No. 22-35112

# In the United States Court of Appeals for the Ninth Circuit

INSTITUTE FOR FREE SPEECH,

*Plaintiff-Appellant*,

v.

FRED JARRETT, ET AL.,

*Defendants-Appellees*.

Appeal from a Judgment of the United States District Court
for the Western District of Washington, The Hon. Barbara J. Rothstein
(Dist. Ct. No. 3:21-cv-05546-BJR)

## PLAINTIFF-APPELLANT'S OPENING BRIEF

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April 8, 2022

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## DISCLOSURE STATEMENT

Counsel certifies that the Institute for Free Speech is a nonprofit corporation, has no parent company and that no publicly held company owns more than 10 percent of its stock.

*s/Endel Kolde*
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## INTRODUCTION

Washington state officials do not appreciate the targets of their enforcement actions having access to free public-interest lawyers. After all, it's easier to beat individuals into submission when they must foot the bill for their defense and are limited to the private market for legal services. Or better yet, face the state as a pro se. But unlike other litigants who would prefer to see their adversaries deprived of counsel, Washington officials believe they can do something about it: construe the provision of pro bono legal services as campaign contributions and threaten public interest lawyers with unacceptable disclosure and reporting regimes for defending the First Amendment rights of people charged with violating the state's Byzantine campaign finance regime.

Washington's threatening posture violates the First Amendment, which has long been understood to secure the right to associate with others in litigating for social change. *See NAACP v. Button*, 371 U.S. 415 (1963). The problem is a recurring one in Washington, and it is time to address it, here.

The Institute for Free Speech (IFS) wishes to represent tax-activist Tim Eyman in a state court appeal of a campaign-finance enforcement action brought by the Washington State Attorney General's Office (AGO). In that action, the AGO persuaded the state court to designate Eyman, an individual, to be a one-man continuing political committee. IFS reasonably fears that providing Eyman pro bono legal services

under these circumstances could be considered an in-kind contribution under the Washington Fair Campaign Practices Act (FCPA), triggering intrusive registration and reporting requirements that are wholly unacceptable to it and its donors. As a result, IFS requested guidance from the AGO and Washington Public Disclosure Commission (PDC) clarifying the state's posture as to its planned representation of Eyman. Both refused to give IFS a definitive answer, causing IFS to self-censor and decline to represent Eyman.

IFS brought suit for declarative and injunctive relief, and nominal damages; but the district court glossed over the government's serial evasions and erroneously dismissed the case for lack of standing. Standing exists because the state's disclosure regime arguably reaches IFS's intended pro bono representation of Eyman. IFS must accordingly refrain from representing Eyman—especially as the state has a history of applying its laws in this fashion, and Defendants have refused to expressly disavow such enforcement against IFS.

IFS is also entitled to summary judgment because the disclosure and reporting regime's application in this situation fails exacting scrutiny and burdens the right to speak and associate for purposes of pro bono litigation without government intrusion. It also impermissibly discriminates against IFS's speech on the basis of content, and is unduly vague.

## STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as the dispute arises under the United States Constitution.

(b) Plaintiff IFS appeals from the district court's order denying its motion for summary judgment and granting Defendants' motion for summary judgment, as well as the judgment against IFS. ER-3–16. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

(c) The order and judgment appealed from were entered on February 7, 2022. ER-16. Plaintiff filed its notice of appeal from that order and judgment on February 7, 2022. ER-171–173. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

## STATEMENT OF ISSUES

1. Whether IFS has standing to bring a pre-enforcement challenge against the FCPA's reporting and disclosure regime where government officials fail to expressly disavow the regime's enforcement against IFS should it follow through on its intent to provide pro bono legal services?

2. Whether standing exists for a pre-enforcement challenge against the FCPA's reporting and disclosure regime where the regime's plain text, and that of a related administrative regulation, contain language that inherently threatens enforcement against the complaining party?

3. Whether the FCPA's reporting and disclosure regime fails exacting scrutiny as applied to pro bono legal services provided in a defense posture in a campaign-finance enforcement action against a de jure one-man continuing political committee who is litigating, not campaigning?

4. Whether the FCPA's reporting and disclosure regime fails strict scrutiny because it is a content-based regulation that favors the provision of free legal services to some political entities, but not others?

5. Whether the FCPA's reporting and disclosure regime is unduly vague because it does not provide sufficient notice for pro bono legal service providers?

## STATEMENT OF ADDENDUM

Pertinent statutes and administrative code provisions are included in an addendum below.

## STATEMENT OF THE CASE

*1. The regulatory regime*

Washington's FCPA contains definitions of "contributions" and "expenditures" that can be plausibly read to apply to the proposed provision of free legal services to an individual who is also a "continuing political committee." *See* RCW 42.17A.005(15) and (22). The plain text of the FCPA's definition of "contribution" includes gifts and anything of value, including professional services for less than full consideration. RCW 42.17A.005(15). "Services or property or rights furnished at less

than their fair market value for the purpose of assisting any candidate or political committee are deemed a contribution. Such a contribution must be reported as an in-kind contribution at its fair market value and counts towards any applicable contribution limit of the provider." RCW 42.17A.005(15)(c). Similarly, the plain text of the FCPA's definition of "expenditure" covers both a "contribution" and a "gift of money or anything of value." RCW 42.17A.005(22).

These definitions' enabling regulation, WAC 390-17-405, warns plainly that neither the FCPA nor the WAC "authorizes the services of an attorney…to be provided to a political committee without a contribution ensuing, unless the political committee is a candidate's authorized committee, political party or caucus political committee… or unless the political committee pays the fair market value of the services rendered."

These provisions, read together, stand for the proposition that pro bono litigation defense services provided to a "continuing political committee" are reportable contributions or expenditures. In addition, Washington authorities have already enforced FCPA reporting of pro bono legal services.

*2. Defendants enforce the FCPA against pro bono legal service providers*

The PDC has a history of aggressively enforcing the FCPA with respect to pro bono legal services. ER-169, ER-153–154; *State v.*

*Evergreen Freedom Found.*, 192 Wn.2d 782, 786 (2019) (pro bono legal services, which Evergreen Freedom Foundation provided to initiative proponents, were reportable to the PDC under the FCPA).

Of even greater concern to IFS, in an action involving the non-profit Institute for Justice's (IJ) representation of a recall campaign, the PDC asserted that the provision of pro bono legal services was a reportable in-kind contribution, essentially making IJ's legal services subject to the FCPA and characterizing IJ as a campaign contributor. ER-153–154. That litigation resulted in the Pierce County Superior Court ruling in favor of IJ and finding that the State's

> treatment of free legal assistance to a political committee in a federal civil rights lawsuit as a "contribution," as that term is defined in RCW 42.17A.005(13), is unconstitutional under the U.S. Constitution. Defendants are permanently enjoined from applying any cap on the amount of free legal services a political committee may receive in a federal civil rights case. Defendants are also permanently enjoined from requiring Recall Dale Washam or any other political committee to report free legal services provided by the Institute for Justice, Oldfield & Helsdon PLLC, or any other attorney in a federal civil rights lawsuit as a campaign contribution.

ER-153, ER-113–115.[1]

The state did not appeal this order, and, to IFS's knowledge, the Commission has not published any guidance indicating that it agrees with that court's interpretation. ER-153.

[1] The FCPA's definition of "contribution" was previously codified in subsection (13) of RCW 47.17A.005.

*3. The Institute for Free Speech Intends to Represent Eyman*

Plaintiff IFS, a nonprofit 501(c)(3) corporation, promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education. *See* ER-151. As such, IFS takes on legal cases that impact free speech rights—and only on a pro bono basis. *Id*. The State of Washington's litigation against Mr. Eyman for alleged FCPA violations raises many important legal issues relevant to IFS's mission of defending free speech. *Id.*

Given the restrictions imposed on Mr. Eyman's ability to participate in the political process in Washington state, as well as the large fines, IFS has an interest in representing him in the appeal of the enforcement action. ER-168–169. IFS's mission includes the representation of individuals whose free expression rights under the U.S. Constitution are violated by government laws or actions, especially in the area of political speech. *Id*. IFS has not represented Mr. Eyman (or his bankruptcy estate) to date, but would represent him in an appeal if the FCPA does not apply to the provision of pro bono legal services of the kind that would be provided in the state-court appeal. *Id*. If IFS were to represent Eyman in an appeal, it expects that the fair market value of its pro bono services would exceed $25,000 per year, while the appeal or possible remands continue. *Id*. Unsurprisingly, Mr. Eyman

has indicated that he would eagerly accept IFS's offer of free legal services, if offered. ER-18.

*3. The state brands Tim Eyman as a committee*

Tim Eyman is a well-known public figure in Washington State, having been a fixture on the state's political scene for over two decades. *Id*. In 2015, the PDC completed an investigation into Eyman and referred the matter to the AGO, who filed an enforcement action against Eyman in Thurston County Superior Court bearing Cause Number 17-2-01546-34 ("enforcement action"). ER-151–152. Eyman was an unrepresented *pro se* party for part of the case. ER-18. On September 13, 2019, as a discovery sanction and on the government's motion for partial summary judgment, the state court found Eyman to be a "continuing political committee" under the FCPA. ER-136.

On February 21, 2021, the state court entered its findings and an injunction against Eyman. ER-152, ER-117–148. Among other things, the findings and conclusions again designate Eyman to be a "continuing political committee" and restrict his rights to be involved in Washington's political process. ER-136–137, ER-146–148. In addition, the court's injunction requires that "Eyman shall report, in compliance with the FCPA, any gifts, donations, or any other funds Defendant Eyman receives directly or indirectly unless the funds are (1) segregated and used only to pay for legal defense[.]" ER-146.

The order's operative language finding Eyman to be a "continuing political committee" and requiring him to report contributions as ordered was originally proposed by the government's attorneys on January 6, 2021. ER-54–55, ER-64–65, ER-67. The state court adopted the government's proposed language on these issues verbatim.

Neither the government's proposed order, nor the state court's actual order, explicitly mention pro bono legal services; nor do they address any potential FCPA obligations on the part of those who donate legal-defense funds or provide pro bono legal services to Eyman.

On April 16, 2021, the Thurston County Superior Court entered final judgment against Eyman, including fines in excess of $2.6 million and also granted the government's fee petition against Eyman in the amount of over $2.7 million. ER-101–108. The decision contributed to Eyman's personal bankruptcy woes. ER-18. On June 15, 2021, the court denied Eyman's motion for reconsideration, thereby triggering the time-to-appeal clock. ER-97–99. On July 16, 2021, Eyman filed an Errata Notice of Appeal and that appeal is ongoing in state court. ER-90–92.

*4. Defendants confirm the threat facing IFS should it represent Eyman*

In order to avoid the sort of collateral litigation that befell IJ in the recall case—and the risk of such litigation ending less successfully—IFS's counsel emailed the AGO's counsel of record in the enforcement action, requesting the government's position on whether IFS handling

Eyman's case on appeal would constitute an in-kind contribution to a political committee or in any way make IFS subject to the FCPA. ER-154; ER-110–111. The AGO's counsel of record declined to offer any clarification and instead referred IFS to the PDC. ER-110 (Newman: "I would encourage you to seek guidance from the PDC."). The AGO also declined to delay entry of judgment in the enforcement action. *Id.*

On April 21, 2021, IFS submitted its verified petition for expedited declaratory order to the PDC, along with the attached exhibits. ER-149–160, ER-162. The petition requested that the PDC:

> [E]nter a binding declaratory order that IFS's provision of pro bono legal services to Mr. Eyman, or his bankruptcy estate, in the appeal of the enforcement action:
>
> 1. Would not constitute a reportable in-kind contribution under RCW 42.17A.005(15) or any other provision of the FCPA; and
>
> 2. Would not in any other way make IFS subject to the FCPA, including, that it would not require IFS to make any registration under the FCPA; file any reports under the FCPA; or disclose the identity of its donors, the value of its services, its cost of providing services, or any other information.
>
> In the alternative, if the PDC concludes that IFS's provision of *pro bono* legal services to Mr. Eyman, or his bankruptcy estate, on appeal would be a reportable in-kind contribution, then it should issue an order specifying:
>
> 3. The nature and extent of the reporting required, who must report, and whether and to what extent IFS must publicly disclose its own donors.

ER-159.

In the days leading up to the PDC's consideration of IFS's petition, IFS's counsel also reiterated in written communications with the PDC's general counsel that IFS was asking the PDC to clarify whether anyone (including Eyman) would have to report IFS's proposed legal services to the PDC and to address the potential reporting requirements "in light of the finding that he is a one-man 'ongoing political committee,'" ER-26–27, ER-29 ("We also wouldn't want Eyman to have to report our *pro bono* legal services."), ER-69. IFS described Eyman's status as a political committee to be the "elephant in the room" that needed to be addressed. ER-24.

IFS's counsel similarly proposed, in writing, that the PDC declare explicitly that the provision of pro bono legal services provided in a defense posture is neither a "contribution" nor an "expenditure" under the FCPA. *Id*. IFS further stressed its concern that a narrow order would not provide IFS with protection because to claim "that IFS is only representing Eyman in his 'individual capacity' would not be accurate if he is also an ongoing political committee." *Id.*

The PDC considered the petition on May 27, 2021, at its regular meeting by audio and online streaming. ER-69, ER-79–80. Commission Chair Fred Jarrett, Commission Vice-Chair Nancy Isserlis, and Commissioners William Downing, and Russell Lehman were present via a video-conferencing platform. ER-80. Executive Director Lavallee,

PDC General Counsel Sean Flynn, and two representatives from the AGO were also present. *Id.*

During the PDC's hearing, IFS's counsel again asked the PDC to address the "elephant in the room"—Eyman's status as a *de jure* one-man continuing political committee—and not unduly narrow the petition. Official PDC Meeting Video, https://bit.ly/3wXu82k, starting at time mark 5:09 (last visited July 21, 2021). IFS also reiterated its request for specific language limiting the reach of the FCPA:

> The provision of pro bono legal services for legal defense is not a contribution or expenditure under the FCPA and would not be considered a contribution or expenditure even if Mr. Eyman is deemed to be an ongoing committee. The FCPA simply does not reach the provision of legal services that are provided solely in a defense posture such as in an enforcement action or on appeal.

*Id.* starting at time mark 5:11.

Commissioner Lehman stated that he found it challenging to grant a request for prospective relief in an "area that is clearly unclear." *Id.* at 5:29; ER-75.

PDC General Counsel Sean Flynn opined that IFS "could" be subject to registration and reporting as an "incidental committee" by virtue of doing pro bono legal work for Eyman. Official PDC Meeting Video, https://bit.ly/3wXu82k at 5:57. He also stated that IFS could "hypothetically" qualify as a "political committee" that would have to

report. *Id.* at 6:00. But he stated that the "highest percentage is an incidental committee." *Id.* at 6:02:20.

When asked whether Eyman's status as an ongoing political committee would affect IFS's duty to report, the PDC's General Counsel answered "potentially yes," but then stated that he did not want to give an opinion on how PDC enforcement viewed that issue, because he viewed that as an issue before the state court. *Id.* at 6:03:06 to 6:05:38.

At the hearing, Commissioner Downing also stated his opinion that the PDC should not reach the question of whether:

> on some broad basis that the provision of pro bono legal services is—is never an in-kind contribution, or create some sort of framework that would, as was suggested, eliminate the possibility of complaints being filed. That can't be done.

ER-76–77.

The PDC voted 3-1 to enter a narrow order that did not reach the question of whether Eyman's de jure status as a one-man ongoing political committee would trigger registration or reporting requirements by IFS. PDC Minutes for May 27, 2021 Regular Meeting, https://bit.ly/3xYHP2r, at 5 (last visited July 21, 2021); ER-86. Specifically, the PDC issued a "binding Declaratory Order as follows:"

> l. *Pro bono* legal services provided prospectively by IFS to Mr. Eyman individually or to his bankruptcy estate, for the limited purpose of pursuing an appeal of the court order and judgment against Mr. Eyman in Thurston County Superior

> Court, No. 17-2-01546-34, does not require IFS to register or report the identity of its donors, the value of its services, its cost of providing services, or any other information to the PDC under the FCPA for those legal services.
>
> 2. The Superior Court has designated Mr. Eyman as a continuing political committee. Whether Pro bono legal services provided prospectively to Mr. Eyman in his role as a continuing political committee must be reported is a question reserved for the ongoing jurisdiction of the Superior Court. The Commission declines to interpret the Superior Court's order or to reach issues that remain before the court in active litigation. Whether IFS must register or report may also require additional analysis under RCW 42.17A.205, RCW 42.17A.207, and RCW 42.17A.240; that information is not before the Commission. Under these circumstances, the Commission is unable to issue a binding Declaratory Order absolving IFS from any and all future FCPA registration or reporting requirements in relation to representing Mr. Eyman in his role as a continuing political committee.

ER-86.

Under present circumstances, IFS is unwilling to represent Eyman and risk being required to register or expose its donors to disclosure. ER-169–170.

*5. Procedural history*

On August 2, 2021, IFS filed this suit against Defendants for nominal damages, injunctive, and declaratory relief in the U.S. District Court for the Western District of Washington and moved for summary judgment. ER-183. The parties stipulated to a schedule for briefing for cross-motions on summary judgment, which was fulfilled. ER-179–180.

On February 7, 2022, the district court granted Defendants' motion for summary judgment for lack of standing and denied IFS's motion for summary judgment. ER-4–16. The district court held that the PDC's declaratory order unequivocally states that representing Eyman on the appeal would not trigger FCPA disclosure requirements. ER-12. The district court next held that IFS's assertions that it might represent other persons in future enforcement actions was too vague to establish Article III standing. ER-14. The district court did not evaluate IFS's substantive claims further.

The district court also entered judgment against IFS. ER-3. IFS filed its notice of appeal on that same date. ER-171–173.

## SUMMARY OF ARGUMENT

IFS has standing to bring its pre-enforcement challenge because it faces a credible threat of enforcement: IFS has a concrete plan to represent Eyman; there is an inherent threat of enforcement in the plain text of FCPA and WAC provisions; and the government has not expressly disavowed enforcement against IFS. Indeed, Defendants amplified the threat by refusing to dispel it when directly asked by IFS for an advisory opinion, and even suggesting IFS would itself become a regulated committee. The district court erred in ignoring the fact that the PDC's order expressly declined to reach the issue of Tim Eyman's novel dual-status as both an individual and a state-designated continuing political committee.

Of course, nothing required IFS to seek that advisory opinion. Plaintiffs are not required to exhaust any state administrative remedies before seeking injunctive relief under § 1983. The district court compounded its errors by erroneously holding that IFS did not properly raise all of its arguments before the PDC, and then finding that this supposed lack of administrative preservation defeated standing to raise a pre-enforcement challenge. By any traditionally accepted measure of standing, this case presents an Article III claim.

The district court also erred in failing to grant IFS's summary judgment motion. Pro bono legal-service providers enjoy a long-established constitutional right to speak and associate for the purposes of litigation against the government. As applied to IFS's public interest mission, the FCPA's disclosure regime disrupts this right's exercise and is thus subject to exacting scrutiny. Defendants fail to carry their exacting-scrutiny burden because the government lacks an important interest in disclosure where the parties are litigating, not campaigning; and because the government declined to narrowly tailor its regime by using a reasonable limiting construction to avoid its application in this situation.

The FCPA and WAC provisions are also content-based speech regulations which fail strict scrutiny, because they disfavor legal speech and advocacy on behalf of continuing political committees, while favoring other speech and advocacy on behalf of other political actors

such as candidates and political parties. The regime's legal provisions are also unduly vague, because they do not allow pro bono legal-service providers to evaluate the risk of becoming subject to the FCPA's reporting requirements, especially where a potential client is both an individual and a state-designated continuing political committee. Finally, IFS has shown actual success on the merits, entitling it to permanent injunctive and declaratory relief, and to nominal damages as well.

The district court's judgment should be reversed.

## STANDARD OF REVIEW

This Court reviews grants of summary judgment and determinations of standing *de novo*. *DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC*, 870 F.3d 978, 982 (9th Cir. 2017); *Easter v. Am. W. Fin.*, 381 F.3d 948, 956 (9th Cir. 2004).

## ARGUMENT

### I. IFS HAS STANDING TO CHALLENGE LAWS THAT THREATEN TO REQUIRE THE DISCLOSURE OF ITS DONORS AND A REPORTING OF ITS ACTIVITIES SHOULD IT PROVIDE PRO BONO LEGAL SERVICES.

#### A. IFS faces a credible threat of enforcement.

To address the chilling effect of speech restrictions, both the Supreme Court and the Ninth Circuit have endorsed a hold-your-tongue-and-challenge-now approach, rather than requiring litigants to speak first and take their chances with the consequences. *Wolfson v. Brammer*, 616 F.3d 1045, 1058-59 (9th Cir. 2010) (citing *Ariz. Right to*

*Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)); *see also Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"); *Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases"). That is because the plausible threat of enforcement invites self-censorship. "[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry *tilts dramatically* toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (emphasis added).

In evaluating whether a plaintiff has alleged a credible threat of adverse state action sufficient for standing, this Court looks at (1) whether there is a reasonable likelihood the government will enforce the law against the plaintiff; (2) whether the plaintiff has a concrete plan that would violate the law; and (3) whether the law is inapplicable to the plaintiff by its terms or as interpreted by the government. *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010); *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *see also Stavrianoudakis v. United States Dep't of Fish & Wildlife,* 435 F. Supp. 3d 1063, 1081-82 (E.D. Cal. 2020) (citing *Lopez* and *Wolfson).* An explicit, direct threat of enforcement against the plaintiff is not required. *Lopez*, 630 F.3d at

786; *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). Such a requirement would undo pre-enforcement doctrine, enabling government officials to escape judicial scrutiny and intimidate speakers into silence merely by remaining coy about their prosecutorial intentions.

*1. A reasonable likelihood exists that Defendants will enforce the FCPA against IFS should it represent Eyman.*

In any pre-enforcement case, the defendants may be expected to adopt a studied silence when asked whether they intend to prosecute the challengers. After all, why confirm your opponent's standing? But past is prologue here. Considering Defendants' history of applying the FCPA against the provision of pro bono legal services by Evergreen Freedom Foundation and the Institute for Justice, IFS has no reason to expect any different treatment. And Defendants' repeated refusal to disavow such enforcement is not encouraging. IFS did not bring this lawsuit because it has nothing else to do. The threat that its provision of pro bono legal services in Washington will trigger Defendants' severe attack on IFS's donor privacy is reasonable. IFS cannot ignore it.

*2. IFS has a concrete plan that would violate the law.*

The district court erred in finding that IFS lacks a concrete plan to violate the law. ER-14–15. It is undisputed that IFS still has a concrete plan to represent Eyman, but the district court misread the PDC's order

as "unequivocal" in authorizing Eyman's representation. It does not. The PDC's order expressly declined to reach the issue of Eyman's present dual status as a committee, leaving IFS at risk of FCPA enforcement for representing him.

And with respect to IFS's representation of as-yet unidentified Washingtonians embroiled in campaign finance disputes with the government, IFS's plan is no less concrete than the plans of the plaintiffs in *Wolfson,* 616 F.3d at 1059 (future intent to run for office and engage in two types of regulated campaigning), *Getman,* 328 F.3d at 1095 (intended future communications were potential "independent expenditures"), and *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1001 (9th Cir. 2010) ("Human Life produced evidence of planned communications that arguably fall within the ambit of the statute it is challenging"), all of which were sufficient to establish standing.

*3. The FCPA applies to IFS by its terms.*

In the standing inquiry, courts consider whether the law's text appears to cover the plaintiff's concrete plan of conduct—whether the "threat of enforcement may be inherent in the challenged statute." *Wolfson,* 616 F.3d at 1059; *see also Majors v. Abell,* 317 F.3d 719, 721 (7th Cir. 2003) ("[T]he threat [of prosecution] is latent in the existence of the statute"). Thus, in *Getman,* this Court found the plaintiff's fear was reasonable because the state statute appeared to regulate the expenditures in question. 328 F.3d at 1094-95 ("The statutory definition

of 'independent expenditure,' on its face, is not limited to including only those communications with explicit words of advocacy. We therefore hold that CPLC suffered the constitutionally recognized injury of self-censorship").

In this case, the FCPA's definitions of "contributions" and "expenditures" can also be plausibly read to apply to IFS's proposed provision of free legal services. *See* RCW 42.17A.005(15) and (22). The plain text of the FCPA's definition of "contribution" includes gifts and anything of value, including professional services for less than full consideration. RCW 42.17A.005(15). "Services or property or rights furnished at less than their fair market value for the purpose of assisting any candidate or political committee are deemed a contribution. Such a contribution must be reported as an in-kind contribution at its fair market value and counts towards any applicable contribution limit of the provider." RCW 42.17A.005(15)(c). Similarly, the plain text of the FCPA's definition of "expenditure" appears to cover IFS's proposed services because it covers both a "contribution" and a "gift of money or anything of value." RCW 42.17A.005(22).

The PDC's enabling regulation, WAC 390-17-405, is even more granular, warning plainly that neither the FCPA nor the WAC "authorizes the services of an attorney…to be provided to a political committee without a contribution ensuing, unless the political committee is a candidate's authorized committee, political party or

caucus political committee… or unless the political committee pays the fair market value of the services rendered" (emphasis added).

Both the FCPA's definitions and the WAC would plausibly apply to IFS's concrete plan to provide Tim Eyman, the state-designated political committee, with free legal-defense services. Such services are a thing of value and, by definition, are offered at less than fair market value.

While IFS disputes the legality of that finding, no party disputes that Mr. Eyman has been designated a "continuing political committee" at the government's request. Thus, the threat of enforcement is latent in the existence of the FCPA's definitions and WAC 390-17-405, especially in light of Eyman's dual-status designation.

*4. Defendants failed to expressly disavow the FCPA's enforcement against IFS for pro bono representation of Eyman and others facing FCPA enforcement.*

Whether the relevant enforcement authorities have disavowed enforcement against the plaintiff is a critical factor in the standing inquiry. *Lopez,* 630 F.3d at 788 ("we have held that plaintiffs did not demonstrate the necessary injury in fact where the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities"); *LSO,* 205 F.3d at 1155 ("Courts have also considered the Government's failure to disavow application of the challenged provision as a factor in favor of a finding of standing");

*compare Johnson v. Stuart,* 702 F.2d 193, 195 (9th Cir. 1983) (no standing for teachers where Oregon Attorney General and school district's lawyer "disavowed" any interpretation of statute that would make it applicable to teachers) with *Bland,* 88 F.3d at 737 ("The Attorney General of California has not stated affirmatively that his office will not enforce the civil statute"). Indeed, as noted supra, the PDC has a history of seeking FCPA enforcement against pro bono legal service providers. ER-153–154.

Defendants do not dispute that they are (or in the case of Mr. Lehman were at the time of the petition vote) responsible for the FCPA's enforcement. *See, e.g.*, RCW 42.17A.105 (Commission—Duties); RCW 42.17A.765 (Enforcement—Attorney general); 42.17A.750 (Civil remedies and sanctions—Referral for criminal prosecution). The PDC also performs a critical gatekeeping function because it screens third-party complaints brought under the FCPA. RCW 42.17A.755; RCW 42.17A.775; WAC 390-37-060. The AGO is also responsible for monitoring Eyman's compliance with the state court's injunction. ER-105. Thus, all roads to FCPA enforcement lead through Defendants.

Defendants have implausibly claimed that they did give IFS full relief, but the PDC expressly declined to reach the issue of Eyman's status as a committee. ER-85–86.

Indeed, in light of Eyman's designation as a continuing committee, Defendants expressly reserved the right to enforce their reporting and disclosure regime against IFS:

> Under these circumstances, the Commission is unable to issue a binding Declaratory Order absolving IFS from any and all future FCPA registration or reporting requirements in relation to representing Mr. Eyman in his role as a continuing political committee.

ER-86.

Thus, contrary to an express disavowal of enforcement, the PDC's order explicitly left open the risk of FCPA enforcement. This Court should also examine what Defendants and their agents have said and done, and what they declined to say or do.

First, IFS initiated the declaratory order process only after the government's lead counsel against Mr. Eyman declined to take any position on whether IFS would need to register and report if it represented Eyman. Dkt. 6-2 at 2. That was not a disavowal of enforcement.

Next, IFS "sought guidance from the PDC" by filing its petition. During the lead up to the PDC hearing, its general counsel and attorney advisor attempted to get IFS to agree to a narrow stipulation that did not address the issue of Eyman's status as a continuing political committee and even floated a further delay of the decision-making

process. ER-24–27; *see also* Official PDC Video Hearing Record, https://bit.ly/3wXu82k at 5:08:55 to 5:09:43; 5:17:30 to 5:17:53.

At the hearing, the PDC's general counsel stated that it was the staff's recommendation that the Commission's "conclusion would be qualified by the commission not giving any opinion as to whether the service, whether services provided Tim Eyman as a political co… any political committee of Tim Eyman's or Tim Eyman as a political committee…" Official PDC Video Hearing Record, https://bit.ly/3wXu82k at 4:55 to 4:55:52 (emphasis added; verbal fillers omitted). The PDC's general counsel similarly acknowledged in response to a question from Assistant Attorney General John Meader that "potentially yes," Eyman's current status as a committee could affect IFS's duty to report. *Id.* at 6:03:06 to 6:05:38.

Neither the PDC's order, nor the actions or statements of the government actors in this case, amount to an express disavowal of enforcement against IFS. On the contrary, they are keeping their options open, knowing full well that doing so will scare off IFS from taking on Eyman's case. If they had wanted to resolve this, an unequivocal order, or even an email from the AGO's counsel or the PDC's counsel might have put the matter to rest. But under this cloud of uncertainty, IFS has standing to bring a pre-enforcement challenge.

The district court ignored the fact that when asked to clarify the FCPA's potential application against IFS, Defendants expressly

declined to address the critical issue: Eyman's de jure status as a continuing political committee. Indeed, the plain text of the PDC's order expressly declined to address that very issue:

> Whether *Pro bono* legal services provided prospectively to Mr. Eyman *in his role as a continuing political committee* must be reported is a question reserved for the ongoing jurisdiction of the Superior Court. *The Commission declines to interpret the Superior Court's order or to reach issues that remain before the court* in active litigation.

ER-86 (emphasis added).

The district court misread the PDC's order when it held that that the order "unequivocally states" that pro bono representation of Eyman would not trigger enforcement or that the order "specifically addressed" the issue of Eyman's status as on ongoing political committee. ER-12–14. On the contrary, the order expressly *declined to address* the issue. ER-86.

Similarly, the district court misapprehended IFS's reasonable concern about narrowing the scope of the order to address only legal services offered to Tim Eyman the individual, while ignoring his legal status as a committee, going so far as to label IFS's position as "disingenuous." ER-10. While IFS would have welcomed a broader, categorical order declaring that pro bono services provided to anyone in a defense posture lie beyond the FCPA's reach, the PDC didn't even reach the specific issue of whether this was so only in the case of Tim

Eyman the individual *and* the committee. Rather, the PDC held it would not require reporting if free legal services were provided to the individual, but it would not state whether providing services to the same individual whom it also deems a committee would trigger reporting. To recharacterize the PDC's order as "unequivocal" is simply wrong, because the PDC expressly declined to address the elephant in the room: that Mr. Eyman remains both an individual and a state-designated continuing political committee.

### B. IFS was not required to exhaust its administrative remedies to establish pre-enforcement standing.

The district court erred in limiting IFS's claims to arguments or proposals made in its initial petition before the PDC. ER-14. First, IFS was not required to even approach the PDC for an advisory opinion before bringing suit. It is well-established that plaintiffs need not exhaust their administrative or state court remedies to seek relief under § 1983, vindicating their constitutional rights. *Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226, 2230-31 (2021) (it is a settled rule that exhaustion of state remedies is not a prerequisite to an action under § 1983); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2172-73 (2019) (federal remedies are directly available for takings claims "as for any other claim grounded in the Bill of Rights."); *Bonelli v. Grand Canyon Univ.*, No. 20-17415, 2022 U.S. App. LEXIS 6346, at *16 (9th Cir. Mar. 11, 2022). That IFS sought to resolve this dispute before involving the

federal courts cannot be used against it when the Defendants proved recalcitrant and unhelpful.

Moreover, the district court overlooked the controlling administrative regulation with respect to the adequacy of IFS's PDC petition. Per WAC 390-12-250, a "petitioner may present additional material and/or argument at any time prior to the issuance of the declaratory order." Thus, IFS's proposal that the PDC impose a limiting construction on the FCPA, in order to avoid constitutional problems, was not "disingenuous," but an argument that IFS was specifically allowed to make "at any time prior to issuance of the order."

It is also well-established that enforcement officials have the ability to impose limiting constructions. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (noting that administrative interpretation and implementation are highly relevant to constitutional analysis and finding that any inadequacies on the face of the guidelines was remedied by the city's narrowing construction); *Yamada v. Snipes*, 786 F.3d 1182, 1188 (9th Cir. 2015) ("In evaluating A-1's challenges, we must consider 'any limiting construction that a state court or enforcement agency has proffered'"). It is undisputed that IFS requested a limiting construction and the PDC did not grant it. "That just can't be done" was the response. ER-77. As a result, we are here today asking this Court for relief.

## II. IFS IS ENTITLED TO SUMMARY JUDGMENT ENABLING IT TO PROVIDE PRO BONO LEGAL SERVICES FREE OF THE FCPA THREAT.

### A. Pro bono lawyers enjoy a constitutional right to associate for the purposes of litigation against the government.

The First Amendment accords heightened free speech guarantees to "advocat[e] [for] lawful means of vindicating legal rights." *Button,* 371 U.S. at 437; *see also Nw. Immigrant Rts. Project v. Sessions*, No. C17-716 RAJ, 2017 U.S. Dist. LEXIS 118058, at *8-9 (W.D. Wash. July 27, 2017) (government may not threaten non-profit organizations for vindicating legal rights). In *Button,* the Supreme Court upheld the NAACP's right to provide nonprofit legal services—as IFS does here—as "a form of political expression" that vindicates civil rights. 371 U.S. at 429, 431 (invalidating anti-solicitation law prohibiting attorneys from advising others about their legal rights).

Recognizing that this form of legal representation was protected expression, the Court noted that the First Amendment "protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429, 437. Virginia could not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439. The Court expressed particular concern that Virginia's vague and broad statute lent itself to "selective enforcement against unpopular causes," such as, then, the civil rights movement. *Id.* at 435-36.

Since *Button,* the Supreme Court has repeatedly accorded broad First Amendment protections to lawyers who vindicate legal rights.

Indeed, it has noted the important First Amendment role of non-profits who litigate in defense of the unpopular, including political dissenters. *In re Primus*, 436 U.S. 412, 427-28 (1978). "The ACLU engages in litigation as a vehicle for effective political *expression and association,* as well as a means of communicating useful information to the public." *Id.* at 431 (emphasis added).

In *Primus*, the court affirmed that South Carolina could "not abridge unnecessarily the associational freedom of nonprofit organizations, or their members," through broad lawyer disciplinary rules. *Primus,* 436 U.S. at 439 (striking down discipline of ACLU lawyer who had offered pro bono representation to a person who had been sterilized in return for receipt of Medicaid benefits); *see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n,* 389 U.S. 217, 221-22 (1967) (*Button* covers non-political cases too, including a union staff attorney handling workers' compensation claims for union members). Similarly, in 2001, the Court affirmed that the government cannot "prohibit the analysis of certain legal issues" without violating the First Amendment. *Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 545, 547-8 (2001) (where Congress funds legal representation for benefits recipients, it may not hamstring the representation). "The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner." *Id.* at 548.

Resting on *Button*'s foundation, these cases confirm that lawyers—and, in particular, non-profit legal organizations—have a fundamental First Amendment right to represent clients in civil-rights litigation against the government.

Times and causes may change, but the tendency of those in power to use the rules against their critics does not. Nor do today's government officials embrace criticism any more than those of the last century. Just as Virginia could not legally shield itself from civil rights lawsuits through the tactical application of lawyer-disciplinary rules, Washington cannot, under the guise of "shining a light on democracy," use campaign-finance regulations to prevent a political dissident from obtaining free legal services to vindicate his civil rights. Doing so is self-serving and advances no legitimate government interest because Eyman is defending himself in court, not campaigning.

Most of the cases cited above feature a pronounced concern that the government was using seemingly neutral regulations to shield itself from critics or prevent other unwanted litigation. In *Button,* Virginia sought to use lawyer discipline to dampen de-segregation lawsuits. 371 U.S. at 435-36 (noting that a facially "even-handed" statute could become "a weapon of oppression"). In *Primus,* South Carolina sought to prevent the ACLU from soliciting lawsuits against doctors complicit in sterilizing its own citizens in order continue receiving Medicaid benefits. *See* 436 U.S. at 415-17, 427. In *Legal Servs. Corp.,* the federal

government sought to insulate itself from constitutional challenges. 531 U.S. at 547-8. And in *Nw. Immigrant Rts. Project,* the government's regulation had the practical effect of reducing non-citizen access to free legal advice in opposition to deportation. 2017 U.S. Dist. LEXIS 118058, at *14 ("[T]he Government does not dispute NWIRP's contention that the Regulation would deprive this 'vulnerable population' of representation, essentially leading to an increase in avoidable deportations").

Here Defendants were asked in various ways to guarantee that they would not attack IFS for representing Eyman in court, but they refused to do so, pointedly avoiding critical questions and deflecting responsibility, all while speculating about the FCPA's possible application against IFS and giving it the run-around.

This should not be a complicated issue. And the core question presented here has nothing to do with campaign finance or any regulatory interest in the conduct of electoral campaigns. One need not agree with Tim Eyman's worldview, or with any of his past political activities, to acknowledge that IFS has just as much of a right to provide him with pro bono legal services as the NAACP had a right to represent civil-rights litigants in 1963; or the ACLU had a right to solicit sterilized mothers in 1973; or the Northwest Immigrant Rights Center had a right to advise non-citizens in removal proceedings in 2017. The civil rights at issue here are timeless and universal; they are

not dependent on the politics, cause, or who holds political power; and they should not depend on whether the potential client is politically popular with those in power. Tim Eyman is appealing a ruinous multi-million-dollar judgment in the state's favor stemming from his political activities. IFS has its own rights of association and expression to represent Eyman and push back against what it perceives as overreach by the state authorities.

### B. The FCPA and WAC fail exacting scrutiny as-applied to pro bono legal services provided in a defense posture.

"Exacting scrutiny is triggered by 'state action which *may* have the effect of curtailing the freedom to associate,' and by the '*possible* deterrent effect' of disclosure." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (citing *NAACP* v. *Alabama*, 357 U. S. 449, 460-461 (1958)) (emphasis in original). "Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." *AFPF,* 141 S. Ct. at 2383. Thus, any potential FCPA disclosure burden on IFS's right to associate with Eyman for the purposes of pro bono litigation against the government must at least pass exacting scrutiny, a standard Defendants cannot meet.

Exacting scrutiny requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement be narrowly tailored to the interest it promotes. *Id.* at 2385. In *AFPF,* the Supreme

Court recently clarified that exacting scrutiny is not tantamount to mere intermediate scrutiny and narrow tailoring is an indispensable part of the test. *Id.* at 2384. "Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Id.*

The disclosure and reporting regime cannot survive exacting scrutiny review here because IFS proposes to associate with Eyman for the purpose of litigating, not campaigning; and also because the FCPA's disclosure and reporting regime is not narrowly tailored to avoid burdening the right to associate for the purposes of pro bono litigation against the government, particularly in a defense posture. Thus, the government's case founders on both the lack of a sufficiently important government interest and the lack of tailoring.

To be sure, the Supreme Court has recognized a public interest "in knowing who is speaking about a candidate shortly before an election." *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). But Tim Eyman—the defendant—is neither a candidate nor an advocate actively promoting a pending ballot initiative, notwithstanding the state's labeling him a continuing political committee. In appealing the State's multi-million dollar judgment against him, Eyman is not participating in the electoral process. Allowing IFS to represent Eyman presents no risk of quid pro quo corruption.

There is also no voter informational interest at stake here because the voters will not be deciding Eyman's appeal. *Cf. Brumsickle*, 624 at 1005-07 (9th Cir. 2010) (noting the voters' role as legislators and discussing the benefits of disclosure in sorting through competing messages and helping them understand who stands to benefit from a ballot initiative). Eyman's case will be decided in the courts, not at the ballot box. Washington's voters are a non-factor here.

Defendants thus lack a legitimate interest in regulating the provision of pro bono legal services to Eyman in his appeal. And the same holds true with respect to IFS's potential representation of other Washingtonians. The state does not need to monitor who donates to IFS and what services IFS provides. Indeed, it is concerning that apart from regulating the bar, the government seeks to require those who would litigate against it to register and file reports with a state agency.

It is well-established that disclosure of contributions burdens First Amendment rights. *Buckley,* 424 U.S. at 68 (public disclosure of contributions will deter some individuals who otherwise might contribute); *AFPF,* 141 S. Ct. at 2388 ("Our cases have said that disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public'") (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)). Even if the government could scrape together some plausible, generalized informational interest in having Eyman disclose information about his receipt of donations (because he is decreed to be

not just a person, but a committee), that interest evaporates with respect to a public interest law firm that would provide Eyman a pro bono legal defense. After all, exacting scrutiny requires the consideration of less-burdensome alternatives. *AFPF,* 141 S. Ct. at 2386 ("California is not free to enforce *any* disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives."). And one such alternative would have been for the PDC to impose a limiting construction on the FCPA as was suggested by IFS (and rejected by the PDC). *See, e.g.,* ER-24, ER-77, ER-86; *see also Ward,* 491 at 795-96 (discussing the role of self-imposed limiting constructions); *Yamada,* 786 F.3d at 1188. Indeed, IFS's proposed limiting construction could have plausibly been narrowed further to apply only to the circumstances of Tim Eyman's case.

Another simple option would have been for the government to state unequivocally in writing that it would consider any representation of Eyman in the appeal of the enforcement action to be a representation of an individual only, and not a representation of a "continuing political committee" for FCPA purposes. The PDC's declaratory order did no such thing and expressly declined to reach that issue.

Any of these options would have been more narrowly tailored than the non-relief offered by the PDC's equivocal order. As a result, the

FCPA's disclosure regime fails exacting scrutiny as-applied to these circumstances.

### C. The FCPA and WAC provisions are content-based speech restrictions which fail strict scrutiny.

The challenged FCPA and WAC provisions are impermissibly content-based speech restrictions because they discriminate between types of legal speakers and pick regulatory winners and losers. In particular, they carve out special treatment for candidates and political parties, but not ongoing political committees.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015) (citations omitted).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. "A law may also be content based if it requires authorities to examine the contents of the message to see if a violation has occurred." *Tschida v. Motl,* 924 F.3d 1297, 1303 (9th Cir. 2019) (citation omitted); *Ark. Writers' Project, Inc. v. Ragland,* 481 U.S. 221,

230 (1987) ("official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment").

The "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Reed,* 576 U.S. at 163 (internal quotation marks omitted). It does not matter whether a law does so by "defining regulated speech by particular subject matter," or by "defining regulated speech by its function or purpose." *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163-64.

Moreover, laws that are facially neutral are nonetheless considered content-based if they "cannot be justified without reference to the content of the regulated speech, or . . . were adopted by the government because of disagreement with [the speech's] message." *Id.* at 164 (internal quotation marks omitted). If a law is "justified by a concern that stems from the direct communicative impact of speech," *Tschida,* 924 F.3d at 1303 (internal quotation marks and brackets omitted), it is content-based.

It is axiomatic that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer,* 961 F.3d 1062, 1072 (9th Cir. 2020) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011)). And the creation of legal briefing and its submission to a court are no

less protected speech than the type of educational services (learning to be a farrier) at issue in *Pac. Coast Horshoeing* or the prescription history at issue in *Sorrell*.

Indeed, the Supreme Court has already recognized that restraints on legal advocacy and training are content-based regulations. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27 (2010) ("Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a 'specific skill' or communicates advice derived from 'specialized knowledge'—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred").

In Washington state, a pro bono lawyer intending to file a brief on behalf of Tim Eyman must consider that doing so may be an in-kind contribution, triggering registration, reporting, and disclosure regimes, because Eyman is also a state-designated continuing political committee. Not so if the lawyer's work defends other regulated political actors, such as the Democratic Party or state senate candidate Claire Wilson. Whether the burden exists depends on the content of her brief and the legal party she represents.

The FCPA's statutory definition of "contribution" under RCW42.17A.005(15), and the PDC's interpretation of that definition, are both content based, because they are focused on the advocacy

content of the message. Legal speech on behalf "political committees" is considered a contribution, while comparable advocacy on behalf of a "political party," "candidate," "authorized committee," or "caucus political committee" is excluded from the definition of "contribution." RCW 42.17A.005(15)(b)(viii)(A)-(B). The administrative regulation further spells out the discriminatory treatment of advocacy speech on behalf of different political entities:

> An attorney…may donate their professional services to a candidate, a candidate's authorized committee, a political party or a caucus political committee, without it constituting a contribution… However, neither RCW 42.17A.005 (16)(b)(viii) nor this section authorizes the services of an attorney…to be provided to a political committee without a contribution ensuing[.]

WAC 390-17-405(2).

The determination of whether a lawyer's speech is a "contribution" turns on the content of his speech or the identity of his client, which means this regulation of speech must withstand strict scrutiny. Moreover, it's not a retort to say that such speech is only burdened and not banned. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell,* 564 U.S. at 565-66. And requiring registration and disclosure is no small thing, as illustrated by the numerous exemptions for favored groups.

Similarly, the fact that the FCPA and WAC grant status-based exemptions illustrates that these provisions are content-based because

they pick "winners and losers." *See Pac. Coast Horseshoeing,* 961 F.3d at 1071 ("the PPEA distinguishes between speakers. It picks winners and losers when it comes to which institutions must ensure that its listeners have satisfied the ability-to-benefit requirement"). In this case, the winners are political parties, candidates, caucus political committees and authorized committees. They get the benefit of pro bono legal services with few or no strings attached. The losers are plain-vanilla political committees, including state-designated-one-man continuing political committees, such as Tim Eyman.

Defendants lack a compelling interest for treating the content of advocacy on behalf of a "political committee" differently from that of a political party, candidate, or the other entities inexplicably exempted from regulation under Washington's regime, let alone evidence proving that this disparate treatment is narrowly tailored. Applying strict scrutiny, this Court should reverse the District Court, grant IFS's motion for summary judgment, and enjoin the application of RCW42.17A.005(15) or WAC 390-17-405(2) to pro bono legal services to any party as an impermissible content-based regulation.

### D. The FCPA and WAC provisions are unduly vague as to their application to pro bono legal services provided in a defense posture

The FCPA's definitions of "expenditure" and "contribution," and the implementing WAC, are all unduly vague because they chill the

exercise of First Amendment rights of expression and association. To quote then-Commissioner Lehman, the challenged regime's application against IFS's provision of pro bono legal services is "clearly unclear." ER-75. As a result, cautious would-be pro bono legal providers will self-censor to avoid becoming subject to the FCPA.

A state law or regulation may be unconstitutionally vague in two ways. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1084 (9th Cir. 2006). First, the regulation may fail to give persons of ordinary intelligence adequate notice of what conduct is proscribed; second, it may permit or authorize "arbitrary and discriminatory enforcement." *Hill v. Colo.*, 530 U.S. 703, 732 (2000); *Berger v. City of Seattle*, 569 F.3d 1029, 1047-48 (9th Cir. 2009) (en banc) (uncertain enforcement of vague regulation "is likely to have a chilling effect on speech."); *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998) (subjective terms invite discriminatory enforcement). "[T]hese vagueness concerns are more acute when a law implicates First Amendment rights and, therefore, vagueness scrutiny is more stringent" in such cases. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 U.S. at 438. "In sum, the [Regulation] in [its] present form [has] a distinct potential for dampening the kind of 'cooperative activity that would make advocacy of litigation meaningful,' as well as for permitting discretionary

enforcement against unpopular causes." *Primus*, 436 U.S. at 433 (quoting *Button*, 371 U.S. at 438).

Here it is at best "clearly unclear" whether representing Eyman in his appeal would subject IFS to regulation under the FCPA, so IFS has so far refrained from representing him. The statute and regulation can both be read as applying to pro bono legal work (hence the inherent threat of enforcement argument). When asked to clarify their position, Defendants expressly declined.

"Washington provides various ways to obtain advice or guidance from the PDC." *Hum. Life of Wash., Inc. v. Brumsickle*, No. C08-0590-JCC, 2009 U.S. Dist. LEXIS 4289, at *41-42 (W.D. Wash. Jan. 8, 2009). But the present circumstances illustrate the hollowness of that promise.

From the standpoint of the would-be government censor, this lack of clarity is a feature, not a bug. Rather than admitting that it wishes to frustrate Eyman's legal defense against the state, the PDC effectively shrugged and threw up its hands. Perhaps IFS might not have to report, but perhaps it might.

Defendants' studied vagueness is designed to chill speech without explicitly banning it because it invites the speaker to self-censor. This is how countless censors have operated for centuries and this Court should not permit Defendants to do so here.

E. IFS has shown actual success on the merits.

IFS is entitled to injunctive relief because once a plaintiff proves that a state law or regulation is unconstitutional as applied, the other permanent injunction factors fall away. The standard for granting a permanent injunction is essentially the same as a preliminary injunction, except that the moving party must show actual success, instead of probable success on the merits. *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n.12 (1987). When actual success is shown, the inquiry is over. A party is entitled to relief as a matter of law irrespective of the amount of irreparable injury that may be shown. *Sierra Club v. Penfold,* 857 F.2d 1307, 1318 n.16 (9th Cir. 1988); *Walsh v. City & Cty. of Honolulu*, 460 F. Supp. 2d 1207, 1211 (D. Haw. 2006).

Similarly, IFS is entitled to nominal damages against Defendants Jarrett, Downing, and Lehman for having burdened its rights. Nominal damages serve to redress constitutional injuries even if a plaintiff "cannot or chooses not to quantify that harm in economic terms." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (applying nominal damages in the context of a college student deprived of his First Amendment right to speak on campus). Moreover, in the Ninth Circuit, nominal damages must be awarded if a plaintiff proves a violation of constitutional rights. *Est. of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000).

## CONCLUSION

This Court should reverse the district court's judgment, and remand the case with instructions to grant IFS's cross-motion for summary judgment.

Dated: April 8, 2022

Respectfully submitted,

*s/Endel Kolde*

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

*Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf*

**9th Cir. Case Number(s)** 21-35112

I am the attorney or self-represented party.

**This brief contains 10,036 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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# ADDENDUM

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**RCW 34.05.240 Declaratory order by agency—Petition.**

(1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show:

(a) That uncertainty necessitating resolution exists;

(b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;

(c) That the uncertainty adversely affects the petitioner;

(d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and

(e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

(2) Each agency may adopt rules that provide for: (a) The form, contents, and filing of petitions for a declaratory order; (b) the procedural rights of persons in relation thereto; and (c) the disposition of those petitions. These rules may include a description of the classes of circumstances in which the agency will not enter a declaratory order and shall be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agencies to provide reliable advice.

(3) Within fifteen days after receipt of a petition for a declaratory order, the agency shall give notice of the petition to all persons to whom notice is required by law, and may give notice to any other person it deems desirable.

(4) RCW 34.05.410 through 34.05.494 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

(5) Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:

(a) Enter an order declaring the applicability of the statute, rule, or order in question to the specified circumstances;

(b) Set the matter for specified proceedings to be held no more than ninety days after receipt of the petition;

(c) Set a specified time no more than ninety days after receipt of the petition by which it will enter a declaratory order; or

(d) Decline to enter a declaratory order, stating the reasons for its action.

(6) The time limits of subsection (5) (b) and (c) of this section may be extended by the agency for good cause.

(7) An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

(8) A declaratory order has the same status as any other order entered in an agency adjudicative proceeding. Each declaratory order shall contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusions.

**RCW 42.17A.005 Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Actual malice" means to act with knowledge of falsity or with reckless disregard as to truth or falsity.

(2) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "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.

(3) "Authorized committee" means the political committee authorized by a candidate, or by the public official against whom recall charges have been filed, to accept contributions or make expenditures on behalf of the candidate or public official.

(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.
(5) "Benefit" means a commercial, proprietary, financial, economic, or monetary advantage, or the avoidance of a commercial, proprietary, financial, economic, or monetary disadvantage.

(6) "Bona fide political party" means:
(a) An organization that has been recognized as a minor political party by the secretary of state;
(b) The governing body of the state organization of a major political party, as defined in RCW 29A.04.086, that is the body authorized by the charter or bylaws of the party to exercise authority on behalf of the state party; or

(c) The county central committee or legislative district committee of a major political party. There may be only one legislative district committee for each party in each legislative district.

(7) "Books of account" means:
(a) In the case of a campaign or political committee, a ledger or similar listing of contributions, expenditures, and debts, such as a campaign or committee is required to file regularly with the commission, current as of the most recent business day; or
(b) In the case of a commercial advertiser, details of political advertising or electioneering communications provided by the advertiser, including the names and addresses of persons from whom it accepted political advertising or electioneering communications, the exact nature and extent of the services rendered and the total cost and the manner of payment for the services.

(8) "Candidate" means any individual who seeks nomination for election or election to public office. An individual seeks nomination or election when the individual first:
(a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote the individual's candidacy for office;
(b) Announces publicly or files for office;
(c) Purchases commercial advertising space or broadcast time to promote the individual's candidacy; or
(d) Gives consent to another person to take on behalf of the individual any of the actions in (a) or (c) of this subsection.

(9) "Caucus political committee" means a political committee organized and maintained by the members of a major political party in the state senate or state house of representatives.

(10) "Commercial advertiser" means any person that sells the service of communicating messages or producing material for broadcast or distribution to the general public or segments of the general public whether through brochures, fliers, newspapers, magazines, television, radio, billboards, direct mail advertising, printing, paid internet or digital communications, or any other means of mass communications

used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign.

(11) "Commission" means the agency established under RCW 42.17A.100.

(12) "Committee" unless the context indicates otherwise, includes a political committee such as a candidate, ballot proposition, recall, political, or continuing political committee.

(13) "Compensation" unless the context requires a narrower meaning, includes payment in any form for real or personal property or services of any kind. For the purpose of compliance with RCW 42.17A.710, "compensation" does not include per diem allowances or other payments made by a governmental entity to reimburse a public official for expenses incurred while the official is engaged in the official business of the governmental entity.

(14) "Continuing political committee" means a political committee that is an organization of continuing existence not limited to participation in any particular election campaign or election cycle.

(15)(a) "Contribution" includes:

(i) A loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds, or anything of value, including personal and professional services for less than full consideration;

(ii) An expenditure made by a person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a political or incidental committee, the person or persons named on the candidate's or committee's registration form who direct expenditures on behalf of the candidate or committee, or their agents;

(iii) The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, digital, or other form of political advertising or electioneering communication prepared by a candidate, a political or incidental committee, or its authorized agent;

(iv) Sums paid for tickets to fund-raising events such as dinners and parties, except for the actual cost of the consumables furnished at the event.

(b) "Contribution" does not include:

(i) Accrued interest on money deposited in a political or incidental committee's account;

(ii) Ordinary home hospitality;

(iii) A contribution received by a candidate or political or incidental committee that is returned to the contributor within ten business days of the date on which it is received by the candidate or political or incidental committee;

(iv) A news item, feature, commentary, or editorial in a regularly scheduled news medium that is of interest to the public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political or incidental committee;

(v) An internal political communication primarily limited to the members of or contributors to a political party organization or political or incidental committee, or to the officers, management staff, or stockholders of a corporation or similar enterprise, or to the members of a labor organization or other membership organization;

(vi) The rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this subsection, means services or labor for which the individual is not compensated by any person;

(vii) Messages in the form of reader boards, banners, or yard or window signs displayed on a person's own property or property occupied by a person. However, a facility used for such political advertising for which a rental charge is normally made must be reported as an in-kind contribution and counts toward any applicable contribution limit of the person providing the facility;

(viii) Legal or accounting services rendered to or on behalf of:

(A) A political party or caucus political committee if the person paying for the services is the regular employer of the person rendering such services; or

(B) A candidate or an authorized committee if the person paying for the services is the regular employer of the individual rendering the services and if the services are solely for the purpose of ensuring compliance with state election or public disclosure laws; or

(ix) The performance of ministerial functions by a person on behalf of two or more candidates or political or incidental committees either as volunteer services defined in (b)(vi) of this subsection or for payment by the candidate or political or incidental committee for whom the services are performed as long as:

(A) The person performs solely ministerial functions;

(B) A person who is paid by two or more candidates or political or incidental committees is identified by the candidates and political committees on whose behalf services are performed as part of their respective statements of organization under RCW 42.17A.205; and

(C) The person does not disclose, except as required by law, any information regarding a candidate's or committee's plans, projects, activities, or needs, or regarding a candidate's or committee's contributions or expenditures that is not already publicly available from campaign reports filed with the commission, or otherwise engage in activity that constitutes a contribution under (a)(ii) of this subsection.

A person who performs ministerial functions under this subsection (15)(b)(ix) is not considered an agent of the candidate or committee as long as the person has no authority to authorize expenditures or make decisions on behalf of the candidate or committee.

(c) Contributions other than money or its equivalent are deemed to have a monetary value equivalent to the fair market value of the contribution. Services or property or rights furnished at less than their fair market value for the purpose of assisting any candidate or political committee are deemed a contribution. Such a contribution must be reported as an in-kind contribution at its fair market value and counts towards any applicable contribution limit of the provider.

(16) "Depository" means a bank, mutual savings bank, savings and loan association, or credit union doing business in this state.

(17) "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.

(18) "Election" includes any primary, general, or special election for public office and any election in which a ballot proposition is submitted to the voters. An election in which the qualifications for voting include other than those requirements set forth in Article VI, section 1 (Amendment 63) of the Constitution of the state of Washington shall not be considered an election for purposes of this chapter.

(19) "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.

(20) "Election cycle" means the period beginning on the first day of January after the date of the last previous general election for the office that the candidate seeks and ending on December 31st after the next election for the office. In the case of a special election to fill a vacancy in an office, "election cycle" means the period beginning on the day the vacancy occurs and ending on December 31st after the special election.

(21)(a) "Electioneering communication" means any broadcast, cable, or satellite television, radio transmission, digital communication, United States postal service mailing, billboard, newspaper, or periodical that:

(i) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name;

(ii) Is broadcast, transmitted electronically or by other means, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and

(iii) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor

during the sixty days before an election, has a fair market value or cost of one thousand dollars or more.

(b) "Electioneering communication" does not include:

(i) Usual and customary advertising of a business owned by a candidate, even if the candidate is mentioned in the advertising when the candidate has been regularly mentioned in that advertising appearing at least twelve months preceding the candidate becoming a candidate;

(ii) Advertising for candidate debates or forums when the advertising is paid for by or on behalf of the debate or forum sponsor, so long as two or more candidates for the same position have been invited to participate in the debate or forum;

(iii) A news item, feature, commentary, or editorial in a regularly scheduled news medium that is:

(A) Of interest to the public;

(B) In a news medium controlled by a person whose business is that news medium; and

(C) Not a medium controlled by a candidate or a political or incidental committee;

(iv) Slate cards and sample ballots;

(v) Advertising for books, films, dissertations, or similar works (A) written by a candidate when the candidate entered into a contract for such publications or media at least twelve months before becoming a candidate, or (B) written about a candidate;

(vi) Public service announcements;

(vii) An internal political communication primarily limited to the members of or contributors to a political party organization or political or incidental committee, or to the officers, management staff, or stockholders of a corporation or similar enterprise, or to the members of a labor organization or other membership organization;

(viii) An expenditure by or contribution to the authorized committee of a candidate for state, local, or judicial office; or

(ix) Any other communication exempted by the commission through rule consistent with the intent of this chapter.

(22) "Expenditure" includes a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of

value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. "Expenditure" also 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, benefiting, or honoring any public official or candidate, or assisting in furthering or opposing any election campaign. For the purposes of this chapter, agreements to make expenditures, contracts, and promises to pay may be reported as estimated obligations until actual payment is made. "Expenditure" shall not include the partial or complete repayment by a candidate or political or incidental committee of the principal of a loan, the receipt of which loan has been properly reported.

(23) "Final report" means the report described as a final report in RCW 42.17A.235(11)(a).

(24) "Foreign national" means:

(a) An individual who is not a citizen of the United States and is not lawfully admitted for permanent residence;

(b) A government, or subdivision, of a foreign country;

(c) A foreign political party; and

(d) Any entity, such as a partnership, association, corporation, organization, or other combination of persons, that is organized under the laws of or has its principal place of business in a foreign country.

(25) "General election" for the purposes of RCW 42.17A.405 means the election that results in the election of a person to a state or local office. It does not include a primary.

(26) "Gift" has the definition in RCW 42.52.010.

(27) "Immediate family" includes the spouse or domestic partner, dependent children, and other dependent relatives, if living in the household. For the purposes of the definition of "intermediary" in this section, "immediate family" means an individual's spouse or domestic partner, and child, stepchild, grandchild, parent, stepparent, grandparent, brother, half brother, sister, or half sister of the individual

and the spouse or the domestic partner of any such person and a child, stepchild, grandchild, parent, stepparent, grandparent, brother, half brother, sister, or half sister of the individual's spouse or domestic partner and the spouse or the domestic partner of any such person.

(28) "Incidental committee" means any nonprofit organization not otherwise defined as a political committee but that may incidentally make a contribution or an expenditure in excess of the reporting thresholds in RCW 42.17A.235, directly or through a political committee. Any nonprofit organization is not an incidental committee if it is only remitting payments through the nonprofit organization in an aggregated form and the nonprofit organization is not required to report those payments in accordance with this chapter.

(29) "Incumbent" means a person who is in present possession of an elected office.

(30)(a) "Independent expenditure" means an expenditure that has each of the following elements:

(i) It is made in support of or in opposition to a candidate for office by a person who is not:

(A) A candidate for that office;

(B) An authorized committee of that candidate for that office; and

(C) A person who has received the candidate's encouragement or approval to make the expenditure, if the expenditure pays in whole or in part for political advertising supporting that candidate or promoting the defeat of any other candidate or candidates for that office;

(ii) It is made in support of or in opposition to a candidate for office by a person with whom the candidate has not collaborated for the purpose of making the expenditure, if the expenditure pays in whole or in part for political advertising supporting that candidate or promoting the defeat of any other candidate or candidates for that office;

(iii) The expenditure pays in whole or in part for political advertising that either specifically names the candidate supported

or opposed, or clearly and beyond any doubt identifies the candidate without using the candidate's name; and

(iv) The expenditure, alone or in conjunction with another expenditure or other expenditures of the same person in support of or opposition to that candidate, has a value of one thousand dollars or more. A series of expenditures, each of which is under one thousand dollars, constitutes one independent expenditure if their cumulative value is one thousand dollars or more.

(b) "Independent expenditure" does not include: Ordinary home hospitality; communications with journalists or editorial staff designed to elicit a news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, controlled by a person whose business is that news medium, and not controlled by a candidate or a political committee; participation in the creation of a publicly funded voters' pamphlet statement in written or video form; an internal political communication primarily limited to contributors to a political party organization or political action committee, the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer campaign workers or incidental expenses personally incurred by volunteer campaign workers not in excess of two hundred fifty dollars personally paid for by the worker.

(31)(a) "Intermediary" means an individual who transmits a contribution to a candidate or committee from another person unless the contribution is from the individual's employer, immediate family, or an association to which the individual belongs.

(b) A treasurer or a candidate is not an intermediary for purposes of the committee that the treasurer or candidate serves.

(c) A professional fund-raiser is not an intermediary if the fund-raiser is compensated for fund-raising services at the usual and customary rate.

(d) A volunteer hosting a fund-raising event at the individual's home is not an intermediary for purposes of that event.

(32) "Legislation" means bills, resolutions, motions, amendments, nominations, and other matters pending or proposed in either house of the state legislature, and includes any other matter that may be the subject of action by either house or any committee of the legislature and all bills and resolutions that, having passed both houses, are pending approval by the governor.

(33) "Legislative office" means the office of a member of the state house of representatives or the office of a member of the state senate.

(34) "Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington, or the adoption or rejection of any rule, standard, rate, or other legislative enactment of any state agency under the state administrative procedure act, chapter 34.05 RCW. Neither "lobby" nor "lobbying" includes an association's or other organization's act of communicating with the members of that association or organization.

(35) "Lobbyist" includes any person who lobbies either on the person's own or another's behalf.

(36) "Lobbyist's employer" means the person or persons by whom a lobbyist is employed and all persons by whom the lobbyist is compensated for acting as a lobbyist.

(37) "Ministerial functions" means an act or duty carried out as part of the duties of an administrative office without exercise of personal judgment or discretion.

(38) "Participate" means that, with respect to a particular election, an entity:

(a) Makes either a monetary or in-kind contribution to a candidate;

(b) Makes an independent expenditure or electioneering communication in support of or opposition to a candidate;

(c) Endorses a candidate before contributions are made by a subsidiary corporation or local unit with respect to that candidate or that candidate's opponent;

(d) Makes a recommendation regarding whether a candidate should be supported or opposed before a contribution is made by a subsidiary corporation or local unit with respect to that candidate or that candidate's opponent; or
(e) Directly or indirectly collaborates or consults with a subsidiary corporation or local unit on matters relating to the support of or opposition to a candidate, including, but not limited to, the amount of a contribution, when a contribution should be given, and what assistance, services or independent expenditures, or electioneering communications, if any, will be made or should be made in support of or opposition to a candidate.

(39) "Person" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.

(40) "Political advertising" includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, digital communication, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.

(41) "Political committee" means any person (except a candidate or an individual dealing with the candidate's or individual's 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.

(42) "Primary" for the purposes of RCW 42.17A.405 means the procedure for nominating a candidate to state or local office under chapter 29A.52 RCW or any other primary for an election that uses, in large measure, the procedures established in chapter 29A.52 RCW.

(43) "Public office" means any federal, state, judicial, county, city, town, school district, port district, special district, or other state political subdivision elective office.

(44) "Public record" has the definition in RCW 42.56.010.

(45) "Recall campaign" means the period of time beginning on the date of the filing of recall charges under RCW 29A.56.120 and ending thirty days after the recall election.

(46) "Remediable violation" means any violation of this chapter that:

(a) Involved expenditures or contributions totaling no more than the contribution limits set out under RCW 42.17A.405(2) per election, or one thousand dollars if there is no statutory limit;

(b) Occurred:

(i) More than thirty days before an election, where the commission entered into an agreement to resolve the matter; or

(ii) At any time where the violation did not constitute a material violation because it was inadvertent and minor or otherwise has been cured and, after consideration of all the circumstances, further proceedings would not serve the purposes of this chapter;

(c) Does not materially harm the public interest, beyond the harm to the policy of this chapter inherent in any violation; and

(d) Involved:

(i) A person who:

(A) Took corrective action within five business days after the commission first notified the person of noncompliance, or where the commission did not provide notice and filed a required report within twenty-one days after the report was due to be filed; and

(B) Substantially met the filing deadline for all other required reports within the immediately preceding twelve-month period; or

(ii) A candidate who:

(A) Lost the election in question; and

(B) Did not receive contributions over one hundred times the contribution limit in aggregate per election during the campaign in question.

(47)(a) "Sponsor" for purposes of an electioneering communications, independent expenditures, or political advertising means the person paying for the electioneering communication, independent expenditure, or political advertising. If a person acts as an agent for another or is reimbursed by another for the payment, the original source of the payment is the sponsor.

(b) "Sponsor," for purposes of a political or incidental committee, means any person, except an authorized committee, to whom any of the following applies:

(i) The committee receives eighty percent or more of its contributions either from the person or from the person's members, officers, employees, or shareholders;

(ii) The person collects contributions for the committee by use of payroll deductions or dues from its members, officers, or employees.

(48) "Sponsored committee" means a committee, other than an authorized committee, that has one or more sponsors.

(49) "State office" means state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer.

(50) "State official" means a person who holds a state office.

(51) "Surplus funds" mean, in the case of a political committee or candidate, the balance of contributions that remain in the possession or control of that committee or candidate subsequent to the election for which the contributions were received, and that are in excess of the amount necessary to pay remaining debts or expenses incurred by the committee or candidate with respect to that election. In the case of a continuing political committee, "surplus funds" mean those contributions remaining in the possession or control of the committee that are in excess of the amount necessary to pay all remaining debts or expenses when it makes its final report under RCW 42.17A.255.

(52) "Technical correction" means the correction of a minor or ministerial error in a required report that does not materially harm the public interest and needs to be corrected for the report to be in full compliance with the requirements of this chapter.

(53) "Treasurer" and "deputy treasurer" mean the individuals appointed by a candidate or political or incidental committee, pursuant to RCW 42.17A.210, to perform the duties specified in that section.

(54) "Violation" means a violation of this chapter that is not a remediable violation, minor violation, or an error classified by the commission as appropriate to address by a technical correction.

**RCW 42.17A.105 Commission—Duties.**

The commission shall:

(1) Develop and provide forms for the reports and statements required to be made under this chapter;

(2) Prepare and publish a manual setting forth recommended uniform methods of bookkeeping and reporting for use by persons required to make reports and statements under this chapter;

(3) Compile and maintain a current list of all filed reports and statements;

(4) Investigate whether properly completed statements and reports have been filed within the times required by this chapter;

(5) Upon complaint or upon its own motion, investigate and report apparent violations of this chapter to the appropriate law enforcement authorities;

(6) Conduct a sufficient number of audits and field investigations to provide a statistically valid finding regarding the degree of compliance with the provisions of this chapter by all required filers. Any documents, records, reports, computer files, papers, or materials provided to the commission for use in conducting audits and investigations must be returned to the candidate, campaign, or political committee from which they were received within one week of the commission's completion of an audit or field investigation;

(7) Prepare and publish an annual report to the governor as to the effectiveness of this chapter and its enforcement by appropriate law enforcement authorities;

(8) Enforce this chapter according to the powers granted it by law;

(9) Adopt rules governing the arrangement, handling, indexing, and disclosing of those reports required by this chapter to be filed with a county auditor or county elections official. The rules shall:

(a) Ensure ease of access by the public to the reports; and

(b) Include, but not be limited to, requirements for indexing the reports by the names of candidates or political committees and by the ballot proposition for or against which a political committee is receiving contributions or making expenditures;

(10) Adopt rules to carry out the policies of chapter 348, Laws of 2006. The adoption of these rules is not subject to the time restrictions of RCW 42.17A.110(1);

(11) Adopt administrative rules establishing requirements for filer participation in any system designed and implemented by the commission for the electronic filing of reports; and

(12) Maintain and make available to the public and political committees of this state a toll-free telephone number.

**RCW 42.17A.750 Civil remedies and sanctions—Referral for criminal prosecution.**

(1) In addition to the penalties in subsection (2) of this section, and any other remedies provided by law, one or more of the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law:

(a) If the court finds that the violation of any provision of this chapter by any candidate, committee, or incidental committee probably affected the outcome of any election, the result of that election may be held void and a special election held within sixty days of the finding. Any action to void an election shall be commenced within one year of the date of the election in question. It is intended that this remedy be imposed freely in all appropriate cases to protect the right of the electorate to an informed and knowledgeable vote.

(b) If any lobbyist or sponsor of any grass roots lobbying campaign violates any of the provisions of this chapter, the lobbyist's or sponsor's registration may be revoked or suspended and the lobbyist or sponsor may be enjoined from receiving compensation or making expenditures for lobbying. The imposition of a sanction shall not excuse the lobbyist from filing statements and reports required by this chapter.

(c) A person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each violation. However, a person or entity who violates RCW 42.17A.405 may be subject to a civil penalty of ten thousand dollars or three times the amount of the contribution illegally made or accepted, whichever is greater.

(d) When assessing a civil penalty, the court may consider the nature of the violation and any relevant circumstances, including the following factors:

(i) The respondent's compliance history, including whether the noncompliance was isolated or limited in nature, indicative of systematic or ongoing problems, or part of a pattern of violations by the respondent, resulted from a knowing or intentional effort to conceal, deceive or mislead, or from collusive behavior, or in the case of a political committee or other entity, part of a pattern of violations by the respondent's officers, staff, principal decision makers, consultants, or sponsoring organization;

(ii) The impact on the public, including whether the noncompliance deprived the public of timely or accurate information during a time-sensitive period or otherwise had a significant or material impact on the public;

(iii) Experience with campaign finance law and procedures or the financing, staffing, or size of the respondent's campaign or organization;

(iv) The amount of financial activity by the respondent during the statement period or election cycle;

(v) Whether the late or unreported activity was within three times the contribution limit per election, including in proportion to the total amount of expenditures by the respondent in the campaign or statement period;

(vi) Whether the respondent or any person benefited politically or economically from the noncompliance;

(vii) Whether there was a personal emergency or illness of the respondent or member of the respondent's immediate family;

(viii) Whether other emergencies such as fire, flood, or utility failure prevented filing;

(ix) Whether there was commission staff or equipment error, including technical problems at the commission that prevented or delayed electronic filing;

(x) The respondent's demonstrated good-faith uncertainty concerning commission staff guidance or instructions;

(xi) Whether the respondent is a first-time filer;

(xii) Good faith efforts to comply, including consultation with commission staff prior to initiation of enforcement action and cooperation with commission staff during enforcement action and a demonstrated wish to acknowledge and take responsibility for the violation;

(xiii) Penalties imposed in factually similar cases; and

(xiv) Other factors relevant to the particular case.

(e) A person who fails to file a properly completed statement or report within the time required by this chapter may be subject to a civil penalty of ten dollars per day for each day each delinquency continues.

(f) Each state agency director who knowingly fails to file statements required by RCW 42.17A.635 shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars per statement. These penalties are in addition to any other civil remedies or sanctions imposed on the agency.

(g) A person who fails to report a contribution or expenditure as required by this chapter may be subject to a civil penalty equivalent to the amount not reported as required.

(h) Any state agency official, officer, or employee who is responsible for or knowingly directs or expends public funds in violation of RCW 42.17A.635 (2) or (3) may be subject to personal liability in the form of a civil penalty in an amount that is at least equivalent to the amount of public funds expended in the violation.

(i) The court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein.

(2) The commission may refer the following violations for criminal prosecution:

(a) A person who, with actual malice, violates a provision of this chapter is guilty of a misdemeanor under chapter 9.92 RCW;

(b) A person who, within a five-year period, with actual malice, violates three or more provisions of this chapter is guilty of a gross misdemeanor under chapter 9.92 RCW; and

(c) A person who, with actual malice, procures or offers any false or forged document to be filed, registered, or recorded with the commission under this chapter is guilty of a class C felony under chapter 9.94A RCW.

**RCW 42.17A.755 Violations—Determination by commission—Penalties—Procedure.**

(1) The commission may initiate or respond to a complaint, request a technical correction, or otherwise resolve matters of compliance with this chapter, in accordance with this section. If a complaint is filed with or initiated by the commission, the commission must:

(a) Dismiss the complaint or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances after conducting a preliminary review;

(b) Initiate an investigation to determine whether a violation has occurred, conduct hearings, and issue and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section; or

(c) Refer the matter to the attorney general, in accordance with subsection (4) of this section.

(2)(a) For complaints of remediable violations or requests for technical corrections, the commission may, by rule, delegate authority to its executive director to resolve these matters in accordance with subsection (1)(a) of this section, provided the executive director consistently applies such authority.

(b) The commission shall, by rule, develop additional processes by which a respondent may agree by stipulation to any allegations and pay a penalty subject to a schedule of violations and penalties, unless waived by the commission as provided for in this section. Any stipulation must be referred to the commission for review. If approved or modified by the commission, agreed to by the parties, and the respondent complies with all requirements set forth in the stipulation, the matter is then considered resolved and no further action or review is allowed.

(3) If the commission initiates an investigation, an initial hearing must be held within ninety days of the complaint being filed. Following an

investigation, in cases where it chooses to determine whether a violation has occurred, the commission shall hold a hearing pursuant to the administrative procedure act, chapter 34.05 RCW. Any order that the commission issues under this section shall be pursuant to such a hearing.

(a) The person against whom an order is directed under this section shall be designated as the respondent. The order may require the respondent to cease and desist from the activity that constitutes a violation and in addition, or alternatively, may impose one or more of the remedies provided in RCW 42.17A.750(1) (b) through (h), or other requirements as the commission determines appropriate to effectuate the purposes of this chapter.

(b) The commission may assess a penalty in an amount not to exceed ten thousand dollars per violation, unless the parties stipulate otherwise. Any order that the commission issues under this section that imposes a financial penalty must be made pursuant to a hearing, held in accordance with the administrative procedure act, chapter 34.05 RCW.

(c) The commission has the authority to waive a penalty for a first-time violation. A second violation of the same requirement by the same person, regardless if the person or individual committed the violation for a different political committee or incidental committee, shall result in a penalty. Successive violations of the same requirement shall result in successively increased penalties. The commission may suspend any portion of an assessed penalty contingent on future compliance with this chapter. The commission must create a schedule to enhance penalties based on repeat violations by the person.

(d) Any order issued by the commission is subject to judicial review under the administrative procedure act, chapter 34.05 RCW. If the commission's order is not satisfied and no petition for review is filed within thirty days, the commission may petition a court of competent jurisdiction of any county in which a petition for review could be filed

under that jurisdiction, for an order of enforcement. Proceedings in connection with the commission's petition shall be in accordance with RCW 42.17A.760.

(4) In lieu of holding a hearing or issuing an order under this section, the commission may refer the matter to the attorney general consistent with this section, when the commission believes:

(a) Additional authority is needed to ensure full compliance with this chapter;

(b) An apparent violation potentially warrants a penalty greater than the commission's penalty authority; or

(c) The maximum penalty the commission is able to levy is not enough to address the severity of the violation.

(5) Prior to filing a citizen's action under RCW 42.17A.775, a person who has filed a complaint pursuant to this section must provide written notice to the attorney general if the commission does not, within 90 [ninety] days of the complaint being filed with the commission, take action pursuant to subsection (1) of this section. A person must simultaneously provide a copy of the written notice to the commission.

**RCW 42.17A.765 Enforcement—Attorney general.**

(1)(a) The attorney general may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17A.750 upon:

(i) Referral by the commission pursuant to RCW 42.17A.755(4);

(ii) Receipt of a notice provided in accordance with RCW 42.17A.755(5); or

(iii) Receipt of a notice of intent to commence a citizen's action, as provided under RCW 42.17A.775(3).

(b) Within forty-five days of receiving a referral from the commission or notice of the commission's failure to take action provided in accordance with RCW 42.17A.755(5), or within ten days of receiving a citizen's action notice, the attorney general must publish a decision whether to commence an action on the attorney general's office website. Publication of the decision within the forty-five day period, or ten-day period, whichever is applicable, shall preclude a citizen's action pursuant to RCW 42.17A.775.

(c) The attorney general should use the enforcement powers in this section in a consistent manner that provides guidance in complying with the provisions of this chapter to candidates, political committees, or other individuals subject to the regulations of this chapter.

(2) The attorney general may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and place designated in the county in which such person resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the attorney general requires the attendance of any person to obtain such information or produce the accounts, bills, receipts, books, papers, and documents that may be relevant or material to any investigation authorized under this chapter, the attorney general shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. The order shall have the same force and effect as a subpoena, shall be effective statewide, and, upon application of the attorney general, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the order were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and the action shall be subject to review by the appellate courts by certiorari or other appropriate proceeding.

**RCW 42.17A.775 Citizen's action.**

(1) A person who has reason to believe that a provision of this chapter is being or has been violated may bring a citizen's action in the name of the state, in accordance with the procedures of this section.

(2) A citizen's action may be brought and prosecuted only if the person first has filed a complaint with the commission and:

(a) The commission has not taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed with the commission, and the person who initially filed the complaint with the commission provided written notice to the attorney general in accordance with RCW 42.17A.755(5) and the attorney general has not commenced an action, or published a decision whether to commence action pursuant to RCW 42.17A.765(1)(b), within forty-five days of receiving the notice;

(b) For matters referred to the attorney general within ninety days of the commission receiving the complaint, the attorney general has not commenced an action, or published a decision whether to commence an action pursuant to RCW 42.17A.765(1)(b), within forty-five days of receiving referral from the commission; and

(c) The person who initially filed the complaint with the commission has provided notice of a citizen's action in accordance with subsection (3) of this section and the commission or the attorney general has not commenced action within the ten days provided under subsection (3) of this section.

(3) To initiate the citizen's action, after meeting the requirements under subsection (2) (a) and (b) of this section, a person must notify the attorney general and the commission that the person will commence a citizen's action within ten days if the commission does not take action authorized under RCW 42.17A.755(1), or the attorney general does not commence an action or publish a decision whether to commence an action pursuant to RCW 42.17A.765(1)(b). The attorney general and the

commission must notify the other of its decision whether to commence an action.

(4) The citizen's action must be commenced within two years after the date when the alleged violation occurred and may not be commenced against a committee or incidental committee before the end of such period if the committee or incidental committee has received an acknowledgment of dissolution.

(5) If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he or she shall be entitled to be reimbursed by the state for reasonable costs and reasonable attorneys' fees the person incurred. In the case of a citizen's action that is dismissed and that the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all trial costs and reasonable attorneys' fees incurred by the defendant.

**WAC 390-12-250 Declaratory order—Petition requisites—Consideration—Disposition.**

(1) Any person may submit a petition for a declaratory order pursuant to RCW 34.05.240 in any form so long as it:

(a) Clearly states the question the declaratory order is to answer; and

(b) Provides a statement of the facts which raise the question.

(2) The executive director may conduct an independent investigation in order to fully develop the relevant facts.

(3) The executive director will present the petition to the commission at the first meeting when it is practical to do so and will provide the petitioner with at least five business days notice of the time and place of such meeting. Such notice may be waived by the petitioner.

(4) The petitioner may present additional material and/or argument at any time prior to the issuance of the declaratory order.

(5) The commission may issue either a binding or a nonbinding order or decline to issue any order.

(6) The commission may decide that a public hearing would assist its deliberations and decisions. If such a hearing is ordered, it will be placed on the agenda of a meeting and at least five business days notice of such meeting shall be provided to the petitioner.

(7) If an order is to be issued, the petitioner shall be provided a copy of the proposed order and invited to comment.

(8) The declaratory order cannot be a substitute for a compliance action and is intended to be prospective in effect.

(9) The commission will decline to consider a petition for a declaratory order or to issue an order when (a) the petition requests advice regarding a factual situation which has actually taken place, or (b) when a pending investigation or compliance action involves a similar factual situation.

**WAC 390-17-405 Volunteer services.**

(1) In accordance with RCW 42.17A.005 (16)(b)(vi), an individual may perform services or labor for a candidate or political committee without it constituting a contribution, so long as the individual is not compensated by any person for the services or labor rendered and the services are of the kind commonly performed by volunteer campaign workers. These commonly performed services include:

(a) Office staffing;

(b) Doorbelling or leaflet drops;

(c) Mail handling (folding, stuffing, sorting and postal preparation, processing emails to and from the campaign);

(d) Political or fund-raising event staffing;

(e) Telephone bank activity (conducting voter identification, surveys or polling, and get-out-the-vote campaigns);

(f) Construction and placement of yard signs, hand-held signs or in-door signs;

(g) Acting as a driver for candidate or candidate or committee staff;

(h) Scheduling of campaign appointments and events;

(i) Transporting voters to polling places on election day;

(j) Except as provided in subsection (2) of this section, preparing campaign disclosure reports required by chapter 42.17A RCW and otherwise helping to ensure compliance with state election or public disclosure laws;

(k) Campaign consulting and management services, polling and survey design, public relations and advertising (including online advertising), or fund-raising performed by any individual, so long as the individual does not ordinarily charge a fee or receive compensation for providing the service;

(l) Creating, designing, posting to and maintaining a candidate or political committee's official campaign website or online forum, so long as the individual does not ordinarily charge a fee or receive compensation for providing the service; and

(m) All similar activities as determined by the PDC.

(2) An attorney or accountant may donate their professional services to a candidate, a candidate's authorized committee, a political party or a

caucus political committee, without it constituting a contribution in accordance with RCW 42.17A.005 (16)(b)(viii), if the attorney or accountant is:

(a) Employed and their employer is paying for the services rendered;

(b) Self-employed; or

(c) Performing services for which no compensation is paid by any person.

However, neither RCW 42.17A.005 (16)(b)(viii) nor this section authorizes the services of an attorney or an accountant to be provided to a political committee without a contribution ensuing, unless the political committee is a candidate's authorized committee, political party or caucus political committee and the conditions of RCW 42.17A.005 (16)(b)(viii) and (a), (b) or (c) of this subsection are satisfied, or unless the political committee pays the fair market value of the services rendered.

**WAC 390-37-060 Case initiation and resolution procedures—Alternative responses to noncompliance—Technical corrections—Investigation of complaints—Initiation of adjudicative proceeding.**

(1) Upon receipt or initiation of a complaint, the PDC staff will conduct an initial review pursuant to WAC 390-37-005.

(a) If the executive director determines that any complaint is obviously unfounded or frivolous, or outside of the PDC's jurisdiction, the executive director will inform the complainant and, as appropriate, the respondent why no further action is warranted.

(b) The executive director may resolve a matter as a technical correction pursuant to RCW 42.17A.755. PDC staff will notify the respondent of the need to make a correction and the deadline by which that correction must be made. The deadline will be no less than two days and no more than fourteen days from the date of the notification. The failure to make the requested correction may result in the initiation of an investigation or other enforcement action.

(c) The executive director may resolve a matter as a remediable violation pursuant to RCW 42.17A.755.

(d) The executive director may resolve any complaint that alleges minor violations of chapter 42.17A by issuing a formal written warning. If the resolution is conditioned upon the respondent reaching or maintaining compliance, specific expectations and any deadlines will be clearly explained in the written warning. A respondent's failure to meet conditions may result in a complaint being reopened.

(e) The executive director may use the complaint publication process set out in WAC 390-32-030 to resolve any complaint that alleges minor or remediable violations or warrants a technical correction under chapter 42.17A RCW.

(f) The executive director may enter into a statement of understanding, in accordance with WAC 390-37-142.

(g) The executive director may propose a stipulation to the commission before or after conducting an investigation.

(h) The executive director may initiate an investigation whenever an initial review of a complaint indicates that a material violation may have occurred.

(i) The executive director may, with the concurrence of the commission chair or vice chair, refer a complaint to the attorney general, in accordance with WAC 390-37-042.

(j) The executive director must report at each regular commission meeting a summary covering the period since the previous commission meeting of all complaints initiated or received; how they were categorized; the nature of the allegations; conformance to required timelines; and actions taken and resolutions achieved pursuant to the alternatives provided for under chapter 42.17A RCW, such as dismissals, requests for technical correction, warning letters, complaint publication, statements of understanding, initiations of investigations, status reviews, stipulations, referrals to the attorney general's office, brief adjudicative proceedings, or commission hearings.

(2) If the executive director determines an investigation will require the expenditure of substantial resources, the executive director may request review and concurrence by the commission before proceeding.

(3) If the executive director determines an investigation is warranted, an initial hearing (also referred to as a "case status review") will be held pursuant to WAC 390-37-071 within ninety days of the compliant being initiated or received.

(4) Following the initial hearing (case status review), and further investigation if needed, the executive director may initiate an adjudicative proceeding before the commission whenever the facts support that a material violation has occurred and the matter is not appropriate for a dismissal or an alternative resolution.

(5) The respondent and complainant must be notified of the date of the adjudicative proceeding or a report on an enforcement matter resulting from a complaint no later than ten calendar days before that date. The notice must contain the information required by RCW 34.05.434, the staff investigative report, and any charges to be adjudicated. The notice, whenever possible, will be delivered electronically.