FILED

OCT 05 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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; JIM CLEMENTS, member of the Public Disclosure Commission, in his official capacity; DAVID SEABROOK, member of the Public Disclosure Commission, in his official capacity; JANE NOLAND, member of the Public Disclosure Commission, in her official capacity; JENNIFER JOLY, member of the Public Disclosure Commission, in her official capacity; BARRY SEHLIN, member of the Public Disclosure Commission, in his official capacity, Defendants - Appellants.	No. 10-35832 D.C. No. 3:09-cv-05662-RBL Western District of Washington, Tacoma ORDER

Before: O'SCANNLAIN, TROTT and W. FLETCHER, Circuit Judges.

We consider whether to grant the Attorney General of Washington's motion for a stay of the district court's order declaring RCW § 42.17.105(8) unconstitutional as applied to ballot measure committees pending appeal.

Our review takes into account four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably harmed absent a stay;

(3) whether the issuance of the stay will substantially injure other parties interested in the proceeding; and

(4) where the public interest lies.

Golden Gate Restaurant Ass'n v. San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (internal quotation marks omitted). These factors represent a sliding scale, and "even failing a strong likelihood of success on the merits, the party seeking a stay may be entitled to prevail if it can demonstrate a substantial case on the merits and the second and fourth factors militate in its favor." *Natural Res. Council, Inc. v. Winter*, 502 F.3d 859, 863 (9th Cir. 2007) (internal quotation marks omitted). The merits of the Attorney General of Washington's appeal rest ultimately on what level of scrutiny this court is to apply to Family PAC's First Amendment challenge to RCW § 42.17.105(8). That question remains open in this circuit following *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

Although the Supreme Court declared in *Citizens United* that "[l]aws that burden political speech are subject to strict scrutiny," *id.* at 898, the Court did not overrule *Buckley v. Valeo*, 424 U.S. 1 (1976), which established that limits on

direct contributions to candidates are assessed under less-than-strict "exacting scrutiny." *See Citizens United*, 130 S. Ct. at 901–15; *Buckley*, 424 U.S. at 25–26. Under *Buckley* and its progeny, this court has upheld limits on contributions made to political action committees that fund political candidates under exacting scrutiny, *Cal. Med. Ass'n v. Fed. Election Comm'n*, 641 F.2d 619, 623 (1980), and stated that "less rigorous scrutiny" applies to limits on contributions to ballot measure campaigns, like those engaged in by Family PAC, *see Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 652 (9th Cir. 2007). We have expressly withheld consideration of whether that level of scrutiny remains the same after *Citizens United*. *See Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 692 n.4 (9th Cir. 2010).

The Attorney General of Washington has thus presented a colorable argument that this court should continue to apply exacting scrutiny to contribution limits such as RCW § 42.17.105(8), and therefore has made at least a "substantial case on the merits" of his appeal. *Natural Res. Council, Inc.*, 502 F.3d at 863. That showing is sufficient to warrant a stay of the district court's order, as the equities lie heavily in the state's favor. Family PAC has failed to identify any contributions greater than $5000 that it expects to receive in the event that the law is overturned, and indeed it has submitted no disclosure statements this campaign

season and appears not to be participating in the upcoming general election. On the other hand, Washington and its voters have a significant interest in preventing the State's longstanding campaign finance laws from being upended by the courts so soon before the upcoming election. As the Attorney General of Washington has identified, significant and potentially harmful confusion regarding the impact of the district court's order has already resulted. Until this court has had the opportunity to clarify the level of scrutiny that applies to laws such as RCW § 42.17.105(8) after *Citizens United*, that law should remain in place for the upcoming election season.

Appellants' motion for a stay of the district court order pending appeal is GRANTED.