NO. 10-35832

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAMILY PAC,

Plaintiff/Appellee,

v.

ROB MCKENNA, in his official capacity as Attorney General of Washington, and JIM CLEMENTS, DAVE SEABROOK, JANE NOLAND, JENNIFER JOLY and BARRY SEHLIN, members of the Public Disclosure Commission, in their official capacities,

Defendants/Appellants.

On Appeal From The United States District Court
Western District Of Washington at Tacoma

No. C09-5662 RBL
The Honorable Ronald B. Leighton, United States District Court Judge

APPELLANTS' RESPONSE TO APPELLEE'S OPPOSITION TO EMERGENCY MOTION FOR STAY UNDER CIRCUIT RULE 27-3

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I. ARGUMENT

Under either the current Ninth Circuit stay criteria briefed by the State or the former version briefed by Family PAC, the State satisfies the test and an emergency stay should be issued.[1] Family PAC's proffered objections do not justify upending Washington's campaign finance system for ballot measures in the weeks before the election without further review by this Court of the significant legal issues raised by the District Court's decision.

A. FAMILY PAC'S OBJECTIONS TO A STAY ARE UNSUPPORTED BY THE FACTS

Despite appearing to assert that its interests in engaging in ballot measure advocacy relate to the 2010 general election, Family PAC's actions do not support such a claim. Family PAC has not filed a single campaign finance report for any contributions or expenditures, including for the 2010 election. App. H (Declaration of Linda A. Dalton, ¶¶18-19). RCW 42.17.105(8) has not impacted Family PAC because it neither raised nor spent any campaign funds, either in 2009 after it filed this action, or at any time in 2010. App. H, ¶18.

Entry of a stay will not impact the sole plaintiff in this lawsuit, Family PAC. While Family PAC's opposition states that "other political committees"

[1] *Compare* State's Mot. at 2 *with* Family PAC's opposition ("Opp.") at 3-4.

"have expressed a desire" to contribute to it in amounts in excess of $5,000 prior to the general election (Opp. at 2), the District Court record does not support that claim.[2] For facts applicable to 2009, Family PAC filed only one declaration and that testimony did not establish that RCW 42.17.105(8) presented any barrier to contributing to Family PAC. District Court Dkt. No. 67; State's App. C; Family PAC App. 22a.

Additionally, Family PAC's suggestion that the State's stay request should be denied because the State did not act quickly enough in seeking the stay should be rejected. Opp. at 1, 4, n. 4. The State requested and was denied an immediate stay from the District Court on the day of the Court's oral decision. State's App. B at 48-49; State's App. H at ¶5. As the timeline outlined in the Dalton Declaration indicates, as soon as all required statutory notices were completed and decision making accomplished, the appeal was

[2] Family PAC loosely makes factual assertions that could be read to apply to their stated 2009 activity or to some unknown 2010 activity. It is unclear which year it refers to and the record provides no support for activity for either year. Moreover, while Family PAC refers to other committees, the record does not support that argument. No political committee (including ballot measure committees) or other person joined with Family PAC in filing this action.

filed.[3] State's App. H, ¶¶3-17. This matter is properly considered on an emergency basis.[4]

B. FAMILY PAC'S OBJECTIONS TO A STAY ARE UNSUPPORTED BY THE LAW.

1. The State Is Likely To Succeed on the Merits

a. The standard of review for a contribution disclosure and timing provision is exacting; the District Court's conclusion to the contrary is error.

The District Court misread relevant case law and incorrectly used the wrong standard of review by applying strict scrutiny to RCW 42.17.105(8). State's Mot. at 8-14. Family PAC asserts that the District Court properly analyzed *Citizens United v. Federal Election Commission*, 558 U.S. __, 130

[3] The State was required to process a number of practical and statutory requirements in filing the appeal and stay documents in this Court. Those included state agency closures; the eight days between the September 1, 2010 hearing in the District Court and receipt of the hearing transcript coupled with the need to file that transcript with the emergency stay motion given the District Court's directive that a written opinion would not be entered; and the requirement in the state's Open Public Meetings Act, RCW 42.30, to provide advance notification to the public of the Commission meeting on September 15, 2010. State's App. H, ¶¶3-17. Despite these realities, the State moved quickly and filed the appeal well within the time frame for emergency motions in Fed. R. App. P. 27-3.

[4] Moreover, while Family PAC claims no emergency exists because the State did not seek an expedited appeal, in reality, the Court has already issued a scheduling order with briefing currently due at the end of 2010 and early 2011. Dkt. No. 94. Since the next general election after 2010 is not until November 2011, a request for an expedited appeal is not necessary at this time.

S.Ct. 876 (2010) (*Citizens United*) as "accurately" holding that "contribution limits" are "bad" and thus strict scrutiny applied. Opp. at 8-9. Family PAC's argument extends *Citizens United* far beyond its holdings and the District Court should have rejected it.

First, the ban at issue in *Citizens United* is not the issue in this case. There, the Supreme Court held that corporations and labor unions had the right under the First Amendment to make independent campaign expenditures in candidate campaigns, overturning the previous federal ban on such activities. 130 S.Ct. at 913. But nothing in that Court's analysis compels a conclusion that the disclosure provision in RCW 42.17.105(8) for state ballot measure committees is unconstitutional, or requires a heightened standard of review.[5]

Second, *Citizens United* did not overrule prior Supreme Court precedent with respect to the *level of scrutiny* applied to disclosure provisions.[6] The

[5] Washington campaign finance laws do not put any limits on contributions to ballot measure committees. RCW 42.17.640; RCW 42.17.645.

[6] For example, in *Citizens United*, the Court did not overrule the contributions analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), all of which used exacting (intermediate) scrutiny on contributions. It is noteworthy that Family PAC's attempt to force *Citizens United* far beyond its holdings was pointedly rejected by the Fifth Circuit Court of Appeals in a recent federal contributions limit challenge. *Cao v. Federal Election Commission*, --- F.3d ----, 2010 WL 3517263 at *3 and *9 (C.A.5 (La.)) ("[W]e do not read *Citizens United* as changing how this court should evaluate contribution limits on political parties and PACs" and stating that the

Citizens United holding clearly delineated between the two levels of scrutiny, strict and exacting. *Citizens United* discussed disclosure provisions as being analyzed under exacting, not strict, scrutiny. 130 S.Ct at 914. The District Court should have analyzed RCW 42.17.105(8) under the same standard.[7]

Finally, the Supreme Court in *Citizens United* upheld *disclosure* provisions. 130 S.Ct. at 914. In so doing, the Court stated that disclosure is justified "based on a governmental interest in providing the electorate with information about the sources of election-related spending." *Id*. Because RCW 42.17.105(8) enables disclosure at a time when voters are voting, this is the same conclusion the District Court should have reached with respect to RCW 42.17.105(8), and in failing to do so, it erred.

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level of analysis in *Buckley v. Valeo* remains post-*Citizens United*.). *Cao* described the Plaintiff's attempt to greatly expand the reach of *Citizens United* as "without merit." *Id*. at *8.

[7]Even the case law relied up by Family PAC --- *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) *(CARC)* (Opp. *passim*) --- used the intermediate level of scrutiny in examining a $250 limit on ballot measure contributions. Family PAC contends that *CARC* did not address the level of scrutiny. Opp. at 5, n. 6. However, the *CARC* decision references exacting judicial review. *CARC*, 454 U.S. at 294. It also discusses a need for the government to demonstrate a "sufficiently important governmental interest" that is "closely drawn" citing to *Buckley v. Valeo*. *CARC*, 454 U.S. at 302 (J. Blackmun and J. O'Connor, concurring).

b. When the proper standard is applied, RCW 42.17.105(8) passes constitutional muster.

When the proper standard is applied, RCW 42.17.105(8) survives constitutional scrutiny. State's Mot. at 13 -15. Family PAC asserts that *CARC* controls and requires the statute to fall as being under-inclusive. Opp. at 12-16. Family PAC is incorrect. First, RCW 42.17.105(8) is not the same kind of restriction at issue in *CARC*, which was a finite limit placed on ballot measure contributions. Unlike the statute reviewed in *CARC*, RCW 42.17.105(8) does not act as a ceiling on ballot measure contributions; instead, it serves as a timing regulation for disclosing contributions and ensuring that voters have access to maximum information at the time of voting.

Second, Family PAC's claims of "under-inclusiveness" require the federal courts to engage in campaign finance line-drawing that the courts, including the Supreme Court, have repeatedly described as better left to legislative bodies. The statute's inclusion of a statutory 21-day period, applicable only to general elections, along with other similar timing provisions,[8] are decisions particularly within the realm of legislative expertise.

[8] *See, e.g.*, RCW 42.17.710 (timing provision for when contributions cannot be made to legislators before and during the legislative session); RCW 42.17.020(19) (defining the timing of "election cycle"); RCW 42.17.640(2) (describing the timing of when primary election

See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 248, 262 (2006); *Buckley v. Valeo*, 424 U.S. 1, 83 (1976); *Cao v. Federal Election Commission,* --- F.3d ----, 2010 WL 3517263, *6.[9]

Finally, Family PAC argues that a different provision in RCW 42.17.105 at subsection (1) sufficiently addresses the State's informational interests, without the need for subsection (8). Opp. at 16-17. That statute has a 24-hour reporting provision for contributions of $1,000 or more during the 21-day period before an election. However, that argument does not address the State's interest in ensuring that as much information as possible is available to voters

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contributions can be made); RCW 42.17.020(20) (c) (providing the time period for electioneering communications). State's App. C ¶ 62.

[9] Even with respect to actual contribution limits, when asked to alter through court order the limits at issue, the *Cao* court noted:

> The Supreme Court rejected this argument in *Buckley* when the Court declared that "Congress' failure to engage in such fine tuning does not invalidate the legislation." *Buckley*, 424 U.S. at 30, 96 S.Ct. 612. Although there may be variances within a statute's limitations on contributions or expenditures, so long as the Government can establish "that some limit ... is necessary, a court has no scalpel to probe ...." or parse through the varying degrees of limitations. Id. (quotations and citations omitted). "In practice, the legislature is better equipped to make such empirical judgments, as legislators have [the] 'particular expertise' " necessary to assess what limits will adequately prevent corruption in the democratic election of their peers. *Randall v. Sorrell*, 548 U.S. 230, 248, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006).
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> *Cao* at *6.

when they cast their ballots in the general election, especially in light of the fact that the vast majority of Washington voters vote by mail.[10]

2. Irreparable harm results in the absence of a stay

The State sufficiently documents that irreparable harm results in the absence of a stay. State's Mot. at 18. When contrasted with the lack of any harm to Family PAC, the State has met its burden on this criteria. Moreover, in the event this Court reverses the District Court's decision, it would be impossible to reverse any harm to the voters or the decision's impact on the 2010 general election if it is not stayed. There will be no way to "un-contribute" money that would be raised (and will most likely be spent) in contravention of RCW 42.17.105(8). Ballot measure campaigns and voters receiving their ballots for the general election are entitled to a consistent campaign election system, without upending those expectations shortly before an election, and when significant issues are on appeal. The balance of hardships tips sharply in favor of the public's interest.

[10] Ballots are being mailed beginning October 3, 2010 (and possibly earlier in Pierce County, Washington), are otherwise available on October 13, 2010, and are being mailed to other voters by October 15, 2010. State's App. D. ¶¶13-14.

3. Here, the public's interest outweighs any First Amendment interest Family PAC may assert.

The mere assertion of a First Amendment right is insufficient to overcome any evaluation of the harm suffered by all Washington voters and all other ballot measure committees in this instance. Opp. at 17-18. The State does not forfeit any argument about the public's interest because this case involves a First Amendment challenge.[11] In fact, Family PAC has engaged in no activity that is impacted by RCW 42.17.105(8). It has been denied nothing. Indeed, while it claims it "forever lost its opportunity to speak" in 2009 (Opp. at 19), the facts reveal that when it was denied a preliminary injunction in this same case in 2009, it never sought an appeal. Family PAC engaged in no actual ballot measure campaign activity in 2009, let alone 2010.

Family PAC's interests here appear to be purely academic. Its one registration form was filed the same day this lawsuit was filed. In its response to the emergency motion for stay, Family PAC ignores the State's briefing about how this is really a facial challenge, not an as-applied challenge to an

[11] Family PAC's reliance on *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002) is misplaced. In *Sammartano*, this Court found that a party seeking a *preliminary injunction* in a First Amendment context *can establish* irreparable injury sufficient to grant relief by demonstrating a colorable First Amendment claim. It did not establish, as Family PAC asserts, that the State, therefore, forfeits any public interest simply because a First Amendment claim is raised.

active political committee. Any academic or hypothetical interest in these issues by Family PAC does not trump the public's real interest in the operation of real election campaigns that are ongoing and heading to the November 2 general election. In light of these positions, the public's interests should be protected where no harm exists to Family PAC.

II. CONCLUSION

The State has satisfied the stay criteria. The State has demonstrated a likelihood of success on the merits because when the proper level of scrutiny is applied, the statute passes constitutional muster. When the risk of harm and the interests of the parties are all properly weighed, the Court should stay the District Court's judgment that invalidated RCW 42.17.105(8) with respect to ballot measures until the appeal can be heard.

RESPECTFULLY SUBMITTED this 30th day of September, 2010.

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