

No. 22-35112  
**In the United States Court of Appeals  
for the Ninth Circuit**

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INSTITUTE FOR FREE SPEECH,

*Plaintiff-Appellant,*

v.

FRED JARRETT, ET AL.,

*Defendants-Appellees.*

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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)

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PLAINTIFF-APPELLANT'S OPENING BRIEF

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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.<sup>1</sup>

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.

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<sup>1</sup> 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 Lavalley,

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:”

1. *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 an 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); *AFPP*, 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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