No. 10-A _______

In The
Supreme Court of the United States

Family PAC, *Plaintiff-Appellee*

v.

Rob McKenna, et al., *Defendants-Appellants*

Appeal from Case No. 10-35832 in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 3:09-cv-05662-RBL in the
U.S. District Court for the Western District of Washington

Application of Family PAC to Vacate the Ninth Circuit's Stay of the District Court's Judgment

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To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

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October 7, 2010

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Application of Family PAC to Vacate the Ninth Circuit's Stay of the District Court's Judgment

To the Honorable Anthony M. Kennedy, Associate Justice of the U.S. Supreme Court and Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit:

Plaintiff-Appellee Family PAC respectfully requests that this Court vacate the Ninth Circuit's stay of the District Court's judgment pending final action by the Ninth Circuit and possible review by the U.S. Supreme Court. As set forth below, the District Court granted Family PAC's motion for summary judgment on September 1, 2010, and held that Washington's $5,000 limit on contributions to ballot measure committees in the 21 days preceding a general election is unconstitutional.

Family PAC filed its challenge to the $5,000 contribution limit before the 2009 election because it wanted to speak about Referendum 71, a ballot measure presented to Washington voters in November 2009. Family PAC planned on producing radio advertisements and conducting get-out-the-vote activities during the 21 days preceding the election. However, because of the $5,000 contribution limit, Family PAC was forced to turn away $80,000 from a potential contributor and was unable to raise the funds necessary to conduct its planned activities.

Thus, Family PAC sought a temporary restraining order to enjoin the $5,000 contribution limit. The District Court, however, refused to enjoin the law because the hearing on Family PAC's motion for a temporary restraining order was held seven days before the election and the District Court didn't want to upset the law so

close to the election, even though Family PAC could have conducted its activities during that time.

Now, long after the close of the 2009 election, the District Court decided in Family PAC's favor, determining that the $5,000 contribution limit is unconstitutional as a matter of law. Yet the District Court's initial refusal to enjoin the law cost Family PAC its ability to speak in the 2009 election.

But now that the law has been enjoined, the Ninth Circuit has stayed the judgment of the District Court and reinstated the unconstitutional contribution limit because, 30 days prior to the election, Family PAC has not yet made concrete plans about how it wants to participate in the 2010 election. Yet we know from the 2009 election, that plans can and do arise in the 21 days before the election. In fact, Family PAC is interested in Initiative 1098, an income tax measure on the 2010 ballot, but has not yet decided on what specific communications they may want to do about it. And because the judgment of the district court was stayed, Family PAC is once again prevented from raising the funds necessary to conduct activities when it decides what communications its wants to do.

The $5,000 limit on contributions to ballot measure committees in this case is identical to the contribution limit found unconstitutional in *Citizens Against Rent Control v. Berkeley* ("*CARC*"), 454 U.S. 290 (1981). Indeed, in *Citizens Against Rent Control*, the Supreme Court stated that "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." 454 U.S. at 296. And so, the $5,000 contribution limit, like the contribution limit in *Citizens Against Rent Control*, and *all contributions to ballot measure committees*, is unconstitutional, and the Ninth Circuit abused its discretion when it granted the stay.

Jurisdiction and Standard of Review

The decision to vacate a stay of a circuit court is considered, on appeal to a Circuit Judge, under the same standards as the Circuit Justice would consider a stay application. *W. Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (holding a "Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [in the Supreme Court] upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Judge is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding the issue of the stay" (quotation omitted)); *see also Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-1313 (1973) (Marshall, J., in chambers) ("There is, to be sure, no doubt that I have the power, as a single Circuit Justice, to dissolve the stay."). "The conditions that must be shown to be satisfied before a Circuit Justice may grant such an application are familiar: a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and

a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309, 1310 (1994).

Facts and Procedural History

At issue in this case is Washington Revised Code ("RCW") section 42.17.105(8), which prohibits a political committee from making or receiving contributions in excess of $5,000 during the 21 days preceding a general election.[1] In other words, the statute imposes a contribution limit of $5,000 during the final 21 days of a campaign.

Plaintiff-Appellee Family PAC is a continuing political committee in Washington state. (App. 3a ¶ 9.) It organized in October 2009 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. 3a ¶ 9.) Family PAC has stated that it will not participate in candidate elections. (App. 3a ¶ 9.) 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 "reject" Referendum 71 at the November 2009 election. (App. 4a ¶ 22.)

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[1] RCW § 42.17.105(8) states in relevant part:
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 . . . 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.

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 2009, the $5,000 contribution limit applied from October 13 through the November 3 election. Family PAC organized as a political committee after October 13, so it was subject to the $5,000 contribution limit for the duration of its 2009 election cycle. (App. 4a ¶ 21.) Compared to other political committees, this placed Family PAC at a significant disadvantage because Washington does not impose contribution limits on political committees at any time except the 21 days preceding a general election.[2]

For example, Washington Families Standing Together, a committee that urged voters to "approve" Referendum 71, and an Intervenor-Defendant below, raised over $2 million, a substantial portion of which was raised through contributions of more than $5,000, including a $100,000 contribution from Microsoft Corporation on October 2 and several $5,000-plus donations on October 12, the day before the $5,000 contribution limit took effect.[3] Moreover, because of how contributions are

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[2] *See* http://www.pdc.wa.gov/public/page2.aspx?c1=0&c2=159 (contribution chart). A copy of the chart is reproduced in the Appendix. (App. 43a.)

[3] *See* http://www.pdc.wa.gov/MvcQuerySystem/CommitteeData/contributions?param=V0FTSEZTIDEwMg%3D%3D%3D%3D&year=2009&type=initiative (Washington Families Standing Together's Campaign Finance Reports). An excerpt of the report containing the referenced contributions is included in the Appendix. (App. 45a-47a.)

reported, other committees do not learn of these large, last-minute contributions until *after* the $5,000 contribution limit has taken effect, effectively handcuffing any effort to respond to a large, last-minute influx of contributions. *See* RCW § 42.17.080 (contribution reporting deadlines).

Family PAC planned radio ads and get-out-the-vote activities in its effort to defeat Referendum 71 in 2009 and secured a donor willing to contribute $80,000 to fund those activities. (App. 20a-22a.) However, because of the $5,000 contribution limit, Family PAC was unable to accept this contribution, and as a result, was unable to produce the radio ads or conduct the get-out the vote activities. (App. 5a ¶ 27; App. 20a-22a.)

Family PAC filed a complaint seeking declaratory and injunctive relief on October 21, 2009. (App. 1a.) In the verified complaint, Family PAC alleged that it had donors willing to contribute more than $5,000 before the November 2009 election, and that it would like to solicit and receive contributions in excess of $5,000 during the 21-day window in future elections. (App. 5a ¶ 27.) Family PAC contemporaneously filed a motion for a temporary restraining order and preliminary injunction. (Dkt. 2.)[4] The District Court held a hearing on October 27, 2009. (App. 13a.)

Despite noting that the $5,000 contribution limit appeared "more related to preventing expenditures than providing information," (App. 16a:18-19), and

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[4] All citations to the docket are to *Family PAC v. McKenna*, No. 3:09-cv-5662-RBL (W.D. Wash.).

expressing skepticism about the asserted State interests, (App. 16a:5-11), the District Court nevertheless denied Family PAC's motion for temporary restraining order. (App. 17a:24-25.) This decision was based in large part on the District Court's unwillingness to "intervene and change the rules of the game at the last minute." (App. 17a:8-11.)

At the conclusion of the hearing, counsel for Family PAC renewed its motion to expedite and expressed a desire to obtain final judgment well in advance of the 2010 general election to avoid a hearing on the eve of another election. (App. 18a:3-7; App. 19a:13-18.) The Court expressed agreement, (App. 19a:19-20), and the parties later stipulated to an accelerated schedule that allowed for summary judgment before the 2010 general election. (Dkt. 51.)

Consistent with that schedule, Family PAC filed a motion for summary judgment on May 19, 2010. (Dkt. 66.) Briefing was completed on June 25, 2010.[5] (Dkt. 77.) The District Court held oral argument on September 1, 2010. (App. 24a.)

At the conclusion of the hearing, the District Court granted Family PAC's motion for summary judgment and held that the $5,000 contribution limit violates the First and Fourteenth Amendments. (App. 31a:15-21.) The District Court also issued its judgment pursuant to Fed. R. Civ. P. 54(b) on September 1, 2010. (App. 34a.) In doing so, the District Court provided all campaigns 41 days' notice that the $5,000 contribution limit would not take effect on October 12, 2010.

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[5] Washington did not file a cross-motion for summary judgment. *See generally* District Court docket.

Nevertheless, Washington delayed fifteen days before filing a notice of appeal, and an additional four days before it filed an emergency motion for a stay in the Ninth Circuit on September 20. (Dkt. 90.) The Ninth Circuit held a telephonic argument on the emergency stay motion on October 5 (Dkt. 105) and issued its stay later that evening. (App. 35a-38a.)

Of the four stay factors,[6] the Ninth Circuit's order devotes scant attention to the first, and arguably most important, factor—Washington's likelihood of success on the merits of its appeal. Had the Ninth Circuit adequately addressed this factor, it would have to reconcile its decision to stay the judgment of the District Court with the Supreme Court's decision in *Citizens Against Rent Control*, where the Supreme Court held that any and all limitations on contributions to ballot measure committees are unconstitutional. 454 U.S. at 296. The Ninth Circuit did not even cite *Citizens Against Rent Control*, let alone try to explain why it is not controlling. (App. 35a-38a.)

Rather, the Ninth Circuit sidestepped the likelihood of success factor by relying on the two-part sliding-scale balancing test rejected by the Supreme Court in *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008),[7] holding that Washington

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[6] To obtain a stay, an appellant must demonstrate: (1) a strong showing of success on the merits; (2) irreparably injury; (3) that a stay will not injure other interested parties, and; (4) that a stay is in the public interest. *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).

[7] In *Winter*, the Supreme Court rejected the alternative two-part sliding-scale test for a preliminary injunction, stating that the preliminary injunction standard is

raised a "substantial case on the merits" because the Ninth Circuit has not resolved whether ballot measure contribution limits are subject to "strict scrutiny," as the District Court held, or "exacting scrutiny," as Washington argued. (App. 36a.) Yet the resolution of this question, however interesting it may be, is purely academic, because the Supreme Court has already held that all limits on contributions to ballot measure are unconstitutional. *CARC*, 454 U.S. at 296.

Turning to the remaining sliding-scale factors, the Ninth Circuit held the factors tipped heavily in the state's favor because Family PAC could not yet "identify any contributions greater than $5,000 that it expects to receive in the event that the law is overturned"[8] and again expressed concern about changing the rules so close to an election.[9] (App. 37a-38a.) So, Family PAC was too late in 2009 to

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a four-part test and noting that the "possibility of irreparable injury" standard "is too lenient." 129 S. Ct. at 374-76. Nevertheless, the Ninth Circuit applied this "too lenient" standard when it granted Washington's motion for a stay on a showing of "substantial questions" rather than a strong showing of success on the merits of Washington's appeal. (*See* App. 36a (*citing Natural Res. Def. Council v. Winter*, 502 F.3d 859, 863 (9th Cir. 2007). *See also Alliance for Wild Rockies v. Cottrell*, 2010 WL 3665149 (9th Cir. 2010) (re-adopting the sliding-scale test). Because Washington cannot make a strong showing with respect to the first *Winter* factor, it cannot meet its burden for a stay.

[8] Given that the District Court entered summary judgment in favor of Family PAC, it is incorrect for the Ninth Circuit to suggest that it would need to "overturn" the law. The status quo after the District Court entered judgment was that the law is unconstitutional and unenforceable. Family PAC was free to solicit and receive contributions in excess of $5,000 absent the Ninth Circuit's stay. By issuing the stay, the Ninth Circuit changed the status quo and reinstated the unconstitutional contribution limit without addressing the merits of Washington's appeal.

[9] It is not clear how the District Court's decision threatened to change the rules of the game. All committees knew on September 1, 2010, that they would be

obtain relief because it identified its donor too late. (App. 17a:8-11.) But now Family PAC is too early because it cannot yet identify a donor that would like to contribute more than $5,000 during a period that does not begin until October 12, 2010, despite having averred in its verified complaint that it intends to solicit such contributions. (App. 37a-38a.)

This whip-saw argument, where a plaintiff is either too late, or too early, combined with the failure to address the Supreme Court's controlling decision in *Citizens Against Rent Control*, demonstrates that the Ninth Circuit clearly abused its discretion when it stayed the judgment of the District Court.

Argument

The four factors to be considered by a court in issuing a stay pending appeal are: (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 issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 129 S. Ct. 1749, 1760-61 (2009). These factors are substantially the same as those governing an application for preliminary injunction. *Id.* (*citing Winter*, 129 S. Ct. at 370).

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permitted to raise contributions in excess of $5,000 during the 21 days preceding the November 2 election as a result of the District Court's decision. This was more than a month *before* the 21-day window, which begins on October 12, 2010.

As an initial matter, the Ninth Circuit applied the wrong standard, reviving the two-part sliding-scale test rejected by the Supreme Court in *Winter*, 129 S. Ct. 374-76. (*See* App. 36a (*citing Natural Res. Def. Council*, 502 F.3d at 863).) For that reason alone, the stay issued by the Ninth Circuit should be lifted. And as set forth below, Washington cannot meet the requirements for a stay of the District Court's order. The Ninth Circuit's stay, reinstating the $5,000 contribution limit and the resulting First Amendment harms for yet another election cycle is a clear abuse of discretion that defies *Citizens Against Rent Control*.

I. Washington Cannot Make a Strong Showing of Success on the Merits Under *Citizens Against Rent Control*.

In *Citizens Against Rent Control*, this Court clearly and unequivocally declared that any and all ballot measure contribution limits are unconstitutional. 454 U.S. at 296. *Citizens Against Rent Control* explained that ballot measure contribution limits are a direct restraint on the freedom of association because they prevent a group of persons from doing what an individual with enough money could do on his own:

> There are of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. 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.

Id.

Citizens Against Rent Control went on to explain that this Court created a narrow exception to this general rule by allowing limits on contributions to

candidates and their committees because of the risk of *quid pro quo* corruption. 454 U.S. at 296-97; *Buckley v. Valeo*, 424 U.S. 1, 23-29 (1976). The risk of *quid pro quo* corruption is not present in ballot measure elections, and so, the exception cannot apply. *CARC*, 454 U.S. at 297-98; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

Remarkably, Washington in its application for a stay, and the Ninth Circuit in its order granting the stay, fail to discuss *Citizens Against Rent Control*. As the Ninth Circuit noted, "the merits of [Washington's] appeal rest ultimately on what level of scrutiny this court is to apply to Family PAC's First Amendment challenge to [the $5,000 contribution limit]." Under *Citizens Against Rent Control*, this question is irrelevant because ballot measure contribution limits are unconstitutional under any degree of scrutiny. *See CARC*, 454 U.S. at 300; *see also id.* at 306 (White, J., dissenting) ("But the Court goes on to assert that the ordinance furthers no legitimate public interest and cannot survive 'any degree of scrutiny.'").

And even if the $5,000 contribution limit is subjected to exacting scrutiny as Washington suggests, the statute remains unconstitutional. Ballot measure contribution limits are not sufficiently tailored to the state's informational interest. *CARC*, 454 U.S. at 298. *Citizens Against Rent Control* explained that the informational interest is adequately served by donor disclosure. *Id.* In *Citizens Against Rent Control*, that disclosure occurred in newspapers days before the election. *Id.* And *Citizens Against Rent Control* explicitly rejected the suggestion

that contribution limits are "necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures." *Id. See also FEC v. Wisconsin Right to Life* ("*WRTL-II*"), 551 U.S. 449, 479 (2007) (rejecting prophylaxis-upon-prophylaxis approach in First Amendment context).

Like the government in *Citizens Against Rent Control*, Washington requires donor disclosure. During the applicable 21-day period, aggregate contributions of $1,000 or more must be reported within 24 hours. RCW § 42.17.105(1). Thus, *every* contribution in excess of $5,000 will be reported within 24 hours. Once reported, information about contributions is available almost instantaneously on the Disclosure Commission's website. The answer to Washington's informational interest is timely and accurate disclosure—something already required by the statute—not a direct restriction on Family PAC's freedom of speech and association. *See Citizens United v. FEC*, 130 S. Ct. 892-917 (2010); *see also Doe v. Reed*, 130 S. Ct. 2811, 2813-14 (2010).

The $5,000 contribution limit is particularly egregious because it imposes a contribution limit, when none otherwise existed, 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."). It also imposes a contribution limit when political speech is most critical and effective. *Id.* ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held.").

The statute also has two glaring omissions that effectively destroy the credibility of the State's asserted interests. First, the statute exempts political parties from the $5,000 limit. RCW § 42.17.105(8). But if the State really believed the public must be informed of contributions in excess of $5,000, political parties would be subject to the same limit. This underinclusiveness makes belief that the State *really* is concerned about informing voters of contributions in excess of $5,000 "a challenge to the credulous." *See Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002).

Second, individuals are permitted to spend an unlimited amount of money in support or opposition to ballot measures at any time, including the 21 days preceding the election. Just as in *Citizens Against Rent Control*, the restriction applies only when individuals seek to associate to advance their cause. 454 U.S. at 296. And as the State explained in its application for a stay in the Ninth Circuit, 2010 is proving to be a record year for ballot measure spending. Thus, it is more important than ever for political committees to be allowed to accept contributions in excess of $5,000 if they are to have any meaningful opportunity to compete in the political marketplace of ideas.

Therefore, the Ninth Circuit abused its discretion in granting the stay by failing to follow this Court's decision in *Citizens Against Rent Control*, which held that all ballot measure contribution limits are unconstitutional. And if the Ninth Circuit remains interested in resolving whether the statute is unconstitutional because it

fails strict scrutiny, or instead exacting scrutiny, it should not do so at the expense of Family PAC's First Amendment rights.

II. The Ninth Circuit Stay Irreparably and Substantially Injures Plaintiffs and Other Parties Interested in the Proceeding.

"The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury . . . ." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As the Supreme Court's action in other First Amendment cases demonstrates, states should not be able to use the length of litigation as an excuse to continue an unconstitutional election scheme. *McComish v. Bennett*, 130 S. Ct. 3408 (2010). The $5,000 contribution limit violates Family PAC's First Amendment rights and causes the loss of their First Amendment rights. Thus, unless the Ninth Circuit's stay is lifted, Family PAC will suffer continuing irreparable injury to its First Amendment rights. For this reason, a stay of the Ninth Circuit's stay is necessary and appropriate.

III. The Balance of Hardships and the Public Interest Favor a Stay to Reinstate the District Court's Judgment.

As set forth above, the loss of First Amendment rights is an irreparable injury; Family PAC's harm thus outweighs any potential non-irreparable injury suffered by the State. *See Elrod*, 427 U.S. at 373. Although a stay would allow Family PAC to raise more money, it would also allow all other ballot measure campaigns to raise more money. And it would allow the citizens of Washington to participate more fully in, and be more fully informed about, the upcoming election. *See, e.g.*, *Bellotti*, 435 U.S. at 792 n.29 (1978) (stating that "far from inviting greater restriction of speech,

the direct participation of the people in a referendum, if anything, increases the need for the widest possible dissemination of information from diverse and antagonistic sources"); *Citizens United*, 130 S. Ct. at 911 ("[I]t is our law and our tradition that more speech, not less, is the governing rule.").

If it is likely that a challenged law violates First Amendment rights of expressive association, then the stay analysis is over, except for formally recognizing that loss of First Amendment rights is irreparable harm, that balancing harms favors constitutional rights, and that the public interest always favors protecting the "supreme Law of the Land." U.S. Const. art VI.[10] If the First

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[10] *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) ("There appears to be no dispute over the appellants' entitlement to relief under the other criteria if their First Amendment rights were violated.") (*citing Elrod*, 427 U.S. at 369-73); *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2010) (finding that the likely success prong is "most important . . . and often determinative in First Amendment cases"); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (likely merits success in First Amendment case established irreparable harm and favorable equities balance and public interest); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary."). As put recently by a federal court in a First Amendment preliminary-injunction decision:

> The violation of an individual's constitutional guarantees is intolerable and undoubtably causes irreparable injury. The Supreme Court has recognized that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 372; *see also Newson v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). If [the challenged provision] does in fact violate Plaintiffs' constitutional freedom of association or speech, allowing its continued operation would cause Plaintiffs irreparable harm.

Foster v. Dilger, slip op. at 4-5, No. 3:10-cv-00041-DCR (E.D. Ky. Sept. 9, 2010) (memorandum and order granting preliminary injunction). Regarding balance of

Amendment prescribes liberty, the government may not be heard to argue that it has an enforcement interest, that duly-enacted laws must be presumed constitutional, that there will be a "wild west" scenario shortly before an election, that the status quo must be preserved, or the like. Such interests asserted for balancing harms or determining public interest are not cognizable if they were inadequate to defeat a determination of success on the merits. The First Amendment trumps all such interests.

The Supreme Court has recognized that challenges to campaign-finance laws would, by their nature, be brought near elections. As *Citizens United* put it:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on . . . .

130 S. Ct. at 895.

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harms: "The harm and difficulty of changing a regulation cannot be said to outweigh the violation of constitutional rights it perpetuates. It would be far worse that an election continue under an unconstitutional regime than the Registry experience difficulty of expense in altering that regime." *Id.* at 14. And regarding public interest: "'It is in the public interest not to perpetuate the unconstitutional application of a statute.'" *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982); *see also G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1999) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). *Foster*, slip op. at 14, No. 3:10-cb-00041-DCR (E.D. Ky. Sept. 9, 2010).

These principles answer common arguments made, and interests asserted, by government entities in the context of permanent injunctions sought in First Amendment free speech and association cases brought near elections. For example, the fact that a challenge is brought near an election has no bearing on whether the challenged provision is unconstitutional and, therefore, no bearing on whether a stay should issue. Bringing a challenge near an election may not be held against a plaintiff because that is naturally when such challenges arise. Indeed here, Family PAC has been criticized both for bringing its challenge too late (in the District Court's denial of TRO) *and* too early (in Ninth Circuit's stay order). Every effort should be made to quickly resolve suits without burdensome litigation in a way that promotes robust public debate on issues of the day. *WRTL-II*, 551 U.S. at 469.

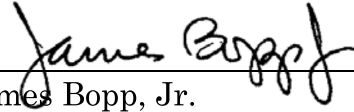
In this case particularly, risk of upsetting election campaigns cannot be a basis for granting a stay of the District Court's order. The District Court rendered its decision well in advance of the 21-day window. All campaigns had adequate notice that the $5,000 contribution limit would not apply and could adjust their campaign strategies appropriately.

Conclusion

For the foregoing reasons, Family PAC requests that its application for a stay of the Ninth Circuit's stay of the District Court's judgment be granted.

October 7, 2010

Respectfully Submitted,



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Certificate of Service

I, James Bopp, Jr., a member of the bar of this Court, certify that on October 7, 2010, I served a copy of the **Application of Family PAC to Stay the Ninth Circuit's Stay of the District Court's Judgment** and **Appendix** with the following individuals at the addresses listed below by placing a true and correct copy for delivery by Federal Express, and served a courtesy copy of the same via email on the following persons:

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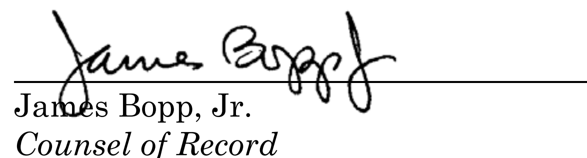

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