Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, Regulations, and Rules

Other Authorities

Argument[1]

I. Even Under Exacting Scrutiny the District Court Erred In Upholding the Disclosure Thresholds.

The State argues exacting scrutiny applies to First Amendment challenges to campaign finance disclosure requirements. State's Third Brief On Cross-appeal ("State's Br.") at 26-28. For the reasons state in its Second Brief On Cross-appeal, ("FP. 2B.") Family PAC believes strict scrutiny applies to Wash. Rev. Code § 42.17.090(1)(b) and Wash. Admin. Code 390-16-034 ("Disclosure Thresholds"). However, even under exacting scrutiny, the Disclosure Thresholds are unconstitutional because they are not substantially related to a sufficiently important government interest.

A. Family PAC's Challenge is Not a True Facial Challenge, but a Challenge to the Disclosure Thresholds As-Applied to All Ballot Measure Committees.

In its responsive briefing, the State again mischaracterizes the nature of Family PAC's challenge with respect to the Disclosure Thresholds, arguing that Family PAC's challenge is a facial challenge and Family PAC may only succeed "by establish[ing] that no set of circumstances exists under which the Act would

[1] This brief replies to the State's responsive arguments in its Third Brief On Cross-appeal concerning only Wash. Rev. Code § 42.17.090(1)(b) and Wash. Admin. Code 390-16-034.

be valid." State's. Br. at 22 (*quoting Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). The State mis-states the facial challenge standard in the First Amendment context. "In the First Amendment context . . . a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010) (recognizing "a second type of facial challenge") (citations and quotations omitted). However, this is not a facial challenge under either standard, because Family PAC does not assert that the law is unconstitutional in all or even a substantial number of its applications. Family PAC has challenged the law only 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. This Court need not decide whether the Disclosure Thresholds further the State's interest in candidate campaigns and may grant Family PAC its requested relief without striking the Disclosure Thresholds in their entirety. To the extent that Family PAC's challenge exhibits 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),[2] Family PAC has met its burden; it has proved that the Disclosure Thresholds are unconstitutional in all their applications *to ballot measure committees*.

The State attempts to broaden Family PAC's challenge beyond what Family PAC has pled. State's Br. 21-23. Because Washington law defines Family PAC as a "political committee," the State asserts that to grant Family PAC's requested relief and declare Wash. Rev. Code § 42.17.090 and Wash. Admin. Code 390-16-034 unconstitutional as-applied to "Family PAC *and all other similar persons*," ER 173 (Complaint ¶¶ 62a, b), would result in invalidation of the Disclosure Thresholds as applied to all "political committees," including candidate committees. Family PAC has not requested this relief. Family PAC organized with the intended purpose of making contributions and expenditures to support or oppose ballot propositions. ER 174 (Complaint ¶ 22). Family PAC is therefore a ballot measure committee by operation. However, Washington law does not provide a separate legal definition for "ballot measure committees;" that is, those

[2] In *Doe v. Reed*, the Supreme Court explained that challenges like those brought by Family PAC can exhibit elements of as-applied and facial challenges: "The claim is 'as applied' in the sense that it does not seek to strike the [law] in all its applications, but only to the extent it covers referendum petitions. The claim is 'facial' in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions." 130 S. Ct. at 2817.

groups like Family PAC whose intended activities consist solely of ballot measure advocacy and do not support or oppose candidates. Rather, by supporting and opposing ballot measures, Family PAC is defined as a "political committee," a designation which includes committees that engage in candidate advocacy, ballot measure advocacy, or both. *See* RCW 42.17.040(39).[3] Because Family PAC's intended activities consist solely of ballot measure advocacy, "all other similar persons" refers not to all other political committees, but all other committees supporting and opposing ballot measures, *i.e.* ballot measure committees. Family PAC requests relief as it applies to ballot measure committees only and, therefore, to grant relief to "Family PAC and *all other similar persons*" would impact only ballot measure campaigns and not candidate campaigns.

B. Family PAC Has Satisfied Its Burden of Proof in this Case.

1. Compelled Disclosure is Per Se Burdensome.

Washington asserts "Family PAC lacks evidence to support its claim that disclosure is too burdensome" and "Family PAC fails to identify what burdens the [Disclosure Thresholds] create." State's Br. 48. Washington ignores that

---

[3] "Political committee" means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, *any candidate or any ballot proposition*. RCW § 42.17.040(39) (emphasis added).

compelled disclosure creates per se burdens on First Amendment rights. The Supreme Court has consistently held that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Davis v. FEC*, 554 U.S. 724, 744 (2008), (*quoting Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *see also Buckley* 424 U.S. at 68 ("It is undoubtedly true that public disclosure of contributions . . . will deter some individuals who otherwise might contribute."); *Citizens United v. FEC*, 130 S. Ct. 876, 194 (2010) ("Disclaimer and disclosure requirements may burden the ability to speak . . . .").

Washington disagrees that technological advances have increased the burdens of compelled disclosure. State's Br. at 49-50. However, the State concedes that "technological developments have improved the dissemination of information," *id*. at 50, yet somehow ignores that dissemination of contributor information on the Internet creates tremendous invasions of privacy not conceivable when contributor records were first made "public" in 1972. Initiative 276 § 28 (1972). Disclosure information is now available on the Internet in searchable form almost instantly. *See* Wash. Admin Code 390-14-026 (campaign statements online within two days). Donor information is being combined with publicly available phone numbers and maps. *See*, *e.g.*, www.eightmaps.com; www.batchgeo.com. *See also* State's Br. at 9 (describing "Gubernatorial Money

Map" showing the locations of contributions created using contributor addresses and zip codes provided to the PDC). The burdens created by compelled disclosure in the "information age" have not escaped the courts. *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). *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.") (emphasis added).

Family PAC has also cited to an expert study[4] showing that compelled disclosure has a significant chilling effect on an individual's willingness to contribute to a ballot measure campaign. This study included individuals residing in Washington. *See* Dick Carpenter, Ph.D, *Disclosure Costs: Unintended*

[4] The State takes issue with Family PAC's use of this study. State's Br. at 28 n.30. Contrary to the State's suggestions, Family PAC has not treated this study as expert testimony on the law in question, but rather uses it as another example of the burdens imposed on contributors by compelled disclosure. Family PAC cited to this study extensively in its briefing before the district court, which is now part of record before this Court, *see* Federal Rules of Appellate Procedure 10(a)(1), and it may be properly considered on appeal to the extent it was used at the court below. Further, the State made no objections to Family PAC's use of this study when the parties were before the district court and should not be heard to raise an objection now.

Consequences of Campaign Finance Reform, Institute for Justice, March 2007 (*available at* http://www.ij.org/publications/other/disclosurecosts.html) ("*Disclosure Costs*").

Also, it is precisely these additional burdens caused by Internet-disclosure that make it imperative for this Court to consider whether Washington's alleged interest in disclosure of small donor information can be served by means less intrusive on First Amendment rights, *i.e.* requiring small donors be disclosed to the government only. *See* 2B. 2B at 43-46 (describing the constitutional distinction between private and public disclosure).

So, the question is not whether the Disclosure Thresholds are "*too* burdensome," State's Br. at 48, but whether the Disclosure Thresholds are substantially related to the State's alleged interest so as to justify the burdens inherently created by compelled public disclosure. *See Buckley*, 424 U.S. at 68. The burden is on the State to make this showing justifying its specific thresholds. *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). As explained below, and more fully in Family PAC's Second Brief On Cross-appeal, the State has not satisfied its burdened. *See infra* 27-28.

2. Family PAC has Satisfied the Requirements of a Pre-enforcement Challenge.

Beyond those burdens inherent in compelled disclosure provisions, Family PAC has alleged additional harm sufficient to satisfy the requirements of a pre-enforcement challenge. In its verified complaint, Family PAC alleged that 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.); *see Human Life*, 624 F.3d at 1022 (*citing California Pro-Life Council v. Getman*, ("*CPLC-I*") 328 F.3d 1088, 1176 (9th Cir. 2003) ("[A] verified complaint may serve as an affidavit for purposes of summary judgment if based on personal knowledge and sets forth the requisite facts with specificity.") Family PAC further alleged in its verified complaint that 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.) Family PAC's allegations are not unfounded and find support beyond the verified statements made in its complaint. *See* Exhibit 1 of the Bieniek Declaration (showing that 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's alleged lack of campaign activity in Washington, State's Br. at 14-15, is a direct result of the First Amendment chill created by the Disclosure Thresholds. Family PAC has sufficiently demonstrated a First Amendment harm to satisfy the requirements of a pre-enforcement challenge.

C. Washington's Disclosure Thresholds are Not Substantially Related to a Sufficiently Important Government Interest.

1. Washington Lacks a Sufficiently Important Interest in Compelled Disclosure of Ballot Measure Information.

Family PAC argued in its Second Brief on Cross-appeal, and maintains here, that Washington lacks a sufficiently important interest in compelled ballot measure disclosure. *See* FP. 2B. at 10-12. The State contends that Family PAC has conceded the State's Informational Interest. State's Br. 29-30. While the State's Informational Interest may be sufficient to warrant the compelled disclosure of ballot-campaign contributions at some higher level, *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009), Family

PAC does not concede the State has an informational interest in disclosure of contributor-data at Washington's low thresholds. *See* ER 26 (Transcript 13, line 25). As explained *infra*, the State has not proven the strength of its informational interest in small donor information overcomes the burdens of compelled disclosure, as is required to survive exacting scrutiny. *See Doe*, 130 S. Ct. at 2818.

The legitimate reasons for requiring disclosure of contributor information in candidate campaigns apply with substantially less force, if at all, in the ballot measure context. As the seminal campaign finance case *Buckley v. Valeo* explained, information regarding contributions and expenditures in *candidate* campaigns "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.[5]

There is a significantly decreased need for voter-reliance on contributor information in the ballot measure context because voters do not need contributor information to predict the effects of a ballot-measure. 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).

The State disagrees that "[e]verything the voter needs to know about the ballot measure is contained in the text of the measure itself." ST. BR. 35 (*quoting* FP. OB. at 11). Yet, Washington's laws governing the initiative process evidence that the ballot measure itself, and the required accompanying documentation, directly further the State's purported interest in informing the electorate regarding the effects of a ballot measure. *See* RCW § 29A.72.060. ("Within five days after

---

[5] The Tenth Circuit recently recognized that "[c]andidate elections are, by definition, ad hominem affairs. The voter must evaluate a human being, deciding what the candidate's beliefs are and what influences are likely to be brought to bear when he or she must decide on the advisability of future government action. The identities of those with strong financial ties to the *candidate* are important in that evaluation." *Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010). The court recognized that ballot measure campaigns are not ad hominem affairs and concluded that "[i]t is not obvious that there is . . . a public interest" in "knowing who is spending and receiving money to support or oppose a ballot issue." *Id*. at 1256.

the receipt of an initiative or referendum the attorney general shall formulate the ballot title . . . and a summary of the measure, not to exceed seventy-five words . . . ."). *See also* §§ 29A.72.290 (ballot title and summary included on ballot); 29A.72.025 (requiring fiscal impact statement of proposed ballot measures, which must be made available on secretary of state's website, 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). The identity of those contributing to ballot measure campaigns simply cannot change this publically available information and it certainly cannot alter the text of the measure itself. *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).

Family PAC understands that certain panels of this Court have recognized a sufficiently important interest in disclosure of contributor information in the ballot measure context. *See e.g.*, *California Pro-Life Council v. Randolph* ("*CPLC-II*"), 507 F.3d 1172, 1178-80 (9th Cir. 2007); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010) ("*Human Life*") *cert. denied,* 562 U.S. ____,

131 S.Ct. ____ (U.S. Feb. 22, 2011).[6] However, for the reasons state above, Family PAC respectfully disagrees that contributor information in the ballot measure context serves an interest of sufficient importance to justify compelled disclosure. Family PAC agrees with the Tenth Circuit, which recently recognized that "[t]he [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. Consequently, "the statements by the Supreme Court supporting disclosures in ballot-issue campaigns were dicta." *Id*. *Citizens United v. FEC* did not change this. While the *Citizens United* Court spoke approvingly of disclosure provisions, the State is incorrect to assert that the reasoning of *Citizens United* "applies

---

[6] While the *Human Life* Court recently found campaign finance disclosure requirements sufficiently important in the ballot measure context, the *Human Life* Court's discussion of that issue should be treated as dicta and not binding on this Court's decision. This is because the plaintiff in *Human Life* challenged only the *definition* of political-committee, and not the political-committee disclosure *requirements*, which include the Disclosure Thresholds challenged here. *See Human Life,* No. 1:08-cv-00590-JCC, VERIFIED COMPL. FOR DECLARATORY & INJUNCTIVE RELIEF at 10-12 (Count 1) (W.D. Wash. April 16, 2008), *available at* http://jamesmadisoncenter.org/Main/WA/Complaint.pdf.

Further, while the *Human Life* Court made reference to disclosure of "the source and amount of contributions" received by political committees, *Human Life*, 624 F.3d at 998, it did so only in describing the reporting required of Washington's political committees. The *Human Life* Court did not subject Washington's specific $25 and $100 disclosure thresholds to the exacting review required under judicial constitutional scrutiny. The State is therefore incorrect to treat *Human Life* as upholding the Disclosure Thresholds challenged here.

equally" to ballot-measures. State's Br. at 31. *Citizens United* involved *candidate* campaigns.[7] *See id*. at 915 ("the public has an interest in knowing who is speaking about a *candidate* shortly before an election.") As explained above, disclosure in *candidate* campaigns serves an informational function not present in ballot campaigns. In a candidate election, the candidate's votes remain unknown at the time of the election itself, as do the specific items he may be called to vote upon. Knowing a candidate's donors in a candidate context thus may help a voter determine how a candidate may vote on a host of issues that may arise during his term in office. Unlike a candidate, a ballot measure is a specific measure, the entire text of which is available at the time an individual votes upon it. While some voters may see a benefit in obtaining interpretations of a measure's potential effects, this does not change the fact that everything about the content of the measure is known the moment it is circulated in the ballot measure context, and it will not change upon becoming law.

2. Even if Washington has Sufficiently Important Interest in Compelled Ballot Measure Disclosure, the Disclosure Thresholds Still Fail Because They are Not Substantially Related to the State's Limited Interest in Contributor Information.

Even if the State has a sufficiently important interest in disclosure of

---

[7] *Citizens United* upheld disclosure of contributions of more than $1,000. 130 S. Ct. at 916, 980 n.1.

contributors to ballot measure campaigns, to survive exacting scrutiny the Disclosure Thresholds must also be substantially related to the government's interest. *Doe*, 130 S. Ct. at 2818. The Disclosure Thresholds are not. Rather, the Disclosure Thresholds "burden substantially more speech than is necessary to further the government's legitimate interest." *CPLC-II*, 507 F.3d at 1183 (quotations and citations omitted).

i. To the Extent Washington has an Interest In Contributor-Data, the Interest is Limited to Information that Can Inform the Voters About the Effects of a Ballot Measure.

The State spends much of its responsive briefing explaining that the Informational Interest is "well-established," State's Br. at 35, and Washington voters, through their the legislature, "have made a policy choice" that public disclosure of personal information about contributors giving as little as $25.01 is "important," *id*. at 38, and that "secrecy" is to be avoided. *Id*. at 47. These arguments obscure the purpose behind requiring disclosure in the first place. The test is not whether voters can benefit at all from compelled disclosure. The test under exacting scrutiny is whether Washington's Disclosure Thresholds are substantially related to providing the electorate with information they can use to understand the effects of a ballot measure so to "inform their decisionmaking at the ballot box." *Human Life*, 624 F.3d at 1008.

The State makes little attempt to explain how its specific, low thresholds actually further the State's interest. Rather, the State treats transparency as a meaningful end in itself, State's Br. at 19, and as a result, it views *any* disclosure as a means to further that interest. *Id*. at 36. But transparency is not a meaningful end in itself and the Informational Interest is not *carte blanche* to require any and all information about campaign contributors. While the State argues the goal of campaign finance disclosure is to avoid secrecy and provide transparency, State's Br. at 47, and to generally "follow the money," *id*. at 4, the real purpose of disclosure has been defined much more narrowly.

As explained in Family PAC's Second Brief on Cross-appeal, the State does not have an interest in following *all* money, but rather an interest in following money that can cue voters to "who [is] really behind [a] proposition" in order to combat voter ignorance regarding the effects of a ballot measure.[8] *CPLC-II*, 507 F.3d at 1179; FP. 2B. at 14-31. *Small* donor information simply cannot cue voters to who is behind a proposition because a small donor's financial support does not

[8] This Court has referred to the goal of campaign finance disclosure as preventing "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 substantial sums are masking their support for, or opposition to, a particular ballot measure, and causing voter ignorance.

rise to a level where it is capable of informing voters that "[the donor] stands to benefit from the legislation." *Canyon Ferry*, 556 F.3d at 1033 (*citing CPLC-I*, 328 F.3d at 1106. Commonsense dictates that it is information regarding major donors and special interests that will cue voters to who stands to benefit from legislation. Indeed, voter reliance on contributor-data in the ballot measure context is entirely premised on the assumption that only those with a vested financial interest in the outcome will expend significant resources in support or opposition to the measure. By knowing who has contributed large amounts in support or opposition to ballot measures, voters may learn who stands to gain from the passage or defeat of the ballot measure. But, 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!'").

ii. Small Donor Information Complicates the Ballot Initiative Process and Works Against the State's Informational Interest.

As explained above, the State's Information Interest is only sufficiently important is aimed at combating voter ignorance regarding the effects of a ballot measure. The State points out that in the 2008 Washington State election, 54,502 contributions were made in amounts between $25.01 and $30. State's Br. at 7 n.6.

The government publicly disclosed the name and address of every one of these donors and made their information available on the Public Disclosure Commission website. State's Br. at 7. While providing scant, circumstantial evidence that voters actually consult this information to inform their decision-making at the ballot box, the State claims this information serves "important informational purposes." State's Br. at 44. However, the research indicates that voters simply do not consult this information. *Disclosure Costs* at 12; *see also* FP. 2B. at 16 n.5. And, when voters are forced to sift through the names and addresses of more than 50,000 small donors with no identifiable connection to each other, as voters must do on the PDC website, the information about major donors, which may cue voters to the effects of a ballot measure, is obscured. Consequently, the State's Informational Interest is frustrated by disclosure of small donors. Such disclosure does not serve "important informational purposes" as the State argues. State's Br. at 44. 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.

3. The Disclosure Thresholds are Not Substantially Related.

i. The Disclosure Thresholds are Too Low to Provide Voters With Cues As to Who Will Benefit Financially From the Effects of a Ballot Measure.

Family PAC's reliance on *Canyon Ferry* is not "misplaced" as the State claims. State's Br. at 42. While this Court may have limited its holding to the specific facts of that case, this Court's statements on the value of disclosure of small donors apply just as forcefully to all disclosure thresholds, including Washington's Disclosure Thresholds. "[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, but rather, the "information to be disclosed is the identity of persons *financially* supporting or opposing a candidate or ballot proposition." *Id.* at 1032 (emphasis in original). Disclosing those *financially* supporting a ballot measure is thought to cue the voters to "who stands to benefit from the legislation." *Id*. at 1033 (*quoting CPLC-I*, 328 F.3d at 1106). But, this Court recognized that as the size of the contribution decreases, the State's (and the voters') interest in knowing who made the contribution "declines drastically" because at some point the contribution no longer cues the voter that the contributor will benefit from the legislation. *Id.* at 1033. *Canyon Ferry* stands for the principle that there is a floor below which compelled public disclosure of contributions is unconstitutional because donor information beneath that level cannot further the State's interest.

Canyon Ferry's principles apply equally to Washington's Disclosure

Thresholds. Public disclosure of a contributor giving $25.01 does not further the State's interest because the identity of that person does not cue the voters that the contributor "stands to benefit from the legislation." *Id*. at 1003.

That small contributors may account for millions of dollars in contributions as the State contends, State's Br. at 7 n.5, 38, does not make the disclosure of each contribution of $25.01 constitutional. Nor does the fact that "individuals . . . have the ability to influence the voters" affect whether disclosure of contributions is constitutional. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978) (explaining that the effect contributions may have on influencing the electorate is not a valid reason to suppress political speech). The State must demonstrate a separate, important interest for setting its thresholds at $25 and $100. *See FEC v. Wisconsin Right to Life* ("*WRTL-II*"), 551 U.S. 449, 479 (2007) (rejecting "prophylaxis-upon-prophylaxis approach").

While the State is correct that the legislature is entitled to some deference in determining the level at which to require reporting and disclosure, this Court has an "'obligation to exercise independent judgment when First Amendment rights are implicated.'" *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (*quoting Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)). One Court of Appeals decision, not binding on this Court, has distinguished *Turner* in

upholding disclosure of contributors giving more than $5,000 to lobbying organizations. *See National Ass'n of Mfrs. v. Taylor*, 582 F.3d 1 (D.C. Cir. 2009) ("*NAM*"); State's Br. at 39-40. However, NAM merely decided that the government need not introduce substantial empirical evidence proving the Informational Interest in the lobbyist context in general. *Id*. at 15. NAM is not authority for dispensing with *Turner*'s evidentiary requirements at all levels of disclosure, especially thresholds as low as $25 and $100. The Supreme Court has "stressed in First Amendment cases that the deference afforded to legislative findings does not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law." *Turner*, 512 at 666.

It has been nearly thirty years since Washington has made any substantive adjustments to its $25 disclosure threshold, RCW § 42.17.090 (1982); 1982 c. 147 § 7, and Washington's $100 employment disclosure provision has not been substantively adjusted in nearly eighteen years. *See* Wash. Admin Code 390-16-034. Even assuming these thresholds were substantially related to a sufficiently important interest when last adjusted, the State's failure to index these thresholds for inflation has cause them to sink to unconstitutional levels. *See Randall v. Sorrell*, 548 U.S. 230, 261 (2006). To be consistent with the legislature's determination that $25 and $100 were sufficient to serve the state's interest when

these limits were last adjusted, the thresholds must be increased to $57 and $153, respectively. Bureau of Labor and Statistics, *CPI Inflation Calculator* (*available at* www.bls.gov/data/inflation_calculator.htm).

The State disagrees that *Randall* applies here because *Randall* involved contribution limits and not disclosure thresholds. State's Br. at 41. However, *Randall* found that because "limits decline in real value each year" a failure to index limits that are already suspiciously low will "burden[] First Amendment interests by threatening to inhibit effective advocacy" more and more each year the limits go unadjusted. *Id*. at 261. Failing to index the Disclosure Thresholds for inflation "threaten[s] to inhibit effective advocacy" of those supporting ballot-measures by subjecting 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 interest. *See* FP. 2B. at 24-25. This will continue to occur more and more each year the Disclosure Thresholds go unadjusted. This result runs contrary not only to the First Amendment, but the legislature's own policy, which instructs that "small contributions by individual contributors are to be encouraged, and that not requiring the reporting of small contributions may tend to encourage such contributions." RCW § 42.17.010(9).

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

The State also fails to adequately justify the information it compels from donors giving $25 and $100, respectively. State's Br. at 44-47, 50-52. With no factual support, the State asserts that "contributor names tell the voters a great deal about the measure," State's Br. at 44, and declares that "[i]dentying for voters who is backing or opposing a ballot measure is precisely the reason for disclosure" without explaining how a contributor's mere identity can be used to "inform [voters'] decisionmaking at the ballot box." *Human Life*, 624 F.3d at 1008. And again, the State mischaracterizes the purpose behind disclosure, arguing instead that the Disclosure Thresholds should be upheld because the Disclosure Law is a "declaration of policy by the voters"[9] and "Disclosing the names and addresses of campaign contributors accomplishes precisely the objectives established, to avoid secrecy and concealment. These were the very reasons the laws were adopted." State's Br. at 47. Avoiding secrecy and concealment are not constitutionally

[9] Many times in its briefing the State attempts to bolster support for its Disclosure Thresholds by reminding the Court that the people of Washington adopted the Disclosure Law through the initiative process. *See*, *e.g.*, State's Br. at 38, 47. This fact is irrelevant to this Court's exacting scrutiny review of the Disclosure Thresholds: "It is irrelevant that the voters rather than a legislative body enacted [a law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981).

cognizable interests. To withstand exacting scrutiny, the information compelled from contributors must be substantially related to the State's limited Informational Interest. The Informational Interest is sufficiently important only if directed at combating voter ignorance regarding the effects of a ballot measure. *See Buckley*, 424 U.S. at 68; *Canyon Ferry*, 556 F.3d at 1032, 1034. Laws demanding that information be disclosed that does not inform the voter as to the effects of a particular ballot measure are overinclusive to the Informational Interest, and the State has no sufficiently important interest in requiring disclosure of that information because it cannot be used by the voter to further the State's interest. *Doe*, 130 S. Ct. at 2818.

As explained previously, *see* FP. 2B. at 27-32, Washington requires disclosure of information that cannot be used to cue a voter to who stands to benefit from the legislation. The names of contributors giving just above $25 may tell the electorate that those contributors support the legislation, but that is the extent to which a name alone can inform a voter. *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!'"). Unless the voter has 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 personal and vulnerable to abuse. s*ee*, *e.g.*, *Disclosure Costs* at 8 (nearly 60% of contributors would "think twice" about contributing if required to disclose personal information).

Washington law requiring public disclosure of small donors' addresses is also overinclusive to the Informational Interest. *See* FP. 2B. at 29-30. The State agrees that the purpose behind disclosing contributors' addresses is not to know the contributors' specific locations, but to reveal whether campaign contributors are coming from a "a particular neighborhood or city, or a particular region of the state," or "coming from persons outside of Washington State." State's Br. at 8 (*quoting* ER 71 (Ellis Decl. at ¶¶ 38-39)). As Family PAC has previously argued, 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, such as a neighborhood. FP. 2B. at 29. In fact, the Public Disclosure Commission's own "Statewide Initiatives Money Map" provides contributor

information with even less specificity, showing amounts contributed in support and opposition to statewide initiatives by *county*. *See* Public Disclosure Commission, Statewide Initiatives Money Map, http://www.pdc.wa.gov/public/ballotmap/ballotinitmap.aspx.

In regard to Washington Administrative Code 390-16-034, requiring contributors donating more than $100 to disclosure their occupation, and their employer's name and address, the State generally asserts that this information "enables contributors, media, voters and the PDC to see patters of contributions from similar occupations, industry and employers." State's Br. at 50. Yet, as Family PAC explained, *see* FP. 2B. at 30-31, multiple leaps of logic are required to find that this information supports the State's Informational Interest. That certain groups, such as lawyers or doctors, stand to benefit from a ballot measure cannot be determined by noting that your neighbor gave $101. And, the value of this information is derived entirely from the assumption that the ballot measure to which the employee has contributed will benefit his employer. This assumption is unreasonable. Employer information at this level is not substantially related the State's interest because it cannot cue voters to who stand to benefit from their contributions.

4. The State has Presented Insufficient Evidence Proving Voter's Use Small Donor Information to Inform Themselves About the Effects of a Ballot Measure.

The government must prove the state's interest. *CFCG*, 474 F.3d at 653 (*citing Shrink Mo. Gov't PAC*, 528 U.S. at 387-88). And "[t]o 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 State has failed to introduce evidence proving that as it pertains to ballot-measure initiatives, voters know the relevant information is available, access it, and use it in their decision making. The bulk of the State's evidence consists of the number of users who have accessed the entire PDC website, State's Br. at 46, and various news media reports using PDC data, none of which discuss donors who gave small amounts to ballot campaigns. FB. 2B. at 38. In contrast, Family PAC has cited a PDC survey regarding the Public Disclosure Law, which indicates the vast majority of individuals who responded did not consult any disclosure information on the PDC's website, SER 19 (Troupis Decl., Ex. 1, 13), and the majority of those responding were not even aware of the existence of the PDC itself. SER 15 (Troupis Decl., Ex. 1, 9). Washington's disclosure regime places significant burdens on First Amendment rights of low-level contributors, *see supra* at 4-7, yet 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. 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.

5. Cannot be Upheld As Necessary to Enforce Other Provision of the PDL.

The State and supporting Amicus Seattle Ethics and Election Committee (Comm. Br.) argue the Disclosure Thresholds are also necessary to detect violations of the Public Disclosure Law. *See*, *e.g.*, State's Br. at 12; Comm. Br. at 4-7. The Supreme Court has rejected this "prophylaxis-upon-prophylaxis approach." *See WRTL-II*, 551 U.S. at 479. The State must demonstrate a separate, important interest for the specific thresholds at which the PDL requires disclosure. Any interest in policing coordinated giving can be achieved through means less burdensome to First Amendment freedoms, *e.g.*, private record-keeping, RCW§ 42.17.090(1)(b) (record-keeping requirement), private government disclosure, and imposing substantial civil penalties for non-compliance. RCW § 42.17.390 (civil penalties and sanctions).

Conclusion

For the foregoing reasons, Family PAC respectfully requests this Court to reverse that portion of the district court's judgment upholding the Disclosure Thresholds.

Dated this 24th day of March, 2011.

Respectfully submitted,

/s/ Noel Johnson
James Bopp, Jr., Esq.
Joseph E. La Rue, Esq.
Noel Johnson, Esq.
BOPP, COLESON & BOSTROM
One South Sixth Street
Terre Haute, IN 47807-3510
(812) 232-2434 Telephone
(812) 235-3685 (facsimile)

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 6,445 words.

Dated this 24 day of March, 2011.

/s/ Noel Johnson
Noel Johnson
Counsel for Appellee/Cross-Appellant Family PAC
Wis. Bar No. 1068004