NO. 10-A-357

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

RESPONSE TO 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 United States Supreme Court and
Circuit Justice for the Ninth Circuit

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The Washington State Attorney General, Robert M. McKenna, and the members of the Washington State Public Disclosure Commission ("State") file this response to the Application of Family PAC to Vacate the Ninth Circuit's Stay of the District Court Judgment ("Application"). They request the Application be denied. Family PAC fails to establish any of the required criteria that guide this Justice's decision in considering an application to vacate a circuit court's stay.

Family PAC brought the action in the District Court to challenge two state statutes and one state rule governing campaign finance in Washington State. Family PAC Appendix[1] at 1a. Family PAC asserted that the provisions violate the First Amendment of the United States Constitution. Following Family PAC's summary judgment motion, the District Court denied Family PAC relief on two of its claims, but granted relief on one claim. Specifically, the District Court ruled for Family PAC on its challenge to Wash. Rev. Code § 42.17.105(8). Among other things, the statute provides that in the 21 days prior to the general election, contributions to ballot measure committees may not exceed $5,000, a period that begins this year on October 12, 2010.

The State immediately sought a stay of the District Court's ruling to avoid irreparable disruption to the November 2010 general election. The

[1] Hereafter, the appendices shall be referred to as follows: Family PAC appendices as "FP App." and the State appendices as "App."

District Court denied the stay, but upon the State's subsequent emergency motion, the Circuit Court granted the stay by order dated October 5, 2010.

Family PAC does not meet the applicable standard for vacating the stay. First, it does not show that the Court would be likely to grant certiorari. Second, it fails to provide any factually supported evidence that it will be harmed as contrasted with the actual harm that would be suffered by voters in Washington in the absence of a stay. Because the balance of equities weighs heavily in favor of maintaining the stay, and thus, the stability of the 2010 general election, the State respectfully requests the application be denied.

STATEMENT

A. Washington's Campaign Finance Laws

Washington's campaign finance laws were originally enacted by the people through Initiative Measure No. 276 ("I-276"), approved November 7, 1972. 1973 Wash. Sess. Laws at 1-31. They are codified in Wash. Rev. Code § 42.17.

I-276 set in motion a culture of transparency in politics and government in Washington. The drafters of I-276 determined that, based upon a recent experience with a 1970 initiative, the public had a strong interest in "the disclosure of money raised and spent on legislative lobbying and ballot measure campaigns." Accordingly, section 1 of I-276 explained that "the public's right to know of the financing of political campaigns and lobbying and the financial

affairs of elected officials and candidates far outweighs any right that these matters remain secret and private." Wash. Rev. Code § 42.17.010(10). While the law has been modified by additions or amendments since its original enactment, including through another initiative in 1992 to add campaign finance provisions such as contribution limits, the Act's fundamental purpose has never been changed or modified.

The Act's purpose is implemented by the Washington State Public Disclosure Commission ("PDC"), a state agency created by I-276. The PDC's mission includes providing campaign, lobbying, and other information to the public in a timely and meaningful manner using modern Internet technology to enable the public to "follow the money."

As designed by I-276, Wash. Rev. Code § 42.17 is implemented and enforced by a five-member citizen commission, all of whom are Defendants in this action. Under Wash. Rev. Code § 42.17, those laws can also be enforced by the state Attorney General's Office, local prosecutors, or through a citizen's action filed in superior court.

B. Wash. Rev. Code § 42.17.105(8)

Family PAC challenged Wash. Rev. Code § 42.17.105(8), along with two other provisions not relevant to the Application. Wash. Rev. Code § 42.17.105(8) currently provides:

> It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person,

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

App. C, ¶ 5.

A purpose of Wash. Rev. Code § 42.17.105(8) is to "push the big money" out early to ensure more timely disclosure to voters. App. F, ¶ 59. This provision was originally adopted in 1985, amended over the years, and has been reviewed by several Washington State Legislatures. *Id.* In 2010, the Legislature again had the provision before it, and retained the language in Wash. Rev. Code § 42.17.105(8). The Legislature re-codified it into a new section of law effective January 1, 2012.[2]

Wash. Rev. Code § 42.17.105(8)'s disclosure provision gives voters timely access to information about contributors before they cast their ballots. App. F, ¶¶ 58-59. Because there are no limits on contributions to ballot measure committees, the timing period serves a useful function in disclosing to the voters those larger contributors on ballot measures at a time when they receive their ballots in the mail. App. F, ¶¶ 60, 63-65. Timing provisions, such as the one

[2] Washington Laws of 2010, Chapter 204, §§ 414, 604 (copy available at http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2016&year=2009).

contained in Wash. Rev. Code § 42.17.105(8), are an integral part of a campaign finance disclosure system. App. F, ¶ 62.

Wash. Rev. Code § 42.17.105(8) has been the law in Washington for 25 years and is a significant and well-known feature of the campaign finance system. App. G, ¶ 7. Significant notice of the timing provision in Wash. Rev. Code § 42.17.105(8) is provided to the public, contributors, and campaigns well in advance of an election. Key dates relevant for filers and contributors under Wash. Rev. Code § 42.17 are posted on the PDC website, including the date of the 21-day period under Wash. Rev. Code § 42.17.105(8). With respect to the 2010 general election, the 21-day period begins October 12, 2010. App. C, ¶ 13.

C. Campaigns and Voting in the November 2, 2010 General Election in Washington State

The elections in Washington State are in full swing. App. A, ¶ 14; App. C, ¶¶ 9-13. There are seven statewide ballot measures (including initiatives and referenda) on the November ballot this year, plus numerous local ballot measures. There are 62 (24 state, 38 local) ballot measure committees for 2010 that are engaged in filing reports for the voters to access. Other registered political committees that file as "other" (or "continuing") political committees could also be supporting or opposing ballot measures. There are 716 active political committees engaged in full reporting for 2010 that could also be contributing to ballot measure campaigns. App. C, ¶ 9.

The PDC publishes a calendar of reporting events that lead up to each general election, including this year's general election scheduled for November 2, 2010. For campaigns and political committees, including ballot measure committees, certain activities, such as filing disclosure reports, are required within certain time periods before the general election. One of those requirements is the 21-day provision in Wash. Rev. Code § 42.17.105(8). App. C, ¶ 13.

Similarly, the Washington State Secretary of State's Office ("SOS") has a calendar of dates for election events that occur prior to the general election. Those include, for example, the mailing dates of vote by mail ballots. Currently, 38 of Washington's 39 counties vote by mail, in addition to overseas and military voters. App. C, ¶ 13. The recent and upcoming dates from those two calendars for the PDC and the SOS include, for example:

- October 3 (SOS) – Overseas and military ballots mailing date for the November 2 general election (Pierce County plans to mail ballots earlier[3])
- **October 12 (PDC) – RCW 42.17.105(8)'s 21-day period begins**
- October 13 (SOS) – Ballots available for November 2 general election
- October 15 (SOS) – Ballots mailed for November 2 general election
- November 2 (SOS) – General election

App. C, ¶ 13.

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[3] Recent media reports indicated that Pierce County was working to mail military ballots by September 18, 2010. "Pierce County: We'll Meet Deadline for Military Voters," Tacoma News Tribune, August 31, 2010 (http://blog.thenewstribune.com/politics/2010/08/31/pierce-county-well-meet-deadline-for-military-voters).

D. Family PAC's Lack of Campaign Activity in Washington State

The record shows that Wash. Rev. Code § 42.17.105(8) did not impact Family PAC because it neither raised nor spent any campaign funds. App. A, ¶ 16; App. C, ¶ 20; App. F, ¶ 67; App. E, ¶¶ 18-19. In sharp contrast to the political committees participating in the 2010 election, Family PAC has not reported any funds raised or spent with respect to any election campaign in Washington State, including for or against any ballot measure in the 2010 general election. *Id.* It filed only one form with the PDC, namely, its political committee registration form, filed the same day this lawsuit was filed in the District Court in 2009. It provided no evidence in either the District Court or the Circuit Court stating it had actually been involved in any ballot measure campaign in either 2009 or 2010.

In its Application, Family PAC claims that it is now "interested" in one state ballot measure, Initiative 1098. Application at 2. However, as below, Family PAC offers nothing to support this assertion (and nothing in the record supports this assertion). It filed no such declaration in the District Court (App. H at page 35, line 24 through page 36, line 19), no such declaration in the Circuit Court (App. I), and again here, Family PAC provided no such declaration with its Application. Family PAC offers only speculation in place of

a showing that it is negatively affected by the Circuit Court's stay of the District Court's decision.[4]

In its Application, Family PAC asserts "[a]lthough a stay [of the Circuit Court Order] would allow Family PAC to raise more money, it would also allow other ballot measure campaigns to raise more money." Application at 15. First, Family PAC has not reported that it raised *any* money, much less demonstrated in the record a need to raise "more" money. Second, according to the PDC's website at www.pdc.wa.gov, as of October 7, 2010, $44.9 million in contributions have been raised to date to support or oppose ballot measures in Washington State, and $15.3 million has been reported spent to date. Wash. Rev. Code § 42.17.105(8) obviously presents no barrier to these fundraising efforts. *See also* App. A, ¶ 14. Furthermore, no other political entity, including any ballot

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[4] Moreover, according to the Secretary of State's website and staff, Initiative 1098 was filed on April 23, 2010, revised on May 18, 2010, was the subject of signature-gathering in the months after that, and was certified for the ballot on August 11, 2010. App. A, ¶ 9. As a new proposed income tax measure (Washington State does not currently have a personal income tax), Initiative 1098 has received high media attention. In fact, the proponents and opponents of this initiative have raised over $9,000,000 to date. App. A, ¶ 15.

Family PAC has been aware of Wash. Rev. Code § 42.17.105(8) since prior to filing this action in October 2009. Had Family PAC been contemplating participation in Initiative 1098, it had sufficient time and opportunity to document, for either the District Court or the Circuit Court, any planned activities including contributions to be solicited or received with respect to Initiative 1098 by the September 1, 2010 summary judgment hearing date, or the October 5, 2010 Circuit Court hearing on the emergency motion for stay when specifically questioned by the Circuit Court judges. Yet, it provided no such evidence and the State can find none. App. A, ¶¶ 8-12. Its unsupported speculations here provide no basis for lifting the Circuit Court's stay. *See, e.g.,* Application at 2 ("Family PAC is interested in Initiative 1098", Family PAC has "not yet decided" on what communications "they *may* want to do about it"); at 10 ("it cannot yet identify a donor that would like to contribute more than $5,000").

measure committees or individuals, came forward to join as a party or to provide amicus support to Family PAC in the District Court or the Circuit Court.

As to Family PAC's discussion of the 2009 election, PDC staff contacts with Family PAC's legal counsel in September 2009, the testimony of Mona Passignano (FP App. at 21a, ¶¶ 6-7), and the testimony of Anne Levinson (App. G, ¶¶ 13-14), demonstrate an awareness of Wash. Rev. Code § 42.17.105(8) by persons working, or in privity, with Family PAC regarding its possible efforts concerning 2009's Referendum 71.[5] Ms. Passignano testified that her organization wanted to give Family PAC more than $5,000 on October 12, 2009, but claims it could not because of Wash. Rev. Code § 42.17.105(8). FP App. at 21a-22a, ¶ 9. However, the 21-day period for 2009 did not begin until October 13 that year.[6] Even so, Ms. Passignano testified that her organization "was able to participate in the Referendum 71 campaign through other methods" despite Wash. Rev. Code § 42.17.105(8). FP App. at 22a, ¶ 12.

E. Proceedings in the District Court

On October 21, 2009, Family PAC filed this action in the District Court, seeking "pre-enforcement, facial and as applied" relief from three provisions, including Wash. Rev. Code § 42.17.105(8). FP App. at 2a. The first two

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[5] Referendum 71 was a ballot measure in Washington State in 2009. FP App. at 5a, ¶ 25.

[6] *See also* "2009 Key Reporting Dates for Committees" on PDC website at http://www.pdc.wa.gov/archive/pdf/2009/2009.krp.com.pdf.

provisions, not at issue in the pending Application, concern contributor disclosure information. The third provision contains the 21-day timing disclosure provision at issue here. Family PAC claimed the challenged provisions violated its rights under the First Amendment to the U.S. Constitution and asked the District Court to invalidate the provisions.

With the filing of its complaint, Family PAC sought a temporary restraining order and preliminary injunction. On October 27, 2009, the District Court denied Family PAC's request. Family PAC did not appeal or seek a stay.[7] The case proceeded in the District Court.

Summary judgment briefing ended in June 2010 and the District Court held a hearing on Family PAC's motion for summary judgment on September 1, 2010. The District Court denied Family PAC's summary judgment motion as it related to the contributor disclosure provisions, but granted its motion with respect to Wash. Rev. Code § 42.17.105(8)'s application as to ballot measures. Except for a one-page judgment (FP App. at 34a), the District Court did not enter a separate written opinion, but orally read its opinion from the bench and the transcript was later made available to the parties. FP App. at 24a-33a.

The District Court determined that, under its reading of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), it must apply strict

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[7] Family PAC attached a copy of the transcript of the October 27, 2009 temporary restraining order/preliminary injunction hearing. FP App. at 13a. Family PAC, however, never appealed that decision and it identifies no basis for this Court to have probable jurisdiction over that ruling of the District Court.

scrutiny to Wash. Rev. Code § 42.17.105(8). The District Court had been made aware that (1) tens of millions of dollars were being contributed to ballot measure campaigns in Washington State in 2010; (2) there was nothing in the record to show that Wash. Rev. Code § 42.17.105(8) had presented any barriers to that immense fundraising; (3) Wash. Rev. Code § 42.17.105(8) was a timing provision; and (4) that there were no contribution limits on ballot measure campaigns. Nevertheless, the District Court described the 21-day timing period of the statute as a contributions "ban." Therefore, applying strict scrutiny, the District Court held that although the State had established a compelling informational interest in the statute, the 21-day period was not narrowly tailored.

Immediately following its oral ruling, the State asked the District Court to stay its decision given that the 2010 election campaigns were fully engaged and voting in the November 2 general election was poised to begin, and in light of the State's vote-by-mail procedures. FP App. at 31a-32a. The request was orally denied by the District Court.[8] FP App. at 32a.

Following the District Court decision, PDC staff began receiving questions about the decision's effect, including on existing committees, from campaign committees, attorneys, the media and others. App. C, ¶ 17; App. D, ¶¶ 5-9. Campaigns commonly put plans into place well before an election as to

[8] Family PAC provided an excerpt of the transcript at FP App. at 24a.

when and how funds will be raised and spent, and the District Court decision caused confusion and uncertainty about the application of Wash. Rev. Code § 42.17.105(8) to the 2010 general election. App. C, ¶ 16.

F. Proceedings in the Court of Appeals

On September 15, 2010, the Commission unanimously joined with the Attorney General in deciding to seek an appeal of the District Court decision with respect to Wash. Rev. Code § 42.17.105(8) and to request an emergency stay of that decision. App. E. The appeal was filed on September 16, 2010 with the Ninth Circuit Court of Appeals and the State's Emergency Motion for Stay was filed on September 20, 2010.[9]

In its stay motion, the State documented the disruption and confusion caused by the District Court's decision to the campaigns already underway; the significant impact of the District Court's decision on pending campaigns and the upcoming 2010 general election; and the complete lack of impact on Family PAC given its non-activity in state campaigns including for the 2010 election. *See* App. C, D, E. The State briefed that it met all the criteria for an emergency motion for a stay, including showing that it was likely to succeed on the merits because the District Court had significantly misread *Citizens United* and Wash. Rev. Code § 42.17.105(8) was a timing provision, not a ban.

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[9] Counsel for Family PAC was notified of the appeal decision and the decision to seek an emergency stay before the appeal and the motion were filed. The motion was filed three working days later. App. E.

The Circuit Court provided Family PAC a week to file its opposition. In that opposition, Family PAC failed to show how it would be adversely impacted by the entry of a stay. The State filed a reply. On October 5, 2010, a three-judge panel of the Circuit Court considered the parties' oral argument on the State's motion and unanimously granted an emergency stay later that same day. FP App. at 35a. The Circuit Court found that "Washington and its voters have a significant interest in preventing the State's longstanding campaign finance laws from being upended by the court so soon before the upcoming election." FP App. at 38a.[10] PDC staff immediately notified Washington State political committees and the media that the stay had been entered. App. B. This was done to address the confusion and questions that resulted from the District Court's judgment, and to return stability to the system.

On October 7, 2010, Family PAC filed an "Emergency Motion to Panel for Reconsideration," in effect seeking a "stay of the stay" while it sought to vacate the Circuit Court's stay through the Circuit Judge for the Ninth Circuit Court of Appeals. The Court of Appeals denied Family PAC's emergency motion that

[10] Indeed, by statute, the Commission is prohibited from enacting new campaign finance rules between July 1 and the day following the general election each year. Wash. Rev. Code § 42.17.370(1). The reason for this is to avoid the disruption that changing the rules of the road during an election season will cause for campaigns, contributors, the voters, and others who participate in the state's political process. The Circuit Court stay serves the same important public purpose.

same day, October 7. FP App. at 35a-38a.[11] Family PAC then filed its Application to vacate the Circuit Court's stay of the District Court's Judgment with Justice Kennedy.

REASONS FOR DENYING THE APPLICATION TO VACATE THE CIRCUIT COURT'S STAY

A. The Principles That Guide The Court's Consideration Of The Application Weigh In Favor Of Upholding The Stay

The "well-established" principles that guide a Circuit Justice or the Court in considering an application to stay a judgment apply when considering an application to vacate a stay. *Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers). The burden, therefore, is on Family PAC to establish (1) a reasonable probability that four members of the Court would grant certiorari; (2) a significant possibility that a majority of the Court will agree with the District Court's decision; and (3) in balancing the equities, a likelihood that irreparable harm will result to Family PAC if the stay is not lifted. *Id.*

"Respect for the judgment of the Court of Appeals dictates that the [Court's] power to dissolve its stay, entered prior to adjudication on the merits, be exercised with restraint." *Certain Named and Unnamed Non-Citizen*

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[11] On October 1, 2010, Family PAC filed a cross-appeal of those portions of the District Court judgment denying its other claims. Dkt. Entry 1-4. The Circuit Court issued a briefing schedule on that same date. The State Appellants' opening brief is due on December 27, 2010. Family PAC, however, does not base its Application on the issues presented by its cross-appeal.

Children, 448 U.S. at 1330. This is particularly true when the Court of Appeals has not yet ruled on the merits of the controversy, *id.*, and the panel below "carefully considered the issues presented and unanimously concluded that a stay was appropriate." *Holtzman v. Schlesinger,* 414 U.S. 1304, 1314 (1973) (Marshall, J., in chambers). "[T]he vacation of an interim order invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket." *Certain Named and Unnamed Non-Citizen Children*, 448 U.S. at 1330-31. Finally, all of these principles are particularly weighty when, as here, the decision affects the integrity of a State's election system just weeks before an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

As Family PAC fails to establish any of the criteria for vacating the Circuit Court's stay, its application should be denied.

B. Family PAC Does Not Demonstrate Why Four Justices Would Vote To Grant Certiorari

Family PAC makes only a passing reference to whether there is a reasonable probability that the Court would grant certiorari on the merits of this case. Application at 3. Instead, Family PAC spends much of its argument disagreeing with the Circuit Court's approach in granting the stay. Application at 8-11. Family PAC's disagreement with the Circuit Court's analysis is not a sufficient basis for vacating the stay. "Unless there is a reasonable probability that the case will eventually come before this Court for plenary consideration, a Circuit Justice's interference with an interim order of a court of appeals cannot

be justified simply because he disagrees with the harm a party may suffer." *Certain Named and Unnamed Non-Citizen Children*, 448 U.S. at 1330-31.

Family PAC does not show a reasonable probability at this stage in the proceedings that the matter will come before this Court. Supreme Court Rule 10 explains that "[a] writ of certiorari will be granted only for compelling reasons." Generally, the Court considers (1) whether there are existing, conflicting appellate decisions on the same important matter that must be resolved by the Court; (2) whether the decision implicates an important question of federal law that has not, but should be, settled by the Court; or (3) there exists such a departure from accepted judicial proceedings that the Court should exercise its supervisory matter. Sup. Ct. R. 10 (a), (b), (c). Until the Circuit Court has had an opportunity to rule on the merits of the parties' controversy, there is no reason to believe that the Court is likely to grant a petition for certiorari in this matter. As a result, this case is starkly different from cases where the Court vacated a stay. For example, the issues raised in *Certain Named and Unnamed Non-Citizen Children* presented an "exceptional case where it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction." *Id.* at 1331.

> The District Court's holding that the Equal Protection Clause applied to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem: the number of unlawful aliens residing in our country has

> risen dramatically. In more immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the Equal Protection Clause to unlawful aliens appears likely to remain.

Id.

In contrast, this case involves the District Court's reading of Wash. Rev. Code § 42.17.105(8) as a contribution ban, as opposed to a timing provision. It also involves the District Court's application of strict scrutiny to Wash. Rev. Code § 42.17.105(8), which the State contends is the incorrect legal standard. While these issues are important to the parties, they are not the exceptional type of issues where, before a ruling by the Court of Appeals, there is a probability that the Court will grant certiorari. This is especially true because, as explained in detail below, Family PAC's reading of *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (*CARC*) and *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), is in error. *See infra* at 17-20.

C. Family PAC Does Not Demonstrate That A Majority Of This Court Would Ultimately Agree With The District Circuit's Judgment

Family PAC fails to demonstrate that this Court would ultimately uphold the District Court's conclusion that Wash. Rev. Code § 42.17.105(8) is subject to strict scrutiny. In support of its argument, Family PAC asserts that *Citizens Against Rent Control v. Berkeley*, *supra*, (*CARC*), controls and stands for the proposition that all contribution regulations on ballot-measure campaigns are

unconstitutional. Application at 11. It, therefore, argues that no amount of scrutiny would save the statute. Application at 12. This reading of *CARC* overstates that case and overlooks significant distinctions presented by the Washington statute.[12]

First, unlike the ordinance reviewed in *CARC*, Wash. Rev. Code § 42.17.105(8) does not act as a ceiling on ballot measure contributions because, before the 21-day period occurs, ballot-measure committees are free to accept *unlimited* amounts of contributions from any source. And, during the 21-day period, committees are free to spend that money without restriction. Wash. Rev. Code § 42.17.105(8) does not, as Family PAC asserts, act as a "direct restraint" on any ballot campaign's freedom of association or ability to spend unlimited amounts of money prior to and after the 21-day period. Application at 13-14. Instead, the statute serves as a timing mechanism for disclosing contributions and ensures that voters have access to maximum information at the time they begin voting.

Second, Family PAC fails to demonstrate that the District Court's reading and application of this Court's decision in *Citizens United* was proper. As stated above, Wash. Rev. Code § 42.17.105(8) involves the timing of disclosures of contributions prior to the general election; it is not a ban on

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[12] Family PAC inaccurately asserts the State did not address *CARC* during the stay motion in the Circuit Court. Application at 12. The State has consistently held that *CARC* does not apply and did brief *CARC* in its reply to Family PAC's opposition to the stay.

contributions. As a result, and contrary to Family PAC's arguments below, the District Court should have applied "exacting" scrutiny in its review, not "strict" scrutiny. If it had done so, Family PAC's challenge would have failed. Therefore, even if the Court were to accept that the District Court's determination that the statute was really a contribution limit, the District Court still erred in its application of this Court's decision in *Citizens United.* Exacting scrutiny applies to a review of a contribution limit.

In *Citizens United*, this Court held that disclosure requirements are subject to "exacting scrutiny which requires a substantial relation between the disclosure requirement and a sufficiently important government interest." *Citizens United*, 130 S. Ct. at 914. The State is unaware of any court that has read *Citizens United* to apply strict scrutiny to contributions. As was pointed out to the District Court, *Citizens United* overruled no U.S. Supreme Court precedent upholding contribution limits and establishing the standard of review for such provisions. Unlike the ban on corporations and unions using general treasury funds for independent expenditures in federal candidate election campaigns – the issue in *Citizens United* – Wash. Rev. Code § 42.17.105(8) is not such a ban, and it is certainly not a ban on ballot measure contributions. It is merely a requirement that the majority of funding for campaigns be made 21 days before an election. This significant misreading of *Citizens United* by the District Court warrants a stay.

Third, Family PAC argues that Wash. Rev. Code § 42.17.105(1) sufficiently addresses the State's informational interests, without the need for Wash. Rev. Code § 42.17.105(8).[13] Application at 13. The argument does not address the State's interest in disclosure, which is served by ensuring that as much information as possible is available to voters *when* they cast their ballots in the general election, especially in light of the fact that the vast majority of Washington voters vote by mail.

The State demonstrated below that its issues were serious, and it raised a sufficient likelihood of success on the merits to warrant a stay. In contrast, Family PAC's Application fails to establish that a majority of the Court would eventually agree with the District Court's ruling. The Circuit Court's decision should be upheld.

D. Family PAC Does Not Establish That The Balance Of The Equities Weigh Heavily In Its Favor

1. The Circuit Court Applied The Correct Standard To Determine That A Stay Was Warranted

Family PAC spends much of its Application disagreeing with the Circuit Court's approach in granting the stay. Application at 8-11. Specifically, Family

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[14] Family PAC's claims of "under-inclusiveness" (Application at 14) require the court to engage in campaign finance line-drawing that the courts, including this Court, have described as better left to legislative bodies. The Washington Legislature's inclusion of a statutory 21-day period, applicable only to general elections, along with other timing provisions in state campaign law is a decision particularly within the realm of its legislative expertise. *See, e.g., Randall v. Sorrell,* 548 U.S. 230, 248, 262 (2006); *Buckley v. Valeo,* 424 U.S. 1, 83 (1976); *Cao v. Federal Election Commission,* --- F.3d ---, 2010 WL 3517263, *6.

PAC takes issue with the Circuit Court's reliance on a balancing approach to the factors set forth in this Court's decision in *Nken v. Holder*, 129 S. Ct. 1749, 1760-61 (2009):

> (1) whether the stay applicant made a strong showing that it is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably harmed absent a stay;
>
> (3) whether issuance of the stay will substantially injure the other parties interested the proceeding; and
>
> (4) where the public interest lies.

Application at 8-11; *see also* FP App. at 36a.

However, Family PAC's disagreement with the Circuit Court's analysis does not merit reversal of the stay. In considering the *Nken* factors, the Circuit Court relied on a "sliding scale" test that "even failing a strong likelihood of success on the merits, the party seeking a stay may be entitled to prevail if it can demonstrate a substantial case on the merits and the second and fourth factor militate in its favor." FP App. at 35a-38a (citation omitted). The Circuit Court then went on to find that the State "presented a colorable argument" regarding the appropriate level of scrutiny, and thus had made, for the reasons described above, a "substantial case on the merits." *Id.* at 37a. This balanced with the Circuit Court's finding that the remaining factors weighed heavily in the State and public's favor – and almost none in Family PAC's – led the Court to conclude that a stay was warranted. *Id.* at 37a-38a. Contrary to Family

PAC's assertion, such a conclusion does not indicate that the Circuit Court applied the wrong standard. Instead, it merely acknowledges that the stay factors are not rigid and "contemplate individualized judgments." *See Hilton v. Braunskill,* 481 U.S. 770, 776 (1987).[14]

2. The Balance Of The Equities Weigh In Favor Of A Stay

Regardless of the Circuit Court's analysis, Family PAC provides no evidence that the equities are in its favor or that it could have prevailed under an alternative articulation of the stay standards. Indeed, to the contrary, the equities tip sharply in favor of maintaining the integrity of Washington's campaign finance system shortly before the general election.

Family PAC argues that because it has raised a First Amendment claim, it is enough to establish irreparable injury. Application at 15. This assertion is incorrect. First, Family PAC has not been injured or impacted in any way by Wash. Rev. Code § 42.17.105(8). In fact, Family PAC has engaged in no activity that even implicates Wash. Rev. Code § 42.17.105(8). It has been denied nothing. Indeed, while it claims it was "unable to produce radio ads or conduct get-out-the vote activities" in 2009 (Application at 6), nothing in the record

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[14] Family PAC relies heavily on *Winter v. Natural Res. Def. Council,* 129 S. Ct. 365 (2008), for its argument that the Circuit Court applied an incorrect standard. However, as this Court acknowledged in *Nken,* while the standards for a preliminary judgment and a stay overlap, the two remedies serve separate purposes. *Nken,* 129 S.Ct. at 1758. "A stay simply suspends judicial alteration of the status quo, while injunctive relief grants judicial intervention that has been withheld by lower courts." *Id.*

supports those assertions. Family PAC engaged in no actual ballot measure campaign activity in 2009, let alone 2010. App. A, ¶ 6; App. C, ¶ 20; App. F, ¶67; App. E, ¶¶ 18-19. Family PAC's Application raises a hypothetical possibility of seeking contributions for campaign activity to support its claimed harm. This assertion is not borne out by the record itself.

Second, the public's interest is not forfeited simply because this case involves a First Amendment challenge. While the entry of the stay impacts none of Family PAC's activities, the absence of a stay would significantly and immediately affect Washington campaigns and voters' interests. App. A, B, C, F. If the stay were vacated, the harm suffered by the voting public would be irreparable. It would be impossible to undo the disruption that altering a campaign finance rule midway through the election season will cause for campaigns, contributors, the voters, and others who are actively participating in this year's election. Further, the informational interests for ballot measure campaigns and the voting public are not insignificant. The voting public is entitled to a consistent campaign election system, without upending those expectations shortly before an election.[15]

In contrast, Family PAC does not demonstrate any real harm if the system is upheld while the issues on appeal are being litigated. Family PAC

[15] Campaigns, the media and others were immediately informed of the Circuit Court's stay. App. B. Vacating the stay at this point would create disruption and renewed confusion at a time too close to the election.

fails to offer any proof of an actual plan to participate in the 2010 election. As such, Family PAC cannot argue that it will be restrained in exercising its First Amendment rights. In light of this position, the Circuit Court properly protected the public's interest and granted the stay.

CONCLUSION

For the foregoing reasons, the Washington State Attorney General and the members of the Washington State Public Disclosure Commission respectfully request that Justice Kennedy deny Family PAC's Application to Vacate the Ninth Circuit's Stay of the District Court Judgment.

RESPECTFULLY SUBMITTED this 11th day of October, 2010.

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