No. 89462-1

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT UTTER and FAITH IRELAND
in the name of the STATE OF WASHINGTON,

Petitioners,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

MEMORANDUM OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF THE PETITION FOR REVIEW

PUBLIC CITIZEN LITIGATION GROUP

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A. INTEREST OF AMICUS CURIAE

Public Citizen, Inc., a national consumer-advocacy and government-reform organization founded in 1971, appears on behalf of its members and supporters nationwide before legislative bodies, administrative agencies, and courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws fostering an open, accountable, and responsive government and protecting consumers, workers, and the public. Both through legislative advocacy and litigation, Public Citizen has long supported campaign finance laws that combat the appearance and reality of political corruption by limiting and requiring disclosure of the sources of the funds used for political campaigns.

Integral to the success of campaign finance reform measures are effective means of enforcement, including provisions allowing private citizens and organizations to bring enforcement actions in appropriate cases when government agencies have failed to do so. Public Citizen submits this memorandum supporting the petition for review because it believes that the lower court has interpreted Washington's campaign finance laws in a way that significantly impairs the efficacy of their citizen's action provision, and that this memorandum may be of assistance to this Court as it considers whether this case merits review.

rected, nullify the effectiveness of citizen actions, a key mechanism for enforcement of the Fair Campaign Practices Act.

The citizen's action provision provides straightforwardly that a citizen may bring an enforcement action in court if, upon notice to the attorney general and the prosecuting attorney in the county where an alleged violation occurred, those officials have "failed to commence an action" within 45 days of the initial notice and then "failed to bring such action within ten days" of a required second notice. RCW 42.17A.765(4)(a)(i)–(iv). Read in context and given their natural meaning, the statutory terms "commence an action" (RCW 42.17A.765(4)(a)(i)) and "bring [an] action" (RCW 42.17A.765(4)(a)(iii)) unambiguously refer to initiating a proceeding in court. Indeed, soon after the statute was adopted through the passage of Initiative 276 in 1972, this Court matter-of-factly noted that a citizen's action had been initiated after "[t]he Attorney General declined to bring any action under the Act," *State v. (1972) Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 504, 546 P.2d 75 (1976)—words that reflect the statutory language entitling a citizen to bring a suit when government officers have declined to do so.

The Court of Appeals, however, read the statute as if it said that a citizen action is barred not just if the attorney general or prosecuting attorney "commence[d] an action," but also if those officials took any step au-

thorized by RCW 42.17A.765(1)–(3), including investigating allegations or referring them for investigation by the Public Disclosure Commission. The court viewed the issue as the meaning of the term "action" in isolation, and held that any of the things that the statute authorizes the attorney general and prosecuting attorney to do in response to a possible violation of the law is "action" that bars a "citizen's action."

The court had one correct insight—that the term "action" should mean the same thing whether it refers to a citizen's action or the kind of action by the attorney general that would bar a citizen's action. But the court drew the wrong conclusion from that premise. The law uses the word "action" to refer to a formal legal proceeding, both when the statute refers to citizen's "actions," and when it refers to "actions" by the attorney general that may bar the filing of citizen's actions,.

The statute does not use the term "action" in isolation, but repeatedly refers to "bringing," "commencing," or "filing" an "action." *See* RCW 42.17A.765(1), (4), (4)(a)(i), (4)(a)(ii), (4)(a)(iii), (4)(a)(iv), (4)(b), (5). Although the word "action" by itself can mean something that someone does, when "action" is used in a statute or other legal writing together with the verbs "commence," "bring," or "file," it unambiguously refers to the initiation of a legal proceeding, as many of this Court's decisions illustrate. *See, e.g., Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d

1095 (2011) (discussing attorney general's power to "commence actions"); *Waples v. Yi*, 169 Wn.2d 152, 159, 234 P.3d 187 (2010) (action is "commenced" by filing a complaint); *State v. Conte*, 159 Wn.2d 797, 810, 154 P.3d 194 (discussing attorney general's power to "bring an action"), *cert. denied*, 552 U.S. 992 (2007); *Whitney v. Buckner*, 107 Wn.2d 861, 865, 734 P.2d 485 (1987) (discussing right of court access to "bring" or "commence" "actions"); *Berge v. Gorton*, 88 Wn.2d 756, 761, 567 P.2d 187 (1977) (discussing attorney general's power to "commence actions or institute proceedings"); *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 158, 122 P. 987 (1912) (same).

In addition, the statute uses the term "action" to describe only certain specific steps the attorney general or prosecuting attorney may take with respect to an alleged violation of the campaign finance laws: namely, "bring[ing]" "civil actions in the name of the state for any appropriate remedy, including but not limited to the special remedies provided in RCW 42.17A.750." RCW 42.17A.765(1). That language plainly refers to initiating legal proceedings. Further, the statute provides that "[i]n *any action* brought under this section, the *court* may award" costs and fees to the state if it prevails, and further specifies what the "judgment" in "such an action" shall encompass. RCW 42.17A.765(5) (emphasis added). The

statutory language can only be understood as meaning that to bring "any action" under RCW 42.17A.765 refers to commencing a legal proceeding.

Likewise, the statute makes plain that the "citizen's action" it authorizes is an action that a person "bring[s] in the name of the state" in court. RCW 42.17A.765(4). The law describes a citizen's action as something "brought" and "filed" by the citizen, terms that unambiguously refer to initiating a legal proceeding. RCW 42.17A.765(4)(a)(i), (iv). The statute provides for the disposition of the "judgment" when "the person who brings the citizen's action prevails," and also grants "the court" discretion to award costs and fees to "the defendant" when "a citizen's action ... is dismissed and ... the court also finds [it] was brought without reasonable cause." RCW 42.17A.765(4)(b). That language leaves no doubt that, under the Fair Campaign Practices Act, filing a citizen's "action" means commencing a civil proceeding in court aimed at obtaining a judgment.

In short, the citizen's action provision authorizes a citizen who has given the requisite notice to bring any of the kinds of "actions" authorized by the statute—that is, civil actions seeking the remedies provided in RCW 42.17A.750 or any other appropriate civil remedies—but only if government officials have not themselves initiated such a legal proceeding. The Court of Appeals' contrary conclusion that a citizen's action is barred if the attorney general does anything that might colloquially be de-

scribed as "action" fails to account for the statute's specific language, which, by referring to bringing or commencing an action, leaves no doubt that an "action" means a legal proceeding.

The Court of Appeals misread the statute by considering the term "action" in isolation from the words that surround it. Its analysis is incompatible with "the rules of statutory construction that require that the statutory provisions be analyzed together in order to fulfill the intent of the statute." *In re Adams*, 178 Wn.2d 417, 423, 309 P.3d 451 (2013). Courts may not address individual words of the statute "in isolation ..." "especially where to do so undermines the overall statutory purposes." *Id.* at 424.

The lower court's limitation of citizen's actions greatly undermines the overall purposes of the Fair Campaign Practices Act. Under the court's view of the statute, a citizen's action is available only when the attorney general fails to take even the most basic, pro forma steps toward investigating allegations of wrongdoing. Indeed, because the attorney general's routine practice is to refer complaints to the Public Disclosure Commission for initial investigation, *see State ex rel. Evergreen Freedom Fdn. v. Nat'l Educ. Ass'n*, 119 Wn. App. 445, 447 n.3, 81 P.3d 911 (2003), the Court of Appeals' holding here would preclude citizen's actions in virtually every case—except perhaps those where the allegations of wrongdoing were so frivolous on their face that the attorney general deemed even an

initial referral for investigation unnecessary. Permitting citizen's actions only in *frivolous* cases, however, would contravene the self-evident function of the statute to provide remedies where government authorities decline to bring potentially *meritorious* actions against wrongdoers.

The drastic limits on the availability of citizen's actions that the Court of Appeals would impose are fundamentally at odds with the broad objectives of Initiative 276. As this Court recognized long ago in upholding the Fair Campaign Practices Act, including its citizen's suit provisions, against broad constitutional challenges, Initiative 276 reflected "public dissatisfaction and/or disenchantment with the functioning or responsiveness of government institutions, to the social needs and desires of the electorate," and in particular widespread public concerns "about the problem of the impact and influence of money and property on governmental decision making." *Fritz v. Gorton*, 83 Wn.2d 275, 279, 285, 517 P.2d 911 (1974). The citizen's action provisions of the initiative upheld by this Court in *Fritz* are an integral part of the means chosen by the people to carry out the objectives of the statute. The people expressed their desire for "[d]irect action ... by the people, limiting or mandating government or official action to conform more closely with the needs and desires of people," *id.* at 279, not only by enacting the statute through the initiative process, but also by providing citizens a direct role in enforcing it.

Importantly, Initiative 276, both as enacted by the electorate and as later recodified, expressly states that its provisions "shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying ... so as to assure continuing public confidence [in] fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected." RCW 42.17A.001. As this Court has held in another statutory context, narrow limits on the availability of private enforcement actions aimed at protecting public interests are incompatible with a statutory mandate of liberal construction. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 40–41, 204 P.3d 885 (2009) (Consumer Protection Act).

Narrow limits on the availability of citizen's actions are even more incompatible with the broad remedial purpose of enforcing campaign finance laws. Citizen's suit provisions by nature have the "obvious purpose" to "encourage enforcement by so-called 'private attorneys general'" and thus reflect an unwillingness to rely on governmental enforcement alone. *Bennett v. Spear*, 520 U.S. 154, 166, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). The "intent to permit enforcement by everyman," *id.*, however, is especially critical when, as in the area of campaign finance law, there is the ever-present possibility that governmental enforcement decisions may reflect political considerations.

At the federal level, for example, enforcement by the Federal Election Commission has been significantly impaired by partisan deadlock among the Commissioners. *See* Public Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* (2013), www.citizen.org/documents/fec-deadlock-statement-and-chart-january-2013.pdf. When deadlock prevents a meritorious enforcement action, federal law permits citizen suits only when the plaintiff can show that the agency's inaction was unlawful. 2 U.S.C. § 437g(a)(8)(C). Washington law, by contrast, provides a safety valve against weak enforcement of the law by permitting citizen's actions when government officers, after notice, fail to bring actions themselves. The Court of Appeals' decision in this case would cut off that safety valve and threaten to impair enforcement of the law.

D. CONCLUSION

The Petition for Review should be granted.

Respectfully submitted,

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December 13, 2013

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 13, 2013, I arranged for service of the foregoing Memorandum of Amicus Curiae Public Citizen, Inc., in Support of the Petition for Review, to the Court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 13th day of December, 2013.

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