Docket No. 10-35832

In the
United States Court of Appeals
for the
Ninth Circuit

Family PAC,

Plaintiff-Appellee,

v.

Rob McKenna, et al.,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for the Western District of Washington, No. 09-cv-5662 Honorable Ronald B. Leighton

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Family PAC's Opposition to Appellant's Emergency Motion for Stay Under Circuit Rule 27-3

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Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, I hereby certify that Appellee Family PAC is a political action committee registered with the Washington State Public Disclosure Commission and that FPIW Action is the parent corporation of Family PAC.

Dated this 27th day of September, 2010.

/s/ Scott F. Bieniek
Scott F. Bieniek

Table of Contents

Table of Contents – Appendix

Table of Authorities

Cases:

Statutes:

Jurisdictional Statement

The action in the District Court arose under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). On September 1, 2010, the District Court granted in part and denied in part Family PAC's motion for summary judgment. (App. 70a.)[1] The District Court issued its judgment on September 1, 2010. (App. 72a)

Washington delayed 15 days before filing a notice of appeal (App. 73a) and did not file this emergency motion for a stay pending appeal until September 20.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the decision of the District Court is a final order.

Statement of Facts

Family PAC organized on October 21, 2009, as a continuing political committee to support traditional family values in Washington by soliciting and receiving contributions, and by making contributions and expenditures, to support or oppose ballot propositions. (App. 4a ¶¶ 21-22.) Family PAC's initial project was to support the effort to repeal Engrossed Second Substitute Senate Bill 5688, commonly referred to as the "everything but marriage" domestic partnership law, by urging voters to

[1] "App." refers to the *Appendix to Family PAC's Opposition to Appellant's Emergency Motion for Stay Under Circuit Rule 27-3* filed concurrently with this opposition.

"reject" Referendum 71 at the November 2009 election. (App. 4a ¶ 22.) Family PAC has indicated that it will only support or oppose ballot measures, not candidates. (App. 3a ¶ 9.)

As a continuing political committee, Family PAC has various registration and reporting requirements. *See, e.g.*, RCW §§ 42.17.040 (registration statement); 42.17.080 (periodic campaign statements); 42.17.510 (identification of sponsors); 42.17.105 (late contribution reports); and 42.17.180 (major donor reports).

In addition to the substantial reporting and disclosure requirements, RCW § 42.17.105(8) prohibited Family PAC from making or receiving contributions in excess of $5,000 during the 21 days preceding a general election (the "$5,000 contribution limit"). As a result, Family PAC was forced to turn away contributors willing to contribute more than $5,000 during the 21 days preceding the Referendum 71 election.[2] (App. 5a ¶ 27.) Other political committees have expressed a desire to make and/or receive contributions in excess of $5,000 during the 21-day period. (App. 29a–37a.) Family PAC has stated that it would like to solicit and receive contributions in excess of $5,000 during the 21 days preceding future general elections to advance its purpose. (App. 5a ¶ 27.)

[2] For example, Focus on the Family Action contemplated making contributions of $60,000 and $20,000 to Family PAC for radio advertisements and get-out-the-vote activities before the Referendum 71 election but was unable to make such contributions because of the $5,000 contribution limit. (App. 24a ¶ 13.)

The District Court granted Family PAC's motion for summary judgment with respect to the $5,000 contribution limit and ruled that it is not narrowly tailored to serve a compelling government interest. (Wash. App. B 48:15-19.)[3]

Standard of Review

The Ninth Circuit reviews a district court's grant of summary judgment *de novo*. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 689 (9th Cir. 2010).

When reviewing a motion to stay an order pending appeal pursuant to Fed. R. App. P. 8(a)(2), the Ninth Circuit considers 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 injured 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 Assoc. v. San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008). *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

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[3] Washington attached a copy of the *Transcript of Proceedings Held Before the Honorable Ronald B. Leighton* (Sept. 1, 2010) as Appendix B to its motion. Judge Leighton read his opinion from the bench at the conclusion of that hearing.

Because Washington did not individually number the pages of its appendix, Family PAC cites to the actual transcript page number, located in the top right corner of each page.

A stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant."[4] *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009). As the moving party, Washington bears the burden of demonstrating that the standards for a stay have been satisfied. *Id.* at 1760-61. A stay must be awarded only on a *clear* showing that the movant is entitled to such relief. *Id.* at 1761.

Washington has not met its burden and this Court should deny Washington's emergency motion for a stay pending appeal.

Argument

After full briefing and argument on Family PAC's motion for summary judgment, the District Court concluded that there was no genuine issue as to any material fact and that Family PAC was entitled to judgment as a matter of law with respect to the

[4] A stay pending appeal is an equitable remedy and delay by a moving party is considered when weighing the propriety of the relief. *Lydo Enterprises, Inc. v. Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984). Here, Washington delayed 15 days from the District Court's judgment before filing its notice of appeal and 4 additional days before filing its emergency motion in this Court. Moreover, Washington has not asked this Court to expedite the underlying appeal. Given that Washington asks for ultimate relief on the merits through this motion, this delay is significant.

The District Court heard oral argument on a fully briefed motion for summary judgment and determined that Family PAC was entitled to summary judgment with respect to the $5,000 contribution limit. Washington now asks this Court to reverse that decision, and reinstate an unconstitutional contribution limit for yet another election cycle, on a hurried, and dilatory, motion to stay pending appeal. This delay prejudices not only Family PAC's, but also this Court's, ability, to address the motion. And as set forth below, Washington fails to cite the controlling Supreme Court case, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), in their motion.

$5,000 contribution limit.[5] To obtain a stay of this Order, Washington must make a "strong" showing that *it*, not Family PAC, is the one that is likely to succeed on the merits. *Hilton*, 481 U.S. at 776. Washington must also demonstrate that it (the state) will suffer irreparable harm, that Family PAC will not be injured by a stay, and that a stay is in the public interest. Washington has not met its burden and its request for a stay pending appeal should be denied.

I. Washington Failed to Make a Strong Showing That It Is Likely to Succeed on the Merits.

A. The District Court did not apply the wrong legal standard when it subjected the $5,000 contribution limit to strict scrutiny.[6]

Washington suggests that the District Court erred by subjecting the $5,000 contribution limit to strict scrutiny. (Memo. at 10-13.)[7] Washington argues that the District Court's reliance on *Citizens United v. FEC*, 130 S. Ct. 876 (2010), is misplaced and that the $5,000 contribution limit should instead be subjected to "exacting scrutiny."[8] (Memo. at 11.)

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[5] Washington did not file a motion to dismiss or a motion for summary judgment in the District Court.

[6] It is unnecessary to decide the level of scrutiny because contribution limits are not permitted in the ballot measure context. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (not addressing level of scrutiny for this reason).

[7] Family PAC cites to *Appellants' Emergency Motion for Stay Under Circuit Rule 27-3* throughout simply as "Memo."

[8] The $5,000 contribution limit, RCW § 42.17.105(8) and the corporate-general-

Strict scrutiny applies, *see infra*, but even if exacting scrutiny applied, it would be high exacting scrutiny that is the functional equivalent of strict scrutiny. The Supreme Court recently explained that "exacting scrutiny" requires "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 130 S. Ct. 2811, 2814 (2010) (*citing Davis v. FEC*, 128 S. Ct. 2759, 2817-18 (2008)). Thus, regulations that burden "core political speech" or that impose severe burdens on the freedoms of speech and association must be narrowly tailored to serve a compelling government interest. *See Buckley v. Am. Constitutional Law Found.* ("*ACLF*"), 525 U.S. 182, 206-09 (1999) (Thomas, J.,

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treasury fund statute in *Citizens United*, 2 U.S.C. § 441b, are more similar than Washington recognizes.

Under § 441b, Citizens United could produce and distribute, using general-treasury funds, a feature-length documentary about Hillary Clinton at any time *except* the 30 days before a primary and the 60 days before a general election, provided that the film did not expressly advocate her election or defeat. And Citizens United could still produce a documentary about Hillary Clinton during the 30/60 day window provided that the film "was not express advocacy or its functional equivalent. *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 481 (2007). Nevertheless, the Supreme Court characterized § 441b as a "ban." *Citizens United*, 130 S. Ct. at 898 ("Section 441b's prohibitions on corporate independent expenditures is thus a ban on speech.").

The $5,000 contribution limit operates in the same manner. A person can make a contribution in excess of $5,000 at any time *except* the 21 days preceding a general election. And during the 21-day window, an individual can make unlimited *personal* expenditures. In other words, RCW § 42.17.105(8) restricts only an individual's freedom of association. It is a "ban" on association because it places a "Spartan limit . . . on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone." *Citizens Against Rent Control*, 454 U.S. at 297.

concurring); *see also Citizens United*, 130 S. Ct. at 898 (applying "strict scrutiny"). Regulations that impose lesser burdens must bear a "substantial relation" to a "sufficiently important" government interest. *See Doe v. Reed*, 130 S. Ct. at 2814 (applying "substantial relation" standard to *disclosure* statute).[9]

Contribution limits are direct restraints on the freedoms of speech and association because contribution limits curtail debate and in turn limit expenditures. *Citizens Against Rent Control v. Berkeley* ("*CARC*"), 454 U.S. 290, 299 (1981). The language from *Citizens United* cited by the District Court conveyed this same point. (Wash. App. B 28:21-25, 29:1-3.) *See Citizens United*, 130 S. Ct. at 898 ("A restriction on the amount of money a person or group can spend on political communication during a campaign . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). As a result, *Citizens United* subjected the challenged statute to "strict scrutiny." *Id.* The District Court could have just as easily cited the language from *CARC* for the same proposition. 454 U.S. at 299 ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

[9] *Doe v. Reed* explained that disclosure requirements, unlike direct restraints on the freedoms of speech and association, do not prevent anyone from speaking. 130 S. Ct. at 2818.

In other words, *Citizens United* is not a radical departure from existing precedent (Memo. at 12), but is instead consistent with the Supreme Court's prior jurisprudence. *Citizens United* is a recognition that the Supreme Court is increasingly suspect of any regulation, such as the $5,000 contribution limit, the net effect of which is to reduce the quantity and quality of debate on a public issue. (Wash. App. B 8:3-11.) *Citizens United* indicates the Supreme Court will look more favorably on disclosure requirements because they do not reduce the quantity of speech. 130 S. Ct. at 913-17 (striking restriction on general-treasury fund electioneering communications but upholding disclosure requirements); *see also Doe v. Reed*, 130 S. Ct. at 2813-14; *CARC*, 454 U.S. at 299-300 ("The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed.").

The District Court accurately captured the holding in *Citizens United* when it stated that "limits on contributions, ceilings on contributions, time limits on contributions are bad and unconstitutional, and disclosure requirements are positive and to be encouraged and are therefore valid." Wash. App. B 8:6-10.)

Washington is correct to note that the Supreme Court has carved out a narrow exception to this general rule by allowing contribution limits to *candidates*. *See Buckley v. Valeo*, 424 U.S. 1, 23-29 (1976). Such limits are justified to prevent *quid*

pro quo corruption, *id.* at 26; *CARC*, 454 U.S. at 297, but the *quid pro quo* interest is inapplicable to ballot measure elections, *CARC*, 454 U.S. at 297; *see also California Pro-Life Council v. Getman*, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003).[10] The District Court correctly noted that the *quid pro quo* interest is inapplicable to the $5,000 contribution limit.[11] (Wash. App. B 46:13-16.)

Thus, it was correct for the District Court to subject the $5,000 contribution limit, RCW § 42.17.105(8), to strict scrutiny because it is a direct restraint on the freedoms of speech and association. Under strict scrutiny, Washington bears the burden of demonstrating that the $5,000 contribution limit is narrowly tailored to a compelling government interest. *California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (*citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)). Washington failed to carry that burden at the District Court, and it has not carried it here. Therefore, Washington has failed to make a strong showing that it is likely to succeed on the merits of its appeal.

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[10] *Citizens United* also rejected the notion that the prohibition on the use of corporate treasury funds to make electioneering could be supported by an interest in preventing *quid pro quo* corruption or the appearance thereof. 130 S. Ct. at 910-911.

[11] Whether the analysis in *Citizens United* is extended to *candidate* contribution limits remains to be seen. But one thing is certain, after the Supreme Court's decision in *CARC*, there does not appear to be a single court that has upheld a restriction on contributions to ballot measure committees. Washington certainly has not cited any.

B. The District Court correctly concluded that the $5,000 contribution limit is not narrowly tailored to a compelling government interest.

Washington's motion for a stay pending appeal rests exclusively on its assumption that the District Court applied the wrong legal standard. Concluding that the District Court applied the wrong standard, Washington presumes that the $5,000 contribution limit survives the "substantial relation" standard.

As a threshold matter, the Supreme Court has already held that contribution limits are unconstitutional as applied to ballot measure committees. *CARC*, 454 U.S. at 300. Washington does not try to distinguish, or even cite, this controlling decision in its motion. The *CARC* decision means Washington cannot meet its burden that it is likely to succeed on the the merits, and so, its motion for a stay pending appeal should be denied.

Furthermore, even if this Court were to conclude that the $5,000 contribution limit is not subject to strict scrutiny, but rather the "substantial relation" standard, Washington has failed to make a strong showing that the $5,000 contribution limit is constitutional under that standard. Because this Court's review is *de novo*, Washington must do more than allege error, it must make a strong showing that it is likely to prevail on the merits of its appeal.

Perhaps to avoid *CARC*, Washington strenuously argues that the $5,000 contribution limit is not a contribution limit at all, but rather, a disclosure requirement. (Memo. at 13.) Such an argument ignores the plain language of the statute. *Nothing* within RCW § 42.17.105(8) suggests it is anything but a limit on contributions during the final days of a campaign.

The argument ignores RCW § 42.17.105(1), which states that a contribution (or an aggregate of contributions) of $1,000 or more during the 21 days preceding a general election must be reported to the Commission within 24 hours.[12] Once such a report is filed for a contributor, the committee must file a supplemental report any time the contributor makes an additional contribution (*of any size*) during that 21-day period. RCW § 42.17.105(3). And the Commission is required to publish a daily summary of all such reports. RCW § 42.17.105(7).

Washington's argument that the contribution limit is a necessary prophylactic measure to ensure that contribution information is made available to voters is identical to the argument advanced and rejected in *CARC*:

> Notwithstanding *Buckley* and *Bellotti*, the city of Berkeley argues that [the contribution limit] is necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures . . . . Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose

[12] Once filed, reports are accessible nearly instantaneously on the Commission's website. (*See* App. 55a ¶ 9; *infra* at 17.)

> money supports or opposes a given ballot measure since contributors must make their identities known under § 112 . . . .

454 U.S. at 298. *See also*, *FEC v. Wisconsin Right to Life* ("*WRTL-II*"), 551 U.S. 449, 479 (2007) (rejecting prophylaxis-upon-prophylaxis approach).

And even if the $5,000 contribution limit is somehow characterized as a disclosure requirement, it cannot survive strict scrutiny, or even the "exacting scrutiny" standard urged by Washington.

First, as *CARC* explained, ballot measure contribution limits "operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure." 454 U.S. at 299-300. All ballot measure contribution limits are unconstitutional because they are not tailored to a sufficient government interest.[13] *Compare id*.[14] (no discussion of permissible level of

[13] Washington advanced two arguments in support of the prohibition on contributions in excess of $5,000 during the 21 days preceding a general election. (*See* App. 38a-45a.)

First, Washington argues RCW §42.17.105(8) "require[s] that large contributions be made before the final weeks of the campaign so that information concerning these contributions may be disseminated to the public well before election day." (App. 40a.)

As discussed, *supra*, the informational interest is adequately served by the 24-hour reporting requirement for contributions in excess of $1,000 during the 21 days preceding an election. And nothing prohibits an individual from spending an unlimited amount of his own resources to support or oppose a ballot measure during the 21 days preceding an election. *See infra*; *see also CARC*, 454 U.S. at 296.

Second, Washington argues the prohibition is designed to level the playing field during the final three weeks of a campaign. (App. 43a.) The Supreme Court has repeatedly rejected the "leveling the playing field" argument. *See Citizens United*, 130 S. Ct. at 904; *Davis*, 128 S. Ct. at 2773-74; *WRTL-II*, 551 U.S. at 487; *First Nat'l*

contribution limits) *with Randall v. Sorrell*, 548 U.S. 230 (2006) (*candidate* contribution limits constitutional but may fall below permissible level).[15] Although the $5,000 contribution limit is somewhat of a moving target because it limits a person's total contributions to $5,000 plus any contributions prior to the 21 day window, it is nonetheless a contribution limit.

The burden imposed by the $5,000 contribution limit is especially harsh because it imposes a contribution limit at precisely the time when most decisions to engage in political speech are made. *Citizens United*, 130 S. Ct. at 895 ("The decision to speak is made in the heat of political campaigns, when speakers must react to messages conveyed by others."). The District Court recognized that the $5,000 contribution limit handicaps a ballot measure committee's ability to respond to "October surprises." (Wash. App. B 39:18.) It also imposes a contribution limit when political speech is most critical and effective. *Citizens United*, 130 S. Ct. at 895 ("It is well

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Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978); *Buckley*, 424 U.S. at 48-49.

[14] "To place a Spartan limit -- *or indeed any limit* -- on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association. Section 602 does not seek to mute the voice of one individual, and it cannot be allowed to hobble the collective expressions of a group." *CARC*, 454 U.S. at 296 (emphasis added).

[15] A candidate contribution limits requires an examination of the *quid pro quo* interest that is inapplicable to ballot measure contributions. *Supra* at 8-9.

known that the public begins to concentrate on elections only in the weeks immediately before they are held.").

Second, the $5,000 contribution limit is underinclusive because it imposes different effective contribution limits on a speaker depending solely on when contributions are made. If Washington has an interest in preventing large ballot measure contributions (which it does not, *supra*), then it must set a uniform contribution limit. *See White*, 536 U.S. at 779-80 (regulation that fails to restrict speech implicating government's alleged interest is underinclusive). The current statute allows a continuing political committee to make and receive unlimited contributions at any time *except* the 21 days preceding a general election.[16] RCW § 42.17.105(8). And committees can make unlimited expenditures provided that they already have the cash on hand, regardless of whether the voters have the ballots in their hands or not.

For example, an individual could have contributed $1,000,000 on October 12, 2009, and another $5,000 during the 21 days preceding the November 2009 election, for an effective contribution limit of $1,005,000. By contrast, his neighbor who made his first contribution on October 13, 2009, was limited to $5,000 by virtue of the $5,000 contribution limit. Any argument that large a contribution on day 21 is more problematic than day 22 poses a "challenge to the credulous," *White*, 536 U.S. at 780,

[16] There is even confusion over when the 21-day period begins and ends. (App. 46a-51a.)

because the underinclusiveness diminishes "the credibility of the government's rationale for restricting speech in the first place."[17] *City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994). And, like Berkeley, Washington allows an individual to make unlimited *expenditures* at any time, and so, the $5,000 contribution limit serves only to infringe on associational rights without serving the informational interest. *CARC*, 454 U.S. at 296.

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

Fourth, the prohibition is underinclusive because it restricts large contributions only during the 21 days preceding a *general* election. RCW § 42.17.105(8). Continuing political committees, state parties, and other organizations can make and receive contributions in excess of $5,000 at any other time during the year, including

[17] Washington's informational interest, *supra* at 11, cannot justify the prohibition because a continuing political committee must file 24-hour reports for all contributions exceeding $1,000 during the 21 days preceding an election. RCW § 42.17.105(1). Thus, the informational interest with respect to contributions in excess of $5,000 is served by this more narrowly tailored provision.

the 21 days preceding a primary or special election. If Washington has an interest in preventing large contributions on the eve of an election, it would prohibit large contributions during the 21 days preceding primary and special elections. The underinclusiveness again diminishes Washington's interest. *White*, 536 U.S. at 780; *City of LaDue*, 512 U.S. at 52.

Finally, as already discussed, Washington's "informational interest" is already served by its more narrowly tailored compelled disclosure provisions. *See CARC*, 454 U.S. at 299-300 ("Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known . . . ."). Washington requires all contributions of $1,000 or more during the 21 days preceding an election to be reported within 24 hours. RCW § 42.17.105(1). To the extent that Washington has an interest in providing voters with information about contributions and expenditures, that interest is already served by the state's stringent disclosure requirements. This point was critical to the District Court decision, and it noted that today, with the advent of technology, there appears to be little need for the $5,000 contribution limit. (Wash. App. B 41:13-15 ("not narrowly tailored "in this modern era when dissemination of information is so advanced and virtually instantaneous").)

Indeed, Washington filed a declaration from the Commission's Chief Technology Officer who proudly stated that "electronically filed [reports] were posted by the PDC within fifteen minutes of being electronically filed." (App. 55a ¶ 9.) And even "reports that were submitted on paper (filed by US Mail or hand delivered) were scanned and available on the Web site the same day there were received in the agency's office, *and often within an hour*." (App. 55a ¶ 9 (emphasis added).) In other words, once a report is filed, it is available almost instantaneously on the Commission's website for the world to see. There is no need to *ban* contributions a full 21 days before an election to ensure that voters have information about contributions.

Thus, Washington failed to make a strong showing that it is likely to succeed on the merits of its appeal and its motion for a stay pending appeal should be denied.

II. Washington Will Not Be Irreparably Harmed Absent a Stay.

In the Ninth Circuit, "the fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellee's] favor." *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002). Here, the District Court found more than serious questions, it ruled that Family PAC established that the $5,000 contribution is unconstitutional as a matter of law. As set forth above,

Washington failed to demonstrate a strong showing that it is likely to succeed on the merits of its appeal.

The "freedom of speech" presumption embodied in the First Amendment also means that state officials have no per se interest in regulating expressive association. Their first loyalty is to the First Amendment. Beyond that, their only interest is in enforcing laws *as they exist*, with any interest in the particular *content* of those laws being beyond their interest in the balancing of harms: "It is difficult to fathom any harm to [Appellants] as it is simply their responsibility to enforce the law, whatever it says." *Id.*; *Ctr. for Individual Freedom v. Ireland*, 613 F. Supp. 2d at 777, 807 (W.D. W.Va. 2009) (*quoting WRTL-II*, 551 U.S. at 473-74).

Thus, Washington failed to demonstrate that it will be irreparably harmed absent a stay.

III. A Stay Will Result in Irreparable Injury to Family PAC.

As the Supreme Court noted in *CARC*, contribution limits in the ballot measure context unconstitutionally inhibit the freedoms of speech and association protected by the First and Fourteenth Amendments. 454 U.S. at 300. "Deprivations of speech rights presumptively constitute irreparable harm . . . . 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v.*

Burns, 427 U.S. 347, 373 (1976); *see also Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (*quoting Elrod*).

Family PAC forever lost its opportunity to speak in the 2009 election as a result of the enforcement of the $5,000 contribution limit. Washington now asks Family PAC, and all Washingtonians, to forfeit their First Amendment rights for yet another election cycle. Absent a clear showing that Washington is likely to prevail on the merits of its appeal, the motion for a stay must be denied. Washington has failed to make such a showing.

IV. A Stay is Not in the Public Interest.

The Ninth Circuit has also held that "it is always in the public interest to prevent the violation of a party's constitutional right." *Sammartano*, 303 F.3d at 874. While the public interest in protecting First Amendment liberties has, on occasion, been overcome by "a strong showing of other competing public interests," *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest in order for a court to find that it is in the public interest to stay an order of the district court. *Id*. (noting that the appellees had made no showing that their challenged regulation, which infringed on appellants' First Amendment rights, could "plausibly be justified," and so granting appellants' request for injunctive relief). As previously discussed, the State lacks an interest in this case.

Washington argues the sky is about to fall because the campaigns have all been operating under the assumption that the $5,000 contribution limit would be in place during the 21 days preceding the election. (Memo. at 19-21.) Family PAC fails to see the relevance of this argument. The First Amendment is designed "to secure the widest possible dissemination of information from diverse and antagonistic sources." *CARC*, 454 U.S. at 296. Washington asks this Court to instead reinstate the $5,000 contribution limit and curtail speech at the very moment that it is most effective. *Citizens United*, 130 S. Ct. at 895.

It is difficult to imagine how the campaigns, or Washington voters, will be harmed by *more* speech. The District Court rendered its decision before the 21-day period commenced. All campaigns have had an opportunity to assess how it might impact their strategy. And as the District Court noted, the decision ensures that all have the opportunity and ability to respond to the inevitable "October surprise." (Wash. App. B 39:16-21.) Voters that mail their ballots before the November 2 deadline will always cast their ballot with less information than those who wait. For voters who wait for the inevitable October surprise before casting their ballot, the District Court's order ensures that they will cast their ballot only after the "robust debate" contemplated by the First Amendment.[18]

[18] "The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in

Conclusion

For the reasons set forth above, Family PAC respectfully requests that this Court deny Defendants-Appellants' Emergency Motion for a Stay Pending Appeal.

Respectfully submitted this 27th day of September, 2010.

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making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. In sum, a restriction so destructive of the right of public discussion [as § 8], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).