

No. 56653-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TIM EYMAN AND
TIM EYMAN WATCHDOG FOR TAXPAYERS LLC,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANTS EYMAN

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I. REPLY TO INTRODUCTION

True to form, rather than focusing on the straightforward facts of the State's claims and its legal theory, Respondent's brief is couched in hyperbolic factual misstatement, innuendo and attacks on Mr. Eyman's "personality, politics, history, financial relationships and transactions." *See* Opening Brief 2

Mr. Eyman did not violate the Fair Campaign Practices Act ("FCPA") with respect to either of the two basic theories of the State: (1) reporting on I-1185 and I-517; and (2) the State's mischaracterization of Mr. Eyman as a "Continuing Political Committee" as that term is defined in RCW 42.17A.005(14).

The "court['s] carefully crafted" injunction was 100% the State's invention, entered by the trial court contrary to CR 52(c) without notice or opportunity for Mr. Eyman's lawyers to comment much less object. It bears no relation to the FCPA's authority to enjoin what the Act forbids nor require what the Act mandates. It does not enjoin "illegal" behavior but exceeds statutory authority to abridge First Amendment freedom of speech.

The Findings, Conclusions and Injunction were drafted and used by Attorney General Robert Ferguson to raise funds for his future political campaign(s). CP 5667

The State induced the trial Court to award attorney fees against Mr. Eyman where no statutory authority exists and fined him millions for conduct and speech neither prohibited by the FCPA nor preceded in this or any other jurisdiction.

Perhaps most disturbing from a professional standpoint is the State's repeated and intentional misstatement of the factual record with the concomitant burden imposed on the appellant and Court to ferret out the truth. The State's approach is predictable, however, given a plain, honest and straightforward statement of the case would expose the weakness of the State's theory.

II. REPLY TO COUNTERSTATEMENT OF THE ISSUES

Further reply is unnecessary.

III. REPLY TO STATEMENT OF THE CASE

A. Reply to Mr. Eyman's history under the FCPA

To the extent this section relates to events prior to March 30, 2012 it is outside the statute of limitations and is moreover irrelevant to the state's actual claim.

In any event, the assertion that Mr. Eyman ever used "political contributions to benefit himself and his family [citing RP 679-80]"¹ is blatantly false and not supported by the record. What Mr. Eyman *did* do from time to time was solicit charitable contributions. These funds were NEVER spent on political campaigns but ONLY used for his family's living expenses. This is not covered by the FCPA which only requires a political committee to report contributions in support of a candidate or ballot proposition. RCW 42.17A.005(41); RCW 42.17A.205(1) ("...receiving contributions or making expenditures in any *election campaign*.") (italics added) In a similar vein the State repeats the same claim in various forms throughout the brief, e.g. characterizing charitable

¹ Resp. br. 3

contributions for Mr. Eyman's personal use as for "work on initiative campaigns."² Let us be clear, "work on initiative campaigns" such as advocacy is not covered by the FCPA, only electoral campaign contributions and expenditures whereas funds given to Mr. Eyman for his personal expenses were used for his personal expenses, not campaigns. The State would mislead the court.

Reference is made to a *2010* campaign where Mr. Eyman allegedly suggested an increase in payments to paid signature gatherers by 50 cents to fund a "kickback."³ But this suggestion was never accepted, is not the basis of the State's action, is outside the statute of limitations, and isn't prohibited by the FCPA in any event.

B. Eyman seeks and expends charitable gifts to pay personal expenses

Continuing on the theme above, the State reaches beyond the Statute of Limitations to fault Mr. Eyman for seeking and

² Resp. br. 4

³ Id.

receiving charitable gifts to defray personal expenses. These were not campaign contributions as a matter of law and accordingly not reportable.

The State then claims Mr. Eyman negotiated a paid signature gathering contract on behalf of the I-1185 committee and agreed to “rais[e] the price per signature for a kickback to himself. Exs 82-87.”⁴ While it is certainly true Mr. Eyman and Citizen Solutions negotiated an agreement to raise the price paid to signature gathers as an added incentive to address market conditions; it is a blatant misrepresentation of the record to claim it was for a “kickback” to Mr. Eyman. The evidence is to the contrary. Ex. 82, 83 and 85 emails from Citizens Solutions, request a price hike to avoid falling short on signatures because of market conditions. Ex. 83 posits signature gathering crews may be unavailable without an additional incentive and “we won’t make anything from the bump—all the extra will go to the coordinators and petitioners

⁴ Id. at 6

to get I-1185 over the finish line.” Elsewhere in the record the principals of Citizen Solutions and Mr. Eyman testified the small price hikes were not to fund a “kickback” but to deal with market conditions requiring an additional incentive to signature gatherers⁵—and there was **no evidence to the contrary**.

Moreover “kickbacks” are not prohibited by the FCPA in any event. The record shows all payments to Citizen Solutions were reported by committee treasurer Stan Long. How Citizens Solutions spends its money is not reportable under the Act.

Space does not permit a detailed reply to every misbegotten factual misrepresentation from the State; however, some general observations are in order. The Court is encouraged to check the factual references in the State’s brief. References to the verbatim report of proceedings (“RP”) are the only references to factual testimony, and they are few and far between. References to the clerk’s papers (“CP”) are not

⁵ See n. 22

references to evidence. Some reference Findings challenged for lack of substantial evidence or as legal conclusions.

For example, the state's claim that Citizen Solution's payment to Watchdog for a consulting contract "was a kickback made...with the specific intent to violate the FCPA by concealing from the public the purpose of five expenditures of donor funds CP4951-52"⁶ is a quotation from a challenged Finding not supported by substantial evidence and, moreover, a legal conclusion not supported by the FCPA.

The above reference to "donor funds" relates to the last five payments, direct and in-kind, to Citizen Solutions for signature gathering. These payments (except one) were properly reported as such. These were not payments *to Mr. Eyman* but to Citizen Solutions, and there is no evidence to the contrary. The only significance of the "five payments" is they were the last payments—all went to Citizen Solutions and were intended to go to Citizen Solutions. They were not "concealed from the

⁶ Resp. br. 6

public” but fully reported. This did not violate the FCPA but was required by the FCPA. That Citizen Solutions eventually entered into a consulting contract with Watchdog for \$308,000 was not reportable and did not violate the FCPA. The State simply refuses to honor this court with an objective statement of the facts as distinguished from its argument. Appellants’ Opening Brief accurately sets forth the facts and then argues legally therefrom. See further discussion *infra* on Finding 2.26.

C. Order for Non-Monetary Sanctions neither lawfully nor factually supported

The order for non-monetary relief was entered by the trial court on September 13, 2019 and was discussed in great detail in Appellants’ Opening Brief p. 66 et seq This order was error.

The object and subject of the order was the State’s claim that Mr. Eyman was a “continuing political committee” because he had received about \$766,000 in charitable contributions to help pay his living expenses (not as campaign contributions.) Although these were not reportable as a matter of law for reasons previously expressed; the State spins the simple reality

by claiming “contributors gave Eyman money for his *political work*, which Eyman did not disclose.” (italics added)⁷ Of course there is no evidence the contributions were intended for anything other than helping Mr. Eyman pay his personal and family expenses and there is no evidence he spent the money other than on just that. But note the clever wording of the claim: “contributors gave Eyman money for his political work...” As stated in Appellants’ Opening Brief⁸ it may be true some donors were personally motivated to help Mr. Eyman because of his anti-tax activism; however their contributions were not to fund campaigns, and didn’t. This is the basic flaw in the State’s theory. Therefore references to the record should be read in that light.

The” prejudice” claimed by the State to justify the discovery order was failure to disclose donor identities.⁹ But isn’t it strange the State never acknowledges that in its brief? The

⁷ Resp. Br. 10

⁸ Opening Br. 23

⁹ CP 1197, see also Opening Br. 71

reason, of course, is that the State had all the donor identities, their addresses, phones numbers, dates of contributions and amounts totaling \$766,447 for a full year prior to filing an **affidavit with the court attesting the donor identities had been withheld to the State's prejudice.** This was a lie. In fact the State had obtained court orders to copy all of Mr. Eyman's bank accounts with all the cancelled checks.¹⁰ When the State defends by claiming Eyman didn't produce all of the cancelled checks, it conveniently omits the fact that it already had them. Thus the State mislead the trial court, and would do it again here.

Mr. Eyman sought discretionary review of the discovery order. The State successfully opposed discretionary review, quoting the commissioner in his order denying interlocutory review.¹¹ However denial of discretionary review does not affect the right of a party to obtain later review of the decision or issues pertaining thereto. RAP 13.5(d) In contrast, this court

¹⁰ CP 255, 307, 522

¹¹ Resp. Br. 13

now has the benefit of full briefing on a completely developed record.

D. The Superior Court entered Findings without prior notice as drafted by the State

As previously noted, contrary to CR 52 (c) the trial court without notice of presentation nor opportunity for Mr. Eyman's counsel to object, entered Findings drafted by the State. This was error requiring the Findings of Fact, Conclusions of Law and Injunction/Judgment be vacated.¹²

IV. STANDARD OF REVIEW

As acknowledged by the State, Conclusions of Law are reviewed de novo. It is equally true legal conclusions denominated as factual findings are also reviewed de novo.

V. REPLY TO ARGUMENT

A. Substantial Evidence Does Not Support the manner in which the FCPA has been applied to Mr. Eyman

The State claims the canon of strict statutory construction does not apply to the FCPA because (1) the FCPA calls for a

¹² *Tacoma Recycling, Inc. v. Capitol Material Handling Co.*, 34 Wn.App. 392, 396, 661 P.2d 609 (1983), citing *Paine-Gallucci, Inc. v. Anderson*, 35 Wn.2d 312, 212 P.2d 805 (1945).

“liberal” construction and (2) “the FCPA is not a criminal statute.”¹³

First, RCW 42.17A.001 does *not* direct the chapter be construed broadly to cover that which is not within its meaning but rather “be liberally construed to promote complete disclosure of all information respecting the financing of political *campaigns* and lobbying” (italics added) as well as “the financial affairs of elected officials and candidates, and full access to public records...” It also cautions the information disclosed “will not be misused for arbitrary and capricious purposes” and reporting persons “be protected from harassment and unfounded allegations.”

Most of this proceeding, however, relates to the government claim that Mr. Eyman is a “continuing political committee” because of his receipt of charitable contributions for his *non-campaign* personal expenses. The remainder relates how a vendor spends its money. The FCPA doesn’t pertain to

¹³ Resp. Br. 20

non-campaign finances and no construction based on the language of the text can manufacture that which isn't there. Nor is Mr. Eyman a candidate. The direction also requires that persons be protected from harassment and unfounded allegations based on information they have freely disclosed. However, this whole proceeding against Mr. Eyman is based on precisely that—information he freely disclosed to PDC investigators. That statute directs Mr. Eyman be *protected*, not harassed, and not subjected to unfounded allegations. Moreover, the State seeks to defeat the purpose of the statute which is to “increase financial participation of individual contributors in political campaigns” by subjecting activists like Mr. Eyman to draconian penalties for actively participating in the political process. Such participation is to be encouraged, not punished.

Second, is the *due process* constitutional mandate that criminal statutes be strictly construed against the government. Constitutional rights are not subject to legislative deprivation.

The State cannot deny this but rather contends this is “not a criminal statute”. Of course it is. *See* RCW 42.17A.750(2) A statute with both civil and criminal remedies, as here, is subject to strict construction against the government. There cannot be one construction for civil penalties and a different one for criminal. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8, 125 S. Ct. 377, 160 L.Ed. 271 (2004)

1. Eyman properly applies the substantial evidence standard.

Given the Findings are 32 pages long with nearly a hundred numbered paragraphs, Mr. Eyman made a good faith if not Herculean effort to direct the Court’s attention to error. See Opening Br., App. A Aside from the complete invalidity of all the Findings due to lack of noticed presentation, errors identified were lack of substantial evidence and/or improper legal conclusion. If “lack of substantial evidence” to support the finding is the problem, it is impossible to cite that which isn’t there (as is apparently the State’s argument.)¹⁴

¹⁴ Resp. Br. 21

Error was assigned to each finding with further specific discussion of findings pertaining to the I-1185 and 517 claims (Opening br. 48-53); and the “continuing political committee” claims. (Opening br. 57-60). Even an overlength brief (by nearly 4,000 words) precluded further discussion of Findings not relevant to actual claims for relief and outside the statute of limitations. Moreover failure to comply with CR 52(c)’s requirement for prior notice of presentation renders *all* Findings invalid.¹⁵

2. Eyman is not a continuing political committee

This topic was addressed at length in Appellants’ Opening Brief. The object here is specific comment on misstatements of fact and law from the State in its Response Brief.

“Eyman repeatedly solicited contributions from the public in support of ballot measures he proposed.”¹⁶ This is correct. Raising money for his political committee was one of his duties

¹⁵ See n. 12

¹⁶ Resp. br. 23

and he performed it well. The FCPA requires campaign contributions be reported and treasurer Stan Long did so.

He contacted contributors “falsely stating if more contributions were not forthcoming, the initiative might fail to qualify.”¹⁷ It costs money to gather signatures and it costs money to maintain the overhead of a political committee. Seeking contributions for a ballot measure campaign is not regulated by the FCPA. Most measures fail for want of sufficient signatures. This was Mr. Eyman’s honest and informed opinion based on years of experience, not a false statement of fact.

“These funds were routed to Eyman personally. Exs 84, 89, 92, 355; RP 778” This statement is categorically false and is not based on the record. All in kind contributions went directly to Citizen Solutions and reported. All campaign contributions went to the I-1185 committee and were reported. All committee expenditures were reported. None went to Mr.

¹⁷ Id. 24

Eyman personally unless properly reported for salary, expense reimbursement, or loan repayment. Moneys spent by Citizen Solutions included a contract payment to Watchdog. This was not reportable.

“Eyman solicited funds for himself to help him further his ballot propositions.”¹⁸ Mr. Eyman solicited charitable money for himself and his family to pay his personal expenses. These expenses were not for a political campaign but for food, lodging, education, etc. Donors may have been motivated to personally help Mr. Eyman for a variety of reasons. However, no contributions were made to be expended on a political campaign, none were, and this is not reportable under the FCPA.

“Eyman failed to separate his personal solicitations for money from his political ones, and thus all of the solicitations were political.”¹⁹ Mr. Eyman sought and received charitable contributions to pay his living expenses. Those receipts were

¹⁸ Resp. Br. 24

¹⁹ Resp. Br. 27

never deposited in the account of a campaign committee but in his personal account. The State claims the \$766,000 referenced in the September 13, 2019 order and the summary judgment was derived from adding up the deposits in Mr. Eyman's personal account. If Mr. Eyman solicited money for a political committee, those funds raised were deposited in the political committee bank account and fully reported. See e.g. App. Br., App. C

The State's theory seems to be without some source of income Mr. Eyman could not live and therefore could not participate in free speech activities. However the FCPA does not require officers of committees report their personal finances.

3. Eyman had no duty to report charitable contributions for his personal use and of course did not do so

If the State claims it properly characterized Mr. Eyman a "continuing political committee" (1) even though he is an individual *not an organization* and (2) he accepted charitable

contributions to defray *non-electoral* personal expenses, it has failed to cite a single precedent from this or any jurisdiction to support that theory.

The Attorney General argues illogically because a single person can be a “political committee” it necessarily follows ipso facto that person, although not an “organization,” can also be a “continuing” committee. But definitions of the two committees are not the same. “It is firmly established as a matter of statutory interpretation that where the legislature uses different language in the same statute, differing meanings are intended. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (‘minimum term’ and ‘release date’ have different meanings within chapter 13.40 RCW); *Haley v. Highland*, 142 Wn.2d 135,147, 12 P.3d 119 (2000) (‘separate property’ and ‘community property’ in chapter 26.16 RCW have different meanings.’)” *State v. Costich*, 152 Wn.2d 463, 98 P.3d 795, 801 (2004)

4. Eyman cannot “conceal” that which he has no duty to report

“He ‘loaned’ money received for the I-1185 campaign to Citizens in Charge, which then funded the I-517 campaign without disclosing the true source of the funds.”²⁰ Watchdog, Mr. Eyman’s LLC, was paid approximately \$308,000 by Citizen Solutions for a consulting contract. This is not reportable under the FCPA. Watchdog then loaned around \$200,000 to Citizens in Charge. This is not reportable under the FCPA. As the trial court found,²¹ over \$100,000 of the amount loaned was repaid.

The State asserts “This loan qualified as a ‘contribution’ under the FCPA.” However, a loan for *full* value (which this was) is not a “contribution” and therefore not reportable. RCW 42.17A.005(15)(a) Every credit card transaction is the same. When a contribution is made by credit card the name of the bank is not disclosed.

²⁰ Resp br. 30

²¹ Concl. 3.5

“Eyman loaned funds received for the I-1185 campaign to Citizens in Charge. Citizens in Charge sent those funds to the I-517 campaign.” *Id.* No. Eyman (really Watchdog) received funds from *Citizen Solutions* and *loaned* some of it to Citizens in Charge. Citizens in Charge used some of its money to hire paid signature gatherers for the I-517 campaign. This was fully and accurately reported as an in-kind expenditure by treasurer Stan Long of the I-517 campaign. The FCPA reporting provisions met with compliance *to the letter*.

What follows under this heading is basically argument addressed elsewhere.

5. Substantial evidence does *not* support the findings of fact

Under this heading the State attempts to factually justify multiple Findings 2.18 – 2.59 based upon alleged “substantial evidence.” Mindful of spatial limitations, this reply attempts to highlight problematic language in the attached Findings (App. A) with brief comments. More fundamentally, even if the

factual findings were supported by substantial evidence, they do not prove a violation of the FCPA in any event.

Finding 2.18. This finding is nearly a full page.

Objectionable language includes “In furtherance of the conspiracy to fund a kickback to himself” Eyman agreed to raise the price per signature. The record shows two small price hikes were necessary to incentivize signature gathers due to market conditions as explained in Ex. 82, 83 and 85. There is *no evidence* this was for a “kickback” to Mr. Eyman. Ex. 83 further states “all the extra will go to the coordinators and petitioners to get I-1185 over the finish line.” Direct testimony from the principals contradicts the “kickback” theory.²² Moreover the FCPA does not regulate price nor “kickbacks” in any event. Contracted payments to Citizen Solutions were not limited to reimbursement for signature gathers but also for overhead, profit, etc.

²² Messers Eyman and William Agazarm testified in person and by deposition that the price hikes were necessitated by market conditions and had nothing to do with the subsequent consulting agreement between Watchdog and Citizen Solutions. CP 3725, 4027

Finding 2.19 claims Mr. Eyman attempted to raise money for the initiative from donors *falsely* claiming “I-1185 might fail to qualify for the ballot. These statements were false, and Defendant Eyman knew them to be false when he made them.” However Mr. Eyman’s statements could not be false but opinion. Ex. 82 and 83 evidence just the opposite of this finding, i.e. “I-1185 might fail to qualify for the ballot,” an obviously true statement. Statements to donors are not regulated by the FCPA in any event. There is *never* a guarantee enough signatures will be gathered, and most initiatives fail for exactly this reason.

Finding 2.20 Disclosure deadlines sometimes differ depending on the reporting timetable. This Finding does not claim disclosure deadlines were *actually* violated nor is it germane to the State’s actual claim.

Finding 2.21 is accurate and does not prove a violation of the FCPA.

Finding 2.22 is based on no substantial evidence Mr. Eyman received a “kickback” and the “RP” references to testimony from the Fagans don’t make sense since they didn’t testify at trial. Moreover they were not involved in the Watchdog contract.

Finding 2.23 repeats the “kickback” claim citing ex. 84 which is a partnership proposal never accepted and without reference to payments per signature. Citizen Solutions paid Watchdog from its profits, as was its right. The finding lacks substantial evidence and doesn’t demonstrate a violation of the FCPA in any event.

Finding 2.24 says “the court finds” \$270k was an “agreed payment that eventually became \$308,185.50” paid to Watchdog. There is no substantial evidence of this, and the State’s references to the record do not support it. However even if true same would not violate the FCPA in any event.

Finding 2.25 claims funds sent to Citizen Solutions would not “exclusively” fund signature gathering but for a

“kickback” to Mr. Eyman, citing ex. 84 and 89. Ex. 84 is a proposal for a partnership agreement never accepted. Ex. 89 says essentially now that the signature drive is over the parties can continue to negotiate a partnership or something else. Neither exhibit is evidence that there was a “kickback,” nor that the contract with Citizens was “exclusively” to pay signature gathers, i.e. it was a flat fee contract to Citizen Solutions with no restriction on how it could allocate or expend its funds. There is no evidence whatsoever the price change for signature gathers was to fund any payment to Mr. Eyman. However, this would not be a violation of the FCPA in any event.

Finding 2.26 reflects Citizen Solutions received various direct payments from the I-1185 committee and in-kind contributions from others. While it is certainly true Citizen Solutions used funds on hand for all purposes including profit (from which the contract payment to Watchdog was funded), there is no substantial evidence these payments were “not needed to fund any expenses related to the I- 1185 drive or

Defendant Citizen Solutions normal operations.” They equaled the flat fee contract price which included profit.

The Finding claims all payments after June 27, 2012 received by Citizen Solutions “were used to pay defendant Eyman a kickback...” These last five payments total \$351,975. Ex. 351 The total payment to Citizen Solutions from all sources was \$1,245,475²³ for 320,000 signatures. The original contract was \$1,050,000 for 300,000 signatures, modified up for price increases by \$190,000²⁴ for a total contract price of \$1,240,000 for 320,000 signatures (almost exactly the total paid). Had Mr. Eyman been paid \$351,975 through a “kickback” of funds otherwise (actually) paid Citizens Solutions, Citizens would have only received \$893,500 in breach of even the original flat fee contract which the state claims Mr. Eyman had every right to negotiate.²⁵ The Finding doesn’t add up, is not supported by substantial evidence and is self-contradictory.

²³ Finding 2.17

²⁴ n. 36

²⁵ Resp. br. 70

Finding 2.27 essentially claims an in-kind donation of \$27,150 from Washington Beer and Wine was “intentionally concealed” by Mr. Eyman and Agazarm and not disclosed as a “kickback” to Defendant Eyman, citing Exs. 351, 355. These exhibits are bank account summaries that do not furnish any evidence about *why* this in-kind contribution was not reported at the time such as beyond the knowledge of the I-1185 treasurer, Stan Long, much less “intentionally concealed” by Mr. Eyman who had no reporting duty in any event. The State provides no evidence any prices were adjusted to fund a kickback. And the actual numbers are inconsistent with that as well.²⁶ It furnishes no evidence that this in-kind contribution was not in fulfillment of the contract price, like every other payment.

Finding 2.28 when compared to the text references is misleading when claiming a lobbyist “was not aware” Mr.

²⁶ Is the “kickback” \$308,000 represented by the Watchdog contract, or \$351,000 represented by the last five payments? How is either funded by \$190,000 in price hikes? If the State claims the “real” contract was for \$1,050,000, why would Citizens Solutions receive less than that after “kickback” deductions?

Eyman was directing payments to himself; whereas their testimony provides no proof he was. They were “not aware” of something which didn’t happen. Messers Chandler, Guadnola and Hanon testified they were pleased enough signatures were acquired and never asked Citizen Solutions how they were going to spend their money. RP 544, 555 Mr. Guadnola assumed Citizen Solutions would make a profit, found nothing wrong with that, and didn’t discuss how it intended to spend its profit. RP 556 Mr. Hanon testified he knew contributions were for more than the cost of signature gathering such as to retire a prior debt to Mr. Eyman and for his compensation, and Hanon agreed. RP 611 He knew a price hike per signature to meet competition from other signature gathering firms was reasonable and agreed to it, RP 612, and was pleased enough signatures were gathered and wasn’t interested in whether or not Citizen Solutions made a profit or how it distributed its funds. RP 613 No FCPA violation here.

Finding 2.29 Emails were exchanged preliminary to the consulting agreement. No FCPA violation here.

Finding 2.30 says Citizen Solutions paid Watchdog \$308,000 which benefited Eyman personally (true enough); however, adds this was *with specific intent to violate the FCPA and to conceal same in “political contributions.”* Cited Exs 84, 89, 92 and 355 provide no substantial evidence of italicized portion. 84 is an unaccepted partnership proposal, 89 furthers the negotiations, 92 is an electronic transfer of the funds, and 355 is a bank account summary. There is no evidence of a violation of the FCPA much less specific intent to do so and the exhibits demonstrate funds to Watchdog came from Citizen Solutions’ bank account for a contract payment, not “political contributions” to some unspecified electoral campaign.

Finding 2.31 says “defendant Agazarm” (without specifying which one) approved the payment to Watchdog and that the final donations received by Citizen Solutions were from the committee and in-kind contributions solicited by Mr.

Eyman, and that Mr. Eyman used some of the money for personal expenses. The Finding is factually accurate aside from the pejorative legal conclusion that was a “kickback,” discussed elsewhere.

Finding 2.32 is factually accurate.

Finding 2.33 is hyperbole referencing “Defendant Eyman’s *schemes*...”as if there is something per se wrong with seeking and receiving payments from a signature-gathering firm and its principals. No violation of the FCPA here.

Finding 2.34 is a pure *legal conclusion* that Mr. Eyman “failed to properly report and intentionally concealed the true purpose of the \$308,185.50” which was for his personal use [and for a loan.] He had no duty under the FCPA to report this and did not do so. Not reporting what one has no duty to report is hardly concealment. In fact all of this *was disclosed* to the PDC investigator Perkins on inquiry.

Finding 2.35 is basically a legal conclusion to be reviewed as such. As previously documented, payment of a

consulting contract to Watchdog from company funds is a non-reportable transaction, non-reportable by anyone, including Mr. Eyman. Moreover it was public knowledge as reported in B & O and IRS tax returns and fully disclosed to the PDC on inquiry. A portion of the amount was loaned to Citizens in Charge and a portion used for Mr. Eyman's personal expenses. This did not violate RCW 42.17A.435 [sic] because it was not made in a fictitious name; nor did it violate RCW 42.17A.445 because it was not an expenditure of *campaign contributions* but rather funds belonging to the vendor.

Finding 2.36 states Mr. Eyman received an email from the PDC on October 19, 2010 regarding concealment. This is correct however no factual reference is cited by the State to support the claim "Despite this knowledge Eyman plotted to conceal contributions through third parties" rendering this Finding not supported by substantial evidence.

Finding 2.37 This Finding accurately quotes an email from Mr. Eyman; however the Finding's claim that this shows a

common plan to conceal “sources of contributions to ballot initiatives as Defendant did with the I-517 campaign as described below” is in no way supported by the State’s lone reference to Ex. 81.

Finding 2.38 identifies an email (Ex. 89) sent by Mr. Eyman to William Agazarm; however, mischaracterizes that email claiming it discusses a “kickback” from Citizen’s Solutions to “secretly” fund the I-517 signature drive, and thus lacks substantial evidence. Moreover, the Finding also claims he secretly “laundered” his money without reporting it, citing Ex. 93 which says nothing of the kind. The Finding lacks substantial evidence.

Finding 2.39 purports to say what Mr. Eyman “did not reveal” in his Ex. 93 email. This is an improper Findings on its face, the email says what it says, not what it doesn’t say. Mr. Eyman did loan money to Citizens in Charge. This was not reportable however fully disclosed to the PDC upon inquiry. The Finding also claims Mr. Eyman “secretly [had]

contributions to the [517?] campaign funneled through Citizens in Charge Foundation to himself.” None of the State’s citations to the record provide substantial evidence, or any evidence, for this claim. Pure fantasy. What really happened was Mr. Eyman loaned money to Citizens in Charge and encouraged his friends to donate to Citizens in Charge to facilitate repayment of his loan. 517 signature gathering was funded by in-kind contributions from Citizens in Charge and accurately reported by treasurer Stan Long.

Finding 2.40 claims Mr. Eyman as part of a “concealment plan” encouraged others to support I-517 by laundering their contributions through Citizens in Charge. Referenced exhibits however show Mr. Eyman encouraged donations to Citizens in Charge but do not show any reportable contributions to I-517, direct or in-kind. As previously noted, Mr. Eyman had loaned money to Citizens in Charge and encouraged donations to that entity to help repay his loan. This is not reportable under the FCPA and the Finding to the

contrary is a legal conclusion, not a factual finding supported by substantial evidence.

Finding 2.41 claims Mr. Eyman received \$103,000 in loan repayments from Citizens in Charge (true); however, he “failed to disclose the true sources of the payments as contributions to the I-517 campaign... “As previously noted, what really happened was Eyman loaned money to Citizens in Charge and encouraged his friends to donate to Citizens in Charge to facilitate repayment of the loan, which it did. The Finding payments from Citizens in Charge to Eyman were contributions to the 517 campaign lacks substantial evidence and is contrary to the evidence. This is a fantasy invented by the State non-existent in reality. However the Finding *does* affirm the payments from Citizens in Charge were to repay “Defendant Eyman’s loan” which affirms why it was not reportable.

Finding 2.42 is pure legal conclusion recharacterizing his loan to Citizens in Charge as a contribution the I-517

campaign and not based on substantial evidence. Even the trial court characterized the funds from Watchdog to Citizens in Charge as a “loan.” If Mr. Eyman loaned money to Citizens in Charge with the expectation it would make in-kind donations to I-517, that is not reportable and does not violate the FCPA. To the extent this Finding is factual, it lacks substantial evidence.

Finding 2.43 does not purport to factually claim any actual contribution to I-517 not accurately reported.

Finding 2.44 is a legal conclusion and not supported by substantial evidence to the extent it purports to be factual. It disregards the fact Mr. Eyman loaned money to Citizens in Charge and the loan is not reportable by anyone. It also ignores whatever help Citizens in Charge gave to I-517 was fully reported as in-kind contributions. It ignores Mr. Eyman was not the treasurer of the I-517 committee and had neither right nor responsibility to report anything. No evidence is identified to support this finding.

Finding 2.45 is a completely argumentative legal conclusion, not supported by substantial evidence, and none is identified. It claims loan repayments to Eyman from Citizens in Charge were “concealed contributions to the I-517 campaign.” There is no evidence that the \$103,000 in loan repayments went anywhere other than Mr. Eyman’s pocket and much of that payment was made long after 517 was dead and buried.²⁷

Finding 2.46 apparently relates to charitable contributions received by Mr. Eyman to pay his personal expenses. These “were cast as compensation to defendant Eyman for his work on initiative campaigns...” No, these were “cast” as charitable donations to help pay his personal expenses. None of this was reportable under the FCPA. Charitable contributions were sought to help pay his personal expenses and were used for his personal expenses, not “further his work on ballot propositions” which is not reportable in any event, only

²⁷ I-517 was defeated in the November 2013 election.

electoral campaign contributions. This is not supported by substantial evidence.

Finding 2.53 refers to four checks by clerical error placed in Mr. Eyman's personal account. When the mistake was discovered, the checks were refunded.²⁸

Finding 2.54 notes Mr. Eyman seeks charitable donations to pay his personal expenses. The State then states: this "indicates that he continues to have an expectation of receiving contributions to support his ballot initiative work and therefore in support of ballot propositions." This is not a factual finding but an argumentative conclusion; however even as written this does not violate the FCPA.

Finding 2.55 the court's order of September 13, 2019 speaks for itself but is legal error.

Finding 2.56 characterizes charitable contributions to pay Mr. Eyman's expenses as political contributions. This is a legal conclusion and without basis in substantial evidence. Said

²⁸Opening br. 38, CP 2847

contributions are not reportable under the FCPA, do not support the legal conclusion Mr. Eyman is a “continuing political committee,” and are not subject to regulation under the FCPA.

Finding 2.57 claims the partial summary judgment was based on the September 13, 2019 discovery order. This is correct although both were error.

Finding 2.58 this is a legal conclusion that Mr. Eyman’s receipt of charitable contributions to pay his personal expenses is “in support of ballot propositions” and therefor he is a “continuing political committee.” The Finding is not supported by substantial evidence. The elements of a “continuing political committee” have not been satisfied when neither funds are contributed nor expended to finance ballot measure campaigns and Mr. Eyman is not an “organization” in any event.

Finding 2.59 Mr. Eyman does not agree that charitable contributions to help pay his family’s expenses are “reportable

political committee contributions.” This is a legal conclusion and to the extent factual, lacks substantial evidence.

B. Superior Court Penalties Legally unjustified

Penalties may only be assessed for violations of the FCPA. If Mr. Eyman didn’t violate the Act, penalties are improper. Penalties are principally assessed based on the *legal conclusion* Mr. Eyman is a “continuing political committee” subject to reporting requirements. If he is not, no penalties are authorized.

The State urged the Court to characterize Mr. Eyman as such as a discovery sanction, not because he violated the Act in fact. Although the September 13, 2019 order was premised on the State’s false claim its trial preparation had been prejudiced because it lacked donor identities; that claim was proven false as it had all canceled checks from all donors at the time of the order. This order and the summary judgment resulting therefrom is assigned error. Moreover after falsely claiming its trial preparation had been prejudiced the State identified

another \$70,000 in charitable contributions at the trial (it said it couldn't conduct) for an additional assessment. All of this has been assigned error. The State has failed to cite a single case from this or any jurisdictions sustaining imposition of a penalty for an individual seeking charitable contributions to pay his personal living expenses, much less characterizing him as a "continuing political committee." This is unprecedented and clear legal error.

Although unjustified in any amount, precedent identified in Appellants' Opening Brief demonstrates the fine was constitutionally excessive. Applying the factors recited by the State: (1) Mr. Eyman did not violate the FCPA and there was no "crime"; (2) there was no violation which related to another violation; (3) the trial court did not and would not consider penalties for like conduct; and (4) no harm resulted to anyone but Mr. Eyman. Finally, Mr. Eyman is indigent and bankrupt and will never be able to pay this \$6 million non-dischargeable

penalty and fees—and the trial court even refused to *consider* Mr. Eyman’s ability to pay.

C. Injunction Improper

No reply is necessary to the State’s response in light of the authorities and analysis in the Opening Brief. That brief demonstrated the injunction is beyond statutory authority in that it does not require what the statute mandates nor prohibit what it forbids. RCW 42.17A.750(1)(i) Moreover it violates constitutionally guaranteed free speech.

Of note however is the Attorney General’s **overt and repeated lie**²⁹ that Mr. Eyman’s claimed First Amendment right to seek and obtain contributions was not “preserved for appellate review.” Resp. Br. 53 Mr. Eyman’s exact argument

²⁹This claim is especially aggravated since first made to affirmatively mislead the Commissioner of the Supreme Court who mistakenly repeated the State’s claim in his Order Denying Stay of September 14, 2021. He relied entirely on the misrepresentation of the Attorney General, not the record. Further proceedings were had on this issue in the Supreme Court culminating in your undersigned’s motion to recuse the Commissioner. The Commissioner however denied the motion to recuse without even claiming the record supported his statement that the issue was not raised below but rather “...Mr. Eyman takes issue with a single sentence in the nine-page ruling concerning his apparent argument that he is equivalent to a charitable organization.” [Eyman’s argument was that he was equivalent to a beggar for funds, not a charitable organization dispersing them, an argument he had raised to the trial court]

(as referenced in Opening Br. at 81) was presented to the trial court in his motion for reconsideration. CP 5311 An argument raised in a motion for reconsideration to the trial court preserves it for appellate review. *Nail v. Consolidated Resources Health Care Fund I*, 155 Wn. App. 227, 231-32, 229 P.3d 885 (2010); *Reitz v. Knight*, 62 Wn. App. 575, 581 n.4, 814 P.2d 1212 (1991); *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986); *Brown v. Safeway*, 94 Wn.2d 359, 369, 617 P.2d 704 (1980)

D. Eyman's Appeal is Timely

The State argued to the Supreme Court that Mr. Eyman's appeal was untimely. The Supreme Court however denied the State's request (not motion), concluding the appeal *was timely* filed within 30 days of denial of Mr. Eyman motion for reconsideration. See Ruling Denying Motion for Stay Pending Appeal, 9/14/2021 p.8; Order 21/1/2021 (denying motion to modify)

As explained in the Commissioner's order on appealability,

...Mr. Eyman timely moved for reconsideration of the judgment and apparently also the order granting the State's petition for fees, denial of which effectively extended the time limit for appeal of the judgment. RAP 5.2(e) As for the judgment, it expressly incorporated the findings of fact and conclusions of law entered February 10, 2021. This appeal appears to be timely as to the judgment, award of attorney fees, and the findings of fact and conclusions of law. As for interlocutory orders entered prior to judgment, an appellate court will consider orders or rulings not designated in the notice of appeal if such orders or rulings prejudicially affected the decisions designated in the notice. RAP 2.4(b) [] Here, Mr. Eyman designated these earlier orders even though it was probably not necessary. In sum, the appeal in its entirety appears to be timely...

Ruling Denying Motion for Stay Pending Appeal (9/14/2021) p.

8

E. Eyman's Statutory Arguments Correctly State the Facts and are Supported by Authority

1. The Trial Court September 13, 2019 discovery order was error

This error was discussed in detail in Appellants' Opening Brief precluding the need for repetition.

The State's continuing effort to mislead the Court will not, however, go without notice. Recall the Order on its face claimed the State was prejudiced in trial preparation based on Mr. Perkins' September 5 declaration (para. 32) which attested:

The best example of how the Eyman Defendants' longstanding misconduct in discovery has impaired the State's ability to prepare for trial is their concealment of donor identities.³⁰

But in its brief the State once again would mislead the court by claiming Mr. Perkins testified "truthfully," Resp. Br. 64, because "He could not review cancelled checks for all payments because Eyman did not produce them..." Whatever Mr. Eyman produced, the fact remains, but was not disclosed by the State, it had independently obtained *every* canceled check comprising the \$766,000. It *had* the donor identities and was therefore not prejudiced from lack of those identities. But the State falsely claimed prejudice to the court for lack of donor identities it already had. *Nieshe v. Concrete School Dist.*, 129

³⁰ CP 1197

Wa.App. 632, 127 P.3d 713 (2005), review denied 156 Wn.2d 1036, 134 P.3d 1170 (discovery sanctions inappropriate when information already in the requesting party's possession.)

But now the State doubles down on its misrepresentation: “Beginning in October 2019 (after the hearing at which the superior court issued the discovery order), the State began dealing directly with the banks to obtain the canceled checks consistent with the court’s orders.” *Id.* But left unsaid the orders permitting the State to access the bank accounts were issued over a year before in 2018.³¹ There was no *new* court order to access bank accounts after the September 13 order. If the State could obtain more information after the September 13 order it could have also done so prior to the order. But now we know the State had at least the cancelled checks for \$766,000 in donations prior to the order, while dishonestly claiming prejudice it couldn’t prepare for trial without them.

³¹ See n. 10

But there is more. In his motion for reconsideration³² of the September 13 order Mr. Eyman provided the state with releases for all his bank accounts thereby curing any claimed prejudice due to lack of donor disclosure (although the State already had what it wanted anyway.) The court summarily denied the motion for reconsideration³³ which would have cured the falsely claimed prejudice; however the State then used the releases to subpoena new bank records without notice to Mr. Eyman's counsel.³⁴ Thus the State introduced \$71,000 of additional cancelled checks at the trial it previously falsely claimed it prejudicially could not obtain. Appellants' Opening brief covers the bases on this issue.

2. The Statute of Limitations was not tolled

The State never argued to the trial court that the Statute of Limitations was tolled. Therefor it cannot be raised for the first time on appeal. RAP 2.5(a)

³² CP 1799

³³ CP 2190

³⁴ CP 5674, Opening br. 43

3. The FCPA, constitutionally applied, should control this case

The State claims, without citation to authority, others beside the committee treasurer or candidate have statutory reporting duties under the FCPA. If only the treasurer has reporting responsibilities, claims the State, this “would provide a massive loophole that would frustrate the FCPA’s purpose” [and defeat the State’s action against the Mr. Eyman.] Resp. Br. 68 So be it. The only person other than a candidate under the FCPA with reporting responsibilities is the committee treasurer. See e.g. RCW 42.17A.210(1), .225(6), 235(2), (6), .240 The plain language of the statute imposes no reporting duty on political committee officers except treasurer. Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e. the rule of *expressio unius est exclusio alterius* applies. See e.g. *Washington State Republican Party v. Washington State Public Disclosure Com’n*, 141 Wn.2d 245, 4 P.3d 808, 827 (2000) It is not up to the court to rewrite the

statute nor to entertain an argument never presented to the trial court by the State.

Then the State attempts to mischaracterize Mr. Eyman's argument: "Mr. Eyman attempts to recharacterize what the superior court found to be a kickback in violation of the FCPA as a private contract between Mr. Eyman's committee [sic] and Citizen Solutions. Eyman br. at 55-56." Resp br. 69 Perhaps this is an inadvertent misstatement by the State, however Mr. Eyman's position *is* a private contract "between Mr. Eyman's *LLC* and Citizen Solutions..." The State's whole theory and claim is that vendor expenditures of funds are reportable; however plainly FCPA reporting requirements do not apply to vendor expenditures. The State offers no citation of authority to the contrary (and your undersigned is aware of none.) The State continues: "Eyman has pointed to no FCPA provision that categorically excludes transactions with vendors." Resp. br. 70 The FCPA defines what is reportable. If it isn't, it isn't. No

need to exclude something with is not included in the first place. *Expressio unius*.

The State admits Mr. Eyman can negotiate any price he wants for signatures “But Eyman intentionally inflated the price in order to funnel the excess to himself.” Resp. br. 70 This is the State’s theory however all the evidence proves the price hikes were requested by the *vendor* to provide added insurance sufficient signatures would be gathered,³⁵ which they were. Moreover, even if Eyman did “inflate the price for a kickback,” that is not a violation of the FCPA which only requires payments to the vendor be reported, which they were. Another “loophole” the State would ask the Court to write out of the statute?

“Eyman’s argument is internally inconsistent. He simultaneously argues that the increased price was necessary to have enough signature gatherers. Yet at the same time, it left the company with \$300,000 to line Eyman’s pockets.” Resp. br.

³⁵ Ex.82, 83, 85

70-71 The response is two fold: (1) Citizen Solutions is not a charity and contracted with the I-1185 committee to make a profit, which it did. It used part of its profit to contract with Watchdog which is its right. (2) The price hikes had nothing to do with a “kickback” because (a) they only generated about \$190,000³⁶ and (b) all of that sum went to signature gatherers directly, not to profit.³⁷ And there is no evidence to the contrary.

Resp. br. 71 identifies yet another “loophole” in the statute which does not require reporting of how a vendor expends its profits “which is not an excuse to conceal contributions under the FCPA.” But perhaps the reason for this “loophole” is that the public interest in ballot campaigns is served by disclosure of contributions to and expenditures from the campaign, not how vendors spend their money. Here all contributions to the campaign were reported as were

³⁶ (Ex 82 + \$100,000 at 0.50 cents/ signature) + (Ex 85 + \$90,000 at \$1.50) = \$190,000

³⁷ Ex. 83 (“And just so you know, we won’t make anything from the bump—all of the extra will go to coordinators and petitioners to get I-1185 over the finish line.”)

expenditures from the campaign. The public has no articulated interest in how ballot campaign officers arrange their personal finances or vendors spend their money. If it is the State's claim "this is contrary to the will of the Washington voters, contrary to public policy and contrary to common sense," a statutory reference might be helpful.

Resp. br. 72 repeats the fantasy that "voters were deceived about both the amount of the funds spent to get I-1185 on the ballot and the source of funds spent to get I-517 on the ballot." No. All contributions, direct and in-kind, were reported for both I-1185 and 517. What the State demands is an public reporting of how Citizen Solutions spends its money and where Citizens in Charge gets its money. But the FCPA's "loophole" doesn't require this. Even if it did, Mr. Eyman couldn't provide it because he is not the treasurer of either campaign with no reporting responsibility much less right to do so.

Nor could he file reports relating to Databar because he was not the campaign treasurer—even though he tried mightily, as shown in this case.

4. State does not have standing to redress individual grievances

The State may bring an action to enforce the FCPA however here it claims discrete misrepresentations of fact to individual private citizens, rights not protected by the FCPA. See Resp. br. 75 It also extends to financial arrangements between private persons and election vendors. “It is improper for a plaintiff lacking standing to assert the rights of other parties or nonparties...the claims of a plaintiff determined to lack standing are not his or hers to assert and cannot be resolved in whole or in part on the merits.” *Ullery v. Fullerton*, 162 Wn.App. 596, 256 P.3d 406, 411 (2011)

F. The Superior Court Improperly awarded the State’s Costs and Attorney Fees

Without doubt the State is the plaintiff in this matter, not the PDC: “The State of Washington (State) brings this action to enforce the state’s campaign finance and disclosure law, RCW

42.17A.” CP 1 Opening br. 95 details the statutory change relevant to this proceeding, i.e. the State was removed as a potential beneficiary of attorney fees and replaced by the PDC; therefore the State isn’t entitled to attorney fees.

In response the State only argues it represents the PDC. However, on its face the action was brought in the name of the State, not the PDC.

The State makes no effort to argue the lack of statutory entitlement to the state for attorney fees under the amended statute somehow doesn’t mean what it says, or provide some exculpatory explanation why the law was changed. Rather “An amendment to an unambiguous statute indicates a purpose to change the law.” *Power v. Utilities & Transp. Comm’s*, 101 Wn.2d 425, 431, 679 P.2d 922 (1984)

The award of attorney fees and costs to the State under the present statute is reversible error.

G. The State should not be Awarded it Attorney fees on Appeal

For the reasons set forth above, there is no statutory authority to award the State reasonable attorney fees even if it prevails.

VI. CONCLUSION

The trial court judgment and injunction should be reversed, and appellants' Eyman should be awarded their costs and reasonable attorney fees for trial and appeal.

I certify that this Brief contains _____ words. A Motion for Overlength Brief is pending.

RESPECTFULLY SUBMITTED this ____ day of June 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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

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Dated this ____ day of June 2022 at Tacoma, Washington.

s/Deena Pinckney_____
Deena Pinckney