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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 FAMILY PAC,)
5 Plaintiff,) Docket No. C09-5662RBL
6 vs.) Tacoma, Washington
7 SAM REED, et al.,)
8 Defendant.) September 1, 2010
9

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

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

5 MR. LARUE: Thank you, Your Honor.

6 The Court is aware of the two provisions that are being
7 challenged. For simplicity's sake, I am going to call one the
8 \$5,000 limit, and I am going to call the other the disclosure
9 thresholds.

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

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

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

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1 WEDNESDAY, SEPTEMBER 1, 2010 - 10:00 A.M.
2 * * *
3 THE COURT: Please be seated. Good morning.
4 THE CLERK: This is in Cause No. C09-5662RBL, in the
5 matter of Family PAC versus Reed, et al.
6 Counsel, please make their appearances.
7 MR. LARUE: Joe LaRue for the plaintiff, Your Honor.
8 THE COURT: Good morning.
9 MS. KRIER: Nancy Krier for the State defendants.
10 MS. DALTON: Linda Dalton for the State defendants.
11 THE COURT: Good morning.
12 All right, this matter comes before the Court on a motion
13 for summary judgment by the plaintiff. I have reviewed the
14 memoranda in favor of the motion and the memoranda in
15 opposition. I have read a lot of cases spanning the last 20
16 years on the constitutionality of campaign finance laws and
17 the like. So I think we are ready to go.
18 Mr. LaRue, I will hear from you first.
19 MR. LARUE: Thank you, Your Honor.
20 May it please the Court. I would like to reserve
21 ten minutes of my time for rebuttal.
22 THE COURT: I am not keeping time. My aspiration, as
23 Ms. Dalton knows, is that no one leaves here while they still
24 have something to say. The Chief Justice from Georgia -- not
25 state but country -- Supreme Court is in Seattle, and I have

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1 limit does in fact serve a State interest.
2 The State first calls the limit a timing mechanism
3 designed to enable earlier disclosure. The State explains
4 that the State's voting mechanism requires ballots to be
5 mailed out to the public at a certain date, and the State
6 desires to cut off large contributions to ballot measure
7 committees after that date so that there's adequate disclosure
8 to the public of who the large contributors are.
9 In response to that, Your Honor, I would just offer a
10 couple of real quick points.
11 *Buckley*, on page 18, the seminal case, says that time,
12 place, and manner restrictions are not permitted for
13 contribution limits or for expenditure limits. Time, place,
14 and manner type analysis just simply doesn't apply.
15 So to the extent that the State suggests that this is
16 merely a timing mechanism to regulate the time when speech can
17 occur, that analysis has no place within the analysis that the
18 Court should perform.
19 Second, I would say that the State has adequate disclosure
20 mechanisms to meet its informational interests without this
21 \$5,000 limit.
22 Any contribution of any more than \$1,000, which is
23 obviously below the \$5,000 limit -- any contributions of more
24 than \$1,000 must be reported within 48 hours during the final
25 21 days before the election. And then if the same contributor

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1 makes another contribution, that contribution has to be
 2 reported within 24 hours. Yes, Your Honor --
 3 THE COURT: I am sorry, I was anticipating --
 4 MR. LARUE: I was anticipating your question.
 5 So the *Citizens Against Rent Control* concurrence,
 6 Justices -- I believe it was Justices Blackman and O'Connor --
 7 they said this, and it's equally true in this case -- and this
 8 is on page 441 of *Citizens Against Rent Control*: "There is no
 9 need for a ceiling on contributions to encourage disclosure so
 10 long as the government enforces its already stringent
 11 disclosure laws."

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

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

25 THE COURT: So is your challenge to the statute in

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1 question a facial challenge or an as-applied?

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

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

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

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

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

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

25 MR. LARUE: Depending on what you mean by the

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1 integrity of the election process.

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

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

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

12 THE COURT: Right.

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

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

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

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

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

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

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

25 But still, the disclosure regulation must satisfy

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1 scrutiny. It is not true to say that disclosure is always
 2 okay, but rather disclosure that satisfies the applicable
 3 level of scrutiny is a good constitutional alternative.
 4 THE COURT: Okay.
 5 MR. LARUE: So let me address the disclosure
 6 threshold, Your Honor. There's a lot in our briefing about
 7 the \$5,000 limit. I think the disclosure thresholds really,
 8 though, are where I ought to focus my time this morning.
 9 THE COURT: That's where you have the -- you have the
 10 wind in your face on the disclosure. I think the State -- and
 11 I will tell them now -- I think with regard to the \$5,000,
 12 21-day ban, I think the wind -- the prevailing winds are in
 13 the face of the State in the aftermath of *Citizens United*, in
 14 particular.
 15 But it seems to me that even low dollar disclosure
 16 thresholds have a palliative purpose, because in the aggregate
 17 those contributions can make a profound difference in an
 18 election; and if they are being orchestrated by some group, it
 19 seems to me that the State has an interest in making sure that
 20 voters know that, that they can follow the money.
 21 MR. LARUE: Your Honor, we actually agree with what
 22 you just said. The only question that we raise with the Court
 23 is whether the thresholds that have been set by the State in
 24 this instance survive exacting scrutiny.
 25 In order to look at that -- as I said in our briefing we

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1 argue strict scrutiny is the applicable level. The State
 2 argues exacting. We believe that even under exacting, these
 3 thresholds fail, and I will explain why.
 4 Exacting scrutiny requires -- and this is *Citizens United*,
 5 914 -- it requires a substantial relation between the
 6 disclosure requirement and a sufficiently important interest.
 7 So in order to test these thresholds against exacting
 8 scrutiny, we need to identify what the State's interest is,
 9 and then see how the limits match up.
 10 THE COURT: Isn't the interest just informational
 11 interest?
 12 MR. LARUE: Actually, Your Honor, the State has
 13 articulated two interests: The informational interest, which
 14 in the Ninth Circuit is follow the money. That's *Canyon Ferry*
 15 and both the *California Pro-Life Council* cases. But the State
 16 also -- in its rationale for these campaign finance laws, the
 17 State says that it wants to encourage small contributions by
 18 small donors. And so that is an interest that it's advanced
 19 to sustain the laws that it develops, and we ought to measure
 20 the laws against that interest as well.
 21 If the Court would like a cite, that's RCW 42 --
 22 THE COURT: I am familiar with the statute.
 23 MR. LARUE: Okay.
 24 THE COURT: But it seems to me -- I will let the
 25 State speak for itself, but with regard to this particular

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1 government interest, it seems to me that it's informational,
 2 follow the money, let people know, push the big money out
 3 first, is on the 21-day, \$5,000. With regard to these lower
 4 thresholds, the \$25 and the \$100 threshold, it seems to me
 5 that the interest is in allowing the voting public to know who
 6 it is that's investing in the effort to solicit their vote.
 7 MR. LARUE: Your Honor, I agree, that is certainly
 8 one of the State's interests. I am simply suggesting that
 9 there's another encapsulated in the law, and I will discuss
 10 both of them, if that's all right.
 11 THE COURT: I am just not sure one undermines the
 12 other.
 13 MR. LARUE: No, Your Honor, I don't believe so,
 14 either, and I am not suggesting that. I am simply saying that
 15 we can look at these thresholds against both those interests,
 16 and we can see whether we can evaluate whether there's this
 17 substantial relation that needs to be there.
 18 In other words, the question, I think, is -- and I think
 19 this is the way the Supreme Court has articulated it: Does
 20 the law further the interest, and is it related such that it's
 21 what it needs to be to further the interest?
 22 With regard to the interest and encouraging small donors,
 23 we suggest that it doesn't further that interest at all; it
 24 actually discourages it.
 25 We cite in our briefing a study that was done. The State

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1 calls that study -- the credibility of that study into
 2 question but it is, to our knowledge, the only academic study
 3 that's been done on the question. And that study suggests
 4 that in states like Washington, and including Washington,
 5 where popular referendums are frequently on the ballot,
 6 there's only a small percentage of people that would be happy
 7 with third-person information being disclosed.
 8 They seem to want it for others, but then when the
 9 question becomes "is it okay if we disclose your information,"
 10 people say "I'm not so sure about that."
 11 A large percentage -- it's in our briefing -- indicate
 12 they would be hesitant to make a contribution to a ballot
 13 measure committee if they knew their personal information or
 14 their employer's information was going to be disclosed.
 15 We believe that the threshold -- I am sorry, the
 16 contributions that encourage -- the disclosure of which
 17 encourage small donors, are the big contributions, because the
 18 reason small donors get discouraged in the political process
 19 is they feel that they are up against big money and they can't
 20 possibly contribute with their \$30 donation.
 21 And so when big money is disclosed, and when everybody
 22 knows that big oil is trying to buy themselves a referendum,
 23 then the small donor is more likely to contribute because he
 24 wants, or she wants, to further the cause against big oil, if
 25 that's their position, and they feel that they have a fighting

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1 shot because the information is out there.

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

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

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

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

12 THE COURT: Justice Alito probably would, too.

13 MR. LARUE: I believe so.

14 THE COURT: You are up to two.

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

17 THE COURT: I know.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 sponsorship fades into support and then into mere sympathy."

2 While it is true -- Your Honor raised the question about

3 contributors from Mississippi, and it is true, perhaps, that

4 is something that this state would have an interest in

5 knowing. The question still becomes: Is this law -- is there

6 a substantial relation to this interest such that it's really

7 furthering the interest in a constitutionally permissible way?

8 And the Ninth Circuit has cautioned that when the

9 thresholds approach zero and approach de minimis, then the

10 Court has to be particularly careful about giving the State

11 the benefit of the doubt.

12 We believe, Your Honor, that the contributions that people

13 really care about are the big contributions, and we believe

14 that by requiring small donor disclosure, the State actually

15 works against the informational interest, because instead of

16 having on its website a small number of items that people can

17 easily see, there becomes these huge lists of contributors,

18 and we suggest few people take the time and wade through it.

19 THE COURT: No, but those with a peculiar interest

20 do, and they then gather the information, organize it and

21 disseminate it to the voters who get it in; clearly, most

22 voters probably get their information in sound bytes and

23 headlines and conversation.

24 Very few people go to the website, I'm sure, in relation

25 to the broader number of folks who vote in a particular

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1 election, but the information is made available if in fact you

2 have a situation where it's out-of-state money that's

3 attempting to sway public opinion and so forth. Those are the

4 kinds of things that voters want to know.

5 MR. LARUE: Your Honor, we agree with Judge Noonan

6 that very few people say so-and-so gave \$76 to this campaign,

7 so I must be against it. We simply -- we believe that the \$25

8 limit or threshold, rather, is too low.

9 Let me say a word about the \$100 threshold, and I will be

10 done until rebuttal, if that's okay.

11 We suggest that with regard to employment information, in

12 order to pass exacting scrutiny, whatever disclosure threshold

13 is put in place, whatever the State does, there has to be a

14 substantial relation to this informational interest.

15 We suggest that the way the State set this up, the way the

16 law currently is, that interest, that relationship is not

17 there, for this reason: Your Honor, I work for a firm called

18 Bopp, Coleson & Bostrom, and if I were to give a contribution

19 of \$101, I would report that and I'd report my firm's address.

20 Bopp, Coleson & Bostrom does sound like a law firm, and so

21 someone looking might assume it's a law firm. But it could

22 just as easily be a company making storm windows.

23 The fact that a particular name is there doesn't really

24 tell us that much, and so a person who's looking to see, are

25 all the lawyers supporting this, or do people who work for --

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1 in the gaming industry, support it?

2 If they don't already know what all the lawyer companies

3 are, or all the gaming casinos in the country -- if they don't

4 already know that, this information people are being forced to

5 disclose won't further this information.

6 THE COURT: Doesn't that miss the point? Whether or

7 not the information made available is understandable, or is as

8 revealing as one would hope, doesn't decide the issue of

9 whether making the information available is violative of free

10 speech.

11 MR. LARUE: Your Honor, we believe actually it does,

12 and we believe that for this reason: The only informational

13 interest that can uphold these types of burdens on speech is

14 the follow-the-money interest.

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

16 MR. LARUE: Yes, Your Honor.

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

18 it?

19 MR. LARUE: Well, that would be readily known through

20 the \$25 contribution disclosure, but it's not --

21 THE COURT: And your employer's from Indiana, one

22 would assume; in today's information age I can't believe that

23 somebody couldn't Google your firm and find out page after

24 page after page after page of references about what you do and

25 who you are.

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1 MR. LARUE: Your Honor, we suggest that if the State

2 really wants the information that it claims it does, the State

3 needs to -- in addition to requiring the employer address and

4 company name, needs to require what the industry is, because

5 the State has articulated --

6 THE COURT: You think it's underinclusive?

7 MR. LARUE: Yes, Your Honor, that's correct. The

8 State has articulated in its briefing that what it's concerned

9 about is knowing whether a particular industry is trying to

10 marshal money to support these ballot measures by having their

11 employees give.

12 I assume the State means they are concerned about big-type

13 industries that typically are in the news for these types of

14 things. But, again, we suggest that because the law doesn't

15 actually ask the question that the State says it wants to

16 know, it's underinclusive to the interest, it can't satisfy

17 exacting scrutiny, and it ought to be declared

18 unconstitutional.

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

20 may.

21 THE COURT: All right.

22 MR. LARUE: Thank you, sir.

23 THE COURT: Ms. Krier, I guess what I want you to

24 focus on is really the 21-day, \$5,000 regulation.

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

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1 statute and the regulation -- meet the exacting scrutiny test.
 2 I am not convinced -- in fact, I am more convinced the
 3 other way with regard to your 21-day, in today's modern age.
 4 So go ahead with that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24

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

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

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

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

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

25

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

8 MS. KRIER: A couple responses, Your Honor.
9 First of all, because the ballots are mailed, someone,
10 yes, could choose to be diligent and vote the minute their
11 ballot comes in the mail, and others wait and then do the rush
12 to the Post Office on the last day.

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

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

26

1 vote, knowing they are not fully informed.

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

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

8 MS. KRIER: Not in Washington, Your Honor, not under
9 42.17.

10 THE COURT: I am not worried about anybody else.

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

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

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

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

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

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

8 I recognize that the form of speech is different, but they
9 were both -- they said you can make your movie, you can do
10 whatever you want, it just has to fall outside the 30- or
11 60-day limitation -- time limitation.

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

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

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

21 THE COURT: Sure you do.

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

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

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

7 I am not saying what the appropriate time period, short of
8 21 days, the ban -- and it is a ban; you cannot make a
9 contribution. You cannot make a contribution to a referendum
10 or initiative within 21 days if that contribution is over
11 \$5,000.

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

14 THE COURT: I understand.

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

18 THE COURT: Why?

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

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

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1 'exacting scrutiny.'" This does impose a ceiling. This says
2 \$5,000 -- you cannot give \$5,000 to a referendum within
3 21 days of the election.

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

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

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

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

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

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

25 THE COURT: They could make the movie before that.

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

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

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

11 As of today, for 2009, there was \$7 million raised and
12 \$6.9 million spent.

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

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

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

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

5 MS. KRIER: But if we can talk about what the
6 plaintiffs have articulated and what is actually in the
7 record, there is a chilling effect. That is not what the data
8 shows. Millions of dollars are pouring in. They poured in
9 2009 when 105(8) was in effect. They are pouring in now. So
10 to suggest --

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

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

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

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

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

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

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

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

13 MS. KRIER: I understand your inquiry, but I would
14 suggest to you that contribution limits have been upheld for
15 40 years, beginning with the federal elections communications
16 decision of *Buckley v. Valeo*.

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

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

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

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1 got to contrast that?

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

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

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

17 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 THE COURT: I understand.

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

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

20 I believe this Court has correctly recognized that this
21 does function as a ban, and that brings us to an interesting
22 question, Your Honor; and frankly, I don't know the answer.
23 But I am going to frame the question for the Court to decide.
24 *Citizens United*, at page 898, said that bans on speech are
25 subject to strict scrutiny.

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1 THE COURT: Right.

2 MR. LARUE: Now, counsel for the State is correct.

3 Up until this time, the Supreme Court has evaluated
4 contribution limits under a lesser form of scrutiny, sometimes
5 referred to as intermediate, sometimes referred to as closely
6 drawn, but *Nixon* and *McConnell* both applied this lesser level
7 of scrutiny.

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

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

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

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1 it under new grounds.

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

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

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

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

19 Thank you, Your Honor.

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

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

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

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1 strict scrutiny for contribution limits in ballot measure
2 campaigns.

3 THE COURT: What year was that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 themselves.

2 THE COURT: Admittedly, it was more a direct speech,

3 because it was a movie that they had produced, and it was

4 ready to go out for Pay Per View and so forth. It's a direct

5 speech, as opposed to contributions leading to expenditures

6 which result in a direct speech; but I think that's a

7 "difference without meaning" contribution. And I understand

8 there's a difference in the court case law about expenditures

9 and contributions, and that they look more warily at limits on

10 expenditures than they do on limitations on contributions.

11 But again, my view -- and I am going to apply strict

12 scrutiny as to the third provision, the \$5,000, 21-day

13 period -- that there is a compelling state interest, but it is

14 not narrowly tailored in this modern era when dissemination of

15 information is so advanced and virtually instantaneous.

16 I am not going to -- and I am going to read an opinion

17 here.

18 MS. KRIER: Should I sit down?

19 THE COURT: I will finish my point. I will let you

20 sit down.

21 I am not going to proscribe what the appropriate period

22 is. It just seems clear to me that 21 days is way too long,

23 and the fact that you mail out ballots 18 days in advance,

24 does not provide what I refer to as a modern-day explanation

25 for what is really another purpose, and perhaps a legitimate

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1 purpose in 1972.

2 How long does it take us to really organize the

3 information so that we can get it meaningfully to the voters

4 before they all stand in line at the polls and vote on

5 election day? We don't do that too much any more.

6 MS. KRIER: If I may suggest, we did speak of this

7 earlier, but the 21-day provision has some counterparts, 42.17

8 and 42.17.080, where certain reports are due in 21 days, and

9 then 103(1), which is the independent expenditure report. So

10 it's not without its other counterparts in the same part of

11 the country.

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

13 All right, I have decided that in the interest of not

14 interfering unnecessarily with the current election cycle,

15 that I would make my decision here today, read a decision, and

16 the transcript will be the record.

17 There will be, of necessity, less -- it will be short on

18 inspiration and flowery language about democracy, the

19 republic, and the time-honored right that we have all come to

20 expect. Please know that they are in my heart, if not in my

21 words. But it will at least allow you to know what the

22 decision is, and you can make your decisions accordingly.

23 Family PAC challenges the constitutionality of three

24 provisions of Washington State's campaign finance laws and

25 rules as violating the First Amendment:

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1 1. RCW 42.17.090, requiring disclosure of names and

2 addresses of contributors giving more than \$25 to a campaign;

3 2. Washington Administrative Code 390-16-034, requiring

4 disclosure of individuals' occupations and names and addresses

5 of employers when they contribute more than \$100; and

6 3. RCW 42.17.105(8), providing a 21-day time period

7 before a general election, during which time no person may

8 make, and no candidate or political committee may accept, any

9 contribution in excess of \$5,000. That's subject to an

10 exception for a bona fide political party, and that issue is

11 not before the Court here.

12 The level of scrutiny to be applied:

13 Laws that burden political speech are subject to strict

14 scrutiny for a violation of the First Amendment, which level

15 of scrutiny requires the government to prove that the

16 restriction furthers a compelling interest and is narrowly

17 tailored to achieve that interest. *Citizens United v. Federal*

18 *Election Commission*, 130 S.Ct. 876, at 898, a 2010-case,

19 citing *Federal Election Commission v. Wisconsin Right to Life,*

20 *Inc.*, 551 U.S. 449, at 464, a 2007 case.

21 Disclaimer and disclosure requirements may burden the

22 ability to speak, but they "impose no ceiling on

23 campaign-related activities," and "do not prevent anyone from

24 speaking." The Court has subjected these requirements to

25 "exacting scrutiny" which requires a "substantial relation"

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1 between the disclosure requirement and a "sufficiently

2 important governmental interest." *Citizens United* at 914,

3 citing *Buckley v. Valeo*, 424 U.S. 1, at 64 and 66, a

4 1976-case, and *McConnell v. Federal Election Commission*, 540

5 U.S. 93, at 201, a 2003 case.

6 Plaintiff argues that exacting scrutiny and strict

7 scrutiny are the same standard when the burden of a statute on

8 First Amendment rights is high, citing *Davis v. Federal*

9 *Election Commission*, 128 S.Ct. 2759, at 2774-75, a 2008-case.

10 It argues that all three subject statutes and regulations

11 place a high burden on the exercise of First Amendment rights.

12 Defendants argue that the subject laws all relate to

13 run-of-the-mill disclosure requirements that should be subject

14 to the less onerous "exacting scrutiny" standard employed by

15 the Supreme Court in *Citizens United*, when dealing with the

16 disclosure and disclaimer requirements imposed by the

17 Bipartisan Campaign Reform Act of 2002.

18 The Court agrees that those disclosure requirements

19 triggered by contributions greater than \$25 and greater than

20 \$100 are evaluated by the less strenuous "exacting scrutiny"

21 standard most recently enunciated in *Citizens United*. The

22 burden on the ability to speak is modest, and they impose no

23 ceiling on campaign-related activities.

24 The Court sees the 21-day/\$5,000 contribution limit

25 differently than either of the parties. The provision

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

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

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

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

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1 the information that disclosure provides.

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

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

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

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

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

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

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

25 The right to receive information is an inherent corollary

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

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

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

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

15 Now, however, campaign contributions can be reported and
16 made publicly available within minutes, and certainly within
17 24 hours. Given that reality, a 21-day ban on large
18 contributions cannot be viewed as necessary or narrowly
19 tailored to effectuate the original purpose.

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

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

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

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

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

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

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

22 Any questions?

23 MR. LARUE: (Shakes head.)

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

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

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

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

16 I think you should be able to do that well before the
17 21-day period at issue here is arrived at.

18 Anything further?

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

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

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

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

6 Ms. Krier?

7 MS. KRIER: We can talk.

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

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

13 MS. KRIER: Has it? Thank you.

14 THE COURT: Okay, anything further?

15 Court will be in recess.

16 MR. LARUE: Thank you, Your Honor.

17 (Proceedings concluded.)

18 * * * * *

19 C E R T I F I C A T E

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

22 /s/ Teri Hendrix _____ September 1, 2010

23 Teri Hendrix, Court Reporter Date

24
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