UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FAMILY PAC, Plaintiff, vs. SAM REED, et al., Defendant.	Docket No. C09-5662RBL Tacoma, Washington September 1, 2010

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:
JOSEPH E. LARUE
Bopp Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807-3510

For the Defendant:
NANCY J. KRIER
Attorney General's Office
WA Public Disclosure Commission
P.O. Box 40908
Olympia, Washington 98504-0898

LINDA ANNE DALTON
Attorney General's Office
P.O. Box 40100
Olympia, Washington 98504-0100

Court Reporter:
Teri Hendrix
Union Station Courthouse, Rm 3130
1717 Pacific Avenue
Tacoma, Washington 98402
(253) 882-3831

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THE COURT: Please be seated. Good morning.

THE CLERK: This is in Cause No. C09-5662RBL, in the matter of Family PAC versus Reed, et al.

Counsel, please make their appearances.

MR. LARUE: Joe LaRue for the plaintiff, Your Honor.

THE COURT: Good morning.

MS. KRIER: Nancy Krier for the State defendants.

MS. DALTON: Linda Dalton for the State defendants.

THE COURT: Good morning.

All right, this matter comes before the Court on a motion for summary judgment by the plaintiff. I have reviewed the memoranda in favor of the motion and the memoranda in opposition. I have read a lot of cases spanning the last 20 years on the constitutionality of campaign finance laws and the like. So I think we are ready to go.

Mr. LaRue, I will hear from you first.

MR. LARUE: Thank you, Your Honor.

May it please the Court. I would like to reserve ten minutes of my time for rebuttal.

THE COURT: I am not keeping time. My aspiration, as Ms. Dalton knows, is that no one leaves here while they still have something to say. The Chief Justice from Georgia -- not state but country -- Supreme Court is in Seattle, and I have

been asked to go have lunch with him. I think the issues here are pretty clear. I don't know that we have to go a real long time on this matter, but again it is my aspiration that you leave here having said everything you needed to say.

MR. LARUE: Thank you, Your Honor.

The Court is aware of the two provisions that are being challenged. For simplicity's sake, I am going to call one the $5,000 limit, and I am going to call the other the disclosure thresholds.

I would like to address just a few remarks to the $5,000 limit. We believe that that's plainly unconstitutional for a number of reasons that we addressed in our briefing. I simply want to call the Court's attention to what I believe is the most fundamental reason, and that's that the Supreme Court says that limits on ballots -- contributions to ballot measure committees are unconstitutional.

In *Citizens Against Rent Control*, page 439, the Court said, "Such limits are" -- and I am quoting here -- "impermissible restraint on the right of expression" because the Court said -- and again I am quoting -- "there is no significant state or public interest in curtailing debate and discussion of a ballot measure."

We think that settles it. The State, in its briefing, has attempted to overcome *Citizens Against Rent Control* and has offered some arguments to the Court that these -- this $5,000

limit does in fact serve a State interest.

The State first calls the limit a timing mechanism designed to enable earlier disclosure. The State explains that the State's voting mechanism requires ballots to be mailed out to the public at a certain date, and the State desires to cut off large contributions to ballot measure committees after that date so that there's adequate disclosure to the public of who the large contributors are.

In response to that, Your Honor, I would just offer a couple of real quick points.

Buckley, on page 18, the seminal case, says that time, place, and manner restrictions are not permitted for contribution limits or for expenditure limits. Time, place, and manner type analysis just simply doesn't apply.

So to the extent that the State suggests that this is merely a timing mechanism to regulate the time when speech can occur, that analysis has no place within the analysis that the Court should perform.

Second, I would say that the State has adequate disclosure mechanisms to meet its informational interests without this $5,000 limit.

Any contribution of any more than $1,000, which is obviously below the $5,000 limit -- any contributions of more than $1,000 must be reported within 48 hours during the final 21 days before the election. And then if the same contributor

makes another contribution, that contribution has to be reported within 24 hours. Yes, Your Honor --

THE COURT: I am sorry, I was anticipating --

MR. LARUE: I was anticipating your question.

So the *Citizens Against Rent Control* concurrence, Justices -- I believe it was Justices Blackman and O'Connor -- they said this, and it's equally true in this case -- and this is on page 441 of *Citizens Against Rent Control:* "There is no need for a ceiling on contributions to encourage disclosure so long as the government enforces its already stringent disclosure laws."

And we believe that's true in this case as well. No matter what the State calls this, whether it's a contribution limit, a timing mechanism, it still asks to limit the amount of money that citizens can give to ballot measure committees, and it's unconstitutional against *Citizens Against Rent Control*.

Finally, *Citizens United* said that the only interest in restricting contributions is the anti-corruption interest, and that's on page 901 of *Citizens United*, where the Court explained what *Buckley* meant when *Buckley* talked about limiting contributions. The *Citizens United* court said it's only the anti-corruption interest, which is limited to quid pro quo corruption, page 901.

THE COURT: So is your challenge to the statute in

question a facial challenge or an as-applied?

MR. LARUE: Your Honor, we are challenging it as applied to all the ballot measure committees; yes, sir. We that believe it has some legislature applications, but it doesn't apply in the ballot measure context.

THE COURT: Because a $5,000 contribution to a Superior Court judge candidate may in fact run afoul of the quid pro quo corruption interest that the government has; but would not -- it would not be applicable to a referenda here, which only, I guess, triggers the informational interest of the government, correct?

MR. LARUE: That is exactly our position; yes, Your Honor. Because as the Court said in *Citizens Against Rent Control* and in *Bellotti,* there's simply no corruption interest with ballot measure committees.

THE COURT: How about the enforcement interest? Is the enforcement interest defined as simply maintaining the integrity of the election process itself?

MR. LARUE: Your Honor, the enforcement interest is connected to the anti-corruption interest.

THE COURT: I know it's connected, but as it is articulated in the case law, is it more directed at the integrity of the election process itself, as opposed to what I refer to as bribery?

MR. LARUE: Depending on what you mean by the

integrity of the election process.

THE COURT: To make sure it's regular, to make sure that everybody votes once, to make sure that -- and only once, those kinds of --

MR. LARUE: Well, Your Honor, it relates to that, yes, but I believe it more specifically relates to the anti-corruption interest, making sure that no one is giving a quid pro quo arrangement in exchange for a contribution.

What the State has the interest in enforcing, with regard to contributions, is the protection of the citizens from quid pro quo relationships being established with candidates.

THE COURT: Right.

MR. LARUE: Now, it may extend beyond that, and Your Honor raises some interesting possibilities. But under the cases, it seems to be more focused on the quid pro quo relationship.

THE COURT: So the corruption and enforcement interests are one and the same. There's only two interests that the government -- that have been identified in the literature.

MR. LARUE: Well, as regards to contribution limits, yes, Your Honor. And again, there are two sides to the same coin. There's no enforcement if there's no quid pro quo corruption. As I am sure the Court is aware, *Citizens United* did away with all the other interests that have been

articulated to support contribution limits. So all we are left with is the anti-quid-pro-quo corruption.

THE COURT: It seems to me, looking at *Doe v. Reed*, and looking at, more particularly, *Citizens United*, that the Supreme Court has decided to, in simplified terms, identify a divide when it comes to contributions; and that is, limits on contributions, ceilings on contributions, time limits on contributions are bad and unconstitutional, and disclosure requirements are positive and are to be encouraged and are therefore valid. That seems to be -- I know that's a down and dirty way of saying that, but that's what I gleaned, generally, from reading the 20 or so cases that I have in my binder.

MR. LARUE: Your Honor, we believe that's correct, so long as the disclosure regulation satisfies -- we argue that the disclosure at issue in this case should be strict scrutiny. *Citizens United* was applying exacting scrutiny. We think that there was a reason that they applied a different standard. But what I am going to argue in just a moment, is that even under exacting scrutiny, the disclosure threshold should fail in this case.

So in answer to Your Honor's question, we believe that the Supreme Court said disclosure does not keep anybody from speaking, and so it is preferred to limits on speech.

But still, the disclosure regulation must satisfy

scrutiny. It is not true to say that disclosure is always okay, but rather disclosure that satisfies the applicable level of scrutiny is a good constitutional alternative.

THE COURT: Okay.

MR. LARUE: So let me address the disclosure threshold, Your Honor. There's a lot in our briefing about the $5,000 limit. I think the disclosure thresholds really, though, are where I ought to focus my time this morning.

THE COURT: That's where you have the -- you have the wind in your face on the disclosure. I think the State -- and I will tell them now -- I think with regard to the $5,000, 21-day ban, I think the wind -- the prevailing winds are in the face of the State in the aftermath of *Citizens United,* in particular.

But it seems to me that even low dollar disclosure thresholds have a palliative purpose, because in the aggregate those contributions can make a profound difference in an election; and if they are being orchestrated by some group, it seems to me that the State has an interest in making sure that voters know that, that they can follow the money.

MR. LARUE: Your Honor, we actually agree with what you just said. The only question that we raise with the Court is whether the thresholds that have been set by the State in this instance survive exacting scrutiny.

In order to look at that -- as I said in our briefing we

argue strict scrutiny is the applicable level. The State argues exacting. We believe that even under exacting, these thresholds fail, and I will explain why.

Exacting scrutiny requires -- and this is *Citizens United*, 914 -- it requires a substantial relation between the disclosure requirement and a sufficiently important interest.

So in order to test these thresholds against exacting scrutiny, we need to identify what the State's interest is, and then see how the limits match up.

THE COURT: Isn't the interest just informational interest?

MR. LARUE: Actually, Your Honor, the State has articulated two interests: The informational interest, which in the Ninth Circuit is follow the money. That's *Canyon Ferry* and both the *California Pro-Life Council* cases. But the State also -- in its rationale for these campaign finance laws, the State says that it wants to encourage small contributions by small donors. And so that is an interest that it's advanced to sustain the laws that it develops, and we ought to measure the laws against that interest as well.

If the Court would like a cite, that's RCW 42 --

THE COURT: I am familiar with the statute.

MR. LARUE: Okay.

THE COURT: But it seems to me -- I will let the State speak for itself, but with regard to this particular

government interest, it seems to me that it's informational, follow the money, let people know, push the big money out first, is on the 21-day, $5,000. With regard to these lower thresholds, the $25 and the $100 threshold, it seems to me that the interest is in allowing the voting public to know who it is that's investing in the effort to solicit their vote.

MR. LARUE: Your Honor, I agree, that is certainly one of the State's interests. I am simply suggesting that there's another encapsulated in the law, and I will discuss both of them, if that's all right.

THE COURT: I am just not sure one undermines the other.

MR. LARUE: No, Your Honor, I don't believe so, either, and I am not suggesting that. I am simply saying that we can look at these thresholds against both those interests, and we can see whether we can evaluate whether there's this substantial relation that needs to be there.

In other words, the question, I think, is -- and I think this is the way the Supreme Court has articulated it: Does the law further the interest, and is it related such that it's what it needs to be to further the interest?

With regard to the interest and encouraging small donors, we suggest that it doesn't further that interest at all; it actually discourages it.

We cite in our briefing a study that was done. The State

calls that study -- the credibility of that study into question but it is, to our knowledge, the only academic study that's been done on the question. And that study suggests that in states like Washington, and including Washington, where popular referendums are frequently on the ballot, there's only a small percentage of people that would be happy with third-person information being disclosed.

They seem to want it for others, but then when the question becomes "is it okay if we disclose your information," people say "I'm not so sure about that."

A large percentage -- it's in our briefing -- indicate they would be hesitant to make a contribution to a ballot measure committee if they knew their personal information or their employer's information was going to be disclosed.

We believe that the threshold -- I am sorry, the contributions that encourage -- the disclosure of which encourage small donors, are the big contributions, because the reason small donors get discouraged in the political process is they feel that they are up against big money and they can't possibly contribute with their $30 donation.

And so when big money is disclosed, and when everybody knows that big oil is trying to buy themselves a referendum, then the small donor is more likely to contribute because he wants, or she wants, to further the cause against big oil, if that's their position, and they feel that they have a fighting

shot because the information is out there.

But when the thresholds are so low that donors are feeling -- small donors are feeling their personal information may get disclosed, the studies indicate they tend not to give.

THE COURT: What do you think Justice Scalia, in his modern day electoral superman model, would say about the tumidity of people who want to participate in election and having their names protected?

MR. LARUE: Justice Scalia would not agree with me, absolutely not. Justice Thomas, though, certainly would.

The question for the Court again, I think, is, first --

THE COURT: Justice Alito probably would, too.

MR. LARUE: I believe so.

THE COURT: You are up to two.

MR. LARUE: All I care about right now, Your Honor, is one, and he's sitting at the bench.

THE COURT: I know.

MR. LARUE: I will move on, though, because the other interest, you are right, Your Honor, is the interest that the State has hung its hat on and is certainly an important interest.

We don't deny that the State has an informational interest in disclosing contributions. In fact, our position is that contributions should be disclosed. The only question is what level do we do it.

THE COURT: Don't you think the regulators and the legislature can say, look, if we've got a referendum -- and let's just talk about referendum -- and say it's a Prop 71, and there are 15,000 contributions from the State of Mississippi that are $25 to $100 in number, don't you think that's information that the voters might want to know, and somebody ought to -- some pundit ought to be able to say why are all these folks from out of state trying to influence our vote on this issue and so forth? Isn't that relevant information that voters have come to expect as they inform their own decision?

MR. LARUE: Your Honor, you raise a valid point. When contributions are viewed in the aggregate, there is a concern.

THE COURT: But in order to aggregate, you've got to take it a grain of sand at a time, don't you?

MR. LARUE: Your Honor, the question becomes where to draw the line on this.

THE COURT: Isn't that a better decision left to the legislature and the regulators, unless one is firmly convinced that the decision is arbitrary and has a significant burden on citizens' free speech rights?

MR. LARUE: Your Honor, I guess in response I would say that in the early 1970s, when this law was crafted, the legislature set a particular limit. Then they adjusted it a

couple times. And I don't have in front of me the history of the law, and I apologize, I am not crystal clear on this, but they adjusted it a couple of times. It's in our briefing, and they adjusted it a couple times. But the effect of inflation on the most recent adjustment has taken the limit back down to what the original enactment was in terms of the dollar value.

The State correctly points out that this law has been back in front of the legislature. They have recodified it several times since then. That tells us nothing, Your Honor, though, whether they have looked at this particular provision of the law and whether they have taken a vote and made a decision that this particular threshold is the proper threshold that ought to be applicable in the State of Washington.

THE COURT: Aren't they entitled to some latitude, given the recognition that the courts have said that sunlight is the best antiseptic; that disclosure laws really are a corollary to the contributor's right to free speech, the electing public have a free speech interest in having the information about the contribution?

Given, though, again, the salutary purposes that are being served, isn't it wise for the Court to defer, to some level, to the people who toil in these vineyards on a daily basis?

MR. LARUE: Well, certainly the Court should consider what the legislature has said, and there is some level of deference there. And I don't need to lecture the Court; I

know you are aware that First Amendment cases are different. Certainly, in other types of laws, there's an extreme amount of deference. When it's a constitutional issue, the Court shows deference, but not total deference.

THE COURT: I understand we are the keeper of the Constitution. I understand that, and it's a vital role that the courts play. But when you are getting down to the level of granularity, as to how many dollars and how many cents is the appropriate level below which the burden on free speech is excessive, certainly reasonable minds can differ.

MR. LARUE: Certainly, Your Honor, and that's why we believe the proper approach for this Court is to consider whether the threshold that is currently in place in Washington State, the $25 and $100 -- whether that satisfies exacting scrutiny under the way the Ninth Circuit, of course, has defined it.

And in *Canyon Ferry*, as the Court I am sure is aware, the Court said that what really matters is that voters know who backs or opposes a particular referendum item.

The Court said -- and this is a quote -- "As a matter of common sense, the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level. As the money value approaches zero, financial sponsorship" -- and that's what the Court said is important for the voters to know -- "financial

sponsorship fades into support and then into mere sympathy."

While it is true -- Your Honor raised the question about contributors from Mississippi, and it is true, perhaps, that is something that this state would have an interest in knowing. The question still becomes: Is this law -- is there a substantial relation to this interest such that it's really furthering the interest in a constitutionally permissible way?

And the Ninth Circuit has cautioned that when the thresholds approach zero and approach de minimis, then the Court has to be particularly careful about giving the State the benefit of the doubt.

We believe, Your Honor, that the contributions that people really care about are the big contributions, and we believe that by requiring small donor disclosure, the State actually works against the informational interest, because instead of having on its website a small number of items that people can easily see, there becomes these huge lists of contributors, and we suggest few people take the time and wade through it.

THE COURT: No, but those with a peculiar interest do, and they then gather the information, organize it and disseminate it to the voters who get it in; clearly, most voters probably get their information in sound bytes and headlines and conversation.

Very few people go to the website, I'm sure, in relation to the broader number of folks who vote in a particular

election, but the information is made available if in fact you have a situation where it's out-of-state money that's attempting to sway public opinion and so forth. Those are the kinds of things that voters want to know.

MR. LARUE: Your Honor, we agree with Judge Noonan that very few people say so-and-so gave $76 to this campaign, so I must be against it. We simply -- we believe that the $25 limit or threshold, rather, is too low.

Let me say a word about the $100 threshold, and I will be done until rebuttal, if that's okay.

We suggest that with regard to employment information, in order to pass exacting scrutiny, whatever disclosure threshold is put in place, whatever the State does, there has to be a substantial relation to this informational interest.

We suggest that the way the State set this up, the way the law currently is, that interest, that relationship is not there, for this reason: Your Honor, I work for a firm called Bopp, Coleson & Bostrom, and if I were to give a contribution of $101, I would report that and I'd report my firm's address. Bopp, Coleson & Bostrom does sound like a law firm, and so someone looking might assume it's a law firm. But it could just as easily be a company making storm windows.

The fact that a particular name is there doesn't really tell us that much, and so a person who's looking to see, are all the lawyers supporting this, or do people who work for --

in the gaming industry, support it?

If they don't already know what all the lawyer companies are, or all the gaming casinos in the country -- if they don't already know that, this information people are being forced to disclose won't further this information.

THE COURT: Doesn't that miss the point? Whether or not the information made available is understandable, or is as revealing as one would hope, doesn't decide the issue of whether making the information available is violative of free speech.

MR. LARUE: Your Honor, we believe actually it does, and we believe that for this reason: The only informational interest that can uphold these types of burdens on speech is the follow-the-money interest.

THE COURT: Well, you are from Indiana, right?

MR. LARUE: Yes, Your Honor.

THE COURT: That's going to be readily known, isn't it?

MR. LARUE: Well, that would be readily known through the $25 contribution disclosure, but it's not --

THE COURT: And your employer's from Indiana, one would assume; in today's information age I can't believe that somebody couldn't Google your firm and find out page after page after page of references about what you do and who you are.

MR. LARUE: Your Honor, we suggest that if the State really wants the information that it claims it does, the State needs to -- in addition to requiring the employer address and company name, needs to require what the industry is, because the State has articulated --

THE COURT: You think it's underinclusive?

MR. LARUE: Yes, Your Honor, that's correct. The State has articulated in its briefing that what it's concerned about is knowing whether a particular industry is trying to marshal money to support these ballot measures by having their employees give.

I assume the State means they are concerned about big-type industries that typically are in the news for these types of things. But, again, we suggest that because the law doesn't actually ask the question that the State says it wants to know, it's underinclusive to the interest, it can't satisfy exacting scrutiny, and it ought to be declared unconstitutional.

Your Honor, I will stop for now and reserve rebuttal, if I may.

THE COURT: All right.

MR. LARUE: Thank you, sir.

THE COURT: Ms. Krier, I guess what I want you to focus on is really the 21-day, $5,000 regulation.

I am satisfied in my own mind that disclosure -- both the

statute and the regulation -- meet the exacting scrutiny test.

I am not convinced -- in fact, I am more convinced the other way with regard to your 21-day, in today's modern age. So go ahead with that.

MS. KRIER: For the record, my name is Nancy Krier, I'm general counsel here on behalf of the State defendants, and with me is Linda Dalton.

I would be happy to turn where the wind is in my face. If I could clarify just a couple points from what I just heard, so we are clear on the record.

First is, what I am hearing is that the plaintiffs are conceding this is not a facial challenge; this is an as-applied challenge.

THE COURT: As-applied, and it's only as to referendum, and because the corruption interest, which I do not intend to evaluate, may render a different decision in a local office where $5,000 could be construed as a quid pro quo.

MS. KRIER: And with that I would like to talk to that just a bit, to make sure I understood what I heard; and secondly that plaintiffs are conceding there is informational interest.

THE COURT: I am satisfied there's an informational interest here. My principal concern is whether or not, in current times, given technological advances and the ability to

get this -- push this information out readily, whether or not the 21-day ban is narrowly tailored to meet its purpose.

MS. KRIER: I would be happy to do that, Your Honor.

And then the third thing I just wanted to confirm from prior argument is just an acknowledgment that we are in the middle of an election. The primaries were just held.

THE COURT: That's why I am going to rule from the bench today so everybody can get to the Court of Appeals before --

MS. KRIER: I wasn't doing anything for Labor Day.

So turning to 42.17.105(8), which the 21-day, $5,000 provision, as briefed, this is a timing provision. And if I can speak to that for just a moment, elections are about timing.

We put in the record, for example, a calendar when certain reports are due, and when the primary happens, when other reports are due; all leading up to the November general election. By definition, elections are creatures of calendars.

And the legislature -- in working through that reality, you need to get the campaigns ready and up and running and the candidates and everything heading toward that November general election. The legislature certainly takes that into account.

If you look through 42.17, as well as Title 29, for example, the election law statutes, there are a number of

events that are calendared, all with a recognition that there needs to be some orderly process as the State moves forward and the locals move forward during an election.

So in light of that reality, the timing of the 21-day provision that's being challenged here does a couple of things. One, it allows evaluation of who is doing the talking in the weeks prior to the election, the general election, which the *Citizens United* court, that talked to the relevant --

THE COURT: Is the regulation or law in the Bipartisan Campaign Reform Act of 2002, that was under scrutiny in *Citizens United* -- is that a timing provision?

MS. KRIER: I don't believe there's similar timing provision --

THE COURT: In 30 to 60 days, they could have done the movie out -- they could have gotten the movie out.

MS. KRIER: There is a timing provision in the electioneering communications part of the BCRA Act, Your Honor, which requires disclosure within a certain time period of advertisement and it meets the federal definition.

So certainly there's a recognition by Congress, and frankly in other parts of the FEC law too, that there are dates that are relevant to getting information out, getting reports in, getting contributions in, as the populus is heading towards the general election date.

What 42.17.105(8) also does, then, is a couple things. One, it pushes that big money out early. It allows people to -- and we are talking not just people in Tacoma or Seattle or Spokane; we are talking about out-of-state voters, overseas voters -- to have the information in hand when the election occurs.

And as was discussed at the temporary restraining order hearing, Your Honor, the reality of Washington's electoral system and the mailing dates for ballots and the fact that 38 of 39 counties now vote by mail -- I vote at my kitchen table -- it allows the information to be out when those ballots are being provided to the electorate.

THE COURT: They are being provided, but clearly when this statute was adopted, the purpose was to get the big money out early. And the reality was, logistically, it took time to gather, organize, and disseminate the information, so that, again, there was some reasonable relation between the 21-day period.

The 21 days before an election is probably the most vital period of time of an election cycle. That's when people are most focused. That's when the debate is joined -- fully joined and so forth.

So the fact that if you send the ballots out in 38 out of the 39 counties 18 days before, if somebody wants to vote, knowing that the debate has not ended, knowing that they are

not fully informed on every matter, that's their prerogative, but does that justify the State saying to a referendum sponsor, you are out of money, a salvo has come from opposition, you want to be able to respond but you are out of money; and because of this provision, you can't raise money to respond? So that last-minute challenge to the referendum goes unanswered.

MS. KRIER: A couple responses, Your Honor.

First of all, because the ballots are mailed, someone, yes, could choose to be diligent and vote the minute their ballot comes in the mail, and others wait and then do the rush to the Post Office on the last day.

So there is a time period, if you will, when it's a rolling election. But that doesn't mean that the interests of the people who vote sooner are any less great than the interests of the people who vote later, and they are entitled to the same information.

THE COURT: You are right. They are entitled to the same information if they wait. The information -- they know at the moment they vote on the 16th day before the election, that they may choose to vote before the candidates have their debate. They can do that if they want. But that doesn't necessarily provide a -- the possibility that they will do that, does not justify a ban on contributions -- on large contributions during the period of time they may choose to

vote, knowing they are not fully informed.

MS. KRIER: We would disagree that this is a ban, Your Honor. It's a timing provision that's well-known in Washington. It's been on the books for generations.

THE COURT: If I have got $5,000 and I want to give it to a referendum, and I am within the 21 days, I can't do it, can I?

MS. KRIER: Not in Washington, Your Honor, not under 42.17.

THE COURT: I am not worried about anybody else.

MS. KRIER: But let's talk -- because this is an as-applied case, let's talk about the record here. And where are the declarations from the people who say I could not provide a contribution under the scenario you just described? We have one declaration from a nonparty who actually had the funding in hand and had access to counsel, and for whatever reason chose not to do it.

If we are talking about an as-applied challenge here, we need to look at what actually is the chilling effect as demonstrated in the record in this case. And I would suggest to you that the record is less --

THE COURT: You would say the hypothetical I presented is not plausible?

MS. KRIER: I would suggest to you that when we are looking at the disclosure statute, and we believe this is a

disclosure statute because it allows the people to access this information, there needs to be more than the thinnest of record, which I would suggest to you this record is less than that, before overturning decades of campaign finance laws; and this is a piece of that law, Your Honor.

THE COURT: How is this law different than the BCRA regulation on the movie *Hillary*?

I recognize that the form of speech is different, but they were both -- they said you can make your movie, you can do whatever you want, it just has to fall outside the 30- or 60-day limitation -- time limitation.

MS. KRIER: If you are looking at the *Citizens United* case, Your Honor, that was a corporate source of funding issue and whether the federal government --

THE COURT: So you think that the case would have turned out differently if Michael Moore wanted to make the movie out of his own funds, and there was a 30- to 60-day time limit that said you can't do it?

MS. KRIER: I don't know what the Court would have decided in that circumstance, Your Honor.

THE COURT: Sure you do.

MS. KRIER: Well, but let's talk about this, because in part 4 of the *Citizens United* decision, there was an 8-1 vote in the strongest of language, consistent, if you will, with another disclosure case, *Doe v. Reed*, where the Court

recognized that the people are entitled to receive this information. And it's a First Amendment right of the people who are voting; it's not only the people making --

THE COURT: I agree, they are entitled to have this information. It just doesn't take 21 days to get them the information. It takes 24 hours.

I am not saying what the appropriate time period, short of 21 days, the ban -- and it is a ban; you cannot make a contribution. You cannot make a contribution to a referendum or initiative within 21 days if that contribution is over $5,000.

MS. KRIER: But if we look at that as a contribution limit, again, we view it as a timing disclosure issue.

THE COURT: I understand.

MS. KRIER: But let's just talk about if it was a contribution limit. The exacting standard applies, which means the intermediate, less rigorous candidate --

THE COURT: Why?

MS. KRIER: Because that's what the Supreme Court has said.

THE COURT: The Supreme Court said, at 914, in *Citizens United*, "disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.' The Court has subjected these requirements to

'exacting scrutiny'." This does impose a ceiling. This says $5,000 -- you cannot give $5,000 to a referendum within 21 days of the election.

MS. KRIER: I vigorously would point out to you, Your Honor, that the exacting scrutiny standard has been applied repeatedly, even if we assume for the moment, for the sake of argument, that this is a contribution limit.

Look at *Buckley v. Valeo*, *Nixon v. Shrink Missouri*, *Montana Right to Life v. Eddleman*, *Jacobus v. Alaska*, as well as *Citizens for Clean Government v. City of San Diego*.

THE COURT: We just had a decision from the United States Supreme Court, two of them; *Citizens United* and *Doe v. Reed.* Why do you think that the Supreme Court, in its opinion in *Citizens United*, made reference to strict scrutiny for the ban itself and for exacting scrutiny on the disclaimer or disclosure?

MS. KRIER: But, Your Honor, again, we would point out there is no ban here.

THE COURT: There is a ban. How can you say there's not ban when somebody absolutely cannot make the contribution during that 21-day period?

MS. KRIER: Because they absolutely can make the contribution in this time period prior to that, and if we look at the record in this case --

THE COURT: They could make the movie before that.

Get outside the 30, 60 days, make your movie, say all you want to say about Hillary. How is it different?

MS. KRIER: It is different, Your Honor, because the kind of restriction that is in 105(8) is not the same kind of restriction that the Court looked at in *Citizens United*.

And we need to look at how this works on the ground. For example, when this Court issued the temporary restraining motion last fall, there was information presented at that time for the 2009 elections as to what was the flow of money coming in out of the initiative campaigns.

As of today, for 2009, there was $7 million raised and $6.9 million spent.

This year, 2010, according to the P.D.C.'s website as of this morning, more than $31 million has been raised, and more than $10 million has been spent on just the initiatives. It's looking to be one of our most costly initiatives ever.

THE COURT: If you go back to the presidential campaign in 2008, there were more than enough words uttered about Hillary and about Obama and about McCain and about Palin and so forth. There was not a dearth of verbiage about them or their positions. There was not a lack of money spent. It was the most expensive election ever conducted in this country.

Nevertheless, the Supreme Court said, by imposing that 30- to 60-day limitation period on this movie, you are -- the

Congress has severely burdened the free speech rights of Truth, a nonprofit corporation. But I don't think the law would have been interpreted any differently had it applied to individuals using their own funds.

MS. KRIER: But if we can talk about what the plaintiffs have articulated and what is actually in the record, there is a chilling effect. That is not what the data shows. Millions of dollars are pouring in. They poured in 2009 when 105(8) was in effect. They are pouring in now. So to suggest --

THE COURT: There was no chilling effect in 2008 except a particular group could not produce -- could not show their particular movie. And it wasn't that the world out there didn't know anything about Hillary.

MS. KRIER: If I may, Your Honor, if I might suggest, I think that is taking *Citizens United* to places it was not intended to go, because there is nothing in that case, under part 4 of the decision, that would suggest states can't craft disclosure systems for their particular states that fit their particular needs. In fact, the cases have suggested to the contrary.

Secondly, that when a state puts that provision in place that enables the voters to receive timely information that is somehow suspect, that is not what *Citizens United* stands for.

In fact, in prior case law, in *McConnell*, the Court held

such disclosure provisions, such as the electioneering communications issue statute you are talking about --

THE COURT: I understand. The Supreme Court has been all over the map on this issue. But *Citizens United* is the most recent. Frankly, as I read *Citizens United* for the second time, I got the impression they viewed *McConnell* as their ugly stepchild.

To me, as I read *Citizens United*, they basically said bans on contributions, ceilings on contributions, are bad; disclosures are good.

Now, the question is whether or not, in order to disclose, you need to ban for 21 days. And that's where I am a skeptic.

MS. KRIER: I understand your inquiry, but I would suggest to you that contribution limits have been upheld for 40 years, beginning with the federal elections communications decision of *Buckley v. Valeo*.

Virtually all 50 states have some sort of contributions limits, if not all of them.

And the contributions limits that have the standard for analyzing them, the Courts have repeatedly said, is an exacting standard.

So does the State have a substantial -- is there a link between the state's requirements at issue versus the governmental interest? And I would put to you that the one unrebutted declaration of Doug Ellis says yes. What have we

got to contrast that?

And we have campaigns going on right now, Your Honor. I tried to do a quick count of how many potential political committees might be affected if 105(8) were suddenly overturned in the middle of an election.

And I would suggest to you it's over 1,000. We have 62 ballot measure committees that have registered for 2010. We have 716 political committees that have registered as full reporting committees. We have 663 candidate committees; of those, 490 survived through -- or appear to have survived through the primary.

So upturning the apple cart in the middle of an election system for these more than 1,000 committees that have been anticipating, planning, and following the calendars they do every year, I would suggest to you is not supported by the very thin record here in this case.

THE COURT: Thank you.

Mr. LaRue -- and I really -- there's no change in my mind on the disclosure. You better focus on the $5,000, 21-day period.

MR. LARUE: I appreciate that, Your Honor. I won't waste your time or anyone else's.

THE COURT: Why isn't the -- why doesn't the *committee for rent control* issue deal with the -- adequately deal with the limitation issue raised by Ms. Krier?

MS. KRIER: Your Honor, we believe that the *committee against rent control* is dispositive for this court. We think it does adequately deal with this. Hat case says you can't put limits on contributions to ballot measure committees.

Interestingly enough, that case started out by considering what level of scrutiny to apply, and they called it exacting. We argued at that time it meant strict, and we think we have some evidence for that.

THE COURT: Well, *McIntyre* seems to suggest that they are synonymous. I think perhaps the difference is that if you find that the burden is high, then exact means strict. If the burden is not so high, exact means something less than strict, which is not an easy concept to grapple with, but I think that's what the cases say.

MR. LARUE: We think you are exactly right, actually, that that is what the cases say. We suggest this is a high burden, because it's a ban, as the Court as recognized.

But the interesting thing about CARC, *Citizens Against Rent Control*, is that in spite of spending some time trying to determine the level of scrutiny, they don't apply it. They simply conclude you can't limit contributions to ballot measure committees because there's no interest to support it.

THE COURT: There's no significant state or public interest in curtailing debate and discussion of a ballot measure and the integrity of the political system will be

adequately protected if contributors are identified in the public filing, revealing the amounts contributed.

MR. LARUE: Exactly, Your Honor. And under the State's reporting regime, as the Court recognized, those reports are available online. Anyone who wants them can go get them. It's not like what it was back in the '70s when you had to go down to city hall and pay money and go searching. Today, you go to their website and they are right there.

THE COURT: Now, let me say, I have a companion down the hall who is the judge handling *Doe v. Reed*.

It was handled on an as-applied basis, as-applied analysis, as I think Justice Alito in the concurring opinion recognized, and as Justice Thomas in the dissent clearly recognized, are problematic in terms of dealing with -- just what we are dealing with now; we are in an election cycle. And getting an issue resolved on an as-applied basis and getting the record fully formed, so that not only the District Court, but the Court of Appeals can resolve the issue on an adequate record is problematic, and may be a bridge too far in virtually every circumstance. By the time you get the issue teed up and resolved, the election cycle is over.

But it was remanded back to the Court to make inquiry as to threats and the potential for threats and so forth and so on. What is the record here that supports the notion, as Ms. Krier challenged, that in fact anybody was prevented from

making a contribution in the final days before the election of -- regarding Prop 71?

MR. LARUE: Your Honor, making and receiving contributions are two sides of the same coin.

In this case, the record reveals that someone was prevented from receiving contributions above the $5,000 limit, and that would be my client, and that's in a verified complaint.

THE COURT: I understand.

MR. LARUE: The record also reveals that there was a contributor who wanted to give a $5,000 contribution. Now, I would suggest to the Court that that second record isn't actually necessary. The fact that there was someone who wanted to receive, and couldn't do it because of the law, that burdened, impermissibly, their right to associate. But the record is bigger than that.

We have the contributor who wanted to give -- an affidavit stating that they had the money; they would have done so, had this law not been in effect.

I believe this Court has correctly recognized that this does function as a ban, and that brings us to an interesting question, Your Honor; and frankly, I don't know the answer. But I am going to frame the question for the Court to decide.

Citizens United, at page 898, said that bans on speech are subject to strict scrutiny.

THE COURT: Right.

MR. LARUE: Now, counsel for the State is correct. Up until this time, the Supreme Court has evaluated contribution limits under a lesser form of scrutiny, sometimes referred to as intermediate, sometimes referred to as closely drawn, but *Nixon* and *McConnell* both applied this lesser level of scrutiny.

The questions becomes: What is the state of the law after *Citizens United?* Because this is a ban on speech. What level of scrutiny should apply? And the Ninth Circuit in *Long Beach* took up that question, Your Honor; it's at page 692, note 4. And the Court there said -- and I am going to quote, if that's all right: "In *Citizens United*, the Supreme Court stated political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws burdening political speech are subject to strict scrutiny" -- and then it gives the *Citizens* cite.

Then the Court said: "It is unclear whether this unqualified statement is the death knell for closely drawn scrutiny or whether it was intended only to reaffirm the long-standing principle that expenditure limitations, like those at issue in *Citizens United*, are subject to strict scrutiny. We need not read the tea leaves to decide this appeal."

That was what *Long Beach* said, because they could decide

it under new grounds.

Similarly, this Court doesn't actually have to decide whether strict scrutiny or lesser scrutiny applies, because the Supreme Court in *Citizens Against Rent Control,* and in *Bellotti*, has said you cannot impose these types of contributions limits on ballot measure committees; and that should settle the issue.

With regard to the State's interest in information, the State said that there's -- because the County is voting by mail, it's important that people have access to the information.

The Court raised the point that people can choose whether to wait for it. But the reality is, this information is available nearly instantaneously with the advent of the Internet. The reports have to be filed quickly. The State can put them up quickly, and the information is there.

So we submit to the Court that this law ought to be declared unconstitutional.

Thank you, Your Honor.

THE COURT: Ms. Krier, do you want to make any final remarks?

MS. KRIER: Just on the last point, Your Honor.

If I could direct the Court's attention to *Citizens for Clean Government v. San Diego*, a Ninth Circuit case, where the Ninth Circuit specifically distinguished and declined to adopt

strict scrutiny for contribution limits in ballot measure campaigns.

THE COURT: What year was that?

MS. KRIER: Of course, I didn't bring the cite here.

MR. LARUE: I believe it was 2008, I think.

THE COURT: I don't know why I think *Citizens United* is a game changer, but I read *Citizens United* as giving a fairly good dissertation on the development of campaign finance law.

And the Ninth Circuit may tell me that I am wrong, but I firmly believe that the law that has evolved and as finally enunciated in *Citizens United* stands for the proposition that bans and limits are bad and disclosure is good.

And I recognize that there is certainly a disclosure purpose behind the statute, the 21-day period. I recognize the "push the big money out first," kind of issue. But I have also been a citizen long enough to know that last minute attacks, "October surprises" as we refer to them in presidential elections, are commonplace, and that somebody's ability to respond may be, and probably oftentimes is, impacted by this particular ban.

MS. KRIER: If I may suggest in response, even if you couch this as a contribution limit for that provision, which again we would dispute, if indeed *Citizens United* had changed the rules of the game, if you will, for all contribution

limits at the federal, state, and local levels, that would have been an earthquake that would have hit around the country.

THE COURT: I thought it was an earthquake that hit this courthouse.

MS. KRIER: The decision has many big components, admittedly, and we focused on different parts of them here today. But if *Citizens United* had suggested that all contribution limits at the state, federal, and local levels are now suspect, I can assure you that would have been articulated in the opinion.

THE COURT: We had this conversation yesterday, because I said, if you just look at this as a strict contribution limit case, how does that change the dynamic, because basically I have got the State arguing this is just a disclosure rule; and clearly *Citizens United* talks about what you do with disclosure and disclaimer rules and the level of scrutiny.

And the plaintiffs argued that essentially the exacting scrutiny and strict scrutiny are the same, and nobody really deals with the issue of contribution limits per se.

My thinking is directed more at the similarities between what was under scrutiny or under evaluation in *Citizens United* and that 30- to 60-day ban period, essentially, for --

MS. KRIER: A source of funding, not the funding

themselves.

THE COURT: Admittedly, it was more a direct speech, because it was a movie that they had produced, and it was ready to go out for Pay Per View and so forth. It's a direct speech, as opposed to contributions leading to expenditures which result in a direct speech; but I think that's a "difference without meaning" contribution. And I understand there's a difference in the court case law about expenditures and contributions, and that they look more warily at limits on expenditures than they do on limitations on contributions.

But again, my view -- and I am going to apply strict scrutiny as to the third provision, the $5,000, 21-day period -- that there is a compelling state interest, but it is not narrowly tailored in this modern era when dissemination of information is so advanced and virtually instantaneous.

I am not going to -- and I am going to read an opinion here.

MS. KRIER: Should I sit down?

THE COURT: I will finish my point. I will let you sit down.

I am not going to proscribe what the appropriate period is. It just seems clear to me that 21 days is way too long, and the fact that you mail out ballots 18 days in advance, does not provide what I refer to as a modern-day explanation for what is really another purpose, and perhaps a legitimate

purpose in 1972.

How long does it take us to really organize the information so that we can get it meaningfully to the voters before they all stand in line at the polls and vote on election day? We don't do that too much any more.

MS. KRIER: If I may suggest, we did speak of this earlier, but the 21-day provision has some counterparts, 42.17 and 42.17.080, where certain reports are due in 21 days, and then 103(1), which is the independent expenditure report. So it's not without its other counterparts in the same part of the country.

THE COURT: I know that. Thank you very much.

All right, I have decided that in the interest of not interfering unnecessarily with the current election cycle, that I would make my decision here today, read a decision, and the transcript will be the record.

There will be, of necessity, less -- it will be short on inspiration and flowery language about democracy, the republic, and the time-honored right that we have all come to expect. Please know that they are in my heart, if not in my words. But it will at least allow you to know what the decision is, and you can make your decisions accordingly.

Family PAC challenges the constitutionality of three provisions of Washington State's campaign finance laws and rules as violating the First Amendment:

1. RCW 42.17.090, requiring disclosure of names and addresses of contributors giving more than $25 to a campaign;

2. Washington Administrative Code 390-16-034, requiring disclosure of individuals' occupations and names and addresses of employers when they contribute more than $100; and

3. RCW 42.17.105(8), providing a 21-day time period before a general election, during which time no person may make, and no candidate or political committee may accept, any contribution in excess of $5,000. That's subject to an exception for a bona fide political party, and that issue is not before the Court here.

The level of scrutiny to be applied:

Laws that burden political speech are subject to strict scrutiny for a violation of the First Amendment, which level of scrutiny requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, at 898, a 2010-case, citing *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, at 464, a 2007 case.

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking." The Court has subjected these requirements to "exacting scrutiny" which requires a "substantial relation"

between the disclosure requirement and a "sufficiently important governmental interest." *Citizens United* at 914, citing *Buckley v. Valeo*, 424 U.S. 1, at 64 and 66, a 1976-case, and *McConnell v. Federal Election Commission*, 540 U.S. 93, at 201, a 2003 case.

Plaintiff argues that exacting scrutiny and strict scrutiny are the same standard when the burden of a statute on First Amendment rights is high, citing *Davis v. Federal Election Commission*, 128 S.Ct. 2759, at 2774-75, a 2008-case. It argues that all three subject statutes and regulations place a high burden on the exercise of First Amendment rights.

Defendants argue that the subject laws all relate to run-of-the-mill disclosure requirements that should be subject to the less onerous "exacting scrutiny" standard employed by the Supreme Court in *Citizens United,* when dealing with the disclosure and disclaimer requirements imposed by the Bipartisan Campaign Reform Act of 2002.

The Court agrees that those disclosure requirements triggered by contributions greater than $25 and greater than $100 are evaluated by the less strenuous "exacting scrutiny" standard most recently enunciated in *Citizens United*. The burden on the ability to speak is modest, and they impose no ceiling on campaign-related activities.

The Court sees the 21-day/$5,000 contribution limit differently than either of the parties. The provision

represents a ban on political speech that is subject to strict scrutiny. Although related to the desire to disclose useful information to voters, it is more than a disclosure or disclaimer regulation. In order to "push the big money out first" to enable full disclosure to the voting public, the law imposes a ban on large contributions during the key part of an election. In so doing, it suppresses political speech and therefore must be subjected to strict scrutiny.

Now, for the application of these standards. Exacting scrutiny, requires a substantial relation between the disclosure requirement and a sufficiently important government interest.

What is the government interest advanced by the disclosure statute and the regulation? It is the informational interest satisfied by allowing voters to "follow the money." The ability for voters to know who it is that is trying to influence their vote. That interest is a vital interest to government and the people it serves.

Are the subject laws substantially related to that vital interest? Yes, though the limits may seem low to the plaintiff, small contributions when aggregated by organizations of people ("special interests," as we so often refer to them in the political debate; unions, business interests, occupational guilds or associations) they can have a powerful impact on the debate and voters can benefit from

the information that disclosure provides.

The disclosure statute, RCW 42.17.090, and the disclosure regulation, Washington Administrative Code 390-16-034, both meet the exacting scrutiny standard and are constitutional.

Plaintiff's motion for summary judgment is therefore denied with respect to that statute and that regulation.

The application of strict scrutiny: The challenged provision must be narrowly tailored to serve a compelling state interest. The burden is on the State of Washington.

With regard to campaign regulations that impact free speech rights, there is generally thought to be formerly three, now perhaps two, government interests:

(1) information interest -- seeing to it that voters have much needed information to inform their voting decisions; and (2) the corruption or enforcement interest -- avoiding quid pro quo influence, pedaling or bribery.

With regard to the subject regulation or the subject statute as it pertains to referenda, it is the information interest that is of primary and perhaps sole concern.

That interest is, however, a compelling one. The ability of the voters to identify those who have invested in the effort to solicit their vote for a candidate or an issue is of vital importance to any effort to build and maintain open government.

The right to receive information is an inherent corollary

of the right to free speech. So said our Circuit Court in *Monteiro v. Tempe Union High School District*, 158 F.3d 1022, at 1027, note 5, a Ninth Circuit 1998 decision.

The interest which the State of Washington seeks to advance in this statute is compelling.

The more pertinent question is whether the law, in this time of immediate dissemination of information, is narrowly tailored to serve that compelling State interest.

The State focuses on the fact that all but one of Washington counties use a vote-by-mail system and they mail ballots 18 days before the election date. This system is offered up as modern-day justification for a 1970s-era law that may have needed up to 21 days to gather, organize, and distribute the information about campaign contributions.

Now, however, campaign contributions can be reported and made publicly available within minutes, and certainly within 24 hours. Given that reality, a 21-day ban on large contributions cannot be viewed as necessary or narrowly tailored to effectuate the original purpose.

The fact that voters have access to ballots earlier than before, and that they may choose to vote before all the election debate is in fact over, is not a sufficient reason to save this statute as it pertains to referenda.

The compelling State interest here is providing access to voters to information relevant to voting decision. That

information can be provided to voters without a ban on large donations lasting for as long as 21 days prior to the election. The 21 days prior to an election is a time when the political debate is fully joined and the attention of voters is most focused.

Banning large contributions for such a long period during this critical time in the debate cannot now reasonably be described as a narrowly tailored solution to the problem government seeks to address.

Such a ban may pass constitutional muster if limited to a time more carefully calculated to reflect the current time necessary to gather and organize and disseminate the relevant information about contributions and contributors that the government legitimately seeks to convey.

In the opinion of the Court, RCW 42.17.105(8), as applied to referenda, is not narrowly tailored to meet its compelling State interest. It imposes a significant burden on free speech. Because it does not pass strict scrutiny when applied to referenda, it is unconstitutional.

Plaintiff's motion for summary judgment as to that statute is granted.

Any questions?

MR. LARUE: (Shakes head.)

MS. KRIER: One question, Your Honor. Would the Court be willing to entertain a stay of this pending the

outcome -- after this November election? There are campaigns that have organized themselves, geared up, worked under the current calendar.

THE COURT: I understand that. Let me just, as an aside, tell you that with regard to payments under Medicaid, with regard to retirement homes and so forth, I entered a stay on one case, and denied it on another, and the Court of Appeals has -- while they get a chance to look at it -- has entered its own stay on that issue.

I cannot say that the exercise of First Amendment rights is any less important than payments under Medicaid to owners and operators of retirement homes. So I am not willing to stay the enforcement at this time. But I wanted to alert you to the fact that the Circuit may disagree with me when you present your position to them.

I think you should be able to do that well before the 21-day period at issue here is arrived at.

Anything further?

MS. KRIER: Will the Court be entering a written order, or do you want the parties to prepare an order?

THE COURT: I am not going to prepare a written order. The transcript is what you've got.

I, oftentimes, will rule from the bench where time is of the essence. So you'll have the transcript of the debate that we had, and you will also have the transcript of my

handwritten remarks so that I think I have given the Circuit a reasoned -- be it be reasonable or not -- a reasoned decision that they can evaluate on the merits, and I don't think that the appellate process ought to be delayed while we wait for some written order.

Ms. Krier?

MS. KRIER: We can talk.

If I may, Your Honor, at some point a written order of the summary judgment motion, I think, would be required. I am not --

THE COURT: I think the transcript has sufficed in years past.

MS. KRIER: Has it? Thank you.

THE COURT: Okay, anything further?

Court will be in recess.

MR. LARUE: Thank you, Your Honor.

(Proceedings concluded.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Teri Hendrix _____ September 1, 2010

Teri Hendrix, Court Reporter Date

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