## Corporate Disclosure Statement

Counsel of record for the Appellee/Cross-Appellant certify to the best of our knowledge and belief in accordance with Federal Rule of Appellate Procedure 26.1 that:

1) Family PAC is a political-action committee registered with the Washington State Public Disclosure Commission; and that

2) FPIW Action is the parent corporation of Family PAC.

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## Introduction

This case involves constitutional challenges to Washington campaign finance and disclosure provisions. First, Family PAC challenges Wash. Rev. Code ("RCW") § 42.17.105(8), which provides that no candidate or political committee may accept any contribution greater than $5,000 within 21 days of general elections. This provision unconstitutionally burdened Family PAC's First Amendment freedoms of speech and association, preventing it from receiving donations of $60,000 and $20,000 that were ready to be made. Without this money, Family PAC could not express its views on Washington's Referendum 71.[1]

Second, Family PAC challenges Wash. Rev. Code § 42.17.090, requiring

[1] The State mischaracterizes Family PAC's challenge, arguing Wash. Rev. Code § 42.17.105(8) has not been "applied" to Family PAC in a way that prohibited any contributions, (App. Br. 29), and therefore Family PAC's challenge is "facial." (*Id*. 30). The State is wrong. The provision was applied directly to Family PAC and kept it from receiving contributions that were ready to be made, ER 103 (Passignano Decl. 13.). Family PAC has challenged the law as it applies to them and all similarly situated ballot measure committees. Family PAC does not challenge the law as it applies to candidate committees. Thus, this is not a true facial challenge, because Family PAC does not assert that the law is unconstitutional in all or even a substantial number of its applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008). To the extent that it has elements of both as-applied and facial challenges, *see Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010) (describing challenge having characteristics of both "as-applied" and "facial" challenges), Family PAC satisfies the facial standard; Wash. Rev. Code § 42.17.105(8) is unconstitutional in all its applications to ballot measure committees. *See infra*.

public disclosure of names and addresses of contributors giving more than $25 to campaigns, and Wash. Admin. Code 390-16-034, requiring public disclosure of individuals' occupations and names and addresses of employers when they contribute more than $100. These provisions unconstitutionally burden and chill First Amendment freedoms.

## Jurisdictional Statement

This action arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States. The district court had jurisdiction based on 28 U.S.C. §§ 1331 and 1343(a). This is a cross-appeal of a final judgment entered by the district court on September 1, 2010, which in part invalidates Wash. Rev. Code. § 42.17.105(8) as to all state ballot measure campaigns, and in part upholds Wash. Rev. Code § 42.17.090 and Wash. Admin. Code 390-16-034. Appellants timely appealed the judgment on September 16, 2010. Appellee/Cross-Appellant ("Family PAC") timely appealed the judgement on September 30, 2010. This Court has jurisdiction under 28 U.S.C. § 1291.

## Statement of the Issues

A. Did the district court err in applying exacting scrutiny instead of strict scrutiny to Washington's disclosure provisions, Wash. Rev. Code § 42.17.090 and Wash. Admin. Code 390-16-034?

B. Did the district court err in holding Washington holds a sufficiently

important interest to justify compelled ballot measure disclosure?

C. Did the district court err in holding Washington's disclosure provisions, Wash. Rev. Code § 42.17.090 and Wash. Admin. Code 390-16-034, were substantially related to a sufficiently important state interest?

D. Did the district court err when it held the state interest advanced by Wash. Rev. Code § 42.17.090 and Wash. Admin. Code 390-16-034 reflected the seriousness of the actual burden on First Amendment rights?

E. Did the district court correctly apply strict scrutiny to Washington's contribution limit provision, Wash. Rev. Code § 42.17.105(8)?

F. Did the district court correctly hold that Wash. Rev. Code § 42.17.105(8) was not narrowly tailored to a compelling government interest?

## Statement of the Case

Pursuant to Federal Rule of Appellate Procedure 28.1(c)(2) Family PAC accepts Appellants' Statement of the Case.

## Statement of the Facts

Family PAC is a State Continuing Political Committee organized pursuant to Wash. Rev. Code § 42.17.040.[2] ER 167 (Comp. ¶ 21.) Family PAC organized on October 21, 2009 with the intended purpose of supporting traditional family values in Washington by soliciting and receiving contributions and by making contributions

[2] A "continuing" political committee is a "political committee . . . of continuing existence not established in anticipation of any particular election campaign." RCW § 42.17.020(14).

and expenditures to support or oppose ballot propositions. (*Id.*) Family PAC's initial project was to support the effort to repeal Engrossed Second Substitute Senate Bill 5688, commonly referred to as the "everything but marriage" domestic partnership law, by urging voters to "reject" Referendum 71. (*Id.* at ¶ 22.) As a continuing political committee, Family PAC has various registration and reporting requirements under Washington's Public Disclosure Law ("PDL"). *See, e.g.,* RCW §§ 42.17.040 (registration statement); 42.17.080 (periodic campaign statements); 42.17.510 (identification of sponsors); 42.17.105 (late contributions reports); 42.17. 180 (major donor reports). Campaign statements filed with the Public Disclosure Commission ("PDC") must include the name, address, and contribution amount for all contributors of more than $25, RCW §§ 42.17.080(2)(a); 42.17.090(1)(b), and the occupation, employer, and employer's address for all contributors of more than $100, Wash. Admin. Code 390-16-034 ("Disclosure Thresholds"). Donors to Family PAC have indicated an unwillingness to contribute amounts in excess of the $25 and $100 thresholds because they do not want their name, address, occupation, employer, and employer's address included on public reports. ER 168 (Comp. ¶ 28.) As set out in Exhibit 1 of the Bieniek Declaration, Family PAC's experience is consistent with the experiences of other political committees in Washington. SER 63 (contributor would like to donate anonymously because wife's colleague is an opposition candidate);

SER 64-68 (contributor desiring anonymity); SER 69-70 (contributor wants name and contribution redacted from PDC website); SER 71 (contributor upset by occupation and employer requirement).

Family PAC intends to solicit contributions in excess of $25 and $100 in the future and anticipates that some potential donors will refrain from contributing in excess of these thresholds because of the mandatory disclosure requirements. ER 168 (Comp. ¶¶ 28-30.)

The PDL also prohibits Family PAC from making or receiving contributions greater than $5,000 during the 21 days preceding general elections. RCW § 42.17.105(8) (the "Contribution Ban"). Family PAC turned away contributors willing to contribute more than $5,000 during the 21 days preceding the Referendum 71 election because of the Contribution Ban. ER 168 (Comp. ¶ 27.) For example, Focus on the Family contemplated contributions of $60,000 and $20,000 for radio advertisements and get-out-the-vote activities but was unable to make such contributions because of the Contribution Ban. ER 103 (Passignano Decl. ¶ 13.) As a result, Family PAC was prohibited from speaking during the important few weeks preceding the election. Other political committees have been forced to return contributions received in excess of $5,000 during the 21-day period. SER 72-80 (Bieniek Decl., Ex. 2, 2-9.)

On October 21, 2009 Family PAC filed this action in the district court challenging the PDL's Disclosure Thresholds, and the Contribution Ban, on the grounds that these provisions are not narrowly tailored to served a compelling government interest in violation of the First Amendment to the United States Constitution. ER 173-74 (Comp. ¶¶ 62, 64-66.)

## Standard of Review

This Court reviews a district court's grant or denial of a summary judgment motion *de novo*. *See Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007). The Court of Appeals applies the same standard used by the trial court under Rule 56 of the Federal Rules of Civil Procedure. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). The Court of Appeals determines, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id*.

## Summary of Argument

The PDL's Disclosure Thresholds and Contribution Ban impose substantial burdens on First Amendment rights. Because they burden political speech, these provisions are subject to strict scrutiny. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010). However, even under exacting scrutiny, these provisions fail because they are

not substantially related to a sufficiently important government interest. In applying exacting scrutiny to the Disclosure Thresholds, the district court erred in determining that the information compelled from small donors furthers the State's limited interest in providing the electorate with information about the effects of ballot measures. The district court framed the State's interest in this information too broadly and mistook any information related to ballot measures as information that serves the State's limited interest. As a result, the district court upheld a disclosure regime that further complicates the ballot measure process for voters by focusing the electorate's attention on irrelevant information and away from the text of the ballot measure. Finally, the district court erred by failing to account for the actual burdens of compelled disclosure made possible by technological advances and the Internet. Had the district court properly balanced these burdens against the strength of the State's limited interest in small donor information, the Disclosure Thresholds would not have survived exacting scrutiny. This Court should reverse the district court's decision.

The district court correctly determined the Contribution Ban is not a disclosure or timing mechanism, but rather a direct limit on contributions to ballot measure campaigns within 21 days of an election. As a ban on speech, the district court correctly subjected the Contribution Ban to strict scrutiny. However, even under lesser scrutiny the Contribution Ban fails because no government interest can justify

limits on contributions in the ballot measure context. This Court should affirm the district court's decision.

## Argument

### I. The District Court Erred In Upholding the Disclosure Thresholds.

#### A. The District Court Erred In Applying Exacting Scrutiny Instead of Strict Scrutiny.

In *Davis v. FEC*, the Supreme Court explained that the level of scrutiny depends on the extent of the First Amendment burden. 128 S. Ct. 2759, 2775 (2008) ("the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights"); *see also Doe*, 130 S. Ct. at 2818 (same). This requires that "exacting scrutiny" and "strict scrutiny" are synonymous when the burdens on First Amendment rights are high.[3] *Davis*, 128 S. Ct. at 2775. *Citizens United* did not change this analysis. *Citizens United*, 128 S. Ct. at 898 (discussing strict scrutiny); *id*. at 914 (discussing exacting scrutiny); *see also Doe*, 130 S. Ct. at

[3] Such a requirement is the only way to make sense of the Supreme Court's use of the strict scrutiny standard when applying "exacting" scrutiny to laws that heavily burden First Amendment rights. *See, e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (*citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest" [*i.e.*, the strict scrutiny standard]). This requirement also explains why the *Buckley* Court said that disclosure provisions must survive "exacting scrutiny," which it described as a "strict standard of scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64, 75 (1976).

2818.

The Supreme Court has consistently held that compelled disclosure provisions impose substantial burdens on First Amendment rights. *Davis*, 128 S. Ct. at 2774-75 (*citing Buckley*, 424 U.S. at 64). Washington's Disclosure Thresholds are no different. Contributors giving as little as $25.01 must *publicly* disclosure their name and where they live. RCW § 42.17.090. Contributors giving more than $100 must *publicly* disclosure their occupation and where they work. Wash. Admin. Code 390-16-034. Technology has made disclosing this information exponentially more intrusive on personal privacy and burdensome on political speech and association by making contributor information easily accessible through the Internet. *See infra at* 41-50. Because the burdens of the Disclosure Thresholds in this case are high, the level of scrutiny is equivalent to strict. Strict scrutiny requires "the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898 (citations and quotations omitted).

The Disclosure Thresholds do not survive strict scrutiny. First, the State's interest in informing the electorate about who has contributed to political committees is not a compelling interest in the referenda context. *See infra* 10-12. Second, the Disclosure Thresholds are not narrowly tailored, nor does the State use the least restrictive means to further its interest, because the monetary thresholds at which

public disclosure is triggered is too low to inform voters as to the effects of a ballot measure and these provisions require public disclosure of more contributor information than is necessary to inform the electorate about the effects of a ballot measure. *See infra* 41-50. The district court did not apply a standard of review equivalent to strict. The district court's failure to subject the Disclosure Thresholds to the critical scrutiny required under First Amendment principles was error.

### B. Even If Exacting Scrutiny Were the Proper Level of Scrutiny, the District Court Erred In Applying It.

#### 1. Washington Has No Sufficiently Important Interest In Compelled Ballot Measure Disclosure.

Relying on *Buckley*, the district court determined that Washington has a sufficiently important interest in informing the public about who contributes to ballot-measure committees ("Informational Interest"). ER 6 (Transcript at 45.) However, *Buckley* stated that information regarding contributions and expenditures "allows voters to place each *candidate* in the political spectrum" and that the "sources of a *candidate's* financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance." 424 U.S. at 67. (Emphasis added). The need to provide this information to voters is a direct result of the realities of *candidate* elections; candidates often discuss their general policies regarding education, health care, and taxes, but rarely disclose

detailed policy positions about those topics. Thus, information regarding contributors to candidates allows voters to better predict the difficult policy decisions that elected officials are called to make, especially on those issues that are not discussed publicly during a campaign.

Everything the voter needs to know about ballot measures is contained in the text of the measures. There is no "political spectrum" and certainly no "future performance." In the ballot-measure context, "[n]o human being is being evaluated," but rather "when a ballot issue is before the voter, the choice is whether to approve or disapprove of discrete governmental action." *Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010). Initiatives can be complex pieces of legislation, but the Informational Interest is not about simplifying the message for voters. *See Bellotti*, 435 U.S. at 792 ("But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment."). Information about contributors may change perceptions about a ballot measure, or may be interesting, SER 128 (Bieniek Decl. Ex. 6, 12), but cannot change the nature of the ballot measure itself. The First Amendment grants advocates the right to separate their message from their identity to ensure that the message will not be prejudged simply because voters do not like the messenger. *McIntyre*, 514 U.S. at 342. The Tenth Circuit also recently recognized that in our

society, where many citizens are "[unable] or unwilling[] . . . to listen to proposals made by particular people or by members of particular groups" nondisclosure can actually further First Amendment virtues: "Nondisclosure could require the debate to actually be about the merits of the proposition on the ballot." *Sampson*, 625 F.3d at 1257. As the Court said in *McIntyre*, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *McIntyre*, 334 U.S. at 348 n. 11 (citations omitted).

Because the identity of the speaker does not change the message communicated and because it simply cannot alter the text of the measure itself, Washington lacks a sufficiently important interest to force speakers to make statements they would otherwise omit. *See id*; *see also Buckley v. American Constitutional Law Foundation* ("*ACLF*"), 525 U.S. 182, 203 (1999) (ballot-measure reporting adds little insight as to the measure). The Tenth Circuit recently invalidated a ballot measure disclosure provision similar to the one at issue here. *Sampson*, 625 F.3d at 1247. In reaching its decision, the court agreed that "the justifications for requiring disclosures in a candidate election may not apply, or may not apply with as much force, to a ballot initiative." *Id*. at 1249. The court explained that "there is no need for concern that contributors can change a law enacted through a ballot initiative as they can influence a person elected to office." *Id*. Washington has no interest in disclosure in the ballot

measure context, and the district court erred by concluding it does.

### 2. Washington's Disclosure Thresholds Are Not Substantially Related to a Sufficiently Important Governmental Interest.

The Disclosure Thresholds also fail the second part of exacting scrutiny. Simply establishing an important interest in disclosure of contributions is only half of the State's burden. Even if the State had a sufficiently important interest in disclosure, to survive exacting scrutiny the law or regulation in question must also be substantially related to the government's interest. *Doe*, 130 S. Ct. at 2818. The Disclosure Thresholds are not. The district court erred in determining Washington satisfied this heavy burden.

The district court's tailoring analysis consisted of one sentence, explaining that "small contributions when aggregated by organizations of people ('special interests' . . . unions, business interests, occupational guilds or associations) they [sic] can have a powerful impact on the debate[4] and voters can benefit from the information that the disclosure provides." ER 6 (Transcript at 45.) The test, though, is not whether voters can benefit at all from compelled disclosure. Rather, the test is whether Washington's compelled disclosure of such low amounts provides voters with the valuable

[4] The effect contributions may have on influencing the electorate is not a valid reason to suppress political speech. *Bellotti*, 435 U.S. at 791 ("To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it... .").

information the *Buckley* Court identified as the justification for such disclosure; namely, information necessary to place the ballot measure in the "political spectrum." *Buckley*, 424 U.S. at 67. Had the district court conducted the proper tailoring analysis, it would have reached the conclusion that Washington's Disclosure Thresholds are not substantially related to its limited informational interest.

**a. Washington Has Only A Limited Informational Interest.**

The district court framed the Informational Interest too broadly: the statute "allow[s] voters to 'follow the money,'. . .'to know who it is that is trying to influence their vote.'" ER 6 (Transcript at 45.) In the referenda context, to the limited extent the Informational Interest exists, "following the money" is not by itself a sufficiently important interest. The interest is not in who gave to a campaign, or in what amount. Instead, the interest is in providing information about the ballot measure itself. To that end, the Informational Interest carries with it three significant limitations and does not encompass information that cannot achieve this goal.

First, the Informational Interest is limited to identifying "persons *financially* supporting or opposing a . . . ballot measure." *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009). That is, "those who (presumably) have a *financial interest* in the outcome . . . ." *Sampson*, 625 F.3d at

1259 (*citing Canyon Ferry*, 556 F.3d at 1033). "[D]isclosure requirements are not designed to advise the public *generally* what groups may be in favor, or opposed to, a particular candidate or ballot issue." *Canyon Ferry,* 556 F.3d at 1032-33. In other words, the donor's financial support must rise to the level where it is capable of informing voters that "[the donor] stands to benefit from the legislation." *Id*. at 1033 (*citing California Pro-Life Council v. Getman* ("*CPLC-I*"), 328 F.3d 1088, 1106 (9th Cir. 2003). By knowing who stands to benefit financially from the outcome of ballot measures, voters can better understand the measures themselves, *i.e.*, their effects.

Second, the Informational Interest is sufficiently important only if directed at combating voter ignorance. *See Buckley*, 424 U.S. at 68; *Canyon Ferry*, 556 F.3d at 1032, 1034. Information that does not inform the voter as to the effects of a particular ballot measure is overinclusive to the Informational Interest. This includes the monetary threshold at which disclosure is triggered as well as the information donors must disclose.

Third, the Informational Interest is temporal—voter ignorance can only be addressed prior to the election; once the vote has been cast, the interest is extinguished because voter ignorance (or knowledge) is immediately moot.

Voter ignorance with regard to ballot measures can be based on a variety of factors, only one of which is more than tangentially related to compelled public

disclosure of donors. First, ballot measures involve increasingly complex legislation. *CPLC-I*, 328 F.3d at 1105. The public lacks the time and ability to "independently study . . . individual ballot measures." *Id*. The State's asserted interest in *small* donor information is not substantially related to this problem. Donor disclosure is presumed to indirectly alleviate the complexity problem by providing donors with an analytical shortcut. Premised on the assumption that only those with a vested financial interest in the outcome will expend resources in support or opposition to the measure, voters may rely on contributor-data for information about ballot measures. *Id.* at 1105. *But see* Dick Carpenter, Ph.D, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* at 4, Institute for Justice, March 2007 (*available at* http://www.ij.-org/publications/other/disclosurecosts.html) ("*Disclosure Costs*") (voters consult little information about donors).

Common sense dictates that it is information about major donors that is most likely to provide meaningful voting cues.[5] If all major donors are tobacco companies,

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[5] What research exists on the use of donor disclosure for voter decision-making indicates that public disclosure is an insignificant factor in informing voters about ballot measures. Although nearly two-thirds of voters rely upon traditional forms of media as sources of information on ballot measures, *Disclosure Costs* at 12, traditional media rarely use public disclosure in their stories. Dick Carpenter, Ph.D, *Mandatory Disclosure for Ballot-Initiative Campaigns*, The Independent Review, 578 (Spring 2009) (*available at* http://www.independent.org/pdf/tir/tir_13_04_6_-carpenter.pdf).

voters might learn who are the likely beneficiaries of the measure, and consequently, the effects of the measure. However, if voters are required to sift through information about thousands of small donors with no discernable connection to each other, the information about major donors is lost in the shuffle.

Furthermore, donor disclosure is an impermissible, indirect method of combating the problem of complexity. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("[The Government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"). Donor disclosure is premised on the notion that voters actually use the information in their decision-making process. The research indicates voters simply do not consult this information. (*Supra* n. 5.)The reason is easily explained—information about thousands of small donors simply adds to the complexity of an already complex and time consuming task. Consequently, the State's Informational Interest is frustrated, not furthered.

If the State focused disclosure laws on major donors, more citizens might consult the information, so that it would play a role in their decision making process. However, so long as the donor information contains the names and addresses of thousands of small donors with no easily identifiable connection to each other, the information simply adds to the complexity. And, the problems regarding the

complexity of the ballot measure itself are already addressed through a number of other provisions designed to simplify the measure for voters that do not involve compelled disclosure of contributor information.[6]

Ballot measure campaigns are not cheap and are often dominated by special interest groups spending millions of dollars. *CPLC-I*, 328 F.3d at 1105. Information about the special interests groups may be compelling—information about individuals giving small amounts is not. *See, e.g.*, Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government*, 282, 289 (2d ed. 2008) (battle between major interests, small donors insignificant). In short, the identity of small donors is irrelevant. *See Canyon Ferry*, 556 F.3d at 1036 (Noonan, J., concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'").

The district court determined that information about contributors donating as little as $25.01 provides voters with valuable information by suggesting that in the *aggregate* they contribute an amount capable of impacting a campaign. ER 6

[6] For example, the Attorney General must prepare a ballot title and summary. RCW § 29A.72.060. *See also* §§ 29A.72.290 (ballot title and summary included on ballot); 29A.72.025 (fiscal impact statement drafted in "clear and concise language" that avoids "legal and technical terms"); 29A.72.100 (petitions must contain a "readable, full, true, and correct copy of the proposed measure" on the reverse side of referenda petitions).

(Transcript at 45) The court's logic misses the mark. The information that disclosure provides must be capable of combating voter ignorance regarding the effects of the legislation. However, the court incorrectly assumed that every piece of compelled information, like the donor's name for instance, can actually be used to cue voters to a single, common source of funding, *i.e.*, a "special interest." Most information is incapable of providing this cue. Publicly disclosing names of small donors takes attention away from the text of the measure and forces them to speculate as to the benefit thousands of unknown, small donors will derive from a particular piece of legislation.

Groups supporting or opposing ballot measures may use "ambiguous or misleading" names, and voters may never know the identity of veiled political actors that have poured "tens of millions of dollars" into a campaign. *California Pro-Life Council v. Randolph* ("*CPLC-II*"), 507 F.3d 1172, 1179 (9th Cir. 2007). Public disclosure of contributors is chiefly designed to address this problem of voter ignorance. A former journalist and government employee described the problem as follows:

> A prime example of this was Proposition 188 on the November 1994 ballot, an effort to overturn California's recently enacted workplace smoking ban. Supporters falsely portrayed the measure as a grassroots effort by small businesses. By reviewing the campaign finance report, I was able to report to readers that it was not the work of small

> businesses, but actually giant tobacco companies. . . . If the campaign finance report had not been public, I could not have substantiated or conveyed this important information to the readers, and they may never have learned the truth about who was really behind this proposition.

*Id*. at 1179.

The goal of campaign disclosure, then, is to prevent "the wolf from masquerading in sheep's clothing." *CPLC-I*, 328 F.3d at 1106 n.24. Accordingly, in applying exacting scrutiny, the essential question is whether the Disclosure Thresholds address the "wolf in sheep's clothing" problem by alleviating concerns that donors who donate an amount substantial enough to influence a campaign are masking their support for, or opposition to, a particular ballot measure, and causing voter ignorance. It was error for the district court to uphold the Disclosure Thresholds on the grounds these provisions furthered any broader interest. The interest is not in following *all* money, as the district court held, ER 6 (App. Br. 45), but rather following the money contributed by those that may be attempting to mask their donations and who stands to benefit.

#### b. The Disclosure Thresholds Are Not Substantially Related.

While Washington may have an interest in providing voters with the information necessary to determine "who [is] really behind [a] proposition," *CPLC-II*, 507 F.3d at 1179, the court improperly determined that the Disclosure Thresholds are

substantially related to this problem. ER 22, 6 (Transcript at 9, 45.) Rather, the district court mistook any type of information, at any threshold, with the actual information that serves this interest.

The State's statute is deficient in several ways. First, the thresholds are too low to provide voters with cues as to who will benefit financially from the effects of particular ballot issues. Second, the statute requires disclosure of information at these low levels that cannot cue voters to "who [is] really behind [a] proposition." *Id*.

#### i. The Thresholds Are too Low to Serve the State's Interest.

While holding that the $100 disclosure threshold was not wholly without rationality, the *Buckley* Court expressly reserved judgment on whether "information concerning gifts [between $10 and $100] can be made available to the public without trespassing impermissibly on First Amendment rights." *Buckley*, 424 U.S. at 84. The "value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level." *Canyon Ferry*, 556 F.3d at 1033. Voters gain little, if any, information from the disclosure of small donors. *Id.* at 1036 (Noonan, J., concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). The Tenth Circuit recently held that a Colorado statute

requiring disclosure of the name and address of all donors making contributions greater than $20 was unconstitutional as applied to a ballot-measure committee that had raised less than $1000.[7] *Sampson*, 625 F.3d at 1261. There is a constitutional floor below which compelled public disclosure of contribution and expenditure information is unconstitutional because donor information beneath that level cannot serve the State's interest in cuing voters as to who stands to benefit financially from the outcome of ballot measures.[8] The State has not met its burden to prove its thresholds have not sunk to unconstitutional levels.

The question is one of degree, not kind, because at some level, the State's Informational Interest may be sufficient to warrant the compelled disclosure of campaign expenditures and contributions. *Canyon Ferry*, 556 F.3d at 1033; *but see id*. at 1034 ("But if we are to give *any* effect to *Buckley*'s "rationality" test, at some

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[7] But for the Contribution Ban, Family PAC would have received donations totaling $80,000. ER 103 (Passignano Decl. 13.) While this is significantly more than received by the committee at issue in *Sampson* (less than $1,000), this fact actually provides the State more incentive to draw donors' attention to large contributors from individual donors. A "special interest" would need to contribute significantly more than $25 to Family PAC, or a similarly situated PAC, for it to have any influence over its expenditures or cue the voters that it stands to benefit financially from its contribution.

[8] Below a certain threshold, a contribution does not indicate *financial*-backing, but rather mere support. *Canyon Ferry*, 556 F.3d at 1033 ("As the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy.").

[monetary level] enough must be enough."). And while the legislature is entitled to some deference in determining where disclosure should begin, *Buckley*, 424 U.S. at 83, the usual deference granted does "not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law," especially when the First Amendment is involved. *Turner*, 512 U.S. at 666. This Court's role is to assure that the legislature "has drawn *reasonable inferences* based on *substantial* evidence." *Id*. (emphasis added). Washington's Disclosure Thresholds cannot survive this standard of review. Rather than weigh the evidence presented by both parties regarding legislative deliberation on Washington's specific Disclosure Thresholds, the district court rested its conclusion on speculation, treating transparency as a sufficiently important interest by itself. ER 28 (Transcript at 15) ("Aren't [the legislatures] entitled to some latitude, given the recognition that the courts have said that sunlight is the best antiseptic. . . ?"). Working backward, the court inferred that because large aggregations of money can provide relevant information, the legislature had set the disclosure thresholds at reasonable levels. ER 27 (Transcript at 14) ("But in order to aggregate, you've got to take it a grain of sand at a time, don't you?"). This formula does not satisfy even the exacting scrutiny standard of review.

The history of the disclosure provision is telling. In the first 10 years, the threshold was increased on three separate occasions, eventually settling on $25, an

amount five-times the $5 threshold contained in Initiative 276. Initiative 276 § 9(1)(b) (1972). The threshold was increased to $10 before 1979. *See* RCW § 42.17.090(1)(b) (1979). Three years later, the legislature increased the threshold to its present level of $25.[9] RCW § 42.17.090 (1982); 1982 c. 147 § 7. In other words, the legislature decided in 1982 that a disclosure threshold of $25 adequately served the state's interests.[10] Nearly *thirty* years have elapsed since the last substantive adjustment.

Even assuming that the $25 threshold was substantially related to a sufficiently important state interest when enacted, this Court should reverse because a failure to index the threshold for inflation has caused the threshold to sink to unconstitutional levels. *See Randall v. Sorrell*, 548 U.S. 230, 261 (2006). Thresholds that are not adjusted for inflation decline in real value each year. *Id*. Washington's Disclosure Thresholds, already far lower than necessary to serve any important state interest, grow further from those interests each year as a result of inflation. *Id*. ("A failure to index limits means that limits which are already suspiciously low . . . will almost

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[9] A minor change that altered the penny triggering disclosure was adopted in 1989. 1989 Wash. Legis. Serv. page no. 14 (West).

[10] Family PAC does not concede that Washington ever demonstrated a compelling interest in disclosure at $25 or $100. Family PAC merely posits that the legislature and PDC believed the Disclosure Thresholds adequately served their interests, that the thresholds must be adjusted for inflation to remain consistent with those determinations, and that the current thresholds are far lower than those deemed sufficient by the legislature and PDC.

inevitably become too low over time."). Yet, the burdens of disclosure remain constant because the PDC has shirked its statutory responsibility to adjust the thresholds, RCW § 42.17.370(11), despite routine adjustments to other thresholds throughout the PDL, Wash. Admin. Code 390-05-400 (adjusting contribution limits), and a command to encourage small contributions by exempting small contributions from disclosure. RCW § 42.17.010(9).

Twenty-eight years since the legislature last adjusted the disclosure threshold, inflation has caused the threshold to revert to its pre-1982 level of $10. Bureau of Labor and Statistics, *CPI Inflation Calculator* (*available at* www.bls.gov/data/-inflation_calculator.htm) ($25 in 2010 is about $11 in 1982 dollars). Inflation, not the legislature, has repealed the legislature's own decision to increase the threshold from $10 to $25. The current threshold must be increased to $56, more than double its present level, to be consistent with the legislature's determination that $25 was sufficient in 1982. *Id.* ($56.38 in 2010 is equivalent to $25 in 1982 dollars). Therefore, no deference is owed to the current disclosure threshold.

The $100 threshold for employment information suffers from the same infirmities. The PDC added the employment requirement in 1993,[11] Wash. Admin.

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[11] A minor change that altered the penny triggering disclosure was adopted by the PDC in 2002.

Code 390-16-034 (1993), concluding that a disclosure threshold of $100 for employment information sufficiently served the purported state interests. SER 136-42, 146, 152-59 (Bieniek Decl. Ex. 6, 20-26, 30, 36-43.)

Seventeen years later the employment threshold has been reduced to nearly half the level deemed sufficient by the PDC. *CPI Inflation Calculator* ($100 in 2010 is equivalent of $66.40 in 1993 dollars). Again, the reduction resulted from inflation, not the PDC's decision to reduce the threshold.[12] The current employment-reporting threshold must be increased to more than $150 to be consistent with the PDC's decision in 1993 that a threshold of $100 is sufficient. *Id.* ($150.61 in 2010 is equivalent of $100 in 1993 dollars).

The failure to account for inflation subjects thousands of additional contributors to the burdens of compelled disclosure at levels far below the thresholds deemed sufficient by the legislature and PDC to serve the purported state interests. For example, for the primary R-71 committees (Washington Families Standing

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[12] The PDC supported legislation in 2002 that would have required employer and occupation data from contributors. SER 162-70 (Bieniek Decl. Ex. 6, 105-113.) The legislation also would have exempted the Disclosure Thresholds from the PDL's requirement to periodically adjust the thresholds for inflation. SER 163 (Bieniek Decl. Ex. 6, 106.) The PDC's support of the legislation indicates that the PDC is aware the thresholds should (for constitutional and statutory reasons) be adjusted for inflation. *Supra* 24-25 (discussing PDC's statutory duty to adjust *all* thresholds for inflation).

Together & Protect Marriage Washington), the inflation reductions resulted in the compelled disclosure of an additional 1,711 contributors, and the reporting of employment information of an additional 183 contributors. *See* Public Disclosure Commission's website, (*available at* http://www.pdc.wa.gov/QuerySystem-/statewideballotinitatives.aspx) A review of all other political committees yields similar results.

Thus, even assuming that Disclosure Thresholds were entitled to deference when originally adopted, the current thresholds are so far below the levels deemed sufficient to serve the purported state interests as a result of inflation that they are no longer substantially related to an important state interest and therefore unconstitutional.

**ii. The Information Compelled from Small Donors Cannot Cue Voters to "Who Is Behind a Ballot Measure."**

Legislation that "burdens substantially more speech than is necessary to further the government's legitimate interest" is not substantially related to the State's interest. *CPLC-II*, 507 F.3d at 1183 (quotations and citations omitted). This is precisely the effect of the Disclosure Thresholds. The State may only compel that information necessary to inform voters about who stands to financially benefit from legislation, and more importantly, the effect of legislation. Washington is "us[ing] a shotgun to

kill wrens as well as hawks,"[13] requiring far more information than is necessary to achieve its legitimate ends.

Donor information only informs voters about ballot measures if the information is capable of telling voters something relevant about the donors. The names of contributors giving just above $25 may tell the electorate that those contributors support the legislation, but without additional, more intimate knowledge of each contributor, the voter is left wondering *what* effect the legislation will have on the donor. Even in the aggregate, a collection of name tells the voter nothing about the effects of ballot measures unless the voter can easily identify a separate connection between contributors. Even in the unlikely event this connection can be identified correctly, the connection becomes important and the names become irrelevant.

A contributor's name is perhaps the least informative aspect of disclosure and at the same time the aspect most vulnerable to abuse and the disclosure of which most likely to chill speech. *See McIntyre*, 514 U.S. at 349 ("[I]n the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's

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[13] *Buckley*, 424 U.S. at 239 (Burger, J., concurring in part and dissenting in part) ("No public right to know justifies the compelled disclosure of . . . contributions [of less than $100], at the risk of discouraging them.")

message."); *see also, e.g.*, *Citizens United*, 130 S. Ct. at 916 (threats and harassment "cause for concern"); s*ee also Disclosure Costs* at 8 (nearly 60% of contributors would "think twice" about contributing if required to disclose personal information). A contributor's name is nearly incapable of providing the electorate with any meaningful cue as to the effects of ballot measures. As a result, Wash. Rev. Code § 42.17.090, is overinclusive to the State's Informational Interest. *See Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991) (a regulation is overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute).

A contributor's home address is likewise subject to abuse and the information voters can learn from donors' addresses can be gleaned easily from other information, the disclosure of which is not as burdensome on First Amendment rights. Addresses inform voters only about contributors' specific locations. Rarely will voters use such precise information about specific donors to learn about the effects of a measure, especially those initiatives voted on state-wide. Rather, addresses alert voters to whether contributions are coming from one particular area of a city or state that share a common characteristic, such as affluence or industry. The State's interest in this information can be served by requiring contributors' area codes, zip codes, or a more specific geographic designation short of requiring an address. Indeed, the district

court's primary concern, alerting voters to the existence and influence of out-of-state contributors, ER 31 (Transcript at 18), can easily be served by these less restrictive means. However, the voters must still speculate as to what benefit a particular geographic cluster of donors will derive from a piece of legislation.

Washington Administrative Code 390-16-034, requiring individuals contributing more than $100 to disclosure their occupation and the name and address of their employers, suffers from similar infirmities. First, the threshold is too low to inform voters about the effects of ballot measures. That certain groups, *e.g.*, lawyers or doctors, stand to benefit from a ballot measure cannot be determined by noting that your neighbor gave $101. Second, even if there is a marginal benefit in determining that many lawyers or doctors gave money to one side of an issue, multiple leaps of logic are required to find that this actually supports the State's Informational Interest. Voters (or media) must first access and analyze this information, come up with a viable theory why it is important that members of certain professions donated, and then use (or disseminate) this information. This does not happen. *See* Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 Election L.J. 236 (2007). Further, this information is only valuable if other potential causes for donations have been ruled out and there are enough donations from identifiable professions to be of statistical

import.

Further, Washington requires more information than necessary to further its limited informational interest. The name of a contributor's employer only allows voters to determine whether a particular industry stands to benefit from proposed legislation if the voter knows to what industry a contributor's employer belongs. The district court's suggestion that voters can use Google to research contributor's employers, ER 32 (Transcript at 19), is unnecessary and burdensome given that the State could accomplish its goals through less restrictive means by requiring disclosure of a contributor's employer's industry in the first instance.

Perhaps most significant is that the value of this information is derived entirely from the assumption that the ballot measure to which the employee has contributed will somehow benefit his employer. This assumption is unreasonable. Voters must speculate whether contributors' donations will benefit the contributor or his or her employer.

Contrary to the district court's assertion, "[w]hether or not the information made available is understandable, or is as revealing as one would hope" *does* actually decide "the issue of whether making the informational available is violative of free speech." ER 32 (Transcript at 19). The *only* interest that can uphold ballot-measure disclosure statutes is the "follow the money" interest. *Canyon Ferry*, 556 F.3d at

1033-34. If information compelled from contributors cannot allow voters to determine who stands to benefit from their contributions, it is overinclusive to the Informational Interest and unconstitutional.

Washington's arguments in support of its disclosure regime suggest that voters should have access to any information that might be somehow useful to voters to determine information about ballot measures, such as income, race, or religion. However, the implications of accepting such an argument are "breathtaking."[14] *See Doe*, 130 S. Ct. at 2814. (Alito, J., concurring). The Constitution demands more precision. As a result, Washington's disclosure requirements must fail.

**c. The Disclosure Thresholds Cannot Be Sustained as Necessary to Enforce Other Provisions of the PDL.**

The Disclosure Thresholds, which are not substantially related to a sufficiently important state interest, *see supra*, cannot be saved on the ground that they are

[14] Demographic information likely to provide insight about a contributor's motives is limitless, and includes information like ethnicity, religious affiliation, level of education, annual income, and marital status. *See, e.g.*, Oral Argument at 55, *Doe*, 130 S. Ct. 2811 (No. 09-559 ) (Apr. 28, 2010) (Alito, J.: "When I asked whether you could – you want to know the religion of the people who signed? No, you can't do that. How much more demographic information could be collect – could be – does the – does the State of Washington have an interest in making publicly available about the people who support this election? Let's say it's – it's a referendum about immigration. Does the State of Washington have an interest in providing information to somebody who says, I want to know how many people with Hispanic names signed this, or how many people with Asian names signed this? Is that – that what you want to facilitate?").

necessary to enforce other provisions of the PDL. Washington argues the primary justification for the occupation and employer information is to detect violations of contribution limits and anti-bundling provisions. SER 121-122, 127-28, 131-33, 137-39, 146-47, 154, 156-58 (Bieniek Decl., Ex. 6, 5-6, 11-12, 15-17, 21-23, 30-31, 38, 40-42); *see also* SER 160 (Bieniek Decl., Ex. 6, 103 (veto of legislation prohibiting collection of employer information because it is necessary to detect "patterns of coordinated contributions").) The Supreme Court rejected this "prophylaxis-upon-prophylaxis approach." *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007). The State must demonstrate a separate, important interest for setting its thresholds at $25 and $100. As set forth above, Washington cannot demonstrate that the thresholds are substantially related to such an interest.

Policing other provisions of the PDL can be achieved through means less burdensome to First Amendment freedoms. The PDL requires political committees to keep detailed records of all contributions and imposes substantial civil penalties for non-compliance with the record-keeping and reporting provisions. RCW §§ 42.17.090(1)(b) (record-keeping requirement) & 42.17.390 (civil penalties and sanctions). Just as in *Buckley*, "[t]here is no indication that the substantial criminal penalties for violating the [Act] combined with the political repercussions of such violations will be insufficient to police the contribution provisions." 424 U.S. at 56.

Any interest in policing contribution limits (inapplicable to ballot measure reporting) and coordinated giving designed to mislead the public about the true identity of the contributor can be achieved through private record-keeping or private government disclosure. *See Constitutional and Normative Issues Related to the Regulation of Internet-Based Campaign Activities Under the California Political Reform Act*: *Hearing Before the Subcommittee on the Political Reform Act & Internet Political Activity*, *Fair Political Practices Commission*, Mar. 24, 2010 (prepared statement of Richard L. Hasen, Professor of Law, Loyola Law School), *available at* http://www.fppc.ca.gov/subcommittee/agenda-3-24-10-docs/hasen-fppc-internet.pdf. ("*Hasen Testimony*"). ("Allowing [government] regulators to verify the information, without making it publically available, can serve the public interest in integrity of campaigns, while still minimizing the dangers of harassment."). There is no interest in public disclosure of employer and occupation information. *See supra* 30-32.

**d. The District Court Erred In Finding that the Strength of State's Limited Informational Interest Reflected the Seriousness of the Actual Burden on First Amendment Rights.**

"To withstand [exacting] scrutiny the *strength* of the governmental interest must reflect the seriousness of the *actual* burden on First Amendment rights." *Doe*, 130 S. Ct. at 2818 (emphasis added) (quotations and citations omitted). The burdens

imposed by the Disclosure Thresholds are high. *See infra* 37-48. Where the burdens are high, exacting scrutiny is equivalent to strict scrutiny, under which the government must prove an interest of such sufficient strength as to overcome these burdens. *Davis*, 128 S. Ct. 2759, 2775. The district court erred in finding that Washington proved a sufficiently strong Informational Interest to overcome the burdens of compelled disclosure under Washington's Disclosure Thresholds.

#### i. The District Court Erred In Holding Washington Had Met Its Burden.

Despite a significantly decreased need for voter-reliance on contributor information in the ballot measure context, the district court concluded that "the government interest advanced by the disclosure statute and the regulation . . . is the informational interest satisfied by allowing the voters to "'follow the money.'" ER 6 (Transcript at 45.) While the Supreme Court recently spoke approvingly of disclosure provisions for contributions of more than $1,000, *Citizens United*, 130 S. Ct. at 916, 980 n.1, it did not say that disclosure provisions are exempt from First Amendment analysis. Rather, the government must prove the state's interest. *Citizens for Clean Government v. City of San Diego* ("*CFCG*"), 474 F.3d 647, 653 (9th Cir. 2007) (*citing Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 337, 387-88 (2000). Even if the government's interest in requiring disclosure of election and ballot-measure

information were well-established, as Washington argues (but the Tenth Circuit disputes)[15], that fact alone would not relieve the government of its burden to provide evidence supporting the strength of its asserted interest in the disclosure of small donor information. *CFCG*, 474 F.3d at 652-54. This is especially true where the record does not support Washington's interest and Washington has failed to overcome evidence to the contrary presented by plaintiff. *See CFCG*, 474 F.3d at 653 (*citing Shrink*, 528 U.S. at 394).

The district court determined disclosure of small donor information enables the electorate to "follow the money," allowing them to make informed decisions. ER 6 (Transcript at 45.) The State's Informational Interest is thus premised on the assumption that as it pertains to ballot-measure initiatives, voters know the relevant information is available, access it, and use it in their decision making. Absent these foundational assumptions, the benefits disclosure are designed to provide cannot be realized and the State cannot claim a sufficiently strong interest capable of overcoming the burdens of compelled disclosure. *See Disclosure Costs* at 11.

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[15] The Tenth Circuit strongly questioned whether the Informational Interest in the ballot-measure context is well established. Rather, the court concluded that "the statements by the Supreme Court supporting disclosure in ballot-issue campaigns were dicta," and "the [Supreme Court] has never upheld a disclosure provision for ballot-issue campaigns that has been presented to it for review." *Sampson*, 625 F.3d at 1258.

To attempt to show *small donor information* is “heavily used” by the public and media to follow the money in ballot-measure campaigns, (App. Br. 6), the State relies not on actual studies or research, but on the number of visitors to the Washington Public Disclosure Commission’s website. ER 60 (Ellis Decl. ¶ 14 (“during fiscal year 2009, the PDC website received 40,243 unique visitors”).) But these numbers do not indicate the number of individuals who actually access the ballot measure reports. Instead, these numbers only indicate the number of visitors to the entire PDC website. In addition to the disclosure reports on ballot measures, the PDC website contains many other items, including disclosure reports on candidate elections, manuals and brochures for people participating in campaigns, lobbyists’ expenditures, and enforcement activity of the PDC. The district court erred by accepting this data as proof of the State’s assertion that small donor information is “heavily used” was error. In fact, the State’s own research indicates exactly the opposite. In 2008, the PDC surveyed the public on Public Disclosure Law. SER 5, 7-27 (Troupis Decl. ¶ 4, Ex. 1, 1-21.) Not only did the vast majority of individuals who responded not consult any disclosure information on the PDC’s website, SER 19 (Troupis Decl. Ex. 1, 13), the majority were not even aware of the existence of the PDC itself. SER 15 (Troupis Decl. Ex. 1, 9.)

The district court also erred in finding that “those with a peculiar interest . . .

gather [donor information], organize it and disseminate it to the voters . . . .” ER 30 (Transcript at 17.) The evidence does not support the district court’s findings. The State’s evidence consists of several news articles that use data from the disclosure reports. Most of these articles deal with candidate reports, which implicate not just an informational interest, but a corruption and enforcement interest not present in ballot measure campaigns. This presumably makes such reports more important — and so, more newsworthy — than reports in ballot measure campaigns. Of the examples provided by the State, only two specifically mention ballot measures. *See* SER 29, 31-33, 40-41 (Decl. of Anderson (#2) ¶ 3, Exhs. A, D.) The first only mentions ballot measures in one of its sixteen paragraphs, describing money spent on two ballot measure campaigns. It does not discuss information on specific donors, let alone donors at or near the $25 and $100 thresholds. Instead, the article provides “horserace” information—*i.e.*, information on what groups are leading the race to raise money. The second article deals with a donation by a large company of over $1,000. Two articles on ballot measure disclosure, neither of which relates to small donors, does not show that this information is “heavily used,” as the State claims. Nor do these articles support the district court’s assumption that, as it pertains to ballot-measures, “most voters get their information in sound bytes and headlines and conversation.” ER 30 (Transcript at 17.) To the extent the State’s evidence proves

anything regarding the use of disclosure information, the articles show the media is concerned with reporting large donations, made by well-known individuals or "special interests." Consequently, the district court erred in concluding, on the record before the court, that Washington has a sufficiently important interest in the disclosure of small donor information in the ballot-measure context.

**ii. The Burdens of Compelled Disclosure Outweigh the Strength of the Informational Interest.**

The district court's decision should be reversed for failure to carefully balance the burdens of compelled disclosure against the strength of the interest that Washington has sought to advance. *Buckley*, 424 U.S. at 68. The district court concluded that Washington's disclosure requirements placed "modest" burdens on the ability to speak. ER 5 (Transcript at 44.) This conclusion was improperly based on the general assumption derived from *Buckley* and enunciated in *Citizens United* that disclosure requirements "do not prevent anyone from speaking," ER 4 (Transcript at 43), rather than on Family PAC's extensive, unrebutted evidence regarding the *actual* burdens of compelled disclosure.[16] The district court effectively decided as a

[16] Justice Thomas recently cautioned against relying on the very assumption on which the district court based its holding. *Citizens United*, 130 S. Ct. at 982 (Thomas, J., concurring in part and dissenting in part) ("Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.").

matter of law that transparency outweighs any burden on First Amendment rights in the ballot-measure context.[17] Had the district court properly weighed the strength of the public's interest in low-level donor information against the burdens of compelled disclosure as evidenced by the parties, the State's disclosure regime would not have passed constitutional muster.

In practice, compelled disclosure provisions impose substantial burdens on First Amendment rights. *Buckley*, 424 U.S. at 64; *see also* SER 81 (Bieniek Decl., Ex. 3.) This has become clear in the years since *Buckley*, without the benefit of research on the effect of disclosure on First Amendment rights, announced that "sunlight is said to be the best of disinfectants." *Buckley*, 424 U.S. at 67.[18] Seizing on this language, disclosure advocates often fail to adequately justify the substantial burdens, treating "transparency" as a meaningful end in itself. Time, experience, and studies

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[17] The Tenth Circuit recently emphasized that the Informational Interest does not categorically trump First Amendment rights. Rather, it stressed the need to balance the public interest in disclosure against the burden on First Amendment rights imposed by a particular statute in a particular circumstance. *Sampson*, 625 F.3d at 1259-61 (holding the burdens of reporting and disclosure outweighed the public's interest in disclosure of expenditures and contributions of a ballot-measure committee spending less than $1000).

[18] Even in *Buckley* the Court recognized that disclosure might deter contributions because of the risk of harassment and retaliation. *Buckley*, 424 U.S. at 68; *see also id.* at 237 (Burger, C.J., concurring in part and dissenting in part) (social costs of public disclosure; $100 disclosure threshold "irrational").

have revealed the true costs inflicted by disclosure and suggest that it is time to reemphasize the importance of applying exacting scrutiny to each application of a disclosure statute, including the threshold at which disclosure occurs.

#### 1. Technological Advances Have Qualitatively Changed the Burdens of Compelled Disclosure.

Technology has dramatically altered the disclosure environment considered in *Buckley*. Records available under the PDL were "public" in 1972 only in the sense that they could be accessed by visiting a government office during business hours. Initiative 276 § 28 (1972). In 1972, the reports of campaign contributions were kept on handwritten forms that often contained completely illegible entries. Craig B. Holman & Robert M. Stern, *Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activity*, Public Integrity, Winter 2000 (*available at* http://www.cgs.org/images/publications/AccessDelayedisAccessDenied.pdf). Copies were prepared by hand or at a cost to the individual requesting copies on a per-page basis. To search, an individual had to manually flip through page after page of reports, which were sometimes organized irregularly. *Id*. at 1. Those who overcame these obstacles still needed to find a way to communicate the message to the public, a task virtually impossible in 1972 without the assistance of the media.

Today, records are kept in computer databases and uploaded to the Internet in

searchable form almost instantly. *See* Wash. Admin. Code 390-14-026 (campaign statements online within two days). Once on the Internet, the information can be combined with publicly available phone numbers and maps. *See*, *e.g.*, www.eightmaps.com; www.batchgeo.com.

In today's "information age," courts cannot ignore the tremendous invasions of privacy that occur when the government compels disclosure and allows it to become part of the public record. *See U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 770 (1989) ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information.") (internal citation omitted). Technological advances and the Internet have essentially redefined the boundaries of *public* disclosure. No longer must employers visit government offices during business hours to learn which employees supported referenda—they can do it from their offices. So can customers, suppliers, and neighbors. Recent elections demonstrate how individuals use disclosure reports to intimidate individuals exercising First Amendment rights. *See, e.g.*, *Citizens United*, 130 S. Ct. at 916 (threats and harassment "cause for concern"); *id.* at 981 (Thomas, J., concurring) ("[S]uccess of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights."). As the California Voter Foundation

president said, "This is not really the intention of voter disclosure laws. But that's the thing about technology. You don't really know where it is going to take you." Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009) (*available at* http://www.nytimes.com/2009/02/08/business/08-stream.html.)

Under current disclosure laws, contributor information is made publically available forever, well after it may be used by the public to analyze a ballot-measure. While the controversial nature of some initiatives is plainly obvious, donors cannot always predict which candidates or ballot-measures will later prove to be controversial or whether their contributions will subject them to retaliation or harassment at some point in the future. These concerns have not escaped the Supreme Court, which recently recognized that fears of retaliation can have a profound chilling effect on the exercise of First Amendment rights. *Doe*, 130 S. Ct. at 2823.

#### 2. Compelled *Public* Disclosure Increases the Burdens of Compelled Disclosure Exponentially.

The district court erred when it failed to consider the important distinction between disclosure of donor information and *public* disclosure of donor information. As the Eighth Circuit put it, "This type of privacy interest—one in which individuals seek to keep information from the general public while simultaneously divulging it

for limited purposes to others—is not unusual." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). The distinction is illustrated in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), a case involving an FEC investigation of campaign-finance complaints against the AFL-CIO, the DNC, and others. The FEC compiled numerous internal documents detailing information about volunteers, members, employees, activities, and political strategy that it planned to make public pursuant to its rule requiring release of investigation materials in closed cases. The court's analysis emphasized the private-public distinction: "[E]ven when requiring disclosure of political speech activities to a *government agency* may be necessary to facilitate law enforcement functions, we have held that '[c]ompelled *public* disclosure presents a separate first amendment issue' that requires a separate justification." *Id*. at 176 (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986) (emphasis added by *AFL-CIO*)). The Court held that the public-disclosure rule violated the First Amendment.[19] Similarly, here, private (to the government) disclosure suffices for government enforcement purposes, and public disclosure is an unjustifiable violation

[19] Washington has indicated that an enforcement proceeding could result in the public disclosure of information that is not otherwise publicly released under the PDL. SER 62 (Bieniek Decl. Ex. 1, 3.) The fact that Washington has communicated this fact to potential donors makes it likely that some donors may refrain from donating *below* the disclosure thresholds because there is no way to ensure their contributions will remain anonymous.

of First Amendment speech and associational rights. Any interest that Washington has in low-level disclosure may be met by private disclosure to the government, making public disclosure unconstitutional.

However, in prior cases discussing compelled disclosure provisions, there has been a failure—or lack of need—to address the difference between compelled "private" disclosure (*i.e.*, disclosure made only to the government) and compelled "public" disclosure (*i.e.*, disclosure made available to the public). Technological advances make it imperative for this Court to consider the differences between private and public disclosure, and the respective benefits and burdens associated with each, which the district court failed to do. *See ACLU of Nevada v. Heller*, 378 F.2d 979, 991 (9th Cir. 2004) ("[I]t is not just *that* a speaker's identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech.") (emphasis in original). Thus, a compelled disclosure system that requires only private reporting may be constitutional in a situation where public reporting would not.

Even disclosure advocates recognize the need to exempt low-level contributions from *public* disclosure. Loyola Law School Professor Richard Hasen recently testified before the California Fair Political Practices Commission that "Campaign finance regulators should create a safe harbor from *public* disclosure

(especially over the Internet) for low-dollar campaign-related activities." *Hasen Testimony* at 4. Hasen even questioned the interest in disclosure of low-level contributions: "It is not clear that small contributor information serves any of the interests in disclosure, and the threat of harassment seems to increase with the cheap speech of the Internet."[20] *Id*. Hasen agrees that full reporting of contributor identity to [the government] will adequately insure campaigns do not circumvent contribution laws and will help maintain public confidence in elections. *Id*.

**iii. Compelled Disclosure Has A Significant Chilling Effect On Political Speech.**

The strength of Washington's interest in disclosure of low-level donor information must outweigh the burdens on the exercise of First Amendment rights caused by the State's regulations, otherwise the statute is unconstitutional. *Buckley*, 424 U.S. at 68; *Canyon Ferry*, 556 F.3d at 1033-35. To properly balance these crucial aspects of the court's analysis, this Court must fully account for the real burdens caused by compelled disclosure at those thresholds set by the State.

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[20] Even though an exemption to disclosure exists for those who can prove a likelihood of harassment, Hasen thinks "it . . . makes sense to raise the threshold for reporting individual contributions because there exists little benefit in public disclosure of the names of [small contributors]." Richard Hasen, *A Semi Objection to Bruce Cain's Semi Case For Semi Disclosure*, CATO UNBOUND, Nov. 15, 2010, http://www.cato-unbound.org/2010/11/15/rick-hasen/a-semi-objection-to-bruce-cain%E2%80%99s-semi-case-for-semi-disclosure/.

Campaign disclosure statutes are often trumpeted on the ground that "sunlight is the best disinfectant" and as enjoying wide public support. *See Buckley*, 424 U.S. at 67; *CPLC-II*, 507 F.3d at 1179. Yet few have actually studied whether campaign disclosure actually solves the problems it seeks to address, and fewer still have probed voters about the chilling effect of compelled disclosure statutes.[21]

In 2007, the Institute for Justice commissioned a study to examine the burdens of compelled disclosure provisions on First Amendment rights. *See* Dick Carpenter, Ph.D, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, Institute for Justice, March 2007 (*available at* http://www.ij.org/publications/other/-disclosurecosts.html) ("*Disclosure Costs*"). Prior to this study, "no one [had] analyzed systematically the effects of campaign-finance regulations on freedom of speech or association." Jeffrey Milyo, Ph.D., *The Political Economics of Campaign Finance*, The Independent Review, Vol. 3, Issue 4, 537, 537 (Spring 1999).

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[21] Evidence of the social costs associated with compelled public disclosure was part of the record in *McConnell v. FEC*. 251 F. Supp.2d 176, 227-229 (D.D.C. 2003) (per curiam). The evidence ranged from large numbers of contributions at just below the disclosure trigger amount, to vandalism after public disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support are not popular everywhere and the results of such disclosure. *Id*. *See also AFL-CIO*, 333 F.3d at 176 (recognizing that releasing names of volunteers, employees, and members would make it hard to recruit personnel, applying strict scrutiny, and striking down an FEC rule requiring public release of all investigation materials upon conclusion of an investigation).

Carpenter's study is important for several reasons. First, the study specifically addresses opinions regarding campaign finance disclosure in the context of ballot measures. *Disclosure Costs* at 5. The few studies conducted prior to Carpenter's focused almost exclusively on candidate disclosure. The distinction is important because courts have held that the state possesses fewer interests with respect to ballot measure disclosure. *See supra* 10-12. Second, the sample population for the survey was drawn from six states that allow citizen-initiated ballot measures, including Washington. *Disclosure Costs* at 6. Third, each of the states included in the sample population compels disclosure of ballot measure contributions after an initial threshold is met and the disclosed information includes the contributor's name, address, contribution amount, and employer. *Id*. Finally, each of the states publishes on a campaign finance website at least some of the donor information collected. *Id*.

This study reveals that only 40% of respondents were comfortable with their *own* name and address being posted on a government website as a result of a contribution to a ballot committee. *Id; see, e.g.,* SER 69 (Bieniek Decl. Ex. 1, 10) (requesting removal of name when she discovered it appeared on internet).) Even fewer respondents (24%) felt that their employer's name should be posted on the Internet because of their political contribution. *Disclosure Costs* at 7. It is constitutionally significant that nearly 60% of respondents indicated that they would

think twice about donating if their name and address would be released to the public. *Id.* Carpenter found that "even those who strongly support forced disclosure laws will be less likely to contribute to an issue campaign if their contribution and personal information will be made public." *Id*. When asked why they would think twice before donating, respondents cited a desire to remain anonymous, fear of retaliation (both personal and economic), and that public disclosure would take away their right to a secret ballot. *Id. See also McIntyre*, 514 U.S. at 343; *see, e.g.*, SER 62 (Bieniek Decl. Ex. 1, 4) (desired anonymity because wife's colleague was also running in race, indicating he feared retaliation against his wife for his donation).) As Carpenter concluded:

> Most respondents also reported themselves less likely to contribute to an issue campaign if their personal information was disclosed . . . . Thus, the cost of disclosure also seems to include a chilling effect on political speech and association as it relates to ballot issue campaigns. . . . The vast majority of respondents possessed no idea where to access lists of contributors and never actively seek out such information before they vote. At best, some learn of contributors through passive information sources, such as traditional media, but even then only a minority of survey participants could identify *specific* funders of campaigns related to the ballot issue foremost in their mind. . . . Such results hardly point to a more informed electorate as a result of mandatory disclosure. . . .

*Disclosure Costs* at 13. Thus, in addition to a significant chilling effect on political speech, research indicates compelled disclosure provisions do not solve the problem they are designed to address.

Washington's disclosure regime places significant burdens on First Amendment rights of low-level contributors. Washington has failed to introduce evidence proving that Washington holds a sufficiently important interest in the disclosure of small contributions in the ballot measure context. *See supra*. On the record before the court, it was therefore error to conclude that Washington's interest in disclosure outweighed the burdens caused by compelled public disclosure.

The Disclosure Thresholds also fail strict scrutiny. The State's interest in informing the electorate about who has contributed to political committees is not a compelling interest in the referenda context. *See supra* 10-12. Even if the Informational Interest is compelling, the Disclosure Thresholds are not narrowly tailored to this interest because the monetary thresholds at which public disclosure is triggered are too low to inform voters as to the effects of a ballot measure and the State requires public disclosure of more contributor information than is necessary to inform the electorate about the effects of a ballot measure. *See supra* 20-34.

## II. The District Court Correctly Struck Wash. Rev. Code Section 42.17.105(8) (the "Contribution Ban").

The Contribution Ban is a limit on contributions and not, as the State argues, a disclosure law or timing mechanism. In *Citizens Against Rent Control v. City of Berkeley* ("*CARC*"), the Supreme Court explained that ballot measure contribution

limits "operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure." 454 U.S. 290, 299 (1981). Because the law places direct limits on expression, any effort to frame the Contribution Ban as a timing mechanism is inappropriate. *Buckley*, 454 U.S. at 18 (time, place, and manner analysis inappropriate to contribution and expenditure limits). Further, the Supreme Court has been clear about what distinguishes disclaimer and disclosure laws from limits on contributions and expenditures: "Disclaimer and disclosure requirements may burden the ability to speak, but they impose *no ceiling* on campaign-related activities and do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (emphasis added) (citations and quotations omitted). The Contribution Ban has precisely the opposite effect of a disclosure law. First, the Contribution Ban imposes a direct ceiling of $5,000 on a campaign contribution during the 21 days preceding an election, thereby banning large contributions during this time. Second, Washington's Contribution Ban prevented Family PAC from *speaking* during the important few weeks preceding the election by prohibiting it from receiving contributions in excess of $5,000 that were ready to be made. ER 103 (Passignano Decl. ¶ 13.) Consequently, the statute is not a disclosure law, and must be scrutinized as a contribution limit and ban.

### A. The District Court Properly Held the Contribution Ban Is Unconstitutional.

#### 1. The District Court Properly Applied Strict Scrutiny.

The district court properly applied strict scrutiny to the Contribution Ban. ER 4 (Transcript at 43.) Beginning with *Buckley v. Valeo*, the Supreme Court has consistently held that contributions are *speech*. 424 U.S. at 14 (Contributions limits "operate in an area of the most fundamental First Amendment activities."). However, because "[a] contribution serves as a general expression of support [*i.e.*, *speech*] for the candidate and his views, but does not communicate the underlying basis for that support," *id*. at 21, contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication [*i.e.*, *speech*]." *Id*. at 20. The Supreme Court has subsequently reaffirmed these principles, namely, that contributions are *speech*. *See Nixon*, 528 U.S. at 387; *FEC v. Beaumont*, 539 U.S. 146, 147-148 (2003); *Randall*, 548 U.S. at 246. While "contribution limits burden associational rights more than speech rights, *Nixon*, 528 U.S. at 388, the Supreme Court has consistently held that the act of making a contribution is equivalent to speaking. It may be "symbolic" speech, *Buckley*, 424 U.S. at 21, and "lie closer to the edges than to the core of political expression[,]" *Beaumont*, 539 U.S. at 148, but it is political speech nonetheless.

In *Citizens United v. FEC*, the Supreme Court announced that "[l]aws that burden political *speech* are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." 130 S. Ct. at 898 (quotations and citations omitted). In accordance with the Supreme Court's directive, the district court properly concluded that the Contribution Ban amounted to a ban on contributions greater than $5,000, which are speech, during the key part of an election, and was therefore subject to the highest level of scrutiny. That *Citizens United* did not concern contribution limits is insignificant because the Court's statement implicates political *speech* and not simply political expenditures. The distinction is further irrelevant because in the context of referenda elections, contribution limits serve as direct limits on expenditures, which operate as a direct limitation on freedom of expression. *CARC*, 454 U.S. at 299-300. Consequently, the district court properly viewed the Contribution Ban as a direct burden on political speech and correctly applied strict scrutiny.

The State's reliance on *Citizens for Clean Government v. City of San Diego* ("*CFCG*"), 474 F.3d 647 (9th Cir. 2007), is misplaced in light of *Citizens United*. (App. Br. 19 n. 11.) In declining to reverse the district court's application of *Buckley*'s "less rigorous" scrutiny to contribution limits to recall petition campaigns, the *CFCG* court stated that contributions to ballot measure campaigns do not "convey

a different type or degree of speech from contributions to candidates or parties," and therefore do not warrant the application of strict scrutiny.[22] *CFCG*, 474 F.3d at 652. However, the district court correctly interpreted *Citizen United* as a "game changer" as to the appropriate scrutiny applicable to laws that burden political speech. ER 52 (Transcript at 39.)

> [P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that

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[22] In *CARC*, the Court discussed, but did not directly apply a standard of review. This was because the Court determined that there existed no state interest that could justify limits on contributions to ballot measure committees. *CARC*, 454 U.S. at 299-300. In reviewing limits on contributions to recall petition campaigns, the *CFCG* court determined that *CARC* "avoided any direct statement regarding the standard of review," and inferred from the Court's language that the Court seemed to apply *Buckley*'s less rigorous scrutiny. *CFCG*, 474 F.3d at 651. The language is not so clear and the Court seems to imply they viewed contributions to ballot measure committees as imposing direct burdens on speech and therefore subject to the highest level of scrutiny. *See CARC*, 454 U.S. at 294. ("[R]egulation of First Amendment rights is always subject to exacting judicial review."); *id.* at 302 ("Berkeley's ordinance cannot survive constitutional challenge unless it withstands exacting scrutiny. To meet this *rigorous* standard of review, Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means closely drawn to avoid unnecessary abridgment of First Amendment freedoms.") (Blackmun, J., and O'Connor, J., concurring) (quotations and citations omitted); *see also ACLF*, 525 U.S. at 207 (Thomas, J., concurring) (explaining the Court applied strict scrutiny in *CARC*). Exacting scrutiny is the equivalent of strict scrutiny when the law burdens core political speech. *See McIntyre*, 514 U.S. at 347 (*citing Bellotti*, 435 U.S. at 786 ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

> the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

*Citizens United*, 130 S. Ct. at 898 (quotations and citations omitted).

The district court analysis is also consistent with *CARC*, which held that ballot measure contribution limits "plainly contravene[] both the right of association and the speech guarantees of the First Amendment." *CARC*, 454 U.S. at 300. The Contribution Ban has the effect of banning contributions greater than $5,000 during the most important part of an election, which directly burdens Family PAC's ability speak. As in *Citizen United*, so here: "As a 'restriction on the amount of money a person or group can spend on political communication during a campaign,' that statute 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" *Citizens United*, 130 S. Ct. at 898 (*quoting Buckley*, 424 U.S. at 19). Restrictions imposing these types of burdens on political speech are subjected to strict scrutiny. *Id*.

### 2. Contribution Limits to Ballot Measure Committees are *Per Se* Unconstitutional Under *Citizens Against Rent Control v. City of Berkeley*.

Even if this Court determines that it was error to subject the Contribution Ban to strict scrutiny under *Citizens United*, it should find such error harmless. Regardless

of the standard of review, the Supreme Court has held that limits on contributions to ballot measure committees are unconstitutional. *CARC*, 454 U.S. at 300. In *CARC*, the Supreme Court ruled on the constitutionality of a limit on contributions to ballot measure committees similar to the Contribution Ban. *Id*. at 298. The Supreme Court recognized the fundamental distinction between contributions in candidate elections and contributions in referenda elections: "'The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.'" *Id*. at 298 (*quoting Bellotti*, 435 U.S. at 790). As a result, the Supreme Court concluded "there is *no* significant state or public interest in curtailing debate and discussion of a ballot measure."[23] *Id*. Therefore, even if viewed as a contribution limit subject to less than strict scrutiny, the Contribution Ban must fail because no state interest exists to justify limits on contributions to ballot measure campaigns. *Id*.

Washington can and does require disclosure of contributions to ballot measure committees. However, the Contribution Ban is not a disclosure law, but a contribution limit. Like Washington, the City of Berkeley in *CARC*, argued unpersuasively that its contribution limit was a disclosure requirement. *CARC*, 454 U.S. at 298. The Court

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[23] Following *Citizens United*, the only interest that can justify limits on contributions is the interest in avoiding quid pro quo corruption, which is not implicated in the ballot-measure context. *Bellotti*, 435 U.S. at 789-90 (state lacked compelling interest in combating corruption in ballot-measure election because no risk of quid pro quo corruption); *CPLC-I*, 328 F.3d at1105 n.23 (same).

rejected this argument. *Id*. (rejecting argument that "[the contribution limit] is necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures."). The Supreme Court explained that in the referenda context, limits on contributions cannot be upheld as necessary to encourage disclosure. *Id*. at 303 (Blackmun, J., and O'Connor, J., concurring). Similarly, Washington's interest in informing voters about the sources of ballot-measure funding, as well the integrity of the political system, "will be adequately protected if contributors are identified in a public filing revealing the amounts contributed." *Id*. at 299-300; *see also id.* at 303 (Blackmun, J., and O'Connor, J., concurring) ("[Government] need not impose a [limit] on contributions to encourage disclosure so long as it vigorously enforces its already stringent disclosure laws.").

Washington attempts to circumvent Supreme Court precedent by suggesting the Contribution Ban serves not disclosure generally, but *timely* disclosure. (App. Br. 14.) The State focuses on the fact that Washington uses a vote-by-mail system in which ballots are mailed to voters 18 days before the election. (*Id*. at 14-15.) Washington contends the Contribution Ban is necessary to "push the big money" out early to ensure disclosure of large contributions are made by the time voters receive their ballots in the mail. (*Id*. at 14.)

The district court properly concluded that despite any compelling interest

Washington holds in disclosing large contributions to voters, the "21-day ban on large contributions cannot be viewed as necessary or narrowly tailored to effectuate [timely disclosure of large contributions]." ER 8 (Transcript at 47.) Indeed, Washington's own evidence undermines its argument that 21 days is necessary to "give voters timely access to information about contributors before they cast their ballots." (App. Br. 14.) Washington's disclosure law requires committees making and receiving contributions in excess of $1,000 during a "special reporting period" to file reports within 48 hours.[24] RCW § 42.17.105(3). Washington proudly asserts that reports filed electronically are available to the public within a matter of minutes. ER 96 (Smith Decl. ¶ 9 (electronically filed reports available within 15 minutes of filing; paper reports available within an hour of filing.).) Moreover, if a committee has already filed a "special report," any subsequent contributions from the same contributor must be filed within 24 hours, regardless of the subsequent contribution's size. RCW § 42.17.105(3). Nearly instantaneous reporting of contributions negates any argument that a blanket ban on contributions in excess of $5,000 during the 21 days preceding a general election is necessary and narrowly tailored to providing voters with information before they cast their votes. As in *CARC*, Washington's current

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[24] The 21 days before a general election is a "special reporting period." RCW § 42.17.105(1)(a)(i).

disclosure regime adequately serves its Informational Interest and Washington has no compelling or important interest to justify limits on ballot measure contributions. *CARC*, 454 U.S. at 299-300.

Washington attempts to salvage its statute by arguing, without any record evidence, "[t]he timing limit . . . reflects the fact that the majority of Washingtonians cast their ballots well before the designated election date." (App. Br. 14.) The district court properly concluded "[t]he fact that voters have access to ballots earlier than before and that they may choose to vote before all the election debate is in fact over is not a sufficient reason to save this statute as it pertains to referenda." ER 8 (Transcript at 47); *see also* ER 37-38 (Transcript at 24-25) (discussing how a voter's choice to vote early cannot justify depriving a ballot measure committee the ability to respond to a last-minute challenge). Washington's interest is limited to informing voters as to who is contributing to referenda campaigns. Washington has shown it can easily further this interest without a ban lasting as long as 21 days prior to an election. The fact that some voters may choose to vote before all sides have spoken cannot save this statute.

Ultimately, Washington severely overstates its interest in informing voters, claiming an interest in allowing voters to "have access to information about large contributions . . . *before and when they are able to start voting*." (App. Br. 32.)

Washington's argument is truly breathtaking in its scope. The State defends the Contribution Ban on the ground that it has the power to determine when ("well before" the election) voters must have all "important" information. (App. Br. 14, 10.) The next logical step is to ban all electioneering (books, pamphlets, television advertising) the moment ballots are distributed by mail, lest any voter feel he or she cast an uninformed ballot.[25] The First Amendment does not allow this. That some speech may fall on deaf ears, or that some voters may regret casting an uninformed ballot, is not an interest that can overcome the tremendous burden on the freedoms of expression and association protected by the First Amendment. It is for the people to decide "what is 'responsible,' what is valuable, and what is truth." *McIntyre*, 514 U.S. at 349 n.11.

### B. Even When Analyzed As a Disclosure Law Under Exacting Scrutiny, the Contribution Ban Fails.

As explained *supra*, the Contribution Ban is not a disclosure law or timing mechanism. However, even if this Court views the Contribution Ban as a disclosure law subject to exacting scrutiny, it still fails because the 21-day ban on large

[25] That voters may cast uninformed ballots was a danger contemplated by the Framers of the First Amendment: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . But if there be any danger that the people cannot evaluate the information and arguments . . . it is a danger contemplated by the Framers of the First Amendment." *Bellotti*, 435 U.S. at 791-92.

contributions is not substantially related to a sufficiently important government interest. *Doe*, 130 S. Ct. at 2818. Further, "[t]o withstand [exacting] scrutiny the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. at 2818 (quotations and citations omitted). The Contribution Ban imposes substantial burdens on First Amendment rights by limiting speech during the key part of the election debate. When a law significantly burdens political speech, exacting scrutiny is equivalent to strict scrutiny and the government must demonstrate a sufficiently important interest that overcomes these burdens. *Davis*, 128 S. Ct. at 2775. The State has failed to show a ban on large contributions in the 21 days preceding an election is necessary to further its interest in informing voters about who is contributing to ballot measures prior to election day. As a result, the Contribution Ban fails exacting scrutiny.

### 1. The Contribution Ban Imposes Tremendous Burdens on First Amendment Rights During the Key Part of the Election Debate.

Limits on contributions to ballot measure campaigns impose significant burdens on the First Amendment rights of association and expression. *CARC*, 454 U.S. at 299. The Contribution Ban exacerbates these burdens by limiting speech during the short time when the public begins to concentrate on the election, when speech is most needed and capable of influence. *Citizens United*, 130 S. Ct. at 895.

The First Amendment protects the right to "speak . . . in the heat of political campaigns, when speakers react to the messages conveyed by others." *Id*. Because voters have ballots in their hands during the 21-day ban, it is vital that speakers have the ability to speak and respond to messages from others during this period. The district court properly emphasized the need to speak during the few weeks preceding the election:

> [L]ast minute attacks, 'October surprises' as we refer to them in presidential elections, are commonplace, and . . . somebody's ability to respond may be, and probably oftentimes is, impacted by this particular ban.

ER 52 (Transcript at 39.) It is not unreasonable to expect the $5,000 contribution limit to hamper a political committee's ability to raise the funds necessary to respond to a particularly vicious attack ad first aired 22 days before the election. *See* ER 38 (Transcript at 25) (discussing the possibility that a last-minute challenge to a referendum will go unanswered).

The burdens imposed by the Contribution Ban are not alleviated simply because Washington imposes no ceiling on contributions prior to the 21 days preceding an election or because ballot measure committees are free to spend their money without restriction during this period. (App. Br. 17.) By banning large contributions during the critical few weeks before an election Washington severely

limits a committee's ability to speak. *See CARC*, 454 U.S. at 299 (limits on contributions . . . in turn limit expenditures). As explained *supra*, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *CARC*, 454 U.S. at 299. In fact, Washington recognizes the heightened need for *disclosure* in the weeks shortly before an election. (App. Br. 22-25.) However, the value of *disclosure* pales in comparison to the value of actual *speech* in the weeks preceding an election. "The remedies enacted by law . . . must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 130 S. Ct. at 911.

Further, the fact that the Contribution Ban may be a "well known feature" of the campaign finance system, ER 156 (Levinson Decl. ¶ 7), does not solve the constitutional infirmities of the statute. The statute's validity cannot depend on whether ballot measure committees are aware of an unconstitutional law's effect. Indeed, a committee may not decide it wishes to speak until shortly before an election. The Contribution Ban not only inhibits the ability to speak, but forces a committee to decide well before the election how, and how much, it will speak.

#### 2. The District Court Paid the Proper Level of Deference to the Legislature.

As explained above, Washington's Contribution Ban is not substantially related

to a government interest because 21 days is not necessary to disclose large contributions. *See supra* 56-60. Washington attempts to save its statute through appeals to legislative deference. (App. Br. 25-27.) While the Supreme Court has preferred to defer to legislative judgment on "the appropriate level at which to require recording and disclosure," *Buckley*, 424 U.S. at 83, such deference is not appropriate with regard to limits on contributions to ballot measure committees because the Supreme Court has determined that such limits are unconstitutional. *CARC*, 454 U.S. at 299-300 (no interest exists to support contribution limits to ballot measure committees).

Even if this Court views the Contribution Ban as partially effectuating the timing of disclosure, it should find the district court paid the proper level of deference to the legislature:

> [C]learly when the [Contribution Ban] was adopted, the purpose was the get the big money out early. And the reality was, logistically, it took time to gather, organize, and disseminate the information, so that, again, there was some reasonable relation between the 21-day window [and informing voters who is contributing to ballot-measure committees].

ER 37 (Transcript at 24.) However, the district court properly concluded that because campaign contributions can be reported within minutes, "a 21-day ban on large contributions cannot be viewed as necessary or narrowly tailored to effectuate the original purpose." ER 8 (Transcript at 47.)

Moreover, the Contribution Ban predates Washington's vote-by-mail system.[26] The statute cannot now be justified by a system that followed its enaction. The 21-day ban presumably originally bore relation to the time period needed to disclose contributions when the law was written. As explained above, campaign contributions can be reported and disclosed within 24 hours and the 21-day ban is no longer necessary to effectuate timely disclosure.

Washington rests it argument on recent wholesale legislative readoption of Wash. Rev. Code § 42.17.105(8). (App. Br. 12.) However, the State provides no evidence showing the legislature now intends the 21-day window to bear relation to the State's vote-by-mail system. Even if Washington could show the legislature readopted the Contribution Ban with the vote-by-mail system in mind, the statute would still fail for want of tailoring, as explained *supra*. The reality is, disclosure of contributor information is available nearly instantaneously with the advent of the Internet. Voters may choose to vote early knowing they are not fully informed, but contrary to Washington's argument, 21 days is no longer substantially related to

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[26] Wash. Rev. Code § 42.17.105(8) was originally adopted in 1985. (App. Br. 12.) Voting by mail was not extended to all citizens until 1993, and then only by request. Not until 2005 could Washington counties choose to conduct all elections by mail. *See* WASHINGTON SECRETARY OF STATE, WASHINGTON STATE'S VOTE-BY-MAIL EXPERIENCE, APPENDIX A (2007), http://www.sos.wa.govdocumentvault/-Washington-StatesVotebyMailExperienceOctober2007-2066.pdf.

informing the electorate as to who has contributed to ballot measure committees. Eliminating or shortening the ban on large contributions would not act to "withhold information from Washington voters," as the State argues, (App. Br. 9), but would rather allow for more speech, and more debate, at the time most critical to their voting.

**C. The Contribution Ban is Unconstitutionally Underinclusive.**

For the reasons explained above, the Contribution Ban fails strict and exacting scrutiny. The statute also suffers from underinclusiveness. Each instance is independently sufficient to render the Contribution Ban unconstitutional.

First, the Contribution Ban is underinclusive because it restricts large contributions only during the 21 days preceding a *general* election. RCW § 42.17.105(8). Continuing political committees, state parties, and other organizations can make and receive contributions in excess of $5,000 at any other time during the year, including the 21 days preceding a primary or special elections. Washington's asserted interest in "push[ing] the big money out early" applies equally in those contests as well. If Washington has an interest in preventing large contributions on the eve of an election, it would prohibit large contributions during the 21 days

preceding primary and special elections.[27] *See Republican Party of Minn. v. White*, 536 U.S. 765, 779-80 (2002) (regulation that fails to restrict speech implicating government's alleged interest is underinclusive). The underinclusiveness diminishes "the credibility of the government's rationale for restricting speech in the first place." *City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994).

Second, the Contribution Ban is underinclusive because it allows bona fide political parties to make and receive contributions in excess of $5,000 during the 21 days preceding a general election. Failing to restrict the ability of *all* political committees to make and receive contributions in excess of $5,000 diminishes "the credibility of the government's rationale for restricting speech in the first place." *City of LaDue*, 512 U.S. at 52.

Third, the Contribution Ban is underinclusive because it imposes different effective contribution limits on a speaker depending solely on when contributions are made. If Washington has an interest in preventing large ballot measure contributions (which it does not), then it should set a uniform contribution limit. The current statute

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[27] The fact that ballot measures are not voted on at primary or special elections is immaterial. The statute applies equally to candidate and ballot measure elections. Candidate elections involve primary and special elections. And while the State is correct that it imposes limits on contributions to candidates, no such limits apply to contributions to political parties or PACs. And political parties and PACs can spend unlimited funds in primaries and special elections to promote or defeat candidates.

allows a continuing political committee to make and receive unlimited contributions at any time except the 21 days preceding a general election. RCW § 42.17.105(8).

For example, an individual could have contributed $1,000,000 on October 12, 2010, and another $5,000 during the 21 days preceding the November 2010 election, for an effective contribution limit of $1,005,000. By contrast, his neighbor who made his first contribution on October 13, 2010, was limited to $5,000 by virtue of the $5,000 contribution limit. Any argument that large a contribution on day 21 is more problematic than day 22 poses a "challenge to the credulous," *Republican Party of Minn.*, 536 U.S. at 780, because the underinclusiveness diminishes "the credibility of the government's rationale for restricting speech in the first place." *City of LaDue*, 512 U.S. at 52.

Finally, and most importantly, the Contribution Ban is underinclusive because individuals can spend unlimited amounts of money during the 21 days preceding a general election, provided that they do not associate with other citizens. ER 83 (Ellis Decl. ¶¶ 60-61.) Thus, the $5,000 contribution limit is a direct restraint on the freedom of association. *CARC*, 454 U.S. at 296 ("To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association"); *see also Citizens United*, 130 S. Ct. at 898 ("Prohibited, too,

are restrictions distinguishing among different speakers, allowing speech by some but not others"). The Contribution Ban "does not seek to mute the voice of one individual, and it cannot be allowed to hobble the collective expressions of a group." *CARC*, 454 U.S. at 296. The State's interest in "pushing the big money" out early is severely discredited by its failure to restrict spending by wealthy individuals during the 21 days preceding an election.

For these reasons, the Contribution Ban is unconstitutionally underinclusive and must fail.

## Conclusion

For the foregoing reasons, this Court should affirm that portion of the district court's judgment striking down the Contribution Ban and reverse that portion upholding the Disclosure Thresholds.

Dated this 26th day of January, 2011.

Respectfully submitted,

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## Statement of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, Family PAC is not aware of any other cases pending in any jurisdiction that raises challenges to statutes similar to Wash Rev. Code § 42.17.090, Wash. Rev. Code § 42.17.105(8), Wash. Admin. Code 390-16-034. There are no same or consolidated cases with this case; no case previously heard by this Court with concern to the issues raised by this brief; raise same or closely related issues; or involve the same transaction event.

DATED this 26th day of January, 2011.

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## Certificate of Compliance

I certify that pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and 28.1(e)(2)(b)(i), the attached principle and response brief is proportionately spaced, has a typeface of 14 points and contains 16,130 words.

Dated this 26th day of January, 2011.

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