NO. 10-35832

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAMILY PAC,

Plaintiff/Appellee,

v.

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

Defendants/Appellants.

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

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

APPELLANTS' EMERGENCY MOTION FOR STAY UNDER CIRCUIT RULE 27-3

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EMERGENCY MOTION FOR STAY OF JUDGMENT

Under Fed. R. App. P. 8(a) (2), Appellants move for a stay of that portion of the judgment issued by the District Court finding that RCW 42.17.105(8), as it relates to ballot measure political committees, is unconstitutional. The District Court's decision profoundly impacts Washington campaign finance structure in the two months immediately proceeding the State's general election.

I. REASONS FOR GRANTING RELIEF REQUESTED

RCW 42.17.105(8) reads:

> It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17.090 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office **or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election.** This subsection does not apply to contributions made by, or accepted from, a bona fide political party as defined in this chapter, excluding the county central committee or legislative district committee.
> (Emphasis added).

Under RCW 42.17.105(8), the 21-day period for disclosure of contributions exceeding $5,000 in Washington State ballot measure campaigns is October 12, 2010. App. D., Ellis Decl. #2, ¶13. Overseas and military ballots are being mailed beginning October 3, 2010 (and possibly earlier in Pierce County,

Washington), are otherwise available on October 13, 2010, and are being mailed to other voters by October 15, 2010. App. D., Ellis Decl. #2, ¶13-14. The general election is November 2, 2010. App. D., Ellis Decl. #2, ¶13. The District Court's decision invalidating RCW 42.17.105(8) for ballot measure committees should be stayed at this critical time in the election season because the State will establish: (1) that it is likely to succeed on the merits, (2) it will suffer irreparable harm in the absence of relief, (3) the balance of equities tip in its favor, and (4) a stay is in the interests of the people of Washington. *Humane Society of the U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009); *Winter v. Natural Resources Defense Council, Inc.*, --- U.S. ---, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008).

The State requests that this Court grant a stay no later than October 6, 2010.

II. FACTS RELIED UPON IN SUPPORT OF EMERGENCY STAY REQUEST

On October 21, 2009, Family PAC filed an action in District Court, challenging the constitutionality of various provisions of the Washington's campaign finance disclosure laws on the theory that they violated its First Amendment rights by limiting its actions in engaging in political speech in anticipation of a referendum before the voters of Washington in November

2009. Dkt. No. 1. That same day, Family PAC registered with the State Public Disclosure Commission ("PDC") as a continuing political committee. Dkt. No. 29, Ex. C. This is the only report Family PAC filed with the PDC. App. D, Ellis Decl. #2, ¶20.

Family PAC sought to enjoin the State from enforcing the challenged provisions. On September 1, 2010, the District Court held a hearing on Family PAC's motion for summary judgment asking that various disclosure provisions of Washington law be invalidated. App. B, Dkt. No. 88. No oral testimony was taken at the hearing. The District Court denied Family PAC's summary judgment request as it related to one statute and one rule and granted its request with respect to RCW 42.17.105(8). Apps. A & B, Dkt. No. 87, 88. On September 16, 2010, Appellants filed the Notice of Appeal and the Representation Statement challenging the District Court's action that invalidated RCW 42.17.105(8) as it related to ballot measure committees. Dkt. No. 90.

The facts relied upon by the Appellants that support their requested stay in this case are provided in the following appendices:

- Appendix A – September 1, 2010 Judgment
- Appendix B – Transcript of September 1, 2010 Summary Judgment Hearing

- Appendix C – Declaration of Doug Ellis filed in the District Court (Dkt. No. 76)
- Appendix D – Declaration of Doug Ellis in Support of Emergency Motion for Stay (Ellis Decl. #2)
- Appendix E – Declaration of Lori Anderson in Support of Emergency Motion for Stay (Anderson Decl.)
- Appendix F – Declaration of Anne Levinson filed in the District Court (Dkt No. 26)
- Appendix G - September 13, 2010 Letter from Family PAC's counsel in Thalheimer v. City of San Diego, 9th Cir. Nos. 10-55322/10-55324/10-55434

There are seven statewide ballot measures (including initiatives and referenda) on the November ballot this year, plus local ballot measures. PDC records indicate that there are 62 (24 state, 38 local) ballot measure committees registered for 2010 that are engaged in "full reporting" as ballot measure committees (as opposed to "mini reporting" for smaller campaigns.) App. D., Ellis Decl. #2, ¶9. Additional committees that file as "other" (or "continuing") political committees could also be supporting or opposing ballot measures. There are 716 active political committees engaged in full reporting for 2010 that could also be contributing to ballot measure campaigns. App. D, Ellis Decl. #2, ¶9.

Based on filings through September 16, 2010, this year's general election looks to be a record-setting year for money raised to support or oppose ballot measures in Washington State, even with RCW 42.17.105(8).

According to the PDC database available on its website at www.pdc.wa.gov, as of September 20, 2010, more than $37 million has been raised for the 2010 ballot measures in Washington State, and more than $15 million has been spent. App. D, Ellis Decl. #2, ¶10, Ex. A. Given the millions of dollars raised to date and the millions of those dollars yet to be spent, there appears to be no barrier to fundraising for the ballot measures on the November 2 general election presented by RCW 42.17.105(8).

Since the District Court's decision on September 1, 2010, uncertainty has been imposed on these campaigns and as a result on the voters of Washington. PDC staff has had contacts from persons inquiring about the District Court decision and its impact on their responsibilities. App. E, Anderson Decl., ¶¶5-9. Callers questioned whether the decision impacted only ballot measures, whether it eliminated contribution limits for candidates, what other committees are impacted, and whether it affected campaigns for the November 2 general election. App. E, Anderson Decl., ¶¶6, 7. As to ballot measure committees, as an example, an attorney who represents Costco (a membership warehouse and retailer) called PDC staff to ask if Costco could now give more than $5,000 to a ballot measure at any time. Two ballot measures (Initiatives 1100 and 1105) affect the sale of liquor in Washington

State and Costco is a large contributor to these campaigns. App. E, Anderson Decl., ¶7. Other inquiries of a similar nature came from an attorney for a state employees' union, the media, and the City of Seattle. App. E, Anderson Decl., ¶8. There have been media stories about the decision. App. E, Anderson Decl., ¶8.

Thus, retaining the same consistent "rules of the road" for ballot measure campaigns which they expected would be in place for the 2010 elections and while this appeal proceeds in an orderly fashion, is reasonable, warranted, and has no impact on Family PAC. This reality further supports entry of a stay.

III. ARGUMENT

A. Standard of Review for a Stay

Under Fed. R. App. P. (8)(a)(2), this Court may stay a judgment of a district court pending appeal. "It has always been held that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Nken v. Holder*, 129 S.Ct. 1749, 1754, 173 L.E.2d 550 (2009) (internal citation and quotations removed). To determine whether a stay is warranted, the court examines the following factors:

1. Whether the stay applicant is likely to succeed on the merits,
2. Whether the stay applicant is likely to suffer irreparable harm in the

absence of relief,
3. Whether the balance of equities tip in the stay applicant's favor, and
4. Whether a stay is in the public interest.

Humane Society of U.S. v. *Gutierrez*, 558 F.3d 896 (9th Cir. 2009); *Winter v. Natural Resources Defense Council, Inc.*, --- U.S. ---, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008). The court should be mindful that a district court's grant of summary judgment is reviewed *de novo* when determining whether the applicant is likely to succeed in the merits of its appeal. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008).

The State satisfies the criteria for obtaining a stay. When balancing the equities in this case and examining the public interest, they lean decisively in favor of a stay. The arguments previously made to the District Court establish that the State is likely to succeed on the merits. As discussed below, failure to stay the District Court's invalidation of RCW 42.17.105(8) with respect to ballot measures will cause irreparable injury to the voters of Washington by materially altering a significant feature of the state's campaign finance disclosure law that has been in place for years, and so close to an election. At the same time, while other ballot measure campaigns and political committees have been active as part of the general election campaign season for 2010,

Family PAC has engaged in no reported campaign activity in 2010 including no activity with respect to any current ballot measure in Washington State and thus would not be harmed by entry of a stay. App. D, Ellis Decl. #2, ¶20, Ex. E. At bottom, the public's interest is not served when a long standing campaign finance provision is tossed out just before an election without first airing the significant legal issues presented by the District Court's decision.

In this case, the District Court applied the improper level of scrutiny in its First Amendment analysis of the statute in question. The District Court erroneously concluded that RCW 42.17.105(8) was a "ban" on contributions and then erroneously applied strict scrutiny in analyzing whether it was constitutional. The District Court also erroneously concluded that the recent U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, 558 U.S. __, 130 S.Ct. 876 (2010) (*Citizens United*), stood for the proposition that all contribution limits must pass strict scrutiny before they can be constitutional. The *Citizens United* Court made no such holding striking down all contribution limits. Because of these fundamental errors, the District Court did not properly evaluate any of the standards that a court must consider in determining whether the statute violated any First Amendment protections.

Additionally, the District Court erroneously allowed Family PAC to claim that it was challenging the statute on an "as applied" basis when it never limited its argument to the statute's application to its own conduct; rather, Family PAC argued that it challenged the statute "as applied to all ballot measure committees" and the District Court engaged in that same review.

Contrary to this analysis, when a challenge is not limited to a particular case or fact pattern, but applied more broadly (such as to all referenda), and the relief reaches beyond a plaintiff's particular circumstances, it is a facial challenge. *Doe v. Reed*, 130 S.Ct. 2811, 2817 (2010). This case really a facial challenge to certain campaign finance laws, which is disfavored under the law. *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190-91 (2008) ("[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.")

Regardless of which type of challenge Family PAC was making, the District Court had little to no evidence from Family PAC to support its claims. All relevant and unrebutted evidence was supplied by the State and that evidence supported a determination that the statute was constitutional. When the correct constitutional analysis is utilized, and the record appropriately

considered, Family PAC will not prevail on its First Amendment claim that RCW 42.17.105(8) in unconstitutional with respect to ballot measure committees.

B. The State Is Likely To Succeed On The Merits Because The District Court's First Amendment Analysis And Resulting Judgment Invalidating RCW 42.17.105(8) Are Fundamentally Flawed

1. The District Court Erroneously Applied Strict Scrutiny To The Disclosure Timing Provision of RCW 42.17.105(8)

Family PAC's claims involve various disclosure provisions of Washington State law. The statute at issue in this appeal involves the timing of disclosures of contributions prior to the general election. As a result, and contrary to Family PAC's arguments below, the District Court should have applied "exacting" scrutiny in its review of RCW 42.17.105(8), not "strict scrutiny. If it had done so, Family PAC's challenge would have failed.

Even if the Court were to accept that the District Court's determination that the statute was really a contribution limit, the District Court still erred in its application of the U.S. Supreme Court's decision in *Citizens United.* Exacting scrutiny applies to a review of a contribution limit. The District Court's misapplication of strict scrutiny renders its decision below fundamentally flawed.

a. The Proper Level of Scrutiny is Exacting

In *Citizens United*, the Supreme Court held that disclosure requirements are subject to "exacting scrutiny which requires a substantial relation between the disclosure requirement and a sufficiently important government interest." *Citizens United* at 914. As argued to the District Court, Washington's interests in providing information to voters in a timely manner are sufficiently important, indeed, even are "extremely compelling." *See, e.g., Human Life of Washington v. Brumsickle*, 2009 WL 62144 *9, *14 (upholding as constitutional reporting requirements for political committees under RCW 42.17). RCW 42.17.105(8) comfortably satisfied the exacting level of scrutiny.

b. The District Court Misread and Misapplied the U.S. Supreme Court's Decision in *Citizens United v. Federal Election Commission.*

The District Court read *Citizens United* to hold as follows:

> [A]s I read *Citizens United*, they basically said bans on contributions, ceilings on contributions, are bad; disclosures are good.

App. B, Dkt. No. 88 at 32.

> 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.
> . . .
> 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.

App. B, Dkt. No. 88 at 44-45.

Appellants are not aware of any court that has read *Citizens United* to apply strict scrutiny to contribution limits. As was pointed out to the District Court, *Citizens United* overruled no U.S. Supreme Court precedent upholding contribution limits and establishing the standard of review for such provisions. Unlike the ban on corporations and unions using general treasury funds for independent expenditures in federal candidate election campaigns -- the issue in *Citizens United* -- RCW 42.17.105(8) is not such a ban, and it is certainly not a ban on ballot measure contributions. It is merely a requirement that the majority of funding for campaigns must be made prior to the 21 days before an

election. This significant misreading of *Citizens United* by the District Court warrants a stay.[1]

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

The record established below provides no basis to invalidate RCW 42.17.105(8) when the proper level of scrutiny is applied. The State's interest in providing disclosure to the voters of information concerning large contributions, and for those campaigns where there are no contribution limits, and at the time the voters in 38 of 39 counties receive their ballots, is real. App. C, Dkt. No. 76, ¶¶ 57-55. Timely disclosure is important because there is "substantial relation between the disclosure requirement and a sufficiently important government interest." *Citizens United* at 914.

RCW 42.17.105(8) functions as a proper timing mechanism enabling earlier disclosure prior to the general election when actual voting has commenced. In particular, ballot measure committees have no contribution limits. The weeks shortly before an election are the most critical to the public

[1] Even Family PAC recognizes the District Court's decision on the level of scrutiny is remarkable. Counsel for Family PAC filed the transcript of the District Court's decision in this case in another pending case in the Ninth Circuit, improperly attempting to extend the District Court's error about the standard of review into other cases pending before this Court. App. G. This fact further warrants a stay until the State here can fully address error fully in briefing to this Court.

as the voting begins. That is when the public has a more particular need for the disclosure of who is funding ballot measures. *Citizens United*, at 915-16. This is acutely true in Washington given the vote-by-mail requirements. In those "weeks" before the general election -- when their ballots are mailed 18 days prior to an election -- the voters will have before them the information RCW 42.17.105(8) provides.

2. RCW 42.17.105(8) is not a ban on contributions.

The District Court erroneously concluded that the statute was a ban on contributions. The District Court did so by merely stating that because a person could not give more than $5,000 within 21 days of the election, it banned that person's First Amendment rights. Even if this Court were to agree for purposes of argument that the provision was a contribution limit, no other court has ever equated a limit on contributions to an outright ban. Such conclusion is without precedent and without any legal support.

Contribution limits are not the same type of provision that was at issue in the *Citizens United* case. There, corporations and unions were completely restricted from giving any money from their general treasuries for independent expenditures. In Washington, persons can contribute any amount to a ballot measure committee prior to the 21 days before an election because there are no

contribution limits in Washington for ballot measures. The only restriction is that the larger contributions must be made 21 days in advance of the election and when voters start casting their ballots and will have access to the contributor information in reports filed with the PDC. Even those persons who give $5,000 or less can still contribute during the 21 days before an election. The District Court's conclusion that the law is a ban to contribution is unsupported.

3. Family PAC's argument that its challenge was "as applied" and not a "facial" challenge belies its briefing and argument and is plainly unsound. The District erred in following this approach.

Initially, Family PAC's Verified Complaint alleged its action was a "pre-enforcement, facial and as-applied constitutional challenge." Dkt. No. 1, ¶ 2; *see also* ¶¶3-4. The core of its briefing focused on argument as a facial challenge to state campaign finance provisions including those that provide campaign finance disclosure and transparency. In fact, in its proposed order (Dkt. No. 66), Family PAC asked the District Court to enjoin the "Public Disclosure Law… § 42.17.010 *et seq*." including with respect to the 21-day/$5,000 provision. *See also* Dkt. No. 66 at 1. Family PAC does not limit its requested relief only to itself. Dkt. No. 1, ¶¶ 62, 66.

However, Family PAC attempted to shift the focus of its claim during oral argument, calling it an "as applied" challenge but without ever articulating what or how the challenged law had been "applied" to it. Family PAC has filed no contribution or expenditure reports for any election or any ballot measure, much less the November 2, 2010 general election. Family PAC submitted one declaration of a non-party indicating when she became aware of RCW 42.17.105(8) (Dkt. No. 67) but failed to establish how that supported its arguments with respect to the statute. Therefore, Family PAC argued at the time of summary judgment that its claim was one "as applied" to ballot measure committees in general and not just to itself.

> 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.

App. B, Dkt. No. 88 at 5-6. While it appears that Family PAC is attempting to create a new hybrid constitutional challenge, its claim is really a facial challenge and as such, the rules applicable to facial challenges should have been applied by the District Court. If they had been, Family PAC would have failed on this issue.

The U.S. Supreme Court has spoken repeatedly on the fact that it disfavors facial challenges. *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190-91 (2008). The same concern that troubled the *Grange* Court applies here. Family PAC's intent – to thwart the will of the people in determining what information it wants to receive in its campaigns, at what level, and when – would short circuit the important democratic process of the state's efforts in crafting of its elections system. Because of the District Court's decision, that result will occur as soon as October 12, 2010 absent a stay.

If this had been analyzed as an "as applied" challenge, it is apparent Family PAC would have failed to meet its burden. Besides its "Verified Complaint", its lone declarant-contributor identified that she had funds in hand before the 21-day period started to run in 2009 so could have participated in the referendum campaign as she suggested she wanted to. That is, Family PAC did not establish that RCW 42.17.105(8) had been applied to it in a manner that impeded any contributions.

The reality is Family PAC filed just one campaign form with the State -- a political committee registration form -- just prior to the 21-day period of RCW 42.17.105(8) and on the same day it filed this lawsuit. This was the

means it used to challenge RCW 42.17.105(8) facially, but failed to establish that anything in RCW 42.17.105(8) was applied.

C. Irreparable Harm Results In the Absence Of A Stay Because The District Court Profoundly Impacted Washington's Campaign Finance System So Close To November 2010 General Election

In the event a stay is not granted, the harm suffered by the voting public is irreparable. The election will have come and gone. Campaign contributions will have been received and spent without benefit of this Court's analysis of whether the provision at RCW 42.17.105(8) is appropriate. The public's expectation about the type of ballot measure contributor information it would have available to it when casting their mail-in votes at any time prior to November 2, 2010 will be thwarted, and with no means to repair the damage for the November election while the case is on appeal. Campaign plans put into effect by ballot measure committees and others months ago --- when to raise funds, when to spend them --- will be impacted with no recourse. The 21-day provision in RCW 42.17.105(8) has been in place for years and is "well known" by campaigns. App. F, Dkt. No. 26, ¶7; App. C, Dkt. No. 76, ¶¶58-65.

D. The Public's Interest In Maintaining Its Campaign Finance System Far Outweighs Any Interest Of The Essentially Non-Existent Activities Of Family PAC and Weighs In Favor Of A Stay

Absent a mistake of constitutional magnitude as determined following an appeal, the public is entitled to have the rules it designed for its elections implemented, especially so close to an election. The voters have the expectation of receiving, at the time they begin to cast their ballots, the information they have had for the past 25 years with respect to ballot measures. The media writes articles and editorials about spending on campaigns and individuals consult the PDC website to see who has spent how much on what measures. App. C, Dkt. No. 76, ¶¶11-26.

This year, there are seven statewide initiatives on the ballot in Washington, plus local measures, with raised funds reaching record levels. Reviewing and voting on those measures takes time.[2] As this Court stated in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105-06 (9th Cir. 2003), "[v]oters act as legislators in the ballot measure context," describing the

[2] Indeed, the September 20, 2010 *Spokesman Review* newspaper's article titled "*Initiative support tepid in poll - Voters remain unsure on tax issues that dominate ballot measures"* describes that "Washington voters may be experiencing initiative overload this year with a near-record number of ballot measures." A pollster is quoted as saying, "It's common to see large blocks of undecided voters before the ballots and voter pamphlets arrive in the mail, Elway said. 'Many people like to sit down and read and try to make sense out of all of it.'" http://www.spokesman.com/stories/2010/sep/20/initiative-support-tepid-in-poll/.

often complex nature of ballot measures and the resulting need for the electorate to know "who backs or opposes a given initiative [so that] voters will have a pretty good idea of who stands to benefit from the legislation." As this Court also definitively stated, "We note that in the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well-established." *California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1179 n. 8 (9th Cir. 2007) (*CPLC II*).

Voters do not wait until the last minute to vote in all cases, and they are entitled to access relevant information provided by their campaign finance laws before they vote. RCW 42.17.105(8) enables them to have access information about large contributions when they able to start voting. Without a stay, the right to receive information (a right that the District Court recognized) will be eliminated in favor of a plaintiff committee that for all intents and purposes is non-existent and has engaged in no contribution or expenditure activity in Washington State.

Disrupting a campaign finance system shortly before ballots are being mailed for the November 2, 2010 general election and overturning a campaign finance statute that has been in effect since 1985 without an opportunity to

fully brief all the legal issues on appeal, is not in the public interest and the public will be harmed by such a result.

All 2010 ballot measure committees have sought contributions and planned its expenditures based on this law. Over $37 million in contributions have been received to date. To disrupt this campaign season in such a profound way would deprive voters of the order that they demand in their elections. Granting a stay retains an important campaign finance provision governing ballot measure campaigns at a crucial time in the election season. The District Court decision has the opposite impact, which is to upend that system during a very active election campaign season and prior to this Court's determination of the issues on appeal. The decision should be stayed.

IV. CONCLUSION

For the reasons stated herein, the Court should stay the District Court's judgment to the extent that it invalidated RCW 42.17.105(8).

RESPECTFULLY SUBMITTED this 20th day of September, 2010.

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