UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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

Plaintiff,

v.

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

Defendants.

No. 3:21-cv-05546 TLF

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: September 3, 2021

Oral Argument Requested

TABLE OF CONTENTS

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

TABLE OF AUTHORITIES

CASES

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

STATUTES

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

OTHER AUTHORITIES

RULES

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

INTRODUCTION

The American legal profession has a storied history of providing free legal services to those in need. Today this ethos is enshrined in Rule of Professional Conduct 6.1, which provides that "[e]very lawyer has a professional responsibility to assist in the provision of legal services for those unable to pay." But the need for free services often outstrips its availability. Moreover, some governments also have a history of interfering with the provision of legal help, especially to those who might fight injustice or disrupt the status quo.

The State of Washington is not interested in helping those poor who dare to get involved in the political process, or even worse, it perceives to be regime critics. If lawyers want to provide free legal services to political dissenters, or those who just get into a conflict with state regulatory authorities, they can be required to register with the government, file reports, disclose donors, or face the threat of third-party complaints under Washington Fair Campaign Practices Act (FCPA).

Plaintiff Institute for Free Speech ("IFS") intends to defend Washingtonians, *pro bono,* against regulatory charges that implicate fundamental First Amendment rights. Tim Eyman, rendered destitute by the state's long campaign against his activism, would retain IFS to represent him on appeal of a judgment enforcing a variety of alleged campaign-finance violations. But IFS refrains from providing Eyman (or any other Washingtonian) legal services because it cannot risk triggering government reporting requirements or getting drawn into collateral litigation targeting its First Amendment speech and associational rights. Accordingly, IFS petitioned the Public Disclosure Commission ("PDC") for a declaratory order to clarify its rights, but the Commission's order avoided many of the issues raised by IFS and left it in legal jeopardy, chilling its rights to free speech and association.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

The PDC has no business regulating the provision of *pro bono* legal services, especially to those the state targets for enforcement. Doing so violates the First Amendment—it discourages the provision of legal services, unfairly benefits the PDC, and fails to promote any state anti-corruption or transparency interests. This court should enjoin the application of Washington's FCPA to the provision of *pro bono* legal services provided in a legal-defense posture.

FACTS

The Institute for Free Speech, 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* IFS's Verified Petition for Declaratory Order before the Washington Public Disclosure Commission (IFS's Pet. to PDC) at 2; Declaration of David Keating ¶6.

As such, IFS takes on legal cases that impact free speech rights—and only on a *pro bono* basis. Keating Dec. ¶7. 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.*

Tim Eyman is a well-known public figure in Washington State. IFS's Pet. to PDC at 3-4. He has been a fixture on the political scene in this state for over two decades. *Id.; see also* David Gutman, *As trial concludes, lawyer says state seeks to eliminate Tim Eyman as 'advocate for less taxes,'* Seattle Times, Jan. 21, 2021, https://bit.ly/3xYwb7Z. In 2015, the PDC completed an investigation into Eyman and referred the matter to the Washington Attorney General ("AGO"), who filed an enforcement action against Eyman in Thurston County Superior Court bearing Cause Number 17-2-01546-34 ("enforcement action"). *Id.* at 4.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

On February 21, 2021, the state court entered the COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND INJUNCTION. *Id.,* Exhibit A. Among other things, the findings and conclusions designate Eyman to be a "continuing political committee" and restrict his rights to be involved in Washington's political process. *Id.* at 20-21, 30-32. 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[.]" *Id.* at 30:17-21. The findings do not 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. Kolde Dec., Ex. A-2. 16. On June 15, 2021, it denied Eyman's motion for reconsideration, thereby triggering the time-to-appeal clock. *Id.*, Ex. B-2. On July 16, 2021, Eyman filed an Errata Notice of Appeal to the Washington Supreme Court. *Id.,* Ex. C-2.

Given the restrictions imposed on Mr. Eyman's ability to participate in the political process in Washington state, as well as the fines, IFS has an interest in representing him in the appeal of the enforcement action. IFS Pet. to PDC at 4; Keating Dec. ¶ 8. It is part of IFS's mission to represent 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 offer to represent him in an appeal if the FCPA does not apply to provision of *pro bono* legal services of the kind that would be provided in the state-court appeal. *Id.* ¶ 9. If IFS were to represent

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

him 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.*

The PDC has a history of aggressive enforcement of the FCPA with respect to *pro bono* legal services. *Id.* ¶ 10. 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. *See* Washington Recall 2: Lawyer Free Speech - Institute for Justice (ij.org), https://ij.org/case/ijvspdc/ (last visited July 13, 2021); *see also* Pierce County Superior Court (PCSC) Cause No. 13-2-10152-7. 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.

IFS Pet. to PDC; Ex. B (ORDER GRANTING PL. MSJ).

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. IFS Pet. to PDC at 5.

In *Farris v. Seabrook,* No. 3:11-cv-5431 RJB, 2012 U.S. Dist. LEXIS 159220, at *9 (W.D. Wash. Nov. 6, 2012), the Commission stipulated that, "pro bono legal services [. . .] with regard to assisting [a person] with the Supreme Court appeal… do not constitute a contribution as defined in RCW § 42.17.020(15)(c)." In 2020, Washington's Supreme Court distinguished *Farris* in connection with pre-filing, *pro bono* legal services in connection with local ballot measures. *State v. Evergreen*

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Freedom Found., 192 Wn.2d 782, 795, n.11 (2020); *but see id.* at 809-10 (McCloud, J., dissenting) (arguing that FCPA definition was vague as applied).

In order to avoid the sort of collateral litigation that befell IJ in the recall case, IFS's counsel emailed the AGO's counsel of record in the enforcement action, requesting clarification as to the State'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. IFS Pet. to PDC at 6; Ex. C (email thread between counsel). The AGO's counsel of record declined to offer any clarification and instead referred IFS to the PDC. *Id.* (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. *Id.* at 12; Kolde Dec. ¶ 3. 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.

IFS Pet. to PDC at 11-12.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

The PDC considered the petition on May 27, 2021, at its regular meeting by audio and online streaming. PDC Minutes for May 27, 2021 Regular Meeting, https://bit.ly/3xYHP2r, at 5 (last visited July 21, 2021). Commission Chair Fred Jarrett, Commission Vice-Chair Nancy Isserlis, and Commissioners William Downing, and Russell Lehman were present via the Teams platform. *Id.* at 1. Executive Director Lavallee, PDC General Counsel Sean Flynn, and two representatives of the AGO were also present. *Id.*

During the PDC's hearing, IFS's counsel 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. PDC Meeting Video, https://bit.ly/3wXu82k, starting at time mark 5:09 (last visited July 21, 2021). IFS also asked for specific language in the order:

> 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. 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.

During the hearing, 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. *Id.* 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 on the record whether Eyman's status as a possible political committee would affect IFS's duty to report, the General Counsel answered

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

"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 6:03:30.

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 continuing political committee would trigger registration or reporting requirements by IFS. PDC Minutes at 5; Kolde Dec. ¶ 11; Ex. D-2 at 8. Under present circumstances, IFS is unwilling to represent Eyman and risk being required to register or expose its donors to disclosure. Keating Dec. ¶¶ 12-15.

ARGUMENT

A long line of precedent establishes that non-profit organizations have a First Amendment right to provide *pro bono* legal services, and that the government may not, under the guise of neutral regulations, protect itself from lawsuits brought by non-profits on behalf of aggrieved citizens (and non-citizens). Here, the State has taken the aggressive and unprecedented step of designating a government critic to be a one-man continuing political committee and is using its campaign finance regulations to interfere with his ability to obtain legal representation. Such behavior has an ignominious history, going back to the civil rights era. In addition, governments may not use vague laws to invite non-profits to self-censor and avoid representing government critics, for fear of falling prey to government regulation.

I. THE FCPA IS UNCONSTITUTIONAL AS-APPLIED TO THE PROVISION OF *PRO BONO* LITIGATION SERVICES BECAUSE IT BURDENS IFS'S FIRST AMENDMENT RIGHTS OF EXPRESSION AND ASSOCIATION WITHOUT EITHER AN IMPORTANT GOVERNMENT INTEREST OR NARROW TAILORING.

A. Non-profit lawyers enjoy an unfettered First Amendment right to advise and advocate on behalf of unpopular parties and political dissidents.

"Attorneys have rights to speak freely subject only to the government regulating with 'narrow specificity.'" *Conant v. Walters,* 309 F.3d 629, 637 (9th Cir. 2002)

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

(citing *NAACP v. Button,* 371 U.S. 415, 433, 438–39 (1963)). Moreover, "the right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances." *Soranno's Gasco, Inc. v. Morgan,* 874 F.2d 1310, 1314 (9th Cir. 1989) (noting that retaliation by state actors for criticism of government officials and exercising legal rights is actionable under § 1983). As this Court recognized again only a few years ago, the government may not threaten non-profit organizations for vindicating legal rights. *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) (citing *Button,* 371 U.S. at 437).

The First Amendment accords heightened free speech guarantees to Plaintiffs and similarly situated persons who "advocat[e] [for] lawful means of vindicating legal rights." *Button,* 371 U.S. at 437. 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" by vindicating civil rights. *Id.* 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. Thus, it found that 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).

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

"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); *see also Nw. Immigrant Rts. Project,* 2017 U.S. Dist. LEXIS 118058, at *12-13 (expressing doubt that regulations that might apply "to individuals seeking pecuniary gain" would also apply "to non-profit organizations such as the ACLU or NAACP.")

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.

And in 2017, this Court held that the First Amendment's protection of the provision of *pro bono* legal services to immigrants subject to removal proceeding fell "neatly within the precedent by the Supreme Court in *Button* and its progeny." *Nw. Immigrant Rts. Project,* 2017 U.S. Dist. LEXIS 118058, at *8-9. There is no reason why this Court's analysis in that case would not apply equally to IFS's proposed

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

representation of Mr. Eyman, who is also locked in a legal battle with the government on matters pertaining to fundamental rights.

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

B. Prior courts have protected non-profit legal providers where governments used seemingly neutral regulations as a shield against unwanted litigation.

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 legal services to vindicate his civil rights. To do 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 pronounced concern that the government was using 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

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

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 bless the provision of legal representation to Eyman on appeal, but they refused to do so, pointedly avoiding critical questions, deflecting responsibility, all while speculating about the FCPA's possible application against IFS and giving it the run-around. At more than one point during the PDC hearing, the PDC's general counsel stated on the public record that IFS might qualify as an "incidental committee" – further stating, "I can definitely see that IFS would be concerned about that." PDC Meeting Record at 4:59, 5:58.

Defendants will no doubt proclaim that they embrace the First Amendment and celebrate the provision of *pro bono* legal services, at least in the abstract, or perhaps for certain favored groups. But the practical reality is that there is only one party that benefits from the uncertainty around the FCPA's application to IFS: the State of Washington.

This should not be a difficult issue. And the question presented here is not really about campaign finance. One need not agree with Tim Eyman's worldview, or 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

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

power; and they most certainly do not depend on whether the potential client is politically popular with those in power.

Button, Primus, Legal Servs. Corp., and *Nw. Immigrant Rts. Project* all involved organizations seeking to provide legal services to individuals who were at odds with the government. Similarly, Tim Eyman is now facing the appeal of a multi-million-dollar judgment in the state's favor. IFS wishes to exercise its own rights of association and expression, in order to advocate for the protection of Eyman's rights of political expression and push back against what it perceives as overreach by the state authorities.

That Eyman's identity and past activities have made him a pariah to much of the state's political establishment (likely many including PDC commissioners and state court judges) only underscores the need for IFS to be able to exercise its rights. Moreover, the state's intrusive campaign-finance regulatory apparatus lacks any legitimate interest in requiring IFS to register or disclose anything to the PDC, especially when it involves litigating rather than campaigning.

C. Defendants cannot demonstrate an important governmental interest that is narrowly tailored to avoid the unnecessary abridgment of First Amendment rights.

To survive this motion, Defendants must satisfy the type of "'exacting scrutiny applicable to limitations to core First Amendment rights.'" *Primus*, 436 U.S. at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)); *see also Nw. Immigrant Rts. Project,* 2017 U.S. Dist. LEXIS 118058, at *13. Just last month, the Supreme Court clarified that in the First Amendment context, *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. *Ams. for Prosperity Found. v. Bonta*, Nos. 19-251, 19-255, 2021 U.S. LEXIS 3569, at *24 (July 1, 2021) *("AFPF").*

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

This important ruling clarified that narrow tailoring is an indispensable component of exacting scrutiny, placing the standard above intermediate scrutiny, if slightly below strict scrutiny. *See AFPF,* at *17-19 (discussing the historical debate about the contours of exacting scrutiny). While "exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *AFPF,* at *19. The PDC's haphazard and broad-brush application of the FCPA to *pro bono* legal services fails this test.

In *AFPF,* the State of California attempted to justify its up-front, blanket collection of donor information in order to potentially investigate charitable wrongdoing. But the Supreme Court held that administrative convenience was insufficient and facially invalidated the statute in *all* applications. *Id.* at *33. "The lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience." *Id.* at *29-30.

Here, IFS seeks only an as-applied remedy for it to represent Eyman and similarly situated persons. And just like California could not justify its disclosure regime on administrative convenience, Washington must do more than offer vague platitudes about campaign-finance transparency.

Defendants (and the regulatory regime that they represent) cannot meet the legal standard here because there is no compelling interest in requiring non-profit organizations, such as IFS (or the ACLU, NAACP, or National Lawyers' Guild), to register and file reports with the PDC when they are representing a party against the state in an enforcement action brought by the AGO. That is because Eyman, and parties like him, are litigating, not campaigning.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

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. 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 on Eyman's appeal. *Cf. Hum. Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 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.

As a result, Defendants 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 representation of other Washingtonians. The state does not need to monitor who donates to IFS and what services are provided by IFS. Indeed, it is concerning that apart from regulating the bar, the government seeks to require those who would litigate against it to register and file reports with a state agency.

It is well-established that disclosure of contributions burdens First Amendment rights. *Buckley,* 424 U.S. at 68 (public disclosure of contributions will deter some individuals who otherwise might contribute); *AFPF,* at *30-31 ("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)). Also, the administrative burdens associated with reporting and itemization also burden

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

speech rights, particularly for smaller organizations without dedicated campaign-finance staff. *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010).

Defendants may not regulate in a way that chills the ability of non-profit organizations to obtain meaningful access to the courts, especially when that access is sought to advance civil-rights objectives. In this context, the government may regulate only with narrow specificity. *AFPF,* 2021 U.S. LEXIS 3569, at *29-30; *Primus*, 436 U.S. at 425 (citing *Button*, 371 U.S. at 433); *Nw. Immigrant Rts. Project v. Sessions*, 2017 U.S. Dist. LEXIS 118058, at *15.

By adopting and enforcing broad definitions of "contribution" and "expenditure" that potentially reach the provision of *pro bono* legal services to litigants such as Tim Eyman and therefore trigger regulation under the FCPA, Defendants have failed to regulate with the narrow specificity required by the Supreme Court and by this Court's own precedent. Moreover, the State's litigation strategy actively interferes with IFS's exercise of its associational rights.

The State's apparently unprecedented (yet successful) effort to have Eyman designated as a one-man continuing political committee, not just retrospectively for purposes of that case but on a going-forward basis, has proven a major impediment. IFS Pet., Ex. A at 20-21, 30-32; Keating Dec. ¶¶ 12-15; Kolde Dec. ¶12; Ex. E-2 (State's Mtn for Partial SJ dated 05-17-2019 at 16-18 ("Defendant Eyman Is a 'Continuing Political Committee'")). The State's designation of Eyman as a "continuing political committee" shackled Eyman with a special legal status. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 598 (2002) ("a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals."). Effectively, Eyman is no longer a regular human being, but is always a "political committee," including as an

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

appellant in the action which designated him as such, and heedless of the fact that he did not initiate the litigation—he seeks only to defend himself in a state-initiated process. He is perhaps the only Washingtonian whom the state has so designated. Franz Kafka could not invent a more maddening plot.

IFS invited the PDC (and the AGO, for that matter) to recognize that *pro bono* legal services provided in this context are different. *See* IFS Pet.; PDC Hearing Record at 5:11. Given the opportunity to narrow the FCPA definitions of "expenditure" and "contribution" to exclude *pro bono* legal services, the PDC expressly declined to do so. "[T]he 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." Kolde Dec., Ex. D-2 at 8.

Indeed, the PDC's order only explicated the Kafkaesque plot, first stating that representing Mr. Eyman in his "individual capacity" would not require registration or reporting, but next acknowledging that Eyman was no longer an individual because the state court had found him to be a "continuing political committee" and declining to take a position on how that affected the reporting obligations. *Id.* So close, yet so far away.

Rather than clarifying the situation, the order obfuscated the legal obligations and highlighted the risk that the PDC might later deem a representation to be a reportable contribution (or expenditure); or serve to invite a third party to file a citizen complaint under RCW 42.17A.775, simply to harass Eyman or IFS.

Moreover, the PDC's attempt to avoid taking a position on the central issue in the petition is all the more surprising because it was the State of Washington that had requested that Judge Dixon designate Eyman to be a continuing political committee. Kolde Dec., ¶ 12; Ex. E-2 at 16-18. Between Eric Newman's email and

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

the PDC's narrow order, IFS is left with more questions than answers. The order, far from providing protection, instead serves as a warning to potential *pro bono* service providers.

The combination of tactical silence and careful narrowing compels IFS, other non-profits, and publicly spirited lawyers generally, to walk away from representing government critics and therefore hobble them in their legal disputes with the state. In this approach, today's Washington is following in the footsteps of Jim Crow Virginia, Dixiecrat South Carolina, and the previous Presidential administration in burdening the expressive rights of non-profit attorneys who seek to litigate civil rights claims against the government.

And the public policy purpose here remains a mystery. The state cannot promote election transparency when there is no election involved. Defendants may wish to maintain the right to regulate here because government agencies are not inclined to limit their own powers, but bureaucratic inertia or the desire to defend long-held turf are neither compelling reasons that meet *Button* and *Primus*'s exacting scrutiny requirement, nor do they meet *AFPF*'s narrow tailoring requirement. *Cf. AFPF,* 2021 U.S. LEXIS 3569, at *28-29 ("The Attorney General may well prefer to have every charity's information close at hand, just in case. But 'the prime objective of the First Amendment is not efficiency.'") (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)).

This Court should follow *AFPF, Button, Primus,* and its own holding in *Nw. Immigrant Rts. Project,* and find that IFS enjoys a fundamental right to represent Tim Eyman and others targeted for state enforcement, and that therefore the FCPA is unconstitutional as applied to the provision of *pro bono* legal services to such clients. The First Amendment forbids the state from requiring IFS to register with the PDC, file any reports, or disclose IFS's donors to the state government or

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

anyone else as a result of representing defendants and respondents to state enforcement actions. Defendants' application of the FCPA imposes an unwarranted restriction on IFS's First Amendment rights of association and political expression.

II. THE FCPA IS UNCONSTITUTIONAL AS APPLIED TO THE TREATMENT OF *PRO BONO* LEGAL SERVICES AS AN "EXPENDITURE" OR "CONTRIBUTION" BECAUSE IT IS A CONTENT-BASED REGULATION THAT FAILS STRICT SCRUTINY

"[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.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

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, if a *pro bono* lawyer wishes to file a brief on behalf of Tim Eyman, she must consider that doing so may be an in-kind contribution, subject to registration, reporting, and disclosure. Not so if her work defends the Democratic Party or, for example, candidate Pat Sullivan. The existence of the burden depends on the content of her brief and the party she represents.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

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 discriminatory treatment of advocacy speech on behalf of different political entities is further spelled out in the administrative regulation:

> 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

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

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 (conveniently for the state) *de jure* one-man continuing political committees, such as Tim Eyman.

Defendants lack any 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 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.

III. THE FCPA IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE PROVISION OF *PRO BONO* LEGAL SERVICES

The FCPA's definitions of "expenditure" and "contribution," the implementing WAC, and the PDC's declaratory order are all unduly vague because they chill the exercise of IFS's, and other potential *pro bono* providers', rights of expression and association. To quote then-Commissioner Lehman, the rules in this area are "clearly unclear." PDC Meeting Record at 5:29. As a result, careful would-be *pro bono* legal providers will steer clear of speaking or associating, in order to avoid becoming subject to the FCPA or drawing a third-party complaint alleging that they must register and report.

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

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

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." *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).

It is "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. When asked, informally and through a specific petition, to clarify the consequences of taking on that representation, Defendants could not give a straight answer. They only compounded the uncertainty created by the state's behavior with respect to IJ and the EvergreenFreedom Foundation over the years.

"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. IFS sought just such advice, investing many hours of lawyer time on its petition, but received guidance that only created more uncertainty.

The vagueness concerns here track those that this Court found unacceptable in *Nw. Immigrant Rts. Project,* 2017 U.S. Dist. LEXIS 118058, at *17 ("The Regulation

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

is not only too broad, it is impermissibly vague. The Government created a moving target with regard to the definition of 'practice' or 'preparation.'"). There, like here, the Plaintiff sought guidance from the government, but was instead rewarded with more uncertainty. "[The government] is equipped to promulgate or interpret regulations in ways that satisfy its significant interest in promoting accountability without invading the First Amendment's guarantees." *Id.* at *19.

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

The 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 generations (even centuries) and this Court should not permit Defendants to do so here.

IV. PLAINTIFF IS ENTITLED TO NOMINAL DAMAGES FOR DEFENDANTS' VIOLATION OF ITS CONSTITUTIONAL RIGHTS OF FREE SPEECH AND ASSOCIATION.

Plaintiff has asserted nominal damages claims for $17.91 against defendants Jarrett, Downing, and Lehman. 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 his or her constitutional rights. *Est. of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *see also ATL, Inc. v. City of Seattle*, No. C09-1240RSL, 2012 U.S. Dist. LEXIS 42114, at *30-31 (W.D. Wash. Mar. 27, 2012) (awarding nominal damages where city improperly refused to accept a permit application). As explained above, defendants Lehman, Jarrett, and

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Downing burdened IFS's rights of free speech and association by issuing an order finding that IFS could be subject to the FCPA for representing Eyman and therefore inviting self-censorship.

CONCLUSION

This Court should grant summary judgment in favor of plaintiff IFS.

Dated: August 2, 2021

Respectfully submitted,

s/Endel Kolde

Endel Kolde, WSBA #25155[1]
INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
(202) 301-1664
Facsimile: (202) 301-3399
dkolde@ifs.org

Counsel for Plaintiff

[1] Admitted in Washington State. Not admitted to practice in the District of Columbia. Currently supervised by D.C. licensed attorneys.