

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

The Honorable Barbara J. Rothstein

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

INSTITUTE FOR FREE SPEECH, a
Virginia non-profit corporation,

Plaintiff,

v.

FRED JARRETT, in his official and
personal capacities as Chair of the
Washington Public Disclosure
Commission; NANCY ISSERLIS, in her
official capacity as Vice-Chair of the
Washington Public Disclosure
Commission; WILLIAM DOWNING, in
his official and personal capacities as a
member of the Washington Public
Disclosure Commission; RUSSELL
LEHMAN, in his personal capacity as a
former member of the Washington Public
Disclosure Commission; PETER
LAVALLEE, in his official capacity as
Executive Director of the Washington
Public Disclosure Commission; and
ROBERT FERGUSON, in his official
capacity as Washington's Attorney
General,

Defendants.

NO. 3:21-cv-05546 BJR

ANSWER TO PLAINTIFF'S
COMPLAINT
AND AFFIRMATIVE DEFENSES

1 **I. GENERAL DENIALS**

2 Defendants Fred Jarrett, in his official and personal capacities as Chair of the Washington
 3 Public Disclosure Commission; Nancy Isserlis, in her official capacity as Vice-Chair of the
 4 Washington Public Disclosure Commission; William Downing, in his official and personal
 5 capacities as a member of the Washington Public Disclosure Commission; Peter Lavallee, in his
 6 official capacity as Executive Director of the Washington Public Disclosure Commission; and
 7 Robert Ferguson, in his official capacity as Washington's Attorney General (collectively,
 8 Defendants) by and through their attorneys, Attorney General Robert W. Ferguson, Deputies
 9 Solicitor General Tera M. Heintz and Karl D. Smith, and Assistant Attorney General S. Todd
 10 Sipe, hereby answers Plaintiff's Complaint Under Fed. R. Civ. P. 57.¹ Except as herein expressly
 11 admitted or qualified, Defendant denies each and every allegation, statement, or charge
 12 contained in the Complaint, and deny that Plaintiff is entitled to any of the relief requested.

13 **II. INTRODUCTION**

14 Defendants admit that the first two paragraphs accurately quote Washington Rule of
 15 Professional Conduct 6.1 and the Pro Bono Washington FAQs website. Defendants admit that
 16 this this Court's General Order 10-05 adopted an amended plan for representation of pro se
 17 litigants in civil rights actions. Defendants admit that Institute for Free Speech (IFS) petitioned
 18 the Public Disclosure Commission (PDC) for a declaratory order. Defendants lack sufficient
 19 knowledge to admit or deny that Tim Eyman would retain the IFS to represent him in his appeal
 20 of a judgment finding multiple campaign finance violations. Defendants lack sufficient
 21 knowledge to admit or deny the alleged reasons for IFS's decision to refrain from providing
 22 Tim Eyman legal services. The remainder of this section consists of legal allegations, arguments,
 23 conclusions, and characterizations to which no response it required. Insofar as a response is
 24 required, the allegations are denied.

25 _____
 26 ¹ Defendant Russell Lehman, who is sued in his personal capacity as a former member of the Washington
 Public Disclosure Commission, is separately represented. This answer is not submitted on his behalf.

1 **III. JURISDICTION AND VENUE**

2 1. This paragraph asserts legal conclusions to which no response is required. To the
3 extent a response is required, the allegations are denied.

4 2. Defendants admit that the PDC and the Attorney General’s Office have their
5 principal place of business in Olympia, Thurston County, Washington.

6 3. Defendants admit that Defendants reside in this judicial district. To the extent a
7 further response is required, the remainder of Paragraph 3 is denied. Defendants admit that venue
8 is proper in this Court.

9 **IV. PARTIES**

10 4. Defendants admit that IFS is a tax-exempt organization under Section 501(c)(3)
11 of the Internal Revenue Code. Defendants are without information sufficient to form a belief as
12 to the truth of the remaining allegations in Paragraph 4, and therefore deny the same.

13 5. Defendants admit that Fred Jarrett is the Chair of the PDC. Defendants admit that
14 Fred Jarrett is being sued in his personal and official capacity. Defendants admit that Fred Jarrett
15 voted in favor of the Declaratory Order No. 18 issued in In re: the Institute for Free Speech. The
16 remainder of Paragraph 5 asserts legal conclusions to which no response is required. To the
17 extent a response is required, the allegations are denied.

18 6. Defendants admit that Nancy Isserlis is the Vice Chair of the PDC and that she
19 voted against of the Declaratory Order No. 18 issued in In re: the Institute for Free Speech.
20 Defendants admit that Nancy Isserlis is being sued in her official capacity only. The remainder
21 of Paragraph 6 asserts legal conclusions to which no response is required. To the extent a
22 response is required, the allegations are denied.

23 7. Defendants admit that William Downing is being sued in his personal and official
24 capacity and that he is a member of the PDC. Defendants admit that William Downing voted in
25 favor of the Declaratory Order No. 18 issued in In re: the Institute for Free Speech. The
26

1 remainder of Paragraph 7 asserts legal conclusions to which no response is required. To the
2 extent a response is required, the allegations are denied.

3 8. Defendants admit that Russell Lehman is being sued in his personal capacity only
4 and that he is a former member of the PDC. Defendants admit that Russell Lehman voted in
5 favor of the Declaratory Order No. 18 issued in In re: the Institute for Free Speech. The
6 remainder of Paragraph 8 asserts legal conclusions to which no response is required. To the
7 extent a response is required, the allegations are denied.

8 9. Defendants admit that Peter Lavallee is being sued in his official capacity as
9 executive director of the PDC. The remainder of Paragraph 9 asserts legal conclusions to which
10 no response is required. To the extent a response is required, the allegations are denied.

11 10. Defendants admit that Robert Ferguson is being sued in his official capacity as
12 Washington State Attorney General. Defendants admit that the Attorney General's Office is
13 representing the State in *State v. Eyman*, Thurston County Cause No. 17-2-01546-34, and on
14 appeal. The remainder of Paragraph 10 asserts legal conclusions to which no response is
15 required. To the extent a response is required, the allegations are denied.

16 V. FACTS AND BACKGROUND

17 11. Defendants admit that Tim Eyman has been involved in Washington politics for
18 over two decades. The remaining allegations are either legal allegations, arguments, conclusions,
19 and characterizations to which no response is required, or defendants are without information
20 sufficient to form a belief as to the truth of the remaining allegations in Paragraph 11, and
21 therefore denies the same.

22 12. Defendants admit the PDC completed an investigation related to Mr. Eyman and
23 referred the matter to the Attorney General's Office in 2015. Defendants admit that the Attorney
24 General's Office filed an enforcement action against Mr. Eyman in the Superior Court of the
25 State of Washington for Thurston County and that it was assigned cause number
26 17-2-01546-34.

1 13. Defendants admit that the Superior Court of the State of Washington for Thurston
2 County entered an order entitled COURT’S FINDINGS OF FACT AND CONCLUSIONS OF
3 LAW AND INJUNCTION. Defendants deny that it was entered on February 21, 2021.
4 Defendants admit that the order states that “Defendant Eyman is a continuing political
5 committee.” The remainder of Paragraph 13 asserts legal conclusions to which no response is
6 required. To the extent a response is required, the allegations are denied.

7 14. Defendants admit that the injunction referenced in the above paragraph requires
8 that “Eyman shall report, in compliance with the FCPA, any gifts, donations, or any other funds
9 Defendant Eyman receives directly or indirectly unless the funds are (1) segregated and used
10 only to pay for legal defense[.]” Defendants admit that the findings in the superior court’s order
11 do not expressly mention the term “pro bono legal services.” The remainder of Paragraph 14
12 asserts legal conclusions to which no response is required. To the extent a response is required,
13 the allegations are denied.

14 15. Defendants admit that the Superior Court of the State of Washington for Thurston
15 County entered its JUDGMENT AGAINST TIM EYMAN AND TIM EYMAN, WATCHDOG
16 FOR TAXPAYERS on April 16, 2021, under cause number 17-2-01546-34.

17 16. Defendants admit that the Superior Court of the State of Washington for Thurston
18 County entered an order under cause number 17-2-01546-34 entitled ORDER DENYING
19 DEFENDANT EYMAN’S MOTION FOR RECONSIDERATION on June 15, 2021. The
20 remainder of Paragraph 16 asserts legal conclusions to which no response is required. To the
21 extent a response is required, the allegations are denied.

22 17. Defendants admit that on July 16, 2021, Tim Eyman filed a document entitled
23 ERRATA¹ NOTICE OF APPEAL TO THE SUPREME COURT OF WASHINGTON under
24 cause number 17-2-01546-34.

25 18. Defendants are without information sufficient to form a belief as to the truth of
26 the allegations in Paragraph 18, and therefore denies the same. The remainder of Paragraph 18

1 asserts legal conclusions to which no response is required. To the extent a response is required,
2 the allegations are denied.

3 19. Defendants are without information sufficient to form a belief as to the truth of
4 the allegations in Paragraph 19, and therefore denies the same. The remainder of Paragraph 19
5 asserts legal conclusions to which no response is required. To the extent a response is required,
6 the allegations are denied.

7 20. Defendants are without information sufficient to form a belief as to the truth of
8 the allegations in Paragraph 20, and therefore denies the same. The remainder of Paragraph 20
9 asserts legal conclusions to which no response is required. To the extent a response is required,
10 the allegations are denied.

11 21. Defendants admit that IFS has not represented Mr. Eyman under cause number
12 17-2-01546-34. Defendant is without information sufficient to form a belief as to the truth of the
13 allegations in Paragraph 21, and therefore denies the same.

14 22. Defendants admit that there was an action involving the Institute for Justice's
15 representation of a recall campaign. Defendants admit that the PDC asserted in that litigation
16 that the provision of *pro bono* legal services was a reportable in-kind contribution. The remainder
17 of Paragraph 22 asserts legal conclusions to which no response is required. To the extent a
18 response is required, the allegations are denied.

19 23. Defendants admit that Paragraph 23 accurately quotes from the Superior Court of
20 the State of Washington for Pierce County's ORDER GRANTING PLAINTIFF'S MOTION
21 FOR SUMMARY JUDGMENT under cause number 13-2-10152-7.

22 24. Defendants admit that the State did not appeal from the Superior Court of the
23 State of Washington for Pierce County's ORDER GRANTING PLAINTIFF'S MOTION FOR
24 SUMMARY JUDGMENT under cause number 13-2-10152-7.

25 25. Defendants admit that, as part of a stipulation entered into with a recall campaign,
26 "the PDC recognized that pro bono legal services rendered by Oldfield & Helsdon, PLLC to

1 RDW after the December 16, 2010, hearing with regard to assisting RDW with the Supreme
2 Court appeal by Dale Washam do not constitute a contribution as defined in RCW §
3 42.17.020(15)(c).” *Farris v. Seabrook*, 2012 WL 5410072 (W.D. Wash. 2012) (internal
4 quotation omitted). The remainder of Paragraph 25 asserts legal conclusions to which no
5 response is required. To the extent a response is required, the allegations are denied.

6 26. Defendants admit that counsel for IFS emailed the counsel for the State in *State*
7 *v. Eyman*, cause number 17-2-01546-34, on April 12, 2021. Defendants are without information
8 sufficient to form a belief as to the truth of the remaining allegations in Paragraph 26, and
9 therefore denies the same. The remainder of Paragraph 26 asserts legal conclusions and
10 characterizations to which no response is required. To the extent a response is required, the
11 allegations are denied.

12 27. Defendants admit that counsel for the State in *State v. Eyman*, cause number
13 17-2-01546-34, responded to counsel for IFS on April 14, 2021. Defendants admit that this
14 response (1) encouraged counsel for IFC to seek guidance from the Public Disclosure
15 Commission, (2) declined to postpone entry of judgment, and (3) did not address whether the
16 State would stipulate to modification of the order of the Superior Court of the State of
17 Washington for Thurston County.

18 28. Paragraph 28 consists of legal conclusions and characterizations to which no
19 response is required. To the extent a response is required, the allegations are denied.

20 29. Defendants admit that IFS submitted to the PDC a Verified Petition for Expedited
21 Declaratory Order on April 21, 2021. The remainder of Paragraph 29 consists of legal
22 conclusions and characterizations to which no response is required. To the extent a response is
23 required, the allegations are denied.

24 30. Defendants admit that Paragraph 30 accurately quotes a portion of IFS’s Verified
25 Petition for Expedited Declaratory Order.
26

1 31. Defendants admit that the PDC considered the IFS petition on May 27, 2021.
2 Defendants admit that PDC's general counsel presented the PDC staff's assessment and that the
3 assessment took the position that providing legal services to Tim Eyman as an individual would
4 not be a reportable contribution. Defendants admit that the PDC's general counsel did not opine
5 regarding the legal effect of the superior court order. Defendants admit that the PDC's general
6 counsel recommended against taking a position on the interpretation of the superior court order
7 and against reaching the issue of services provided to Mr. Eyman as a political committee, as
8 that would be a matter for the superior court. Defendants admit that the PDC's general counsel
9 advised against taking a position on whether IFS would be considered to be an incidental
10 committee or political committee in certain hypothetical situations. The remainder of Paragraph
11 31 consists of legal conclusions and characterizations to which no response is required. To the
12 extent a response is required, the allegations are denied.

13 32. Defendants admit that, during the hearing, the PDC's general counsel questioned
14 whether, in certain hypothetical situations, it was possible that IFS could be deemed an incidental
15 committee required to register and report, but took the position that the PDC should not address
16 such hypotheticals in the declaratory order process to give a wide berth to superior court's
17 jurisdiction. Defendants are without information sufficient to form a belief as to the truth of the
18 remaining allegations in Paragraph 32, and therefore deny the same.

19 33. Defendants admit that counsel for IFS appeared before the PDC via a video
20 platform and presented argument regarding the petition. Defendants admit that counsel for IFS
21 used the phrase "elephant in the room." Defendants admit that IFS asked that the PDC opine on
22 whether Mr. Eyman would have to report IFS's legal services to the PDC.

23 34. Defendants admit that counsel for IFS suggested the language quoted in
24 Paragraph 34, with the exception of several non-material wording differences, and that the
25 declaratory order does not include that language. Defendants are without information sufficient
26

1 to form a belief as to the truth of the remaining allegations in Paragraph 34, and therefore deny
2 the same.

3 35. Defendants admit that then-Commissioner Lehman spoke the phrase quoted in
4 Paragraph 35, though the paragraph omits and mischaracterizes the context of his statement. The
5 remainder of Paragraph 35 consists of legal conclusions and characterizations to which no
6 response is required. To the extent a response is required, the allegations are denied.

7 36. Defendants admit that the PDC voted in favor of a declaratory order and that
8 Commissioner Isserlis voted against the proposed order. The remainder of Paragraph 36 consists
9 of legal conclusions and characterizations to which no response is required. To the extent a
10 response is required, the allegations are denied.

11 37. Defendants admit that the PDC issued its declaratory order on June 9, 2021.

12 38. Paragraph 38 consists of legal conclusions and characterizations to which no
13 response is required. To the extent a response is required, the allegations are denied.

14 39. Defendants admit that Paragraph 39, with the exception of an alteration to the
15 capitalization of a word and the non-italicization for “*pro bono*,” accurately quotes, in part, the
16 Commission’s declaratory order.

17 40. Paragraph 40 consists of legal conclusions and characterizations to which no
18 response is required. To the extent a response is required, the allegations are denied.

19 41. Defendants admit the averment in Paragraph 41.

20 42. Defendants deny the averment in Paragraph 42.

21 43. Defendants admit that the declaratory order did not note Commissioner Isserlis’s
22 no vote and did not include a dissenting opinion. Defendants deny that the declaratory order
23 “omitted a dissenting opinion” in any other sense.

24 44. Defendants deny the averments in Paragraph 44.

25 45. Paragraph 45 consists of legal conclusions and characterizations to which no
26 response is required. To the extent a response is required, the allegations are denied.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

46. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 46, and therefore deny the same.

COUNT I

47. Defendants reallege and incorporate by reference their responses to Paragraphs 1 through 46.

48. Paragraph 48 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

49. Paragraph 49 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

50. Paragraph 50 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

51. Paragraph 51 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

52. Paragraph 52 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

53. Paragraph 53 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

54. Paragraph 54 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

55. Paragraph 55 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

COUNT II

56. Defendants reallege and incorporate by reference their responses to Paragraphs 1 through 55.

57. Paragraph 57 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

58. Paragraph 58 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

59. Paragraph 59 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

60. Defendants deny the averment in Paragraph 60.

61. Paragraph 61 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

62. Paragraph 62 consists of legal conclusions and characterizations to which no response is required. To the extent a response is required, the allegations are denied.

VI. PRAYER FOR RELIEF

In response to Plaintiff's Prayer for Relief, Defendants deny Plaintiff is entitled to the relief sought or any other relief.

VII. AFFIRMATIVE DEFENSES

Defendant's affirmative defenses to the Complaint are set forth below. By setting forth the following defenses, Defendant does not assume the burden of proof on the matter and issue other than those on which they have the burden of proof as a matter of law.

1. Defendants are immune from suit, in whole or in part, under the Eleventh Amendment to the U.S. Constitution.

2. Plaintiff's damages claims are barred by sovereign immunity.

3. Defendants Jarrett and Downing, in their individual capacities, are entitled to qualified immunity, in whole or in part.

1 4. Defendants are entitled to quasi-judicial immunity, quasi-judicial prosecutorial
2 immunity, and/or legislative immunity.

3 5. Plaintiff lacks standing.

4 6. Plaintiff's claims are moot.

5 7. Plaintiff's claims are unripe.

6 8. This case is non-justiciable.

7 9. This Court lacks subject matter jurisdiction.

8 10. Plaintiff has failed to state a claim upon which relief may be granted.

9 11. The *Younger*, *Pullman*, and/or *Rooker-Feldman*² abstention doctrines warrant a
10 stay or dismissal of the case.

11 12. Plaintiff has failed to join a necessary party.

12 13. Plaintiff has failed to exhaust administrative remedies.

13 Defendants reserve the right to supplement these defenses and assert additional defenses
14 and affirmative defenses as established by the facts of the case.

15 VIII. NO WAIVER

16 Defendants by their responses and omissions herein waive no burden of proof,
17 presumptions, nor any other legal characterizations to which they may otherwise be entitled, and
18 expressly reserve the right to assert such.

19 IX. DEFENDANTS' REQUEST FOR RELIEF

20 Wherefore, Defendants pray that the Court:

21 1. Dismiss Plaintiff's Complaint with prejudice;

22 2. Deny all relief that Plaintiff requests;

23 3. Grant Defendants costs and reasonable attorney fees; and

24
25
26

² *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Younger v. Harris*, 401 U.S.
37 (1971); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Rooker v. Fidelity Trust Co.*, 263
U.S. 413 (1923).

1 4. Grant Defendants such other and further relief as the Court may deem just and
2 proper.

3 DATED this 30th day of August 2021.

4 ROBERT W. FERGUSON
 Attorney General

5 *s/ Tera M. Heintz*
6 TERA M. HEINTZ, WSBA No. 54921
 Tera.Heintz@atg.wa.gov

7 *s/ Karl D. Smith*
8 KARL D. SMITH, WSBA No. 41988
 Karl.Smith@atg.wa.gov
 Deputy Solicitors General

9 *s/ Todd Sipe*
10 TODD SIPE, WSBA No. 23203
 Todd.Sipe@atg.wa.gov
 Assistant Attorney General

11 PO Box 40100
12 Olympia, WA 98504-0100
13 360-753-6200

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF system which will serve a copy of this document upon all counsel of record.

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

DATED this 30th day of August 2021, at Olympia, WA.

s/ Stacey McGahey
STACEY MCGAHEY
Legal Assistant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26