionality is on the State.

Statutes and other governmental acts which burden constitutional rights are subject to different levels of judicial review depending upon the right burdened or the characteristics of the group affected by the statute or act.[17] Typically, the level of judicial review falls along a spectrum from rational basis review,[18] to intermediate scrutiny,[19] to strict scrutiny.[20] Washington's FCPA's disclosure requirements burden (among other rights) core First Amendment rights, and are thus subject to a level of scrutiny falling between intermediate scrutiny and strict scrutiny – exacting scrutiny:

> The United States Supreme Court has recognized that compelled disclosure may encroach on First Amendment rights by infringing on the privacy of association and belief. As a result, the Court has held that disclosure regulations must survive "exacting scrutiny."

Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007).[21] Under this level of review, there must be "a substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. To

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[17] *See generally United States v. Carolene Prod. Co.*, 304 U.S. 144, fn.4 (1938) and subsequent decisions.

[18] Strict scrutiny is applied when a classification of a law affects a fundamental right or a suspect class. *State v. Harner*, 153 Wn.2d 228, 235–36, 103 P.3d 738 (2004).

[19] Intermediate scrutiny is applied, for example, to challenges brought under the First Amendment to "time, manner, and place restrictions on speech." *State v. Jorgenson*, 179 Wn.2d 145, 160, 312 P.3d 960 (2013) (citing *United States v. Laurent*, 861 F.Supp.2d 71, 103 (E.D.N.Y.2011) (collecting cases)). Washington courts also apply intermediate scrutiny to laws burdening Second Amendment rights. *Id.*

[20] The rational basis test is applicable to statutes that do not affect a suspect of quasi-suspect class and do not otherwise burden a fundamental right. While a relaxed level of review, laws which are not rationally related to a legitimate state interest will be found unconstitutional. *See DeYoung v. Providence Med. Ctr.,* 136 Wn.2d 136, 960 P.2d 919 (1998) (striking down an eight year statute of repose for medical malpractice claims under the rational review standard as violative of the state constitution's privileges and immunities clause).

[21] *See also State ex rel. Washington State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 282, 150 P.3d 568 (2006) ("Laws that burden the First Amendment right to political speech are inherently suspect, and subject to 'exacting scrutiny.'"); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 671, 72 P.3d 151 (2003) ("When legislating by initiative, the people remain subject to the mandates of the Constitution.").

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survive this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment." *Filo Foods LLC v. City of SeaTac*, 179 Wn. App. 401, 408, 319 P.3d 817 (2014) (citing *Doe v. Reed*, 561 U.S. 186 (2010)).

While in general a statute is presumed constitutional and the party challenging the statute bears the burden of proving its unconstitutionality, this burden is reversed when the State purports to use its police power to burden First Amendment rights. In that context, "the State bears the burden of establishing that such a law furthers a substantial governmental interest and is not outweighed by the burden on political speech." *State ex rel. Washington State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 282, 150 P.3d 568 (2006).[22] Even if the State can articulate a sufficiently important governmental interest, such interest must be closely related to the specific application of the disclosure requirements. *John Doe No. 1 v. Reed*, 561 U.S. 186, 198, 130 S. Ct. 2811, 2819, 177 L. Ed. 2d 493 (2010). *No* interest the Attorney General can articulate is sufficiently related to the requirement of legal expense disclosure.

A statute which burdens constitutional rights must be narrowly and precisely drafted, and applied narrowly and with great restraint. *See, e.g.*, *Bare v. Gorton*, 84 Wn.2d 380, 385, 526 P.2d 379 (1974) ("First Amendment rights are not to be abridged or even chilled by statutory vagueness. Any legislative impingement on these rights must be drawn with precision and narrow specificity.") (citing *Baggett v. Bullitt*, 377 U.S. 360 (1964)). The FCPA,

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[22] *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010) ("The Court has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."); *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) ("We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.' . . . That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."

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as applied to the act of filing a lawsuit, falls well short of the stringent tests applied to statutes burdening First Amendment rights.

2. The Attorney General's application of the FCPA to the conduct of Defendants is unconstitutional in at least four ways.

a. If the FCPA regulates expenditures made in the course of a legal challenge, the Statute violates the First Amendment's guarantee of the right to petition the judiciary and the right to access the courts.

Under the Attorney General's reading of the statute, in which the term "support or oppose" encompasses expenditures made in the course of filing or pursing a lawsuit, the statute would unconstitutionally impinge upon the Washington fundamental constitutional right of access to the courts and the First Amendment right to petition the government for redress of grievances. The Washington Supreme Court has repeatedly recognized that a "plaintiff's right of access to the courts . . . must be accorded a high priority." *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 783, 819 P.2d 370 (1991). Any statute that purports to require disclosure of donations to or legal fees generated by an organization that files a lawsuit which in any way touches on or concerns a political matter would be subject to additional constitutional scrutiny in that the statute infringes upon the right of access to the courts. While courts have recognized a governmental interest in ensuring the electorate knows who pays for advertisements and election campaigns, no court has held that there is a legitimate governmental interest in requiring disclosure related to a lawsuit challenging the constitutionality of a proposed local ordinance.

In *Putman v. Wenatchee Valley Med. Ctr., P.S.,* 166 Wn.2d 974, 980, 216 P.3d 374 (2009), the Court struck down a statute requiring medical malpractice plaintiffs to submit a certificate of merit prior to filing suit in part because the requirement violated the

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constitutional right to access the Courts. The Court emphasized the crucial importance of this right, stating that:

> The very essence of civil liberty certainly consists in the right of every individual to *claim the protection of the laws*, whenever he receives an injury. One of the first duties of government is to afford that protection. The people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations. . . . Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. . . . Accordingly, we must strike down this law.

Id. at 979 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)) (emphasis in original). The importance of this right to judicial redress was recently articulated by our Supreme Court in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). As the Court explained:

> The United States Supreme Court recognizes that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. For example, the question presented in Bill Johnson's Restaurants was whether the National Labor Relations Board (NLRB) could enjoin an employer's non frivolous pending lawsuit against an employee, when the employer was allegedly motivated to file the suit to retaliate against the employee's exercise of rights under the National Labor Relations Act, 29 U.S.C. §§ 151–169. Drawing the constitutional line, the court held that frivolous suits (i.e., those that lack a "'reasonable basis,'" are "based on insubstantial claims," or are "baseless") are "not within the scope of the First Amendment protection" but that all other suits are constitutionally protected. . . .
>
> The United States Supreme Court has elaborated on the contours of the First Amendment's right to petition in a doctrine that began in antitrust litigation. Under the *Noerr—Pennington* doctrine, when individuals petition any branch of government, including the courts, such petitioning cannot be a basis for antitrust liability, unless the petition was a 'mere sham.' . . .
>
> In sum, the United States Supreme Court has interpreted the petition clause to expansively protect plaintiffs' constitutional right to file lawsuits seeking redress for grievances. The only instance in which this petitioning activity may be constitutionally punished is when a party pursues frivolous litigation, whether defined as lacking a reasonable basis, or as sham litigation.[23] That the petition clause requires this limitation makes good sense, considering that the right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the

[23] To the extent this articulation of rights is dispositive here, the Chamber notes that the suit filed against STW was not frivolous and was not a "sham" lawsuit. On the contrary, the suit was brought in good faith and was far from frivolous as evidenced by the simple fact that the Chamber and Co-Plaintiffs were successful on the merits. See Zeeck Decl. Ex. 4.

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> foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

Id. at 288–92 (emphasis added) (internal citations omitted). Washington Courts have similarly interpreted the right expansively, as most clearly demonstrated in *Putnam* when the Court struck down a statute which "hindered" access to the courts. Here, the Attorney General's interpretation of the statute burdens the right to file a lawsuit, one of the highest and most essential privileges of citizenship that lies at the foundation of orderly government. The right to bring suit to challenge an unconstitutional law is a particularly powerful example of the fact that the right to access the courts and petition the judiciary for redress is "conservative of all other rights."

While the Attorney General may contend that the statute as interpreted does not *deny* access to the courts, it cannot be disputed that the State's interpretation burdens and chills this right. A potential litigant must subject their finances to state scrutiny *before* even filing suit, give the near certainty that the cost of hiring an attorney to draft a complaint will exceed the statutory minimum.[24] In fact, the requisite filing fees associated with filing suit in Pierce County Superior Court exceed this minimum.[25] The chilling effects of the Attorney General's interpretation is undeniable, and any potential litigant may now think twice before filing a suit challenging even the most egregiously unconstitutional ballot proposition (or in any way "opposing" a candidate for office)[26] for fear of finding themselves in Defendants' unenviable position of facing a suit for substantial civil penalties. In *Putnam,* the Court held that the certificate of merit requirement, which only "hinder[ed] [the

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[24] *See, e.g.*, Zeeck Decl. ¶ 8 ("In fact, the requisite filing fees associated with filing suit in Pierce County Superior Court exceed this minimum.")

[25] *Id.*

[26] Under the state's interpretation of the statute, a suit challenging a candidate's qualifications for office, for example, would similarly constitute "opposition to or support of" a candidate. Indeed, a citizen suit alleging that a still-running candidate for office violated the FCPA might similarly fall within the statute's extraordinary (as interpreted) breadth.

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plaintiff's] right of access to courts" and by no means precluded them from bringing suit, sufficiently burdened the right to violate the constitution. *Putnam*, 166 Wn.2d at 979.

In sum, the FCPA, as interpreted by the Attorney General, burdens and chills the bedrock constitutional right to access the Courts and petition the judiciary for redress by requiring litigants to subject their finances to state oversight on pain of substantial civil or criminal penalties. Such an interpretation is unconstitutional.

b. The phrase 'support or oppose' is unconstitutionally vague if the term encompasses the act of filing a lawsuit. No reasonable person would interpret this language to apply to the filing of a lawsuit challenging a facially unconstitutional ballot measure.

Statutes which burden First Amendment rights are particularly vulnerable to vagueness and overbreadth challenges. As our Supreme Court has explained:

> The United States Supreme Court has repeatedly recognized that a vague regulation of speech infringes on First Amendment rights. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997). ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.") This Court has also recognized that if speakers are not granted wide latitude to disseminate information without government interference, they will steer far wider of the unlawful zone . . . . Under the Fourteenth Amendment, a statute may be void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988) Moreover, the Supreme Court has "repeatedly emphasized that where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential." *Id.* (citing, *e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217–18, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975)).

Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n, 161 Wn.2d 470, 484-85, 166 P.3d 1174, 1182 (2007) (emphasis added) (some internal citations omitted).[27] Notably, the regulation must be more than clear, it must amount to a bright-line test easily

[27] See also *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 266, 4 P.3d 808 (2000) ("Buckley requires the definition of election-related speech to be sharply drawn . . . in order to assure that general political speech is not restricted, election-related speech must be narrowly defined, even if to do so results in some election-related speech evading regulation.") (citing *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L.Rev. 1751, 1754 (1999)).

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understood by any lay person. As the United States Supreme Court has famously articulated, only the clearest test "offers . . . security for free discussion." *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516 (1945)). Any other approach "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id*.

The phrase "support or oppose," if applied to acts outside of traditional electioneering and advertising, is vague, and persons of common intelligence undeniably must guess at its meaning and would differ as to its application. The state cannot reasonably deny that a substantial portion, if not the vast majority, of persons of common intelligence would not have guessed that the phrase "support or oppose" in the Fair Campaign Finances Act would apply to the act of filing suit to challenge a facially unconstitutional proposed ballot proposition. Indeed, even legal counsel of common intelligence, searching every published Washington appellate decision, would find no hint that the statute had ever or would ever be so applied. There can be no more significant affirmation of the vagueness of the FCPA (as sought to be applied by the Attorney General in this case) than the conclusion of the PDC when applying these exact facts. The PDC, the agency tasked with interpreting and applying the FCPA, recognized that the FCPA and related regulations are not clear on what activity is covered by the statute. In recommending that the Attorney General's Office *not* file legal action against the Chamber, the EDB and the Port with respect to the STW Initiatives, Chair Anne Levinson said:

> ...I would like to add at this point that we – the Commissioners have heard the issues raised by the petitioner and by the respondents in this matter and have discussed the need for a rule-making to provide clearer guidance to the regulated community and to the public regarding what actions constitute political actions that need to be reported for ballot measure propositions as they're being considered for placement on the ballot and at each stage thereafter. So we will be working with Staff to engage in a rulemaking in that

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> regard and would ask that all of the parties to this matter plan to participate and offer their input and insights when we do that [28]

Appendix 4 to the Chamber's Answer at 33:11–24. The fact that the PDC announced its intention to move forward with rulemaking is significant in two critical ways: (1) the PDC recognized that the existing statutes are vague, too vague for enforcement; and (2) the Attorney General's decision to move forward with this enforcement action prior to achieving clarity through the pending rulemaking process is revealed for the over-reach that it is.

The United States Supreme Court, faced with the similarly vague phrase in a federal disclosure statute ("relative to a clearly identified candidate") adopted a saving construction and construed the statute to only apply to "expenditures for communications that expressly advocated the election or defeat of a clearly identified candidate." *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 485, 166 P.3d 1174 (2007) (citing *Buckley v. Valeo*, 424 U.S. 1, 42–44 (1976)) (emphasis added).

In *Voters Educ. Comm.,* the Washington State Supreme Court upheld the FCPA in the face of a vagueness challenge. In doing so, the court held that a person of ordinary intelligence would have a reasonable opportunity to understand the meaning of "in support of, or opposition to" in the definition of a "political committee." In reaching this conclusion, the Court relied upon a decision of the United States Supreme Court[29] which defined the terms "oppose" and "support" in terms of *communications* that refer to a candidate and promote or attack that candidate:

> "The Court upheld as sufficiently precise to satisfy First Amendment concerns the definition of '[f]ederal election activity' to mean 'a public communication that refers to a clearly identified candidate for Federal office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.' Thus, the Court's considered endorsement of the

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[28] Appendix 4 to the Chamber's Answer (Transcript, WA State Public Disclosure Commission, August 8, 2016) at 33:11-:24.

[29] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

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> terms "supports" and "opposes" provides relevant guidance on the matter before us.

Id. at 488 n.9 (emphasis added). In other words, as the Court acknowledged, the statute is only constitutional insofar as a reasonable person would understand what "oppose" and "support" means, and a reasonable person would understand those terms to refer to *communications or advertisements* in support of or opposition to a candidate or ballot measure in an election campaign. Filing a lawsuit does not fit within this definition, and no reasonable person would understand these terms to so mean. Indeed, the Washington PDC, whom the Attorney General relies on for expertise in interpretation of the FCPA, understood that the statute and rules are unclear on this point. Further, the term would render the statute unconstitutional if so interpreted, as discussed herein.

The purpose of the FCPA is to ensure that the financing of *political campaigns and lobbying* are fully disclosed to the public. RCW 42.17A.001. The law is designed to let the voters know who is trying to sway their vote.[30] Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering, and does nothing to sway votes. For this reason alone, this Court should dismiss this suit.

c. Campaign finance disclosure laws withstand exacting scrutiny only to the extent they further the important government interest of protecting the right of the public to know who is financing campaign communications and advertisements and trying to sway the public's opinions.

The FCPA has withstood constitutional challenge, but always on the grounds that the public has an interest in knowing who was trying to sway its votes: "In short, the voters need to know 'who is doing the talking' about ballot measures." *State ex rel. Washington State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568

[30] *Voters Educ. Comm., supra*

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(2006). "FCPA's disclosure provisions require … organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections." *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 483, 166 P.3d 1174, (2007) (citing *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)). No effort was made by the Defendants to sway or influence votes. The effort was to determine whether the STW Initiatives were *lawful.*

In *Family PAC v. McKenna*, 685 F.3d 800, 808 (9th Cir. 2012), the Ninth Circuit upheld provisions of the FCPA in the face of the constitutional challenge, on the grounds that Washington state has a strong governmental interest in informing the electorate regarding who financed ballot measure *communications* and *advertisements*. As the court explained:

> Disclosure enables the electorate to give proper weight to different speakers and messages, by providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. The money in ballot measure campaigns produces a cacophony of political communications through which voters must pick out meaningful and accurate messages. Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, we think being able to evaluate who is doing the talking is of great importance. . . . Washington's disclosure requirements therefore serve a strong governmental interest. (emphasis added.)

Id. at 808–09 (9th Cir. 2012) (internal citations omitted) (emphasis added).[31]

As the Ninth Circuit has pointed out, the United States Supreme Court has recognized only three "important" interests justifying campaign finance disclosure laws: "providing the electorate with information, deterring actual corruption and avoiding any appearance

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[31] *See also Citizens United,* 558 U.S. at 371 ("[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.") (emphasis added); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 197 (2003) (upholding disclosure requirements because they protect the "interests of individual citizens seeking to make informed choices in the political marketplace"); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.")

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thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." The Ninth Circuit held that the second of these interests, "deterring corruption or the appearance thereof—falls out of the picture in the context of ballot initiatives." *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009) (citing *First Nat'l Bank of Boston*, 435 U.S. at 790). The third interest is similarly inapplicable when there are no substantive limits on contributions (the more "substantive electioneering restrictions" referenced above), which is the case in Washington. *Id.* The only possible "important" governmental interest is providing the electorate with information regarding who finances campaign speech and advertisements, an interest which has no applicability here.

In *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), the Ninth Circuit *repeatedly* emphasized that the important government interest justifying Washington's campaign finance disclosure laws was the right of the public to know who is financing campaign *communications and advertisements*:

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential. . . . [D]isclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention. . . . [I]n the cacophony of political communications through which [Washington] voters must pick out meaningful and accurate messages[,] being able to evaluate who is doing the talking is of great importance. . . . . Individual citizens seeking to make informed choices in the political marketplace need to know what entity is funding a communication. . . . Campaign finance disclosure requirements thus 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. . . . Washington voters' interest in knowing who is speaking about physician-assisted suicide shortly before the vote on a ballot initiative that proposes to legalize that practice is sufficient to support the Disclosure Law's requirements. . . . [T]he government has a vital interest in providing the public with information about who is trying to sway its opinion. . . . The ability of voters to determine who is behind the advertisements seeking to shape their views is integral to the full realization of the American ideal of government. . . . [T]he voters who passed Washington's Disclosure Law merely provided for a modicum of information from those who wish to influence the public's vote.

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Id. at 1005–07 (internal citations omitted).

The constitutional underpinning of campaign disclosure laws – the need of the public to know who funds campaign speech and advertising – is entirely absent in this case. It is well worth noting here that pursuing a lawsuit is an extremely public process, with the names, identities, legal standing and other details about the parties filed in the courts in full public view. Although the statute by its terms does not apply to any of the Defendants, if it did as urged by the Attorney General, it would be unconstitutional and fail exacting scrutiny because it burdens core First Amendment rights and the law as applied does not further a substantial governmental interest outweighing this burden.

d. The statute is constitutional only to the extent the constitutional right of free speech is balanced against the constitutional right of the public to act as an informed legislature through the state constitutional initiative mechanism. There is no constitutional right to legislate through the local initiative process.

The decisions upholding the constitutionality of campaign disclosure laws are based in part on *competing* constitutional rights: The constitutional right to free speech and association, balanced against the rights of citizens to legislate through the state initiative process. *See, e.g.*, *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010) ("In the ballot initiative context, where voters are responsible for taking positions on some of the day's most contentious and technical issues, voters act as legislators . . . ."). As the Washington Supreme Court has repeatedly recognized, the constitutional interests at play are significantly diminished in the context of local initiatives, which are purely creatures of statute and have no constitutional basis. *See, e.g.*, *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 103-04, 369 P.3d 140, 143 (2016) ("As a preliminary issue, it is important to distinguish statewide and local initiatives. The right of the people to file a statewide initiative is laid out in the Washington Constitution. . . .

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However, the right to file a local initiative is not granted in the constitution. Instead, state statutes governing the establishment of cities allow the cities to establish a local initiative process.").

Even more fundamentally, there is no constitutional right to bring an *invalid* initiative. Washington courts have routinely invalidated petition-based measures that exceed the scope of initiative and referendum power. *See, e.g., City of Port Angeles,* 145 Wn. App. at 883.[32] In *none* of these decisions were the plaintiffs prosecuted or otherwise penalized on the grounds that they were a political committee, or were engaging in electioneering, a political campaign, or political communication.

D. Under the doctrine of constitutional avoidance, the FCPA should be interpreted to avoid the constitutional infirmities inherent in the Attorney General's interpretation of the statute.

A core principle of statutory interpretation is that a Court should construe a statute to avoid constitutionally doubtful results**: "**We construe statutes to avoid constitutional doubt." *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434–35, 341 P.3d 953, cert. denied, 136 S. Ct. 79, 193 L. Ed. 2d 33 (2015) (citing *State v. Robinson*, 153 Wn.2d 689, 693–94, 107 P.3d 90 (2005)). "[W]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so." *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972). "If, among alternative constructions, one or more would involve serious constitutional difficulties, the court, without doing violence to the legislative purpose, will

[32] *See also City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 388-91, 93 P.3d 176 (2004); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 709, 911 P.2d 389, cert. denied, 519 U.S. 862 (1996); *Malkasian*, 157 Wn.2d at 261; *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 173, 149 P.3d 616 (2006); *Snohomish County v. Anderson*, 123 Wn.2d 151, 152-53, 868 P.2d 116 (1994); *Stansbury*, 155 Cal. App. 4th at 1590 ("[T]here is no constitutional right to place an invalid initiative on the ballot.").

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reject those interpretations in favor of a construction which will sustain the constitutionality of the statute." *Grant v. Spellman*, 99 Wn.2d 815, 819, 664 P.2d 1227 (1983). Even if one plausible reading is not unambiguously unconstitutional, this canon nonetheless puts a 'thumb' on the scale in favor of the construction which most avoids "constitutionally murky waters." *In re Cross*, 99 Wn.2d 373, 383, 662 P.2d 828, 834 (1983).

Here, there is a construction of the statute that avoids the myriad constitutional difficulties discussed herein, and this construction most comports with the plain language of the statute: the phrase "support or oppose" means to engage in electioneering or politically related communication with the electorate, but the phrase does *not* encompass the act of filing a lawsuit challenging the constitutionality of a ballot proposition.

E. Public policy considerations militate against the Attorney General's interpretation. The primary protection against the potential for majoritarian oppression and discrimination through ballot initiatives is access to the judiciary.

In addition to the constitutional avoidance canon of construction, sound public policy supports a construction of the FCPA which does not render the act of preparing for or filing a lawsuit challenging the constitutionality of a proposed local initiative subject to regulation and oversight by the State. These public policy issues are not divorced from the constitutional infirmities of the statute, and both inform and provide context for the constitutional defects in the Attorney General's interpretation of the statute. While the constitutional rights of corporate and governmental entities like the Defendants may be a politically attractive target in the current political climate,[33] the reading of the statute advocated for by the Attorney General's office would do equal violence to the constitutional rights of the most politically and socially vulnerable members of society.

[33] *See, e.g.*, http://www.wamend.org/initiativelanguage (Yes on 735 initiative, an initiative urging Washington state congressional delegation to propose an amendment to the federal constitutional overturning *Citizens United* and limiting constitutional rights to individuals); https://d3n8a8pro7vhmx.cloudfront.net/wamend/pages/583/attachments/original/1442382982/I-735_Endorsements_9-15-15.pdf?1442382982 (list of elected officials and organizations endorsing I-735).

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The initiative process, while often a powerful tool of positive social change through direct democracy, may also be used to enact extraordinarily regressive or socially destructive measures into law. The threat posed by discrimination of the majority against minorities through the ballot process underscores the importance of fundamental check on the ballot initiative process: the right to access the Courts to challenge an unconstitutional and discriminatory ballot measure. Under the Attorney General's reading of the statute, any person seeking to challenge facially unconstitutional ballot measure which would have the effect of stripping away that person's constitutional rights would be subject to regulation and oversight by the State.

There is a significant body of academic literature discussing the negative impact citizen initiatives can have on minority populations. *See, e.g.*, Barbara Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 254 (1997) (listing a significant number of initiatives seeking to repeal existing gay rights laws or prohibit new ones, and noting that initiatives targeting the civil rights of minorities passed at a *much* higher rate than initiatives on all other subjects.).[34]

Notably, many of the harmful effects to minority populations begin when the initiative is first circulated for signature and are independent of the ultimate citizen vote on the initiative. *See, e.g.*, Todd Donovan, *Direct Democracy and Campaigns Against Minorities,* 97 Minn. L. Rev. 1730, 1778 (2013) ("When minority rights are put to a popular vote, campaigns portray the minority as a threat and thus create spillover effects, with the

[34] *See also* Donald P. Haider-Markel et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 30711 (2007) (gays and lesbians lost more often than they won when questions about their rights were decided by a public vote); Caroline J. Tolbert & Rodney E. Hero, *A Racial/Ethnic Diversity Interpretation of Politics and Policy in the States of the U.S.*, 40 Am. J. Pol. Sci. 851, 867 (1996) (analyzing the popularity of initiatives targeting minorities); Additional academic literature abounds.

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members of the minority stigmatized in ways that would not have occurred were it not for the campaign against their rights.").

Examples of voter-approved ballot initiative that restrict minority rights or target minorities for differential treatment are voluminous. Early in the twentieth century, Oklahomans approved an initiative that stripped voting rights from African-Americans.[35] California voted to prohibit Asians from owning land,[36] and Arizonans passed an initiative that prohibited employment of immigrants.[37] Since the 1960s, initiatives and referendums have been used to legislate on matters such as race-neutral access to public accommodations, access to fair housing, school desegregation, and protections against discrimination in employment based on sexual orientation.[38] Californians approved initiatives repealing fair access to housing.[39] Voters in Arizona and other states made English an "official" language,[40] and Colorado passed an initiative that prohibited extending anti-discrimination protections to gays and lesbians,[41] while voters in multiple states approved initiatives repealing applications of affirmative action when based on criteria of race and ethnicity.[42]

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[35] Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall*, 92–93 (1989) (The amendment established an educational requirement for voting, but in effect only applied it to black citizens).

[36] The Act targeted the expanding Japanese farm communities by prohibiting ownership of land by corporations controlled by persons ineligible for naturalization. *Id.* at 93.

[37] The initiative required at least 80% of employees of a company employing six or more people to be U.S. citizens. *Id.*

[38] *See Barbara S. Gamble, Putting Civil Rights to a Popular Vote,* 41 Am. J. Pol. Sci. 245, 263–65 (1997) (listing several examples of each of these types of measures).

[39] *Id.* at 255.

[40] *Id.* at 260–61.

[41] *Id.* at 260.

[42] *See generally, e.g.*, Daniel Martinez HoSang, *Racial Propositions: Ballot Initiatives and the Making of Postwar California* 20141 (2010) (describing the passage and history behind Proposition 209). Initiative 200 in Washington (1998), is a local example. Complete Text of Initiative 200, Wash. Secretary St., https://www.sos.wa.gov/elections/initiatives/text/i200.pdf (last visited Sept. 6, 2016).

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Another significant body of academic literature has noted that the greatest protection against these types of ballot propositions that discriminate against or unduly burden the rights of minorities is the third branch of government – the judiciary, through the mechanism of constitutional challenge to the ballot propositions.[43] The Attorney General's position would burden and limit this fundamentally important rights-protecting mechanism.

Under the Attorney General's interpretation of the statute, a minority person challenging a facially unconstitutional, discriminatory ballot proposition (for example, any of the initiatives mentioned in the preceding paragraphs) is subject to regulation and oversight by the State, and faces civil or criminal penalties for failing to willingly submit their legal expenditures to review by the State. The State's reading of the statute burden the federal First Amendment rights of persons seeking to exercise their Washington State Constitutional right of access to the Courts in order to vindicate other constitutional rights challenged by unconstitutional ballots. While the State may contend that it would not seek to prosecute such persons, prosecutorial discretion cannot save an unconstitutional law. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

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[43] See, e.g., Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1, 23 (1978) (arguing that the Supreme Court should recognize and address discriminatory measures within initiatives and referendums); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 Cornell L. Rev. 527, 609-25 (1994) (arguing that the Equal Protection Clause justifies different judicial protection for certain minority groups in the plebiscitary process); Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 Urb. L. Ann. 135, 158-59 (1981) (proposing a heightened level of scrutiny for direct democracy and citizen lawmaking procedures that have a disproportionate impact on minority groups); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 Ohio St. L.J. 399, 410 (1999) (arguing that courts should apply strict scrutiny to successful ballot measures when 'the initiative has unduly burdened a minority group's civic participation').

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Under the Attorney General's interpretation of the statute, a person challenging a similarly patently unconstitutional ballot measure would be subject to regulation and oversight by the State, or face civil or criminal sanction. Stated differently, a gay man challenging an initiative purporting to repeal his right to marry, a Muslim woman challenging a stigmatizing ban on a court's consideration of Sharia Law,[44] or a Hispanic woman challenging a discriminatory employment initiative, would be required to report to the State nearly the moment they hired an attorney to draft a complaint.

Such a reading of the statute is unconstitutional, absurd,[45] and the public policy ramifications of such an interpretation are abhorrent. The State should have no right to regulate or peer into the finances of an individual utilizing their constitutional right of access to the courts to vindicate their other constitutional rights – much less such a right to regulate backed by civil and *criminal* penalties.

F. None of the Defendants "received contributions or made expenditures" in support of or opposition to a ballot measure.

The Chamber and the EDB expended funds from their general budgets to pay the legal fees at issue in this case, and thus did not "receive contributions or make expenditures" in support of or opposition to a ballot measure. In fact, at the time the lawsuit was filed, the Chamber had not paid the legal bills, and so no expenditure of any kind had been made.

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[44] Jacob Gershman, *Oklahoma Ban on Sharia Law Unconstitutional, US Judge Rules*, WALL ST. J. (Aug. 16, 2013, 6:17 PM), http://blogs.wsj.com/law/2013/08/16/oklahomaban-on-sharia-law-unconstitutional-us-judge-rules/; Jack Jenkins, *Fearing Shariah, Alabama Votes To Ban 'Foreign Laws',* THINKPROGRESS (Nov. 5, 2014, 10:10 AM), http://thinkprogress.org/election/2014/11/05/3589225/alabama-votes-to-ban-foreignlaws/.

[45] A fundamental canon of statutory interpretation is to avoid interpretations of statutes that produce absurd results. *See, e.g.*, *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008).

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IV. CONCLUSION

At its heart, this motion asks the Court to decide between two competing interpretations of the statute at issue: The first interpretation under which the phrase "support or opposing" a ballot proposition means what any layman reading the statute would take the statute to mean: money spent 'supporting or opposing' the ballot proposition's chances of being voted into laws through the typical electioneering activities of placing billboards and buying advertising space in local newspapers and the like. This interpretation is constitutionally sound and which comports with nearly every decision interpreting the statute or analogous statute.

The second interpretation stretches the meaning of the phrase "in support of or opposition to" to encompass the constitutionally protected act of filing a lawsuit challenging a facially unconstitutional ballot proposition. The constitutional infirmities of this interpretation are legion.

Defendants ask this Court to rely upon the doctrine of constitutional avoidance and interpret the statute at issue here to avoid the 'constitutionally murky waters' the State seeks to wade into. If it cannot, then the Constitutional issues must fully and soundly defeat the State's interpretation of the FCPA. Defendants also request attorneys' fees pursuant to RCW 42.17A.765(5).

Dated this 19th day of October, 2016.

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Dept 17 Hon. Ronald E. Culpepper
Hearing date set: Friday, November 18, 2016
Time: 9:00 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, v. ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, TACOMA-PIERCE COUNTY CHAMBER, JOHN WOLFE, in his official capacity as Chief Executive Officer for the PORT OF TACOMA, and CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, AND CLARE PETRICH, in their official capacities as Commissioners for the PORT OF TACOMA, Defendants.	No. 16-2-10303-6 MOTION TO DISMISS OF DEFENDANTS JOHN WOLFE, IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER FOR THE PORT OF TACOMA, AND CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, AND CLARE PETRICH, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS FOR THE PORT OF TACOMA

Comes now the Defendants , JOHN WOLFE, in his official capacity as Chief Executive Officer for the PORT OF TACOMA, and CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, AND CLARE PETRICH, in their official capacities as Commissioners for the PORT OF TACOMA (collectively the "Port"), and submits this

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Motion to Dismiss Plaintiff's Complaint. The State of Washington (herein after "AG") alleges the Port violated RCW 42.17A.555- use of public facilities for campaign purposes. The Port respectfully urges the Court to find that the Port committed no violation of the Fair Campaign Practice Act ("FCPA") and to dismiss the Complaint.

I. INTRODUCTION

The Port did not violate RCW 42.17A.555. The Port did not use public facilities for campaign purposes. Seeking judicial review is not "use of public funds for campaign purposes". The Port (1) filed a declaratory judgement lawsuit to request a neutral fact finder to make a judicial determination on the legal validity of the Initiatives, and (2) held a public vote to ratify that action during a properly noticed, public meeting where public comment for and against was received, consistent with RCW 42.17A.555(1). The Port's legal action also is consistent with the long list of legal cases in which public agencies have properly sought judicial review of the legal sufficiency of a proposed Initiative; in no case were these action found to violate RCW 42.17A.555.

The Port took no campaign action to influence the vote on a ballot measure. Here, any expenditures at issue were made prior to a ballot initiative campaign, and were in fact related to reviewing the legality of such a campaign on the grounds that the matters were facially unconstitutional. If a proposed local initiative is facially beyond the local initiative power and unconstitutional, it can logically never become part of a legitimate "ballot initiative campaign."

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There is *no* First Amendment right to place an initiative on the ballot, much less an invalid one. Including invalid initiatives on the ballot does not vindicate or protect any rights, rather it undermines the integrity of a system intended to enact laws. The Port's action in pursuing a legal determination from the neutral judicial system was not campaigning but instead was consistent with the underlying purpose of Washington campaign laws to protect the integrity of the voting process.

Before we address each allegation in detail below, we first provide the Court with background facts regarding the Port, as well as facts related to the Port's legal action.

II. BACKGROUND FACTS

A. The Port.

The Port is a special purpose public port district that operates under Title 53 of the Revised Code of Washington and is classified as a special purpose district. The Port is a member of The Northwest Seaport Alliance, a marine cargo operating partnership with the Port of Seattle. Under a port development authority, the ports manage the container, breakbulk, auto and some bulk terminals in the Seattle and Tacoma harbors. Dec of Wolfe, at ¶ 1-3. Today, the Port covers more than 2,700 acres in the Port industrial area. The Port is one of the top container ports in North America and a major gateway for trade with Asia and Alaska. Dec of Wolfe, at ¶ 4-5.

Five Commissioners are elected to four-year terms by the citizens of Pierce County to serve as the Port's board of directors. The Commission hires the CEO, sets policy and

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strategic direction, and approves all major expenditures. Dec of Wolfe, at ¶ 6.

Port Strategic Plan. With input from community members, customers, business leaders and employees, the Port has in place a 10-year Strategic Plan in 2012 ("Plan"), found at http://portoftacoma.com/sites/default/files/StrategicPlanBrochure.pdf. The Plan is updated annually to provide further focus and clarity to the initiatives. The Plan focuses on four areas that build on the Port's specific strengths to make better connections:

- Strategic investments
  We will make strategic investments that enhance the Port's waterway, terminal, road, rail and industrial property infrastructure to create the most efficient, productive and cost-effective system possible to move our customers' freight to the marketplace.

- New business opportunities
  To create opportunity for future investments, we will focus attention on attracting new business opportunities with healthy income streams and increase the diversity of the Port's business portfolio.

a.

- Customer care
  We're serious about our tagline "People. Partnership. Performance." We will continue to demonstrate great care for our business relationships with customers and key stakeholders.

- Community pride
  Business development, environmental stewardship and livable communities go hand in hand. We continually hear that our community's support of the Port and trade-related jobs is a key competitive advantage. We intend to grow the Port responsibly to ensure continued trust in our collective future.

Dec of Wolfe, at ¶ 7-8.

Port Mission. The Port mission is to **"**Deliver prosperity by connecting customers, cargo and community with the world". The Port's Core values are as follows:

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- **Integrity**
  Being ethically unyielding and honest; inspiring trust by saying what we mean and matching our behaviors to our words; acting in the public interest and in a manner to maintain public confidence.
- **Customer focus**
  Creating long-term relationships by consistently delivering value; helping customers to become high-performance businesses by understanding their business needs; establishing realistic expectations and meeting commitments.
- **Teamwork**
  Focusing on the success of the entire organization; fully utilizing our collective skills, knowledge and experiences to achieve our goals; encouraging diversity, respect and full participation; being effective collaborators with a broad range of partners in the region; having fun together.
- **Courage**
  Facing challenges with fortitude; setting aside fears and standing by personal principles; extending beyond personal comfort zones to achieve goals; taking responsibility for actions.
- **Competitive spirit**
  Pursuing our goals with energy, drive and the desire to exceed expectations; going the extra mile for our customers and to differentiate ourselves in the market; demonstrating passion and dedication to our mission; constantly improving quality, timeliness and value of our work.
- **Sustainability**
  Focusing on long-term financial viability; valuing the economic well-being of our neighbors; doing business in a way that improves our environment.

Dec of Wolfe, at ¶ 9.

As a public port district, the Port has a legislative mandate to foster economic development in Tacoma and Pierce County. The Port also is owner of land both within and outside of Tacoma city limits. A critical segment of the Port's state mandated mission, use of tax dollars and business is to lease lands to tenants. More than 29,000 jobs are generated by Port activity, which also provides $195 million per year in state and local taxes to support education, roads and police and fire protection for our community. [Port Economic Impact Study, 2014]. The Tacoma-Puyallup Industrial Subarea's 21,300

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jobs make up 4 percent of the Puget Sound Region's industrial employment. [PSRC Industrial Lands Analysis, 2015]. These jobs pay an average $80,000 a year. [PSRC Industrial Lands Analysis, 2015]. Dec of Wolfe, at ¶ 10-14.

B. Port's Legal Challenge

The Port became aware of two potential City of Tacoma Initiatives, led by a committee called Save Tacoma Water (STW). STW's Code Initiative 6 seeks to have the City Council enact the changes to the Tacoma Municipal Code ("Code Initiative"). STW's Code Initiative 6 sought to impose a requirement that any land use proposal requiring water consumption of 1336 CCF (one million gallons) of water or more daily from Tacoma be submitted to a public vote prior to "the City" "providing water service" for such a project. (*Code Initiative at §A*). The Initiative would accomplish this by requiring developers seeking that water use to fund the "costs of the vote on the people" and only if "a majority of voters approve the water utility service application and all other application requirements may the City provide the service." *Id*. Dec of Lake, at ¶ 1-4.

STW's Code Initiative expressly purports to elevate its proposed Charter amendment above state law, by pronouncing that "all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of the City of Tacoma only to the extent that they do not violate the rights or mandates of this Article. (*Id,* §*B*). STW's Code Initiative expressly purports to overrule and/or disavow the United States Constitution, along with "international, federal [and] state laws" that

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"interfere" with the proposed amendment. (*Id*, §*C*), and to curtail the jurisdiction of state and federal courts, and to eliminate certain rights of corporations, in conflict with the Washington and Federal Constitutions, as well as U.S. Supreme Court rulings. The Initiative deprives corporations of their right under the Washington state constitution to sue and defend against lawsuits in courts, "like natural persons." Wash. Const. art. I, § 12, and seeks to deprive the courts and other "government actors" from recognizing any "permit, license, privilege, charter or other authorizations" that would violate the Initiative. *Id*. The Initiative also gives "any resident of the city" the right to enforce the Initiative. *Code Initiative§ D*. STW apparently sought all of these results through Tacoma Municipal Code provisions. The companion measure, STW's Charter Initiative 5, repeats all the same provisions of the Code Initiative. Dec of Lake, at ¶ 5-8.

The Port was aware that STW's Initiatives were near identical to Initiatives recently found to be legally invalid (outside the valid scope of local initiative powers) by the Washington Supreme Court in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016). Dec of Lake, at ¶ 9.

The Port, along with co-Plaintiffs Economic Development Board for Tacoma-Pierce County ("EDB") and the Tacoma-Pierce County Chamber ("Chamber") filed a legal action on June 6, 2016 to seek judicial determination under Washington's Uniform Declaratory Judgment Act, RCW Ch. 7.24, that both the Charter Initiative and Code Initiative are beyond the proper scope of the local initiative power, and for injunctive relief. The Port

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spent approximately $45,000 in that legal effort. Dec of Lake, at ¶ 10.

The City of Tacoma ("City") filed its Answer and Cross Claims on June 8, 2016. In its pleadings, the City agreed the Initiatives were legally defective and filed a cross claim against the Initiative sponsors within the existing suit. Dec of Lake, at ¶ 11.

On June 18, 2016, the Port Commission held a public meeting, which it noticed in advance the Commission's intention to take up a vote to "ratify the Port's action of filing a Declaratory Judgment and Injunctive challenge of two proposed local initiatives filed with the City of Tacoma—Charter Amendment 5 and Code Initiative 6 ("Initiatives"). The Declaratory Judgment asks the Pierce County Superior Court to (1) declare that local Initiatives exceed the proper scope of local initiative powers and therefore are invalid, and (2) enjoin the Initiatives' signatures from being validated and enjoin the Initiatives from being placed on the November 2016 ballot, or adopted by the City." See Port of Tacoma Commission Agenda for June 16, 2016, **Exhibit 1.** Dec of Lake, at ¶ 12. Staff provided a Port Commission Memo which was publically available. **Exhibit 2**. Dec of Lake, at ¶ 13. The Port Commission took public comment on the matter from over 20 persons, who spoke for and primarily against the action. The Port Commission voted unanimously to ratify filing the legal action. See *Minutes of June 16, 2016 Port meeting*, **Exhibit 3.** Dec of Lake, at ¶ 14-15.

On July 1, 2016, the Pierce County Superior Court granted Plaintiffs' Motion for

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Declaratory Judgement, finding the two Initiatives invalid and granting an injunctive relief to prevent the Pierce County Auditor from placing the measures on the ballot. See Order, **Exhibit 4.** Dec of Lake, at ¶ 16.

On June 16,2016 after the Port, Chamber and EDB filed their complaint, but before the Superior Court's ruling, Arthur West filed a citizen's complaint[1] asserting that the Port, Chamber and EDB had violated the FCPA by operating as a "political committee" and failing to report contributions and expenditures in violation of the FCPA, RCW 42.17A. Dec of Lake, at ¶ 17. He also claimed the Port had spent public resources on campaign activity in violation of RCW 42.17A.555. *Id.* West filed his complaint with the Attorney General's office, which referred the matter to the Public Disclosure Commission to seek its expertise in determining whether the Port, Chamber and EDB had violated the FCPA. Dec of Lake, at ¶ 18.

The PDC Staff undertook an investigation, after which they found as follows:

> Based on the factors identified in the investigation, staff found and concluded as follows:
>
> **First Allegation: Port of Tacoma Officials (John Wolfe, CEO) did not use facilities of the Port of Tacoma to oppose Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 in a manner prohibited by RCW 42.17A.555 because the Port's expenditures were "normal and regular" in that that they were lawful, and usual and customary**.

See **Exhibit 5,** *PDC Staff Report to PDC Commission*. Dec of Lake, at ¶ 19.

After hearing on August 8, by unanimous vote, the PDC Commission

[1] Pursuant to RCW 42.17A.765(4).

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recommended that the Attorney General **not** file suit. See **Exhibit 6**, *PDC Commission letter to AG*. Dec of Lake, at ¶ 20.The PDC Commission also expressly took note of the vagueness of the statutes in question, and discussed the need for and their intention to undertake "rulemaking to provide clearer guidance to the regulated community and the public regarding what actions constitute activity reportable under RCW 42.17A for ballot propositions, as they are being considered for placement on the ballot and at each stage thereafter." The Commission expressed its intent to work with PDC staff to pursue such rulemaking and asked that all parties (EDB, Chamber and Port) plan to participate and offer input. Dec of Lake, at ¶ 21.

Nonetheless, the Attorney General ignored the recommendation of the very entity charged with addressing FCRA issues and filed this action against the Chamber, the Port and the EDB. The Attorney General bases its claim for civil penalties and injunctive relief on the assertion that paying legal fees to determine the legality of a local ballot measure is an "**expenditure that is made in support of or in opposition to any ... ballot proposition,**" and that by failing to report the legal fees expended to challenge the STW Initiatives, the Chamber and EDB violated RCW 42.17A.255. The lawsuit further asserts that by paying legal fees to challenge the STW Initiatives, the Port violated RCW 42.17A.555 which prohibits the use of public facilities for the purpose of opposing ballot propositions. See *AG Complaint on file*.

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III. ANALYSIS IN SUPPORT OF DISMISSAL

A. Dismissal Appropriate Pursuant to CR 12(b)(6).

A complaint can be dismissed under CR 12(b)(6)[2] for "failure to state a claim upon which relief can be granted." Whether a CR 12(b)(6) dismissal is appropriate is a question of law. *Tenore v. AT & T Wireless Servs., 136 Wash.2d 322, 329-30, 962 P.2d 104 (1998).* On a 12(b)(6) motion, the Court examines the pleadings to "determine whether claimant can prove any set of facts, to "determine whether claimant can prove any set of facts consistent with the complaint, which would entitle claimant to relief" *North Coast Enterprises Inc., v. Factoria Partnership*, 94 Wn App 855, 859, 974 P2d 1257 (1999).

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate when " 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.' " *Haberman v. Wash. Pub. Power Supply Sys.,* 109 Wash.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (*quoting Bowman v. John Doe Two,* 104 Wash.2d 181, 183, 704 P.2d 140 (1985)). One purpose of CR 12, which permits the inclusion of all defenses in a responsive pleading, is to eliminate unnecessary delay in the conduct of an action. *Kuhlman Equipment v.*

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[2] Civil Procedure 12(b): How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19.

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Tamermatic Inc. (1981) 29 Wash.App. 419, 628 P.2d 851.

B. Dismissal Appropriate Pursuant to CR 56.

Dismissal pursuant to CR 56(c)[3] is proper if the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). All the facts submitted and the reasonable inferences there from are considered in the light most favorable to the nonmoving party. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990). A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 383, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989). The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985). Issues of law are properly resolved on summary judgment. *See Harris v. Harris*, 60 Wn.App. 389, 392, 804 P.2d 1277, review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991); *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975).

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[3] The rule of Civil Procedure 56(c) provides:
The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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C. THE PORT DID NOT VIOLATE RCW 42.17A.555, USE OF PUBLIC FACILITIES FOR CAMPAIGN PURPOSES.

1. Relevant authority to be considered on this question includes the following:

- **RCW 42.17A.555 Use of public office or agency facilities in campaigns—Prohibition—Exceptions.**

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

(4) This section does not apply to any person who is a state officer or state employee as defined in RCW 42.52.010.

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2. Analysis. The Port did not use public facilities for campaign purposes. Seeking judicial review is not use of public facilities for campaign purposes. The Port took no electioneering or campaign action to influence the vote on the ballot measures. The Port (1) filed a declaratory judgement lawsuit to request a neutral fact finder to make a judicial determination on the legal validity of the Initiatives, and (2) held a public vote to ratify that action during a properly noticed, public meeting where public comment for and against was received, consistent with RCW 42.17A.555(1). The Port's legal action is consistent with the long list of legal cases in which public agencies have properly sought judicial review of the legal sufficiency of a proposed Initiative; in no case were these action found to violate RCW 42.17A.555.

There are no Washington cases which hold that judicial review of a local initiative is improper use of public facilities. The Court should reject the AG's attempt to create new law.

In this enforcement action, the Court is required to view the FCPA in the light more favorable to the Port. Therefore, construing the statute in favor of the Defendants, this Court should reject the AG's tortured interpretation of FCPA and dismiss the case.

No public policy is offended by dismissal of this case. Including invalid initiatives on the ballot does not vindicate or protect any rights, rather it undermines the integrity of a system intended to enact laws. The Port's action in pursuing a legal determination from the neutral judicial system was not campaigning but instead was consistent with the underlying purpose of Washington campaign laws to protect the integrity of the

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voting process.

2.1 Judicial Review is Not Use of Public Funds for Campaign Purposes.

The Port's action was confined to the judicial and not the campaign/ electioneering arena. No funds were raised or spent to campaign in support or opposition of the Initiatives. The Port adopts by reference the analysis contained in the Co-Defendants EDB & Chamber's Motion to Dismiss as if fully set forth herein. In addition, the Port offers the following.

The Port's declaratory judgement action is nothing close to the advertising campaign analyzed in *Voter Educ. Comm. v. Pub. Disclosure Comm'n.,* 161 Wn.2d 470 (2007). There, the advertisement slammed a particular candidate and concluded that "Deborah Senn Let Us Down." Because Senn was not an incumbent, the Court held that the advertising "had contemporary significance only with respect to Senn's candidacy for attorney general." 161 Wn.2d at 791. Here, in contrast, the Port's request for judicial determination was not accompanied by any information that explicitly or implicitly asks voters to cast their ballot for or against the measures.

Raising questions about the legal sufficiency of a measure does not constitute electoral communications and does not seek to support or oppose any measure. The Port sought to engage a neutral fact finder on the legal status of the measures so that the Pierce County Auditor (and City Council) would have the benefit of that judicial ruling.

Just as the Court found in *Seattle v. State,* 100 Wn.2d 232 668 P.2d 1266 (1983), that "An even-handed program of assistance available to *all* candidates based on

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objective minimum qualification criteria simply does not involve the abuses of public trust which inspired RCW 42.17.130.", neither does a strictly judicial inquiry into the legal legitimacy of a measure offend the purpose for which RCW 42.17.130 was enacted. The purpose of RCW 42.17.130 instead was to prohibit the use of public facilities for partisan campaign purposes. *Id.* at 248.

AGO 2006 No. 1 is in accord: " ...the statute prohibits the use of public resources to aid one side or another of a ballot measure campaign; it does not prohibit efforts to provide information about a proposed measure where the office or agency providing the information would be affected, or where information is shared as part of its responsibilities. AGO 1994 No. 20, at 10 (citing *City of Seattle v. State*, 100 Wn.2d 232, 247-48, 668 P.2d 1266 (1983)); see also AGO 1975 No. 23, at 13 (noting that the statute does not prohibit the use of public resources to provide information simply to explain the measure in relation to the functions of a particular office or agency)."

The purpose of Washington's campaign laws is to ensure that the financing of *political campaigns and lobbying* are fully disclosed to the public. RCW 42.17A.001. The laws are designed to let the voters know who is attempting to influence their vote.[4] Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering.

The Washington Supreme Court case of *King County Council v. Public*

[4] *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n,* 161 Wn.2d 470, 488, 166 P.3d 1174 (2007).

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Disclosure Commission, 93 Wn.2d 559; 611 P.2d 1227(1980) is also instructive. There, the Supreme Court reviewed and reversed the Public Disclosure Commission's (PDC Commission) decision that four members of the King County Council (Council) violated *RCW 42.17.130* by voting to endorse a ballot measure. That statute (predecessor to current RCW 42.17A.555) prohibited the use of the facilities of a public office to promote or oppose an individual's candidacy or a ballot proposition.

The Council to endorsed Initiative No. 335, a statewide anti-pornography ballot measure, after a public meeting where 12 citizens were heard. Some spoke for and others against the motion. Council members debated and the motion passed by a 4-to-3 vote. The PDC Commission argued the county council's endorsement violated: (1) Const. art. 7, § 1 (amendment 14) because it amounts to an expenditure of public money for private purposes; (2) *Const. art. 1, § 19*, which states all elections shall be "free and equal"; and (3) the First Amendment and *Const. art. 1, § 4*, which guarantee the rights to petition and initiative. The Supreme Court disagreed as to all counts.

In rejecting the PDC Commission's argument that the council action violated the prohibition against spending public money for a private purpose, the Court expressly found that the Council's vote (to support) the Initiative was **not** a campaign activity[5]:

[5] The Appeals Court took into account (1) Const. art. 7, § 1 (amendment 14) which provides in part: ". . . All taxes . . . shall be levied and collected for public purposes only." The same limitation is imposed by this provision upon the *expenditure* of public money. *State ex rel. Collier v. Yelle, 9 Wn.2d 317, 326, 115 P.2d 373 (1941)*, as well as (2) Attorney General opinions: "The Attorney General has advised that state expenditures for an individual's candidacy would not be for a public purpose. Attorney General Opinion, February 16, 1979, at 4; Attorney General Opinion, July 7, 1976, at 5-6. But these opinions

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> **A campaign was not waged in the instant case**. The public hearing was not expenditure in support of the initiative so the constitution has not been violated.

Pursuant to CR 12(b)(6), the AG's complaint should be dismissed.

2.2 The Port's judicial expenditure is not a FCPA campaign law violation because Port action was "normal and regular" in that that it was lawful, and usual and customary, as allowed by FCPA.

The FCPA contains important exemptions to what otherwise would be a campaign law violation. Relevant here, RCW 42.17.130 contains an exemption for "Activities which are part of the normal and regular conduct of the office or agency"[6]. Further, WAC 390-05-273 explains that the "normal and regular" proviso means:

> Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

Ports are charged with economic development and preventing anti-development and unconstitutional legislation is a necessarily implied power. Ports also are empowered to

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evaluate the use of college facilities on behalf of candidates rather than ballot measure endorsements.

[6] RCW 42.17.130 No elective official nor any employee of his [or her] office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities: ... (3) Activities which are part of the normal and regular conduct of the office or agency.

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sue and be sued. RCW 53.08.047, RCW 59.57.030. The Port has been involved in a number of lawsuits over the past decades (See **Exhibit 7,** *List of Port litigation,* attached to Dec of Wolfe). Litigation is a "normal and regular" means employed by the Port. Thus the Port's activity in pursuing the Declaratory Judgement action is exempt and not a FCPA violation.

The Port pursued the Declaratory Judgement action on the Initiatives as part of its normal and regular activity, because the Initiatives had the potential to impact the Port's economic development mission. The Port has long been a public policy advocate on issues affecting industrial and manufacturing preservation and theses sector's role in economic vitality. Port communications regarding the need to preserve and protect industrial lands and jobs is part of the Port's normal and regular conduct of the Port. Examples of such communications include:

- The Port's standard presentation on the 2012-2022 Strategic Plan. See **Exhibit 2** attached to Dec of Wolfe, is one was given to the Propeller Club.
- The Port's Gateway stories about Frederickson's industrially-zoned property, attached as **Exhibit 3 and 4** attached to Dec of Wolfe.
- The Port's presentation PowerPoint that shows the Port's role in economic and industrial growth over the years, attached to Dec of Wolfe as **Exhibit 5.**

Further, Washington courts routinely exercise Declaratory Judgment power pursuant to Chapter 7.24 RCW in pre-election initiative challenges brought by public

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entities exactly like that brought by the Port.[7] Under the Uniform Declaratory Judgment Act, a Court has the "power to declare rights, status and other legal relations." RCW 7.24.010. That power includes declaring the pre-election status of a local initiative as beyond the scope of the local initiative power and the right of the Auditor to refrain from placing invalid measures on the ballot. See, e.g., *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746 (1980) (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Ford v. Logan*, 79 Wn.2d 147, 151 (1971) (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App.427, 432-33 (2011) (upholding pre-election challenge to scope of initiative as exceeding initiative power and therefore invalid); *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386 (2004) (affirming declaratory judgment "striking [initiative] from the ballot").

The Port sought judicial, and not political or campaign, resolution of the legal issues in accordance with the Washington State Supreme Court ruling in *Philadelphia II v. Gregoire*, 128 Wash.2d 707 (1996), which held that courts should determine whether a proposed initiative exceeds the scope of local initiative power.

The Port's legal action also is consistent with the long list of legal cases in which

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[7] *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn. 2d 97 (Feb. 4, 2016), S*ee also City of Longview v. Wallin, 174 Wn. App. 763,* 301 P.3d 45 (Div. 2 2013), *cert denied*, 178 Wn.2d 1020 (2013); *Eyman v. McGehee,* 173 Wn. App. 684, 294 P.3d 847 (Div. 1 2013);

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public agencies have properly sought judicial review of the legal sufficiency of a proposed Initiative (below); in no case were these action found to violate RCW 42.17A.555.

- *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 101-105 369 P.3d 140 (2016) ("The petitioners include Spokane County....Applying those existing standing requirements, we hold that petitioners in this case have standing to bring their challenge".)

- *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259-60, 138 P.3d 943, (2006) (Supreme Court of Washington described "it is will settled that it is proper for cities to bring challenges that the subject matter is beyond the scope of the initiative power & "In this case, like many other cases, the local officials had a valid concern that the proposed initiative was outside the scope of the initiative power" 157 Wn.2d at 269)

- *Whatcom Cty. v. Brisbane*, 125 Wn.2d 345, 346, 884 P.2d 1326 (1994) (Whatcom County Superior Court sustains "a challenge by Whatcom County to a referendum petition to amend portions of a critical areas ordinance")

- *Snohomish Cty. v. Anderson*, 124 Wn.2d 834, 836, 881 P.2d 240 (1994) ("The Snohomish County Council (County or Council) commenced an action against the citizens seeking and successfully securing a declaratory judgment the ordinance was not subject to a referendum")

- *City of Longview v. Wallin*, 174 Wn. App. 763, 783, 301 P.3d 45 (Div. 2, 2013) (Cities have standing to bring court challenges to local initiatives that exceed the scope of initiative powers)

- *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 387, 93 P.3d 176 (Div. 1, 2004) (City challenge to local initiative, "limited to whether the initiative was beyond the initiative power, was appropriate".)

- *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 6-7, 239 P.3d 589 (2010) ("The city council declined to either enact the initiatives or refer them to the ballot. Instead, the council sought declaratory judgment that the initiatives were beyond the scope of the local initiative power because they concerned administrative matters; because the Washington State Legislature had vested the

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responsibility to run the water system to the council, not the city; and because the initiatives were substantively invalid.")

- *King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 592, 949 P.2d 1260 (1997) ("The County filed a complaint seeking a declaratory judgment under RCW 7.25.020 validating the bonds. Specifically, the County sought a declaration…determining that Initiative 16 is inapplicable to the issuance of the Bonds as authorized by the Bond….")

- *Pierce Cty. v. Keehn*, 34 Wn. App. 309, 311, 661 P.2d 594 (Div. 2, 1983) ("the County filed an action to declare Initiative 1 invalid. In September the trial court granted the County's motion for summary judgment, holding that the auditor (and County Executive) properly refused 'to accept, verify, register, or file the initiative petition under Article V, Section 5.40 of the [Pierce] County Charter.'")

- *Spokane v. Taxpayers of Spokane*, 111 Wn.2d 91, 94, 758 P.2d 480 (1988). ("In response to the filing of this initiative, the City began this declaratory action on October 6. Named as defendants were Spokane's taxpayers, the ratepayers of the City's refuse utility, and the City's qualified and registered electors. In its suit, the City sought a declaratory judgment that the initiative did not apply to the waste-to-energy project and that the City Council could proceed with the issuance and sale of the revenue bond" & "We hold a justiciable controversy exists as to the ratepayers and electors". 111 Wn.2d at 96)

- *Clallam Cty. v. Forde*, No. 28487-1-II, 2003 Wash. App. LEXIS 47, 3 (Unpublished Div. 1, 2003) ("Clallam County commissioners voted against holding public hearings on the petition, concluding that the proposed repeal was not within the initiative power of the people. The county subsequently moved for and was granted relief on summary judgment".)

- *City of Monroe v. Wash. Campaign for Liberty*, No. 68473-6-I, 2013 Wash. App. LEXIS 378, 5 (Unpublished Div. 1, 2013) ("In July 2011, the City filed a complaint for declaratory relief against Seeds of Liberty and the other sponsors of Monroe Initiative No. 1. The City sought a declaration that the initiative, 'in its entirety, is invalid because it is beyond the scope of the local initiative power, and therefore null and void.'")

- *Metro. Seattle v. Seattle,* 57 Wn.2d 446, 448, 357 P.2d 863, 866 (1960). (The City of Seattle moved challenged a ballot title under RCW 29A.36.200 which allows "persons" to challenge a local initiative ballot title "if any persons are dissatisfied

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> with the ballot title for a local ballot measure that was formulated by the city attorney or prosecuting attorney preparing the same, they may at any time within ten days from the time of the filing of the ballot title, not including Saturdays, Sundays, and legal holidays, appeal to the superior court of the county…")

Not one of the above public entities who pursued judicial Declaratory Judgement actions for ballot propositions were subjected to any state enforcement action. The "normal and regular" occurrence of public entities seeking judicial review of ballot measure which affect them is why the PDC Staff recommended no enforcement action against the Port under these facts, and why the PDC Commission unanimously agreed:

> **Investigative Findings and Conclusion**
> Based on the factors identified in the investigation, staff found and concluded as follows:
>
> **First Allegation:** Port of Tacoma Officials (John Wolfe, CEO) did not use facilities of the Port of Tacoma to oppose Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 in a manner prohibited by RCW 42.17A.555 **because the Port's expenditures were "normal and regular" in that that they were lawful, and usual and customary.**
>
> **Recommendation**
> For the reasons described above, staff recommends that:
>
> *For Port of Tacoma Officials (John Wolfe, CEO)* the Commission find there is **no apparent violation of RCW 42.17A.555**, and recommend to the Washington Attorney General that that office take no further action with respect to this allegation in the Complaint.

PDC Staff Report to Commission, **Exhibit 5** to Dec of Lake, at page 1 & 2. Emphasis added, and See **Exhibit 6** to Dec of Lake, *PDC Commission letter to AG.*

Litigation is a "normal and regular" means employed by the Port. Public entities normally and regularly seek judicial review of ballot measure which affects them. The

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Port pursued the Declaratory Judgement action on the Initiatives as part of its normal and regular activity, because the Initiatives had the potential to impact the Port's economic development mission. Thus the Court should find that the Port's activity in pursuing the Declaratory Judgement action is exempt, not a FCPA violation, and should dismiss the AG's Complaint pursuant to CR 12 and or 56.

2.3 Even if the Port was engaging in support of or opposition to the STW Initiatives (which it was not), the Port's public meeting and vote precisely complied with RCW 42.17A.555(1)'s exception[8] to use of public office or agency facilities in campaigns.

State campaign law provides an express exception to the otherwise express prohibition on use of public office or agency facilities in campaigns. The Port meeting notice and process satisfy the RCW 42.17A.555(1)criteria; no violation occurred.

RCW 42.17A.555(1) allows an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, port

[8] RCW 42.17A.555(1): "No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:
(1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;"

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districts to express a collective positon and even vote to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition and (b) public comments pro and against are allowed and taken.

On June 18, 2016, the Port Commission held a public meeting, which it noticed in advance the Commission's intention to take up a vote to "ratify the Port's action of filing a Declaratory Judgment and Injunctive challenge of two proposed local initiatives filed with the City of Tacoma—Charter Amendment 5 and Code Initiative 6 ("Initiatives"). See Port of Tacoma Commission Agenda for June 16, 2016, **Exhibit 1** to Dec of Lake. Staff provided a Port Commission Memo which was publically available. **Exhibit 2** to Dec of Lake. The Port Commission took public comment on the matter from over 20 persons, who spoke for and primarily against the action. The Port Commission voted unanimously to ratify filing the legal action. See Minutes of June 16, 2016 Port meeting, **Exhibit 3** to Dec of Lake. The Port meeting notice and process satisfy the RCW 42.17A.555(1)criteria; no violation occurred. The PDC Staff and Commission unanimously agreed, the Attorney General is the only out layer. The AG's Complaint should be dismissed pursuant to CR 56.

2.4 Even if the Port was engaging in support of or opposition to the STW Initiatives (which it was not), no violation occurred because the STW Initiatives are not "ballot propositions" as defined in Washington law.

The Port supports and adopts by reference as if fully set forth herein the analysis submitted by the Chamber and EDB, in its Motion to Dismiss. This includes but is not

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limited to the analysis that because a "ballot proposition" is defined under RCW 42.17A.005(4) as an issue which is submitted to the secretary of state prior to the gathering of signatures (RCW 29A.72.010), a local initiative can never qualify as a "ballot proposition" as defined by RCW42. 17A.005(4). And only when the petition is submitted to the voters does it become a “measure” under RCW 29A.04.091.

Here, any expenditures at issue were made prior to a ballot initiative campaign, and were in fact related to challenging the initiation of such a campaign on the grounds that the ordinance was facially unconstitutional. If a proposed local initiative is facially beyond the local initiative power and unconstitutional, it can logically never become part of a legitimate "ballot initiative campaign." The Court should dismiss pursuant to CR 12(b)(6).

2.5 Applying Statutory Construction, Spending Funds on Declaratory Judgement Action is NOT “Use of Public Funds”

The Court should dismiss because the AG fails to state a claim upon which relief may be granted. The AG’s claims, as they relate to the Port, are:

> 3.10 The Port of Tacoma spent at least $45,000 in attorneys’ fees in conjunction with its participation in the lawsuit [concerning the STW initiatives]”.

Compl. And:

> 3.12 The funds spent by the Port of Tacoma in opposition to Charter initiative 5 and Code initiative 6 were a prohibited use of a public facility because they were to oppose Charter Initiative 5 and Code Initiative 6 by removing them from the ballot.

Id. This AG Action does not withstand even the most cursory statutory construction, because “funds” are not “public facilities”. The claims should be dismissed under the CR

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12 standard. The Port expands upon the statutory construction analysis set forth by Co-Defendants EDB and Chamber. The FCPA is plain and unambiguous as it applies to the Port. Under the plain meaning rule, the Court must enforce the statute as written and dismiss the AG's Complaint. *Food Servs. of Am. v. Royal Heights*, 123 Wn.2d 779, 784, 871 P.2d 590 (1994). Courts routinely apply the plain meaning rule to avoid interpretation of a clear and unambiguous statute. *Davis v. Dep't of Licensing*, 137 Wn 2d 957, 964, 977 P.2d 554, 556 (1999*). See also State v. Enstone*, 137 Wn. 2d 675, 680, 974 P.2d 828, 830 (1999); *State v. Chapman*, 140 Wn. 2d 436, 998 P.2d 282 (2000); *Hendrickson v. State*, 140 Wn.2d 686, 2 P.3d 473 (2000).

"If, however, the intent of the statute is not clear from the language of the statute by itself, the court may resort to statutory construction". *Id.* "Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." State v. Soto, 177 Wn. App. 706, 714, 309 P.3d 596 (Div. 3, 2013); *citing In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). *See Also Weyerhauser Co. v. Tri*, 117 Wash. 2d 128, 133-134, 814 P.2d 629, 631 (1991)). "Another well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). The legislature chose to omit "public funds" from RCW 42.17A.555, despite defining and using the term "public funds" elsewhere in the FCPA, at RCW 42.17A.550. The Court must dismiss the AG Complaint because the AG Complaint conflates "public funds" with "public facilities".

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The AG's Complaint must also be dismissed under the dictionary definition rule. "Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning". *W. Telepage v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000); *citing State v. Smith,* 117 Wn.2d 263, 271, 814 P.2d 652 (1991). "Because those terms are not defined in the statute, we turn to their ordinary dictionary meaning". *W. Telepage*, 140 Wn.2d at 609. Cases cited. Here, Merriam-Webster's online dictionary[9] defined facilities as "something (such as a building or large piece of equipment) that is built for a specific purpose". The AG points to no Port use of buildings or equipment. Instead, the AG Complaint at ¶¶ 3.10 & 12 only refers only to "funds spent" in its allegation that Port unlawfully used "public facilities". Therefore, the AG Complaint fails to satisfy the dictionary definition cannon of construction.

Specific to the Port, the legislature's choice to expressly not call out "public funds" in RCW 42.17A.555 (use of public facilities), but to expressly refer to public funds elsewhere throughout the FCPA, completely disposes of the AG's contention that public money is the same thing as "use of any of the facilities of a public agency, directly or indirectly, for the purpose of…the promotion of or opposition to any ballot proposition". Because the legislature chose *not* to prohibit the use of "public funds" to support or oppose ballot measures, and chose instead to prohibit the use of "public facilities", the

[9] http://www.merriam-webster.com/dictionary/facilities?utm_campaign=sd&utm_medium=serp&utm_source=jsonld . Accessed October 15, 2016.

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Court should enforce the statute as written and dismiss the AG Complaint for failure to state a legal claim. RCW 42.17A.555, relied upon by the AG, reads:

> No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.

Compare RCW 42.17A.555's **omission** of "public funds" to other provisions of the FCPA that **expressly address** "public funds".

> **Use of public funds for political purposes.**
> Public funds, whether derived through taxes, fees, penalties, or any other sources, shall not be used to finance political campaigns for state or school district office. A county, city, town, or district that establishes a program to publicly finance local political campaigns may only use funds derived from local sources to fund the program. A local government must submit any proposal for public financing of local political campaigns to voters for their adoption and approval or rejection.

RCW 42.17A.550. A ballot proposition is not a "political campaign for state or school district office". If the Court first buys the silly proposition that filing a lawsuit to enjoin a facially unconstitutional local ballot measure is a "political purpose", then the Court will realize that the FCPA does not actually prohibit the action the AG alleges the Port took.

The FCPA provides another important example of the treatment of "public funds" as distinct and different from "public facilities". RCW 42.17A.635 provides in part:

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> (3) Any agency, not otherwise expressly authorized by law, may expend public funds for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official[10] or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency. Public funds may not be expended as a direct or indirect gift or campaign contribution to any elected official or officer or employee of any agency. For the purposes of this subsection, "gift" means a voluntary transfer of anything of value without consideration of equal or greater value, but does not include informational material transferred for the sole purpose of informing the recipient about matters pertaining to official agency business. This section does not permit the printing of a state publication that has been otherwise prohibited by law.

Once again, "public funds" and "public agency facilities" are not the same thing.

Here, the AG Complaint alleges "The Port of Tacoma spent at least $45,000 in attorneys' fees in conjunction with its participation in the lawsuit [concerning the STW initiatives]", and "The funds spent by the Port of Tacoma in opposition to Charter initiative 5 and Code initiative 6 were a prohibited use of a public facility because they were to oppose Charter Initiative 5 and Code Initiative 6 by removing them from the ballot". The Court must enforce the statute as written, and recognize that the statute that the AG seeks to enforce, RCW 42.17A.555, omits reference to the use of public funds. As a result, the AG fails to state a claim upon which relief may be granted and this case should be dismissed pursuant to CR 12(b)(6).

2.7 The AG Action Also Fails For Lack Of Any Underlying Statewide Initiative.

In that unlikely event the Court finds that the Defendants engaged in opposing a

[10] "Elected official" means any person elected at a general or special election to any public office, and any person appointed to fill a vacancy in any such office. RCW 42.17A.005(15).

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ballot measure, then the Port expands upon Co-Defendants EDB and Chamber's correct observation that the FCPA prohibitions only apply to **statewide initiatives**.

The Port identified just two cases in which a court found that a public agency violated the FCPA. Both involved statewide initiatives. In *Herbert v. Pub. Disclosure Comm'n*, 136 Wn. App. 249, a school district employee and building union representative for the Seattle Education Association circulated blank ballot petitions for signature gathering via school email system. The underlying ballot measures were the 2004 statewide Referendum 55[11] (concerning charter school authorization) and statewide measure 884[12] (Sales tax increase for educational trust). The Court found that this action constituted use of public facilities in support of a ballot measure.

Second, in *King Cty. Council v. Pub. Disclosure Com*, 93 Wn.2d 559, 560, 611 P.2d 1227 (1980), Washington State's Supreme Court analyzed the County Council's "motion to endorse Initiative No. 335, a **statewide** anti-pornography ballot measure". Emphasized. There are no Washington cases holding that judicial review of a local initiative is a prohibited use of public facilities. This Court should reject the AG's attempt to create new law, and should dismiss pursuant to CR 12(b)(6).

2.8 Court Must Dismiss, as Statute Must Be Constructed in Favor of Defendant

A further cannon of statutory construction requires that the FCPA shall be

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[11] https://www.sos.wa.gov/elections/initiatives/statistics_referendummeasures.aspx. Accessed October 15, 2016.

[12] "This measure would create an education trust fund for smaller classes, extended learning programs, certain salary increases, preschool access, and expanded college enrollments and scholarships, funded by increasing retail sales tax by 1%". https://www.sos.wa.gov/elections/initiatives/people.aspx?y=2004. Accessed October 15, 2016.

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construed in favor of the Port. A punitive statute should "be literally and strictly construed in favor of the accused". *State v. Halsen,* 111 Wash. 2d 121, 123, 757 P.2d 531, 533 (1988). Here, the face of the AG Complaint prays for "imposition of a civil penalty". A penalty is punitive. The AG's Complaint presupposes at least the existence an underlying "ballot measure" where none exists here; presupposes that filing a lawsuit is a campaign practice to oppose a ballot measure; and also invites the Court to ignore decisional law and numerous relevant cannons of statutory construction. As to each of these issues, the Court is required to view the FCPA in the light more favorable to the Port. Therefore, construing the statute in favor of the Defendants, this Court should reject the AG's tortured interpretation of FCPA and dismiss the case.

2.9. Legal challenges to patently invalid Initiatives are <u>consistent</u> with the public purpose of Washington's Campaign laws designed to protect the integrity of the Voting process.

Here, the initiative sponsors freely exercised their rights to petition the government and speak. The Port's actions in no way interfered with signature gathering. Indeed, the Port meeting where the Port's legal action was publically noticed arguably beneficially gave the public, both for and against, an additional forum of expression, as was favorably observed by the Supreme Court in *King County Council v. PDC, Id at 1231, (*"The endorsement also served beneficial purposes, including generation of public interest and debate, informing citizens of their elected representatives' stands on the ballot issue and furtherance of *local* anti-pornography policy").

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At the same time, it must be emphasized that "[t)here is *no* First Amendment right to place an initiative on the ballot." *Angle v. Miller, 613*F.3d 1122, 1133 (9th Cir. 2012) (emphasis added) (citing *Meyer v. Grant,*486 U.S. 414, 424 (1988)).

Initiative supporters have no right to use the ballot as a forum for political expression. The purpose of the ballot is to elect candidates and enact law -not for political expression. As the U.S. Supreme Court explained in the Washington Top 2 Primary case, "[b]allots serve primarily to elect candidates, *not as forums/or political expression." Wash. Grange v. WA Republican Party,* 552 U.S. 442, 453 n.7 (2008) (emphasis added) (citation and internal quotation marks omitted).

Washington law is the same as federal law on this point. In *City of Longview v. Wallin*[13]*,* Initiative sponsors argued that they had a First Amendment right to have their initiative appear on the ballot. There, the defendant relied on *Coppernoll*[14] to argue a pre-election challenge to the scope of a local initiative violated his free speech rights. 301 P.3d at *59*. The Court rejected the argument that a pre-election challenge infringed on the sponsor's free speech rights and explained there was no constitutional right at issue. The local initiative power derives from statute, **not** the constitution, so "local powers of initiative do not receive the same vigilant protection as the constitutional powers addressed in *Coppernoll* [a statewide initiative case]." *Id.*

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[13] *City of Longview v. Wallin, 174 Wn. App. 763,* 301 P.3d 45 (Div. 2 2013), *cert denied*, 178 Wn.2d 1020 (2013).

[14] *Coppernoll v. Reed*, 155 Wn.2d 290, 299 (2005).

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The Court in *Wallin* also concluded that where, as here, "the petition sponsors were permitted to circulate their petition for signatures and to submit that petition to the county auditor *to* have the signatures counted," the sponsors suffered no impairment of their right to political speech. 301 P.3d at 60. The Court rejected the sponsors' argument that the First Amendment affords initiative sponsors the "right to have any initiative, regardless of whether it is outside the scope of local initiative power, placed on the ballot." *Id.* As in *Wallin,* including invalid initiatives on the ballot does not vindicate or protect any rights, rather it undermines the integrity of a system intended to enact laws. The Port's action in pursuing a legal determination from the neutral judicial system was not campaigning but instead was consistent with the underlying purpose of Washington campaign laws to protect the integrity of the voting process.

IV. CONCUSION.

The Port did not use public facilities for campaign purposes. Seeking judicial review is not use of public facilities for campaign purposes. The Port took no electioneering or campaign action to influence the vote on the ballot measures. The Port (1) filed a declaratory judgement lawsuit to request a neutral fact finder to make a judicial determination on the legal validity of the Initiatives, and (2) held a public Port Commission vote to ratify that action during a properly noticed, public meeting where public comment for and against was received, consistent with RCW 42.17A.555(1). The Port's legal action is consistent with the long list of legal cases in which public agencies

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have properly sought judicial review of the legal sufficiency of a proposed Initiative; in no case were these action found to violate RCW 42.17A.555.

There are no Washington cases which hold that judicial review of a local initiative is improper use of public facilities. The Court should reject the AG's attempt to create new law. In this enforcement action, the Court is required to view the FCPA in the light more favorable to the Port. Therefore, construing the statute in favor of the Defendants, this Court should reject the AG's tortured interpretation of FCPA and dismiss the case.

No public policy is offended by dismissal of this case. Including invalid initiatives on the ballot does not vindicate or protect any rights, rather it undermines the integrity of a system intended to enact laws. The Port's action in pursuing a legal determination from the neutral judicial system was not campaigning but instead was consistent with the underlying purpose of Washington campaign laws to protect the integrity of the voting process. The Port respectfully urges the Court to find that the Port did not commit a violation of the Fair Campaign Practice Act and to dismiss the Complaint.

DATED this 17th day of October, 2016.

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s/Carolyn A. Lake
s/Seth S. Goodstein
Carolyn A. Lake, WSBA # 13980
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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY; TACOMA-PIERCE COUNTY CHAMBER; JOHN WOLFE, in his official capacity as Chief Executive Officer for the Port of Tacoma; and CONNIE BACON, DON JOHNSON, DICK MARZANO, DON MEYER, and CLARE PETRICH, in their official capacities as Commissioners for the Port of Tacoma,

Defendants.

NO. 16-2-10303-6

REPLY OF DEFENDANTS IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Assigned Judge:
Hon. Ronald E. Culpepper

Hearing Date/Time:
December 9, 2016 at 1:30 p.m.
SPECIAL SET

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I. INTRODUCTION

The Attorney General ("AG") attempts to transform a lawsuit filed to determine whether a local ballot initiative was void *ab initio,* into an "election campaign." But Pierce County Superior Court Judge Jack Nevin was not a voter on July 1, 2016, and the Chamber, the EDB, and the Port were not *campaigning* to *sway* his vote. The Plaintiffs in the STW Initiative lawsuit came before a recognized court, not to persuade the judge to vote in a particular way, but rather to have him apply a set of established, published legal principles – the law – to a facially and flagrantly unconstitutional local initiative. The Plaintiffs sought a *legal* resolution to the problem they faced, not a *political* one.

The Fair ***Campaign Practices*** Act[1] applies to *political* practices, and requires disclosure of "independent expenditures" made in "support or opposition" to a "ballot proposition" in an "election campaign." Filing a legal challenge to the validity of a ballot initiative is not "opposing" the initiative in an "election campaign," and thus legal fees to prepare such a challenge are not "independent expenditures" made in an "election campaign." But the Attorney General asks this Court to distort the FCPA and the word "oppose" as used within the Act, to include filing a lawsuit. Twisting the statute in this way ignores the plain language of the Act, and is unconstitutional. The Attorney General's Response fails to address several of the constitutional infirmities outlined by Defendants, cites misleading or inapplicable cases, and inadequately addresses others.[2]

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[1] ("FCPA" or the "Act.") RCW Chapter 42.17A.

[2] In a footnote, the AG asks this Court to stay these proceedings given the pendency of *State of Washington v. Evergreen Freedom Foundation*, Washington Supreme Court No. 932328. The issue in *Evergreen* is entirely distinct from the issues in this suit and the grounds on which Defendants have moved. It is an appeal of the superior court's decision that the definition of a ballot proposition does not cover local initiatives until they are actually placed on the ballot. Defendants have not moved on any issue that turns on that question. Even if the *Evergreen* matter were sufficiently similar to the issues here, the AG has provided no authority that this Court should grant a stay of proceedings here, and has not provided this Court with any briefing in the *Evergreen* matter or described how the outcome of that decision will "have a direct bearing on this case." This Court should decline the AG's inadequately briefed and supported request for a stay. *See, e.g. Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to the record or authority will not be considered).

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II. AUTHORITY AND ARGUMENT

A. Counterstatement of Key Facts and Background

The parties agree that the purpose and underlying policy of the FCPA is that "political campaign and lobbying contributions and political expenditures be fully disclosed [and] the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private."[3] That is precisely Defendants' point. The FCPA gives the people the right to know who is financing *election campaigns.*

The AG relies on this statement of purpose of several key terms from the Act, but distorts its purpose, ignores the stated definitions, and uses them out of context. Most critically, an "election campaign" is defined at RCW 42.17A.005(17): "'Election campaign' means any campaign in support of or in opposition to a candidate for election to public office and any campaign in support of, or in opposition to, a ballot proposition." The AG plucks the term "opposition" out of this definition and tries to apply it outside the context of an election campaign. But application to a lawsuit is not a constitutionally valid application.

The AG admits the Public Disclosure Commission ("PDC") enacted rules and issued declaratory orders and interpretations to "guide participants in *elections* in Washington."[4] It fails to acknowledge, however, that *none* of these orders or interpretations hints that a legal challenge is reportable political activity, and that the PDC admitted as much in its meeting.[5] If any such interpretation or order existed, it was incumbent on the AG to identify it.[6]

The AG also neglects to mention that Judge Nevin enjoined the STW Initiatives

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[3] Quotation is from Plaintiff's Response, 2:2-13, and is virtually identical to Defendant's Motion, 8:4-22. Both cite RCW 42.17A.001, Declaration of Policy of the FCPA.

[4] Response, 6:5-6

[5] Defendants' Motion to Dismiss, 4:1-18 and Ex. 5 to Zeeck Dec.

[6] Because of the lack of clarity on this issue, the PDC recommended that no action be taken on this issue (and the other issues presented in the original citizen's action complaint) and suggested that further rulemaking be conducted.

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because they were *facially unconstitutional* and outside the scope of the initiative process, that is, they were void *ab initio*. Stated differently, ***there was no constitutionally legitimate political question for the electorate to consider in an election campaign***, and that is precisely the legal determination sought by the Chamber, EDB and Port.

The AG fails to note an additional critical fact: The legal process is already a very public one. The Washington State constitution requires that "[j]ustice in all cases shall be administered openly."[7] This guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases. *Cohen v. Everett City Council,* 85 Wn.2d 385, 388, 535 P.2d 801 (1975). "The right of access to judicial records, like the openness of court proceedings, serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process." *Republic of Philippines v. Westinghouse Elec. Corp.,* 139 F.R.D. 50, 56 (D.N.J.1991) (citing *Press–Enterprise Co. v. Superior Court,* 464 U.S. 501, 508 (1984)). Openness is presumptive. The burden of persuading the court that access must be restricted to prevent a threat to an important interest is generally on the proponent – a party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. *Dreiling v. Jain*, 151 Wn.2d 900, 917, 93 P.3d 861, 871 (2004).

All of this means the public has extensive access to court records. Pleadings identify parties and issues with great specificity. A "plain statement" of the Plaintiff's claims is required. Attorneys are identified down to their bar numbers and email addresses. Court proceedings are open. The AG has simply misunderstood and misapplied the FCPA to the filing of STW Initiative lawsuit.

Finally, the AG wastes a significant amount of argument defining a "ballot

[7] Const. art. I, § 10.

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proposition" and outlining distinctions between state and local ballot process.[8] That may be the issue in the AG's *Evergreen* case, but it is not what Defendants moved on in this case, and it is not an issue here.

B. Under well-established principles of statutory interpretation, the term "oppose" does not encompass filing a lawsuit to challenge an unconstitutional proposition.

The AG notes that the fundamental objective in statutory interpretation is determining legislative intent, and that a provision must be interpreted in the context of the entire statute, but ignores both of these mandates and instead focuses myopically on a single out of context word that it contends supports its position – the term "oppose."[9]

The decisions cited in Defendants' original motion, *as well as* the cases cited by the AG reaffirm that the purpose (and only constitutionally permissible purpose) of the FCPA is to require disclosures related to *political campaign* finances in order to inform the electorate about who is trying to sway their vote. The italicized portion of the AG's citation to *Young Americans For Freedom, Inc. v. Gorton*, 83 Wn.2d 728, 732, 522 P.2d 189, 191 (1974) aptly demonstrates this point: "Section 20 was designed not to inhibit the free expression of ideas, but *to inform the electorate of the source and sponsorship of persuasional influences which are designed to sway and procure their political interest, allegiance, and support.*" (emphasis in AG's citation, but not in original decision).[10] A lawsuit challenging an unconstitutional ballot measure is in no way an attempt to create a "persuasional influence" designed to "sway and procure [the electorates] political interest, allegiance, and support." On the contrary, a lawsuit is entirely removed from the political electoral sphere, and is

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[8] Opposition at 3:11–6:3.

[9] As both sides have agreed, the purpose of the FCPA is to require disclosure of financing related to *political campaigns*. The statute is replete with examples, but for quick reference, s*ee, e.g.*, RCW 42.17A.001(1), (10) the public policy of Washington is that political ***campaign*** and lobbying contributions and expenditures be "disclosed to the public" and that the public has a "right to know of the financing of ***political campaigns.***"); RCW 42.17A.001: The FCPA "shall be liberally construed to promoted complete disclosure of all information respecting the financing of ***political campaigns and lobbying***….").

[10] Response, 14:21-14.

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instead a request to the judiciary to determine legal rights and responsibilities based on established law.[11]

Ignoring this fundamental fact, the AG contends – with no support or analysis – that the citation above "expands to include much broader information and in a much more global sense."[12] The point the AG attempts to make is a predicate to success in this enforcement action: That the FCPA was designed to and does encompass political campaigning, *but also includes* activity as far afield as filing a lawsuit challenging the constitutionality of a ballot measure. The AG has not, and cannot, prove this proposition, and on this issue alone this lawsuit should be dismissed.

The AG's contention that the STW Lawsuit advanced "electoral political goals" is incorrect, and deeply troubling. Defendants' suit was not an attempt to sway votes, but rather to seek judicial resolution of important legal and constitutional questions through a constitutionally guaranteed mechanism: access to the Courts. Under the AG's position, any act challenging the constitutionality of a law or other government act is an *electoral political act* subject to state oversight and potential sanction for failing to adequately subject oneself to State scrutiny.

The AG's attempts to distinguish decisions relied upon by Defendants fail. The AG ignores that in *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 598, 49 P.3d 894, 902 (2002), the court explicitly equated the phrase "support or oppose" with engaging in *political* activity: "We use the phrases 'electoral political goals' and 'electoral political activity' to convey the statutory language 'support of, or opposition to, any candidate or any ballot proposition.'" *Id.* at 598 n.13. The AG ignores that in *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470,

[11] In this case, it was a request to determine whether the proposed ballot proposition 1) was even within the scope of the proposition power and 2) ran afoul of the federal and state constitutions.

[12] The AG repeatedly asserts a similar point, that the phrase "electoral political goals" is extremely broad. The AG neither supports nor explains this contention.

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166 P.3d 1174 (2007) the Court held that:

> The people have declared that it is the policy of the state of Washington that groups ***who sponsor political advertising*** must disclose their . . . expenditures. . . . [T]hese disclosure requirements . . . merely ensure that the public receives accurate information about who is doing the ***speaking***.

Id. at 498 (emphasis added). Even if a strained reading of the statute could conceivably encompass expenditures made in legal challenges to unconstitutional ballot propositions, such a strained reading would be unconstitutionally vague. As the PDC recognized that the existing rules were too vague to fault these parties, and recommended that the AG take no action. The PDC noted that further rulemaking was in order.

C. The FCPA as interpreted by the AG is unconstitutionally vague.

The AG advocates for a constitutional vagueness standard that is contrary to unambiguous Supreme Court precedent. Statutes that burden First Amendment rights are particularly vulnerable to vagueness challenges, and the United States Supreme Court has established a rigorous standard because of the chilling effect of vague laws on free speech.[13] Despite a clear and unbroken line of contrary precedent, the AG contends that it should be allowed "considerable discretion" to regulate speech, unbound by "rigorous rules" or even the contrary conclusions of the agency charged with administering the FCPA. *See* Opposition at 19:12–20:1.

In support of this extraordinary and authoritarian position, the AG relies almost exclusively on a single, inapplicable decision of the United State Supreme Court: *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). This decision, simply, has nothing to do with the contention that the regulation is unconstitutionally vague. The question in *Ward* was whether a "time, place and manner" restriction was constitutional, a First Amendment doctrine

[13] *See, e.g.*, *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 484-85, 166 P.3d 1174, 1182 (2007) ("The Supreme Court has repeatedly emphasized that where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential.").

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distinct from whether a statute that burdens speech is unconstitutionally vague. ("We granted certiorari to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech.")[14] In *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236, 1243 (10th Cir. 2002), the Tenth Circuit struck down a law regulating a local election process, and explicitly noted that the *Ward* standard was inapplicable to such substantive First Amendment challenges: "*Ward v. Rock Against Racism*, 491 U.S. 781 (1989), is not controlling. The test set forth in *Ward* is applicable to content neutral time, place, or manner regulations where strict scrutiny is inapposite."[15] When first amendment rights are implicated, the Constitution absolutely *demands* a high degree of specificity. *See, e.g.*, *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").[16]

The other decision cited by the State, *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990), in clear and unmistakable terms explained that it analyzed the standard applicable to laws ***not*** implicating First Amendment rights, and is thus not relevant here. The AG failed to bring this important point to the Court's attention. ("Vagueness challenges to enactments ***which do not involve First Amendment rights*** are to be evaluated in light of the particular facts of each case… when a challenged ordinance ***does not involve***

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[14] *See id.* at 789.

[15] *Id.* at 1242 fn. 2.

[16] Citing, *e.g.*, *Smith v. California*, 361 U.S. 147, 151; *Winters v. New York*, 333 U.S. 507, 509—510, 517—518; *Herndon v. Lowry*, 301 U.S. 242,; *Stromberg v. California*, 283 U.S. 359*; United States v. C.I.O.*, 335 U.S. 106, 142, (Rutledge, J., concurring); *Speiser v. Randall*, 357 U.S. 513, 526; *Cantwell v. Connecticut*, 310 U.S. 296, 311.

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First Amendment interests . . .").[17]

It is notable that the AG marshalled numerous PDC Declaratory Rulings and PDC Interpretations, but was not able to locate a single such authority that even implied that filing a lawsuit challenging the constitutionality of a ballot proposition was a reportable action.[18] If such documents existed, it was incumbent upon the AG to draw the Court's attention to them. The AG has not done so, the PDC made no such recommendation based on any such existing interpretation, and therefore, it must be presumed that no such authority exists.[19] Indeed, the only reasonable conclusion is that no such documents exist and that no reasonable person would infer or be on any kind of notice that the term "oppose" purportedly includes the act of filing a lawsuit challenging the constitutionality of a ballot proposition. This was the conclusion the PDC reached in recommending that the AG take no action.[20] The AG entirely ignores the PDC's acknowledgment that the Act is vague on this issue.

Additional decisions among the Circuit Courts and the United State Supreme Court abound[21] emphasizing this critical point: When the government regulates speech (especially

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[17] *Id.* at 177, 182. This decision also makes the important point that *penal* statutes have additional requirements which must be satisfied to avoid a due process challenge under the Fourteenth Amendment. Although not necessary for the resolution of the present motion, Defendants expressly reserve the right to mount a due process challenge given the penal nature of the statute at issue here. *Id.* at 178.

[18] *See* Dalton Decl. Exs. A–G, N.

[19] *See, e.g., PacifiCorp v. Washington Utilities & Transp. Comm'n*, 194 Wn. App. 571, 616, 376 P.3d 389 (2016) ("'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'") (quoting *DeHeer v. Seattle Post–Intelligencer,* 60 Wash.2d 122, 126, 372 P.2d 193 (1962).

[20] *See* Appendix 4 to Chamber's Answer at 33:11–24 (PDC Chair Anne Levinson discussing the need for rule-making to provide guidance and clarity); Dalton Decl. Ex. L (letter from PDC recommending no legal action be taken against Defendants and noting the need for "rulemaking to provide clearer guidance to the regulated community and the public.").

[21] *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603, 87 S. Ct. 675,.684, 17 L. Ed. 2d 629 (1967) ("¨We emphasize once again that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [those subject to the law] what is being proscribed. . . . The regulatory maze created by New York is wholly lacking in 'terms susceptible of objective measurement. . . . Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules."); *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760, 48 L. Ed. 2d 243 (1976) ("The general test of vagueness applies with particular force in review of laws

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when non-compliance subjects one to civil penalty, as is the case here), the government may only do so with the *utmost* clarity. The AG contends that interpreting the FCPA to apply to the act of filing a lawsuit – an outcome the PDC believes is unclear and an outcome portended by no published decision or agency interpretation – meets this strict and rigorously enforced standard. It does not.

D. The Constitutions protect against statutes that *burden* access to the Courts, not only those that *deny* access to the Courts.

The AG's apparent position is that only laws that actually *prevent* access to the Courts can *burden* the constitutional right to access the Courts.[22] This is not the law. Just as campaign finance disclosure laws *burden* speech[23] without necessarily stopping any individual from speaking, laws may *burden* the right to access the courts without literally closing the courthouse doors. The constitutional question is whether a law *burdens*, not denies access to the Courts. As the AG did not address, Defendants have described in detail how the AG's interpretation of the FCPA *burdens* access to the Courts. *See* Motion at 17:11–18:2. Moreover, the burden is aptly demonstrated by the AG's actions in this lawsuit. Defendants here filed a lawsuit (with no prior knowledge or reasonable opportunity to understand that such action would require them to file a report) challenging an unconstitutional ballot proposition, and the AG now seeks to punish[24] Defendants for exercising their right to access the Courts without subjecting their finances to State oversight.

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dealing with speech. Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. . . . [W]e conclude that Ordinance No. 598A must fall because in certain respects men of common intelligence must necessarily guess at its meaning.") (emphasis added)

[22] *See* Opposition at 17:4–5 ([T]hey never identify how such a filing actually prevents access. In fact, it does not") (Emphasis added).

[23] Such burden does not necessarily render a campaign disclosure laws unconstitutional, but rather subjects the law to exacting scrutiny.

[24] The enforcement provision of the FCPA is penal in nature, and the AG has in fact requested that this court "grant summary judgment in favor of the AG and proceed to consideration of a penalty against the Board and Chamber." Opposition at 22:23-24.

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The AG's reliance on *Doe v. Reed*, 561 U.S. 186 (2010) and *Human Life of Washington, Inc.*, 624 F.3d 990 (9th Cir. 2010) is misplaced. These decisions have no relevance to whether the FCPA burdens the right to access the courts, and in fact do not even mention this right. These decisions relate to whether campaign finance laws survive "exacting scrutiny." It is telling that in footnote 11 the AG notes that "nationwide, no cases could be found that tie the right to access the courts with any campaign finance laws." There are apparently *no* published decisions in the United States in which a state has attempted to enforce their campaign finance laws against or otherwise utilize their police powers to sanction litigants who have exercised their constitutional rights to access the courts to challenge unconstitutional ballot measures.

E. The AG fails to carry its burden of establishing that the FCPA survives exacting scrutiny.

The AG gives short shrift to the "exacting scrutiny" analysis in the decisions it cites, and so fails to reckon with the fact that the requisite governmental interest in *every* decision cited by the AG entirely absent here. "The State bears the burden of establishing that such a law furthers a substantial governmental interest and is not outweighed by the burden on political speech." *State ex rel. Washington State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 282, 150 P.3d 568 (2006).

While Courts have upheld portions of the FCPA under the exacting scrutiny standard, they have only done so after analyzing the substantial governmental interest and the actual burden on speech. As the AG notes, the Ninth Circuit upheld a portion of the FCPA in *Family PAC v. McKenna*, 685 F.3d 800, 808 (9th Cir. 2012). The Ninth Circuit has noted that the Supreme Court has recognized only three sufficiently important governmental interests in the context of campaign finance laws. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009). Of these, *only* one is even arguably applicable to the FCPA: an informational interest allowing the electorate to give proper

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weight to different speakers and messages:

> Disclosure enables the electorate to give proper weight to different speakers and messages, by providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. The money in ballot measure campaigns produces a cacophony of political communications through which voters must pick out meaningful and accurate messages. Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, we think being able to evaluate who is doing the talking is of great importance. . . . Washington's disclosure requirements therefore serve a strong governmental interest.

Family Pac, 685 F.3d at 808–09 (9th Cir. 2012) (emphasis added).[25] These interests serve to inform the electorate regarding the different political messages competing for their attention so that they may make informed political choices. This interest is *entirely absent* here, as a lawsuit is not one of the messages vying for a citizen's attention in an attempt to sway their vote. On the contrary, a lawsuit seeks a legal – not a political – resolution of a problem by applying the law to a set of facts.

Further, any informational interest is significantly weakened in the context of litigation. Given the public nature of court proceedings, any possible informational interest is substantially weakened.[26] This is in stark contrast to the salutary purpose of FCPA requirements associated with political communication, without which the public might have no knowledge of who financed or created the messages.

F. This Court should rely on the doctrine of constitutional avoidance to reject the AG's constitutionally infirm interpretation of the FCPA.

The AG fails to mention or address the doctrine of constitutional avoidance, and

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[25] *see also Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) ("[D]isclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention. . . . [I]n the cacophony of political communications through which [Washington] voters must pick out meaningful and accurate messages[,] being able to evaluate who is doing the talking is of great importance. . . . . Individual citizens seeking to make informed choices in the political marketplace need to know what entity is funding a communication. . . . Campaign finance disclosure requirements thus 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.").

[26] *See infra* at 3:4–24.

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instead contends (incorrectly) that there exists some reading of the FCPA and some reading of case law that permits the AG to levy a sanction against Defendants for filing a lawsuit challenging an unconstitutional ballot proposition. As discussed, any such interpretation of the FCPA is unconstitutional in that, *inter alia*, such a reading would render the statute unconstitutionally vague and such a reading does not survive exacting scrutiny. In order to avoid these constitutionally murky waters, the Court should employ the doctrine of constitutional avoidance and reject the constitutionally suspect interpretation advanced by the AG. *See, e.g.*, *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972). The Court should instead embrace a reading of the statute which is free from constitutional defect and most consistent with the plain meaning and purpose of the FCPA, *i.e.*, that the phrase "support or oppose" pairs with the defined term "election campaign," and includes political communication with the electorate, but the phrase does *not* encompass the act of filing a lawsuit challenging the constitutionality of a ballot proposition.

III. CONCLUSION

Defendants ask this Court to rely on the doctrine of constitutional avoidance and interpret the statute at issue here to avoid the 'constitutionally murky waters' the AG seeks to wade into. If it cannot, then the Constitutional issues must fully and soundly defeat the AG's interpretation of the FCPA. Defendants also request attorneys' fees pursuant to RCW 42.17A.765(5).

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