UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

Family PAC, Plaintiff, vs. **Rob McKenna**, in his official capacity as Attorney General of Washington, and **Jim Clements**, **David Seabrook**, **Jane Noland**, **Jennifer Joly**, and **Barry Sehlin**, members of the Public Disclosure Commission, in their official capacities, Defendants.	No. 3:09-cv-05662-RBL **Plaintiff's Notice of Motion and Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment** NOTE ON MOTION CALENDAR: June 11, 2010 The Honorable Ronald B. Leighton **ORAL ARGUMENT REQUESTED**

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TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY GIVEN NOTICE THAT on Friday, June 11, 2010, in the United States District Court for the Western District of Washington, Tacoma Division, located at 1717 Pacific Avenue, Tacoma, Washington, Family PAC will and hereby does move for summary judgment on all claims presented in Plaintiff's Verified Complaint. (Dkt. 1.)

This motion for summary judgment is made pursuant to Rule 56 of the Federal Rules of Civil Procedure, and on the grounds specified in this Notice of Motion and Motion, and Plaintiff's Memorandum in Support of Summary Judgment, the documents filed in support thereof, the Verified Complaint, and such other and further evidence as may be presented to the Court at the time of the hearing.

In support thereof, Family PAC presents the following memorandum in support of its motion for summary judgment.

Introduction

Plaintiff Family PAC seeks summary judgment on all counts in its Verified Complaint for Declaratory and Injunctive Relief, declaring that:

(1) The Public Disclosure Law, Wash. Rev. Code ("RCW") § 42.17.010 *et seq*. ("PDL") requirement that political committees report the name and address of all contributors of more than $25, and the occupation, employer, and employer's address of contributors of more than $100, violates the First Amendment because it is not narrowly tailored to serve a compelling government interest, and;

(2) The PDL's prohibition on contributions in excess of $5,000 during the twenty-one days preceding a general election violates the First Amendment because it is not narrowly tailored to serve a compelling government interest.

Procedural History

Family PAC filed a verified complaint for declaratory and injunctive relief on October 21, 2009. (V. Compl., Dkt. 1.) At a hearing on October 27, 2009, the Court denied Family PAC's motion for a temporary restraining order and preliminary injunction. (Minute Entry, Dkt. 35.) Family PAC now moves for summary judgment on all claims presented in the verified complaint.

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Statement of Facts

Family PAC organized on October 21, 2009 as a continuing political committee to support traditional family values in Washington by soliciting and receiving contributions, and by making contributions and expenditures to support or oppose ballot propositions. (V. Compl. ¶¶ 21-22, Dkt. 1.) Family PAC has stated it will support or oppose only ballot measures, not candidates. 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 the 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.

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. (V. Compl. ¶ 28.) Family PAC's experience is consistent with the experiences of other political committees in Washington. (Decl. of Scott F. Bieniek in Supp. of Pl.'s Mot. for Summ. J. ("Bieniek Decl."), Ex. 1, 4 (would like to donate anonymously because wife's colleague is an opposition candidate); *id.* at 5-9 (desiring anonymity); *id.* at 10, 11 (wants name and contribution redacted from PDC website); *id.* at 12 (upset by occupation/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. (V. Compl. ¶¶ 28-30.)

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The PDL also prohibits Family PAC from making or receiving contributions in excess of $5,000 during the 21 days preceding a general election. RCW § 42.17.105(8) (the "$5,000 contribution limit").

Family PAC turned away contributors willing to contribute more than $5,000 during the 21 days preceding the Referendum 71 election because of the $5,000 contribution limit. (V. Compl. ¶ 27.) For example, Focus on the Family Action 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 $5,000 contribution limit. (Passignano Decl. ¶ 13.) Other political committees have been forced to return contributions received in excess of $5,000 during the 21-day period. (Bieniek Decl., Ex. 2.)

Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This does not mean that there cannot be some dispute as to the facts: "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 457 U.S. 242, 247-48 (1986). Here, there is no genuine issue as to any material fact that might affect the outcome and Family PAC is entitled to judgment on all claims in the Verified Complaint.

Argument

I. The challenged provisions are subject to strict scrutiny.

The First Amendment to the United States Constitution states "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[1] Laws burdening core political speech are subject to "exacting scrutiny"; they must be "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (*citing First Nat'l Bank of Boston*

[1] The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

v. Bellotti, 435 U.S. 765, 786 (1978) (equating "exacting scrutiny" with "strict scrutiny")). *See also Buckley v. Am. Constitutional Law Found.* ("*ACLF*"), 525 U.S. 182, 206-09 (Thomas, J., concurring) (law implicating "core political speech" or imposing substantial burdens on First Amendment rights is always subject to strict scrutiny).

Strict scrutiny applies because the U.S. Supreme Court has consistently held that compelled disclosure provisions impose substantial burdens on core political speech. *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008) (*citing Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). (*See also* Bieniek Decl., Ex. 3 (discussing burdens of occupation and employer reporting requirement, including chilling effect and burdens of collecting information).)

Similarly, the $5,000 contribution limit is subject to strict scrutiny. *See Citizens Against Rent Control v. Berkeley* ("*CARC*"), 454 U.S. 290, 298 (1981) (discussing similar contribution limit and holding that "regulation of First Amendment rights is always subject to exacting judicial scrutiny").

Under strict scrutiny, Washington must demonstrate that the challenged provisions are "'(1) narrowly tailored, to serve (2) a compelling state interest.'" *Cal. Pro-Life Council, Inc. v. Randolph* ("*CPLC-II*"), 507 F.3d 1172, 1178 (9th Cir. 2007) (*citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). As set forth below, Washington cannot demonstrate that the disclosure thresholds or the $5,000 contribution limit survive strict scrutiny, and Family PAC is entitled to summary judgment.

II. The prohibition on contributions in excess of $5,000 during the twenty-one days preceding a general election is not narrowly tailored to serve a compelling government interest.

Regulations that impose substantial burdens on First Amendment rights must survive strict scrutiny. A prohibition on contributions in excess of $5,000 during the 21 days preceding a general election is not narrowly tailored to serve a compelling government interest and Family PAC is entitled to summary judgment.[2]

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[2] In the context of candidate elections, limitations on contributions are generally subject to lesser scrutiny than limitations on expenditures. *See McConnell v. FEC*, 540 U.S. 93, 134-35 (2003). However, in the context of referenda elections, contribution limits serve as direct limits on expenditures; and therefore, are subject to strict scrutiny. *CARC*,

RCW § 42.17.105(8) states:

> It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17.090 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election. This subsection does not apply to contributions made by, or accepted from, a bona fide political party as defined in this chapter, excluding the county central committee or legislative district committee.

Family PAC is a political committee, RCW § 42.17.020(39), and any contribution to it is reportable pursuant to RCW § 42.17.090. "Statewide office," RCW § 42.17.020(46), does not include a "ballot proposition." RCW § 42.17.020(4). Therefore, Family PAC cannot make or receive contributions in excess of $5,000 during the 21 days preceding a general election.

Family PAC is entitled to summary judgment on Count II for several reasons. The U.S. Supreme Court has ruled that contribution limits to ballot measures, such as the $5,000 contribution limit, are unconstitutional. Moreover, the limitation at issue here is underinclusive, because different limitations are imposed on individuals depending on when contributions are made, because it allows political parties to make and receive contributions in excess of $5,000 in the 21 days preceding a general election, and because it applies only to *general* elections.

First, 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." *CARC*, 454 U.S. at 299-300. All ballot measure contribution limits are unconstitutional because they are not narrowly tailored to a compelling government interest.[3] *Compare id.* (no discussion of permissible level of contribution limits) *with Randall v. Sorrell*, 548 U.S. 230 (2006) (candidate

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454 U.S. at 299-300.

[3] Washington has advanced two arguments in support of the prohibition on contributions in excess of $5,000 during the 21 days preceding a general election. (Bieniek Decl., Ex. 4.)

First, Washington argues RCW §42.17.105(8) "require[s] that large contributions be made before the final weeks of the campaign so that information concerning these contributions may be disseminated to the public well before election day." (*Id.* at 3.) As discussed below, *infra* n.7, the informational interest is adequately served by the 24-hour reporting requirement for contributions in excess of $1,000 during the 21 days preceding an election. And nothing prohibits an individual from spending an unlimited amount of his own resources to support or oppose a ballot measure during the 21 days preceding an election.

Second, Washington argues the prohibition is designed to level the playing field during the final three weeks of a campaign. (*Id.* at 6.) The Supreme Court has repeatedly rejected the "leveling the playing field" argument. *See Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010); *Davis*, 128 S. Ct. at 2773-74; *FEC v. Wisc. Right to Life*, 551 U.S. 449, 487 (2007); *Bellotti*, 435 U.S. at 790-91; *Buckley*, 424 U.S. at 48-49.

contribution limits constitutional but may fall below permissible level).[4] The $5,000 contribution limit is somewhat of a moving target because it limits a person's total contributions to $5,000 plus any contributions prior to the 21 day window, but it is nonetheless a contribution limit.

The burden imposed by the $5,000 contribution limit is especially harsh because it imposes a contribution limit at precisely the time when most decisions to engage in political speech are made. *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010) ("The decision to speak is made in the heat of political campaigns, when speakers must react to messages conveyed by others."). For example, it is not unreasonable to expect the $5,000 contribution limit to hamper a political committees ability to raise the funds necessary to respond to a particularly vicious attack ad first aired 22 days before the election. It also imposes a contribution limit when political speech is most critical and effective. *Id.* ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held.").

Second, the $5,000 contribution limit 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, *supra*), then it should set a uniform contribution limit. *See Republican Party of Minn.*, 536 U.S. at 779-80 (regulation that fails to restrict speech implicating government's alleged interest is underinclusive). The current statute allows a continuing political committee to make and receive unlimited contributions at any time *except* the 21 days preceding a general election.[5] RCW § 42.17.105(8).

For example, an individual could have contributed $1,000,000 on October 12, 2009, and another $5,000 during the 21 days preceding the November 2009 election, for an effective contribution limit of $1,005,000. By contrast, his neighbor who made his first contribution on October 13, 2009, was limited to $5,000 by virtue of the $5,000 contribution limit.[6] Any argument that large a contribution

[4] Candidate contribution limits are subject to a lesser standard of review. *Supra* n.2.

[5] There is even confusion over when the 21-day period begins and ends. (Bieniek Decl., Ex. 5.)

[6] Moreover, an individual may spend an unlimited amount of his own money on independent expenditures during the 21 days preceding a general election. *See* RCW §§ 42.17.105(8) and 42.17.020(39) ($5,000 limit applies only to contributions to "political committees," which are defined as "any person (except a candidate or an individual dealing

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1 on day 21 is more problematic than day 22 poses a "challenge to the credulous," *Republican Party*
2 *of Minn.*, 536 U.S. at 780, because the underinclusiveness diminishes "the credibility of the
3 government's rationale for restricting speech in the first place."[7] *City of LaDue v. Gilleo*, 512 U.S.
4 43, 52 (1994).

5 Third, the prohibition is underinclusive because it allows bona fide political parties to make and
6 receive contributions in excess of $5,000 during the 21 days preceding a general election. RCW §
7 42.17.105(8). Failing to restrict the ability of *all* political committees to make and receive
8 contributions in excess of $5,000 diminishes "the credibility of the government's rationale for
9 restricting speech in the first place." *City of LaDue*, 512 U.S. at 52.

10 Finally, the prohibition is underinclusive because it restricts large contributions only during the
11 21 days preceding a *general* election. RCW § 42.17.105(8). Continuing political committees, state
12 parties, and other organizations can make and receive contributions in excess of $5,000 at any other
13 time during the year, including the 21 days preceding a primary or special election. If Washington
14 has an interest in preventing large contributions on the eve of an election, it would prohibit large
15 contributions during the 21 days preceding primary and special elections. The underinclusiveness
16 again diminishes Washington's interest. *Republican Party of Minn.*, 536 U.S. at 780; *City of LaDue*,
17 512 U.S. at 52.

18 Thus, Family PAC has established that it is entitled to summary judgment on Count II because
19 RCW § 42.17.105(8) is not narrowly tailored to serve a compelling government interest and thus
20 violates the First Amendment to the United States Constitution.

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25 with his or her own funds or property) having the expectation of receiving contributions or making expenditures in
26 support of, or opposition to, any candidate or any ballot proposition").

27 [7] Washington's informational interest, *supra* n.3, cannot justify the prohibition because a continuing political
28 committee must file 24-hour reports for all contributions exceeding $1,000 during the 21 days preceding an election. RCW § 42.17.105. Thus, the informational interest with respect to contributions in excess of $5,000 is served by this more narrowly tailored provision.

III. The Public Disclosure Law's $25 and $100 reporting thresholds are not narrowly tailored to serve a compelling government interest.

A. Compelled disclosure provisions impose substantial burdens on First Amendment rights.

Strict scrutiny applies because compelled disclosure provisions impose substantial burdens on core political speech. *Davis*, 128 S. Ct. at 2774-75. (*See also* Bieniek Decl., Ex. 3). That the disclosure burden is high has become clearer after *Buckley* said (without the benefit of research on the effect of disclosure on First Amendment rights) that "sunlight is said to be the best of disinfectants." *Buckley*, 424 U.S. at 67.[8] 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 have revealed the true costs inflicted by disclosure and suggest that it is time to reemphasize the importance of applying strict 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) ("*Access Delayed*"). Copies had to be 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. And the process could be complicated by candidates seeking to game the system, such as former New York

[8] Even in *Buckley* the Court recognized that disclosure might deter contributions because of the risk of harassment and retalliation. *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").

1 Governor George Pataki, who is famous for organizing his lists alphabetically by *first* name. *Access*
2 *Delayed* at 1. If an individual overcame all of these obstacles, he or she still needed to find a way
3 to communicate the message to the public, a task virtually impossible in 1972 without the assistance
4 of the mainstream media.

5 Today, records are kept in computer databases and uploaded to the Internet in searchable form
6 almost instantly. *See* Wash. Admin. Code 390-14-026 (campaign statements online within two days).
7 Once on the Internet, the information can be combined with publicly available phone numbers and
8 maps. *See*, *e.g.*, www.eightmaps.com; www.batchgeo.com.

9 In today's "information age," courts cannot ignore the tremendous invasions of privacy that
10 occur when the government compels disclosure and allows it to become part of the public record.
11 *See U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 770 (1989) ("The central storage
12 and easy accessibility of computerized data vastly increase the potential for abuse of that
13 information.") (internal citation omitted). For example, the Federal Rules of Civil Procedure now
14 require litigants to redact certain personal identifying information because of identity-theft concerns.
15 Fed. R. Civ. P. 5.2. The rule allows parties to move, for good cause, to redact additional information
16 and limit or prohibit non-parties' electronic access to filed documents. *Id*.

17 However, the concerns here go far beyond identity theft. No longer must employers visit
18 government offices during business hours to learn which employees supported referenda—they can
19 do it from their offices. So can customers, suppliers, and neighbors. Recent elections demonstrate
20 how individuals use disclosure reports to intimidate individuals exercising First Amendment rights.
21 *See, e.g.*, *Citizens United*, 130 S. Ct. at 916 (threats and harassment "cause for concern"); *id.* at 981
22 (Thomas, J., concurring) ("[S]uccess of such intimidation tactics has apparently spawned a cottage
23 industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First
24 Amendment rights."). As the California Voter Foundation president said, "This is not really the
25 intention of voter disclosure laws. But that's the thing about technology. You don't really know
26 where it is going to take you." Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-*
27 *Edged Sword*, N.Y. Times (Feb. 8, 2009) (*available at* http://www.nytimes.com/
28 2009/02/08/business/08stream.html.)

2. Compelled *public* disclosure increases the burdens of compelled disclosure exponentially.

An important distinction must be drawn 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 seeks 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 union and DNC "assert[ed] that releasing the names of hundreds of volunteers, members, and employees w[ould] make it more difficult for the organizations to recruit future personnel." *Id.* at 176.[9] 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.[10] The transferrable concept is that private (to the government) disclosure sufficed for government enforcement purposes, and public disclosure was unjustifiable and in violation of First Amendment speech and association rights. Any interest that Washington has in such low-level disclosure may be met by private disclosure to the government, making public disclosure unconstitutional.

[9] In addition to this future chill, the court noted that disclosure of strategies to opponents would "frustrate the organizations' ability to pursue their political goals effectively." *AFL-CIO*, 333 F.3d at 177.

[10] Washington has indicated that an enforcement proceeding could result in the public disclosure of information that is not otherwise publicly released under the PDL. (Bieniek Decl., Ex. 1, 2.) 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.

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). As discussed above, the technological advances that have occurred in the last thirty years make it imperative for the Court to consider the differences between private and public disclosure, and the respective benefits and burdens associated with each.

Strict scrutiny requires that each application of a statute restricting speech must be supported by a compelling government interest. *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL-II*"), 551 U.S. 449, 478 (2007);[11] *see also 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, in applying strict scrutiny to the provisions of the PDL challenged herein, the Court must be cognizant of the fact that private and public reporting provisions impact First Amendment rights in slightly different ways. A compelled disclosure system that requires only private reporting may be constitutional in a situation where public reporting may not.

3. Compelled disclosure has a significant chilling effect on political speech.

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.[12]

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[11] This opinion states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[12] 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); Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at

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).

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 infra* 14. 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 at least some of the donor information collected on a campaign finance website. *Id.*

The results of the study are consistent in one respect with prior studies on campaign finance disclosure—over 80% of the respondents agreed that the government should make public the identities of those who contribute to ballot measures.[13] *Id.* at 7. However, that is where the similarities end.

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http://www.ij.org/publications/other/disclosurecosts.html); William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis*,* White*, and the Future of Judicial Campaign Financing*, 86 Denv. U. L. Rev. 195, 218-20 (2008) (discussing the burdens of disclosure).

[13] Respondents were asked to state how they felt about the following statement. "The government should require that the identities of those who contribute to ballot issue campaigns should be available to the public." This finding is consistent with the findings of David Binder, relied upon by the court in *CPLC-II*, where 71% of respondents felt that it was important to know the identities of individuals that contributed to a ballot measure committee. *CPLC-II*, 507 F.3d at 1179.

1 When the issue was personalized, support for public disclosure waned significantly. Only 40%
2 of respondents were comfortable with their *own* name and address being posted on a government
3 website as a result of a contribution to a ballot committee. *Id.* (*See.e.g.,* Bieniek Decl., Ex. 1, 10
4 (requesting removal of name when she discovered it appeared on internet).) Even fewer respondents
5 (24%) felt that their employer's name should be posted on the Internet because of their political
6 contribution. *Disclosure Costs* at 7. Nearly 60% of respondents indicated that they would think twice
7 about donating if it meant that their name and address would be released to the public. *Id.*
8 Furthermore, after comparing general support for disclosure laws with an individual's likelihood of
9 contributing to a campaign if their information is made public, Carpenter found that "even those who
10 strongly support forced disclosure laws will be less likely to contribute to an issue campaign if their
11 contribution and personal information will be made public." *Id.* at 7. When asked why they would
12 think twice before donating, respondents cited a desire to remain anonymous, fear of retaliation
13 (both personal and economic), and that public disclosure would take away their right to a secret
14 ballot. *Id. See also McIntyre*, 514 U.S. at 343 ("The specific holding in *Talley* related to advocacy
15 of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in
16 the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the
17 hard-won right to vote one's conscience without fear of retaliation."). (*See, e.g.*, Bieniek Decl., Ex.
18 1, 3-4 (desired anonymity because wife's colleague was also running in race, indicating he feared
19 retaliation against his wife for his donation).) As Carpenter concluded:

20 > while voters appear to like the idea of disclosure in the abstract (that is, as it applies to
21 > someone else), their support weakens dramatically in the concrete (that is, when it involves
> them). Stated succinctly, it is 'disclosure for thee, but not for me.' . . . But the potential
22 > costs do not end there. Most respondents also reported themselves less likely to contribute
> to an issue campaign if their personal information was disclosed . . . . Thus, the cost of
23 > 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
24 > 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
25 > 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
26 > results hardly point to a more informed electorate as a result of mandatory disclosure. . .

27 *Disclosure Costs* at 13. Thus, in addition to a significant chilling effect on political speech, research
28 indicates compelled disclosure provisions do no solve the problem they are designed to address.

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B. Washington lacks a compelling interest sufficient to justify compelled ballot measure disclosure.

In *Buckley*, the Supreme Court stated that "disclosure requirements, as a general matter, directly serve [three] substantial governmental interests." 424 U.S. at 68.

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office [("Informational Interest")]. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity [("Corruption Interest")]. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits [("Enforcement Interest")].

Id. at 66-68.

Subsequent courts have clarified that the Corruption and Enforcement Interests are unique to candidate elections, and; therefore, cannot justify compelled ballot-measure disclosure. *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); *Cal. Pro-Life Council, Inc. v. Getman* ("*CPLC-I*"), 328 F.3d 1088, 1105 n.23 (9th Cir. 2003) (same). *See also Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031-32 (9th Cir. 2009) (Enforcement Interest cannot justify ballot-measure disclosure because it is necessary only to enforce contribution limits—limits that are unconstitutional in ballot-measure elections); *CPLC-I,* 328 F.3d at 1105 n.23 (same). However, these courts have suggested that the Informational Interest may be sufficient to justify compelled ballot-measure disclosure, a conclusion that appears to be premised on a misreading of *Buckley* and the Informational Interest discussed therein. *See*, *e.g.*, *CPLC-II*, 507 F.3d at 1178-80.

In *Buckley*, the Supreme Court 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. The need to provide this information to voters is a direct result of the realities of a political campaign involving *candidates*; candidates often discuss their general policies regarding education, health care, and taxes, but rarely disclose detailed policy positions about those topics. Issues that escape the attention

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of the media are simply not discussed. Thus, information regarding contributors to a candidate allows voters to better predict some of the difficult policy decisions that an elected official is called to make in office, especially on those issues that are not discussed publicly during a campaign.

By comparison, everything the voter needs to know about a ballot measure is contained in the text of the measure itself. There is no "political spectrum" and certainly no "future performance." Initiatives can be complex pieces of legislation, but the Information 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 no doubt may change perceptions about a ballot measure, or may be interesting, (Bieniek Decl., Ex. 6, 12), but it simply does not change the nature of the ballot measure itself.[14] 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 proponent. *McIntyre*, 514 U.S. at 342. The identity of the speaker is no doubt helpful in evaluating the message, "but the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 348 n. 11 (citations omitted). "Don't underestimate the common man. People are intelligent enough to evaluate the source of anonymous writing. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth." *Id.*

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 compelling government

[14] The power to compel information that is "interesting" or likely to influence an individual's vote knows no bounds. 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, *Doe v. Reed*, No. 09-559 (Apr. 28, 2010) (Roberts, 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?")

interest to force a speaker to make a statement that he would otherwise omit. *See id*; *see also ACLF*, 525 U.S. at 203 (ballot-measure reporting adds little insight as to the measure).

C. The $25 and $100 reporting thresholds are not narrowly tailored.

However, even if the Court determines that Washington has a compelling interest sufficient to justify compelled ballot measure disclosure, the reporting thresholds fail to survive the second part of the strict scrutiny analysis. To survive strict scrutiny, the law or regulation in question must also be narrowly tailored to further the government's interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). The regulation may also be underinclusive if it fails to restrict speech that does implicate the government's interest. *See*, *e.g.*, *Republican Party of Minn.*, 536 U.S. at 779-80. Finally, a regulation is not narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990).

1. Washington has only a limited informational interest.

Courts have recognized only one state interest sufficient to justify the compelled disclosure of contributions and expenditures in ballot measure elections—combating voter ignorance by informing voters about who supports and opposes a ballot issue. The Information Interest carries three significant limitations. First, the Information Interest is limited to identifying "persons *financially* supporting or opposing a . . . ballot measure. *Canyon Ferry*, 556 F.3d at 1032. Second, the interest is compelling only if directed at combating voter ignorance. *See Buckley*, 424 U.S. at 68; *Canyon Ferry*, 556 F.3d at 1032, 1034. Third, the 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.[15]

[15] During oral argument on Family PAC's motion for temporary restraining order, it was suggested that the $5,000 contribution limit is designed to ensure that voters have all the information necessary to vote when ballots are mailed. By implication, this would suggest that Washington does not have an interest in providing voters with any additional information about contributors through election day, and certainly no interest in providing information about contributors *after* the election has occurred.

1 The State's informational interest is only compelling if the remedy alleviates the problem of
2 voter ignorance. Voter ignorance with regard to ballot measures can be based on a variety of factors,
3 only one of which is more than tangentially related to compelled public disclosure of donors.

4 First, ballot measures involve increasingly complex legislation. *CPLC-I*, 328 F.3d at 1105. The
5 public lacks the time and ability to "independently study . . . individual ballot measures." *Id*. Donor
6 disclosure is presumed to indirectly alleviate the complexity problem by providing donors with an
7 analytical shortcut. Premised on the assumption that only those with a vested financial interest in
8 the outcome will expend resources in support or opposition to the measure, voters may rely on
9 contribution data for information about a ballot measure. *Id.* at 1105. *But see Disclosure Costs* at
10 4 (voters consult little information about donors).

11 Common sense dictates that it is information about major donors that is most likely to provide
12 a meaningful voting cue.[16] If all major donors are tobacco companies, voters might learn something
13 about the likely beneficiaries of the measure. However, if voters are required to sift through
14 information about thousands of small donors with no discernable connections to each other the
15 information about major donors is lost in the shuffle.

16 Furthermore, donor disclosure is an indirect method of combating the problem of complexity.
17 *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("[The Government] must
18 demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in
19 fact alleviate these harms in a direct and material way"). Donor disclosure is premised on the notion
20 that voters actually use the information in their decision-making process. The research indicates
21 voters simply do not consult this information before casting a ballot. *Supra* n.16. The reason for their
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23 [16] What little research exists on the use of donor disclosure for voter decision-making indicates that public disclosure is an insignificant factor in providing voters with knowledge about ballot measures. Although nearly two-
24 thirds of the voters rely upon traditional forms of media as sources of information on ballot measures, *Disclosure Costs* at 12, traditional media rarely uses public disclosure in their stories. Dick Carpenter, Ph.D, *Mandatory Disclosure for*
25 *Ballot-Initiative Campaigns*, The Independent Review, 578 (Spring 2009) (*available at* http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf) (Using Colorado as an example, over 95% of media sources "focused on the content
26 of the ballot issues, predicted effects of the issues' passage or defeat, and otherwise discussed the merits or demerits of the proposed initiatives without making any reference to information resulting from disclosure" and even within two
27 weeks of an election, 97% of stories did not draw on, appear to draw on, or make reference to disclosure reports.). Thus, the voters, who gain most of their information from the news media, rely on a source that, for all practical purposes,
28 ignores the public disclosure system in its coverage of ballot measures. *See also*, Plaintiff's Memo in Support of Motion for Temp. Restraining Order and Prelim. Inj. at 17, n. 19.

ignorance is easily explained—information about thousands of small donors (information they are told is important for them to consider) simply adds to the complexity of an already complex and time consuming task.

If the state focused disclosure laws on major donors, more citizens might consult the information, and it might begin to 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 the compelled disclosure of contributor information.[17]

Second, ballot measure campaigns are not cheap and are often dominated by special interest groups that pour millions of dollars into the campaign.[18] *CPLC-I*, 328 F.3d at 1105. Information about the special interests groups may be compelling—information about individuals giving small amounts that have no discernable influence on the campaign 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!'").

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[17] 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).

[18] For example, in California, "[f]rom 2000 through 2006, special interests spent over $1.3 billion passing or defeating ballot measures."Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government*, 282 (2d ed. 2008) (*available at* http://cgs.org/images/publications/cgs_dbi_full_book_f.pdf). Merely getting a ballot measure on the ballot is a difficult and expensive proposition that prevents small, unorganized donors—such as those who are only contributing $100—from being able to influence an election. David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money*, 68-69 (2000). *See also Democracy by Initiative* at 284 ("Today, qualifying a measure on the ballot can cost between $500,000 and $3 million.'"). *See also* Plaintiff's Memo in Support of Motion for Temp. Restraining Order and Prelim. Inj. at 23-24, n. 23.

1 Third, it is said that groups supporting or opposing ballot measures often use "ambiguous or
2 misleading" names, and voters may never know the identity of veiled political actors that have
3 poured "tens of millions of dollars" into a campaign. *CPLC-II*, 507 F.3d at 1179. Public disclosure
4 of contributors is chiefly designed to address this last of the problems of voter ignorance.

5 A former journalist and government employee described the problems as follows:

6 A prime example of this was Proposition 188 on the November 1994 ballot, an effort
7 to overturn California's recently enacted workplace smoking ban. Supporters falsely portrayed the measure as a grassroots effort by small businesses. By reviewing the
8 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
9 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
10 proposition.

11 *CPLC-II*, 507 F.3d at 1179.

12 The goal of campaign disclosure, then, is to prevent "the wolf from masquerading in sheep's
13 clothing." *CPLC-I*, 328 F.3d at 1106 n.24. Accordingly, in applying strict scrutiny, the essential
14 question for the Court is whether the PDL's disclosure thresholds address the "wolf in sheep's
15 clothing" problem by alleviating concerns that donors who donate an amount substantial enough to
16 influence a campaign are masking their support for, or opposition to, a particular ballot measure, and
17 causing voter ignorance.

18 **2. The reporting thresholds are not narrowly tailored to the limited informational**
19 **interest.**

20 The $25 and $100 reporting thresholds are not narrowly tailored to the State's interest in
21 avoiding the "wolf in sheep's clothing" problem. Washington may have an interest in providing
22 voters with the information necessary to determine "who [is] really behind [a] proposition."
23 *CPLC-II*, 507 F.3d at 1179. However, common sense dictates—and the Ninth Circuit has
24 found—that the "value of this financial information to the voters declines drastically as the value
25 of the expenditure or contribution sinks to a negligible level." *Canyon Ferry*, 556 F.3d at 1033.
26 Voters gain little, if any, information from the disclosure of small donors. *Id.* at 1036 (Noonan, J.,
27 concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter
28 exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). In other words, there is a

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constitutional floor under which compelled public disclosure of contribution and expenditure information is unconstitutional.

The question is one of degree, not kind, because at some level, the State's information interest may be sufficient to warrant the compelled disclosure of campaign expenditures and contributions. *Canyon Ferry*, 556 F.3d at 1033. 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. The 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. In Washington, there is no indication that there was substantial evidence that the $25 and $100 limitations were adequate when they were implemented; common sense and what little evidence does exist on thresholds this low suggests that individuals do not use this information. *See generally*, *Disclosure Costs*.

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 threshold contained in Initiative 276. As originally enacted, the PDL required disclosure of all contributors of more than $5.[19] 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 again increased the threshold, this time to its present level of $25.[20] 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

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[19] Washington's disclosure threshold is far lower than the threshold upheld in *Buckley*. 424 U.S. at 84 (did not decide whether the government may compel the disclosure of gifts of less than $100 in 1976 dollars). Since then, the federal disclosure provision has been increased to $200. 2 U.S.C. § 434(b)(3)(A).

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

interests.[21] Nearly thirty years have elapsed since the last substantive adjustment, and the legislature has failed to increase the threshold even once.

Even assuming that the $25 and $100 thresholds were narrowly tailored to serve a compelling state interest when enacted, Family PAC remains entitled to summary judgment because a failure to index the thresholds for inflation has caused the thresholds to sink to unconstitutional levels. Thresholds that are not adjusted for inflation decline in real value each year. *Randall*, 548 U.S. at 261.[22] Washington's disclosure thresholds, already far lower than necessary to serve any compelling state interest, grow further from those interests each year as a result of inflation.

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 of $25 in 1982 dollars). Therefore, it is incorrect to give any deference to the current disclosure threshold.

The $100 threshold for employment information suffers from the same infirmity. The PDC added the employment requirement in 1993,[23] Wash. Admin. Code 390-16-034 (1993), concluding

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[21] Plaintiff does not concede that Washington demonstrated a compelling interest in disclosure at $25 or $100. Plaintiff merely posits that the legislature and PDC believed the $25 and $100 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.

[22] The $25 and $100 thresholds apply to both candidate and ballot-measure elections. The burden of adjusting the thresholds is "upon incumbent legislators who may not diligently police the need for changes in limit levels." *Randall*, 548 U.S. at 261. Incumbent legislators with a sizeable war-chest may be less likely to adjust the level, ensuring that he will know the identity of any individual who contributed to his opponent's campaign. *Id.*

Moreover, 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).

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

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that a disclosure threshold of $100 for employment information sufficiently served the purported state interests. (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 in 1993. *CPI Inflation Calculator* ($100 in 2010 is equivalent of $66.40 in 1993 dollars). Again, the reduction resulted from inflation, not a decision by the PDC to reduce the threshold.[24] 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 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 the decisions of the legislature and PDC were entitled to deference when they originally adopted the thresholds, the current thresholds are so far below the levels deemed sufficient to serve the purported state interests as a result of inflation that Family PAC is entitled to summary judgment as a matter of law with respect to Count I because the thresholds are no longer narrowly tailored to serve a compelling state interest.

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[24] The PDC supported legislation in 2002 that would have required employer and occupation data from contributors. (Bieniek Decl., Ex. 6, 105-113.) The legislation also would have exempted the $25 and $100 reporting thresholds from the PDL's requirement to periodically adjust the thresholds for inflation. (*Id.* at 106.) The PDC's support of the legislation suggests two things. First, the PDC may have exceeded its statutory authority in adopting an administrative rule requiring employer information, necessitating legislation to confirm their administrative decision. (Bieniek Decl., Ex. 6, 11-12). Second, it indicates that the PDC is aware the thresholds should (for constitutional and statutory reasons) be adjusted for inflation. *Supra* n.22 (discussing PDC's statutory duty to adjust *all* thresholds for inflation).

3. The disclosure thresholds cannot be sustained as necessary to enforce other provisions of the PDL.

As set forth above, the current disclosure thresholds are not narrowly tailored to serve a compelling state interest. The current disclosure thresholds cannot be sustained on the ground that they are necessary to enforce other provision of the PDL. *See WRTL-II*, 551 U.S. at 479 (rejecting "prophylaxis-upon-prophylaxis approach"). The State must demonstrate a separate, compelling interest for setting its thresholds at $25 and $100. As set forth above, Washington cannot demonstrate that the thresholds are narrowly tailored to serve a compelling state interest.

Washington argues the primary justification for the occupation and employer information is to detect violations of contribution limits and the anti-bundling provisions. (Bieniek Decl., Ex. 6, 5-6, 11-12, 15-17, 21-23, 30-31, 38, 40-42); (*Id.* at 103 (veto of legislation prohibiting collection of employer information because it is necessary to detect "patterns of coordinated contributions").) The Supreme Court has rejected this "prophylaxis-upon-prophylaxis approach." *WRTL-II*, 551 U.S. at 479.

Furthermore, public disclosure is not the least restrictive means of policing and enforcing other provisions of the PDL. 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). As the Supreme Court said 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 contributions 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. There is simply no interest in public disclosure of employer and occupation information. *See supra* 20.

Therefore, Plaintiff is entitled to summary judgment because the disclosure thresholds are not narrowly tailored to serve a compelling state interest.

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Conclusion

2 For the foregoing reasons, the Court should grant summary judgment for Plaintiff Family PAC
3 on all claims presented in the Verified Complaint.
4
5 Dated this 19th day of May, 2010.
6 Respectfully submitted,
7

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**Pro Hac Vice Application Granted*

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CERTIFICATE OF SERVICE

I, Sarah E. Troupis, am over the age of 18 years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On May 19, 2010, I electronically filed the foregoing document described as Plaintiff's Notice of Motion and Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

Linda A. Dalton
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Counsel for Defendant Rob McKenna
and Defendant Members of the Public Disclosure Commission

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Counsel for Defendant Members of the Public Disclosure Commission

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 19th day of May, 2010.

/s/ Sarah E. Troupi
Sarah E. Troupis
Counsel for Plaintiff Family PAC