NO. 09-35128

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMAN LIFE OF WASHINGTON, INC.,

Plaintiff-Appellant,

v.

BILL BRUMSICKLE (Chair), KEN SCHELLBERG (Vice Chair), DAVE SEABROOK (Secretary), JANE NOLAND, JIM CLEMENTS, in Their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission, ROB MCKENNA, in His Official Capacity as Washington Attorney General,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 08-CV-00590 The Honorable John C. Coughenour

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I. JURISDICTION STATEMENT

The Appellant, Human Life of Washington, Inc. (HLW), filed a federal district court action under 42 U.S.C. §1983, against the Appellees, Bill Brumsickle (Chair), Ken Schellberg (Vice Chair), Dave Seabrook (Secretary), Jane Noland, and Jim Clements, in their official capacities as officers and members of the Washington State Public Disclosure Commission, and Rob McKenna, in his official capacity as Washington State Attorney General (collectively "State Defendants").[1] HLW purported to raise issues under the First and Fourteenth Amendments of the United States Constitution. The District Court had jurisdiction to hear HLW's complaint per 28 U.S.C. §1331. The District Court issued a final judgment on January 23, 2009, finding for the State Defendants. ER 1. The State Defendants agree that this Court has jurisdiction to hear any appeal from the District Court's final judgment in this matter. 28 U.S.C. §1291; Fed. R. Civ. P. 54(a).

II. ISSUE STATEMENT

(1) Has HLW presented this Court a sufficient basis to strike down 35 years of campaign finance disclosure for ballot measures in Washington State, when

[1] While this matter was at the district court level, there was an additional defendant, a local county prosecutor, who was later dismissed from the action. Dkt. No. 60. For purposes of distinguishing between the defendants, the state actors were referred to as the "State Defendants" below. For purposes of this brief, that description will continue.

it: (a) provides the Court nothing in the facts or law to support its claims, and (b) the result it seeks is to deprive voters of information revealing who is seeking to affect their vote and how much money they are raising and spending to do it?

(2) Do Washington's statutory definitions of political committee, political advertising, and independent expenditures, and a rule explaining when reporting is not required for ratings and endorsements, satisfy the First Amendment?

III. STATEMENT OF CASE

A. Washington State's Culture of Transparency

In 1972, Washington voters passed Initiative No. 276, which stated "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." RCW 42.17.010(10). While the law has been modified,[2] the Act's fundamental purpose has remained unchanged. That purpose is implemented by the state Public Disclosure Commission (PDC) and allows the public to "follow the money" in elections by providing timely information about campaign financing, lobbying activities and financial affairs of public officials. RCW 42.17; ER 148-49; ER 148-49.

[2] ER 147-48. In 1992, Initiative 134 added campaign finance provisions that included contribution limits.

1. Registration and Disclosure Requirements

Like most states and the federal government, Washington requires committees involved in political campaigns to register with an oversight agency, appoint a treasurer, and publicly disclose contributions and expenditures. RCW 42.17.040, .060, .080, .090; http://www.fec.gov/ (federal law); http://disclosure.law.ucla.edu (summary of state laws).

If an entity has "the expectation of receiving contributions or making expenditures in support of, or opposition to . . . any ballot proposition," then it is a political committee under Washington law. RCW 42.17.020(39); RCW 42.17.020(4) (definition of ballot proposition). Once an entity becomes a political committee under either prong of the statute,[3] it must "file a statement of organization with the commission"[4] and make periodic reports of the contributions it receives and the expenditures it makes relating to its support or opposition to a ballot measure. RCW 42.17.065, .080. ER 158-59.

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[3] A further discussion of the Washington state appellate courts interpretation and application of RCW 42.17.020(39) is contained in Argument § 2 (b. and c.).

[4] The statement of organization as it relates to ballot measure committees simply requires disclosure of the name of the organization, related or affiliated committees or other persons, identification of officers and titles, and identification of a treasurer. RCW 42.17.040(2).

State law requires full reporting[5] political committees to disclose receipt of anything of value contributed for the purpose of supporting or opposing any election campaign. RCW 42.17.020(15), (18), (22), .080, .090; WAC 390-05-210(1). For a political committee, that includes contributions to and expenditures from its campaign account, as well as any in-kind contributions. For an entity that is a political committee for only a period of time, that includes its contributions and expenditures, as defined in state law, for that time. ER 164-65. To avoid entanglement of campaign and non-campaign activities and expenditures, entities engaging in political committee activities, including solicitation of contributions, typically create a separate political committee account. *Id.*

Once a committee is registered, its contribution and expenditure reports are filed at defined intervals (typically monthly) and on specific forms.[6] RCW 42.17.080; ER 159, 161-65. If a group does not meet the definition of a political committee, but makes an expenditure from its general fund to support or oppose a ballot measure or candidate which is not coordinated with another

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[5] This requirement only applies to those subset of political committees that raise or spend more than $5000 in a calendar year or that intend to raise more than $500 from any one contributor. Committees spending or raising funds below those amounts qualify for "mini-reporting." *See also* 42.17.370(8); Washington Administrative Code (WAC) 390-16-105 through -125.

[6] While reports typically occur on a monthly basis, as an election approaches, report dates change to seven and twenty-one days prior to an election. RCW 42.17.080; ER 160-61. This requirement reflects the increased solicitation and spending that occurs closer to an election and the public's increased desire to know. ER 160-61.

committee, it is required to disclose that expenditure as an "independent expenditure." RCW 42.17.100; ER 165-66, 167-69.

Additionally, political advertising is one of the types of expenditures state law requires committees to disclose. Political advertising includes "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." RCW 42.17.020(38). This term is used in various sections of the state campaign finance disclosure laws, most provisions of which did not form the basis for HLW's claims below.[7]

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[7] In addition to its challenges to the definitions of political committee, political advertising, and independent expenditure, HLW challenges the constitutionality of WAC 390-16-206, which explains when ratings or endorsements qualify as reportable expenditures. In particular, the PDC's rule clarifies when certain activities do not need to be reported. The rule reads:

> (1) Any person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition shall report such expenditure including all costs of preparation and distribution in accordance with chapter 42.17 RCW. However, rating, endorsement or recommendation expenditures governed by the following provisions are not reportable: The news media exemptions provided in RCW 42.17.020 (15)(b)(iv) and (21)(c), and WAC 390-16-313 (2)(b), and the political advertising exemption in WAC 390-05-290.
>
> (2) A candidate or sponsor of a ballot proposition who, or a political committee which, is the subject of the rating, evaluation,

Alleged violations of RCW 42.17 may be pursued through an administrative procedure before the PDC, or in a superior court action. RCW 42.17.395, .400. The penalties available in administrative and judicial remedies are limited to civil penalties.[8] RCW 42.17.360, .390, .400.

2. Public Access to Campaign Finance Information and Filer Assistance

Public demand for campaign finance information has increased since the Act's inception. ER 197-98. The PDC website provides easily accessible information related to laws and rules, filer assistance (including training videos), and access to the searchable database. ER 210. The ease of access to campaign finance information has become an integral part of the state's electoral culture.[9] ER 151-52; ER 378-80. Since its inception in 2000 through May 2008, the PDC website has been visited over 870,000 times, with 14,000 visits per month, and 700 visits per day. During that time, a total of 4,494,289 pages were viewed. ER 210-

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endorsement or recommendation shall not be required to report such expenditure as a contribution unless the candidate, sponsor, committee or an agent thereof advises, counsels or otherwise encourages the person to make the expenditure.

[8] In the event a matter were to proceed to superior court under RCW 42.17.400 by the State or a citizen acting on behalf of the State, the Attorney General's Office, or a state prosecutor, the penalty limits are set forth in RCW 42.17.390.

[9] HLW's own website page for its political committee, Human Life PAC, has a link to the PDC's website with the following statement: "For information on campaign finances and expenses, including statewide initiatives, search the Public Disclosure Commission database HERE." ER 381, 388. The end of that page further states, "Funding makes a significant impact on general elections." ER 388.

11. Since the vast majority of the reports are filed electronically with the PDC, the public can scrutinize where and when millions of dollars are received and spent in political campaigns.[10] ER 153, 155, 380, 211-13.

In addition to its website, the PDC staff provides assistance to any group questioning whether it should file and how to file the reports. Help is provided on the PDC website (with links to statutes, rules, manuals, and brochures), through free PDC-provided electronic filing software and training, and consultations using a toll-free telephone number or electronic mail. ER 155-56, 223.

Finally, any group can obtain pre-enforcement guidance from the PDC through requests for informal advisory opinions (ER 155-56), declaratory orders (RCW 34.05.240 and WAC 390-12-250), PDC interpretations (RCW 34.05.320), or formal rulemaking requests (RCW 34.05.330 and WAC 390-12-255).

B. Initiative 1000 and Predecessor Initiative 119

In November 1992, Washington voters rejected an initiative (I-119) that proposed a "death with dignity" law. ER 108. Over $3,250,000 was spent in support and opposition to I-119. ER 154, 174. In August 2007, former Washington State Governor Booth Gardner formed a committee to support a similar initiative for the November 2008 ballot. ER 105-21. He formally filed the measure as an initiative with the Washington State Secretary of State on January 9, 2008,

[10] Currently, the vast majority of filers meet the statutory filing deadlines with little to no incident. ER 212-13, 223.

receiving national media attention. ER 105-21. The measure (I-1000) qualified for the November 2008 ballot (ER 123, 124-44, 378) and both proponent and opponent political committees registered with the PDC. ER 233, 379.[11] I-1000 passed in November 2008. Dkt. No. 82 at 5.

C. Human Life of Washington, Its Related Organizations, and Their Activities In Washington Ballot Measure Campaigns

1. Human Life of Washington and its Associated Entities

HLW admits it has a long history of opposing ballot measures such as I-1000. Dkt. No. 1 at ¶17; Dkt. No. 8 at 2; ER 394-417. HLW incorporated in 1971 "[t]o aid, assist, instruct, educate, counsel, direct and participate in the desimination [*sic*] of any and all information and material concerned with or involved in the respect and preservation of the value of human life," and "[t]o accomplish the purposes herein set forth . . . *may* . . . *engage in any lawful activity either in its own name or in association with other persons, clubs, associations, corporations or other entity.*" ER 181 (emphasis added).

HLW created two such "other entities," namely, Human Life of Washington Educational Foundation,[12] established in 1984, and Human Life PAC (HL PAC),

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[11] As of the filing of the summary judgment response in August 2008, more than $1,400,000 had been spent on the campaign. ER 379.

[12] Its Foundation's purpose is: "Through educational, legislative, and judicial efforts, we seek reform in our culture's understanding of personhood, view of life and freedom." ER 188. This is identical to the stated purpose of HLW. ER 181.

created in 1980.[13] HLW operated HL PAC as a "political committee connected to Human Life" and engaged in fundraising to support or oppose campaigns.[14] ER 394. Through it, HLW engaged in both candidate and ballot measure advocacy, and HL PAC filed reports with both the PDC and the Federal Election Commission (FEC). ER 231; ER 268-336; ER 490-96.

Contrary to its assertions, HLW has not been "fully independent of any candidate, political party, or political committee in its planned First Amendment activities." ER 72. Though frequently the funding for campaign advocacy was done by HL PAC, it also appears that HLW also undertook the funding of campaigns. ER 225-226; ER 408; ER 411.

Below, HLW alleged that its anticipated ad campaign directed at I-1000 would be less than 20 percent of its budget.[15] Dkt. No. 1 at ¶31; ER 361; ER 368; ER 371-72. However, HLW CEO Kennedy's inquiry to the National Right to Life organization about production of proposed HLW radio ads reflected a range of up to $50,000 for the described work. ER 447; ER 373-374.

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[13] All three entities shared the same mailing address, phone number, fax number, website, CEO, and some common board members and staff. ER 186-188; ER 452; ER 456; ER 339-350.

[14] According to HLW CEO Dan Kennedy, HL PAC is an "internal PAC" of HLW. ER 348.

[15] HLW received approximately $200,000 per year in revenue. ER 187; *see also* Dkt. No. 1 at ¶31.

2. HLW Contacts with the PDC

HLW is familiar with campaign finance disclosure reporting and how to access information on the PDC website. Its political committee has a long history of filing disclosure reports at the state and federal levels. ER 171. HLW and HL PAC staff have contacted PDC staff over the years for technical assistance, including obtaining help with filings and rule interpretation. ER 190 (question from CEO Kennedy about notification regarding HL PAC endorsements); ER 223-24 (HL PAC electronic filings).

3. HLW Role in the Washington State "Death with Dignity" Initiatives

HLW actively opposed I-119 in 1991, both directly and through its political committee, HL PAC, making contributions and expenditures, contributing to other political committees, and filing reports. ER 225-29, 229-31; *see* ER 73-74. Its newsletters repeatedly called upon readers to "oppose," "defeat," "stop," and "reject" I-119, while calling for volunteers to doorbell and make contributions.[16] ER 394-414.

[16] Its involvement was apparently so extensive that after I-119 was defeated HLW made a full-page plea for funds stating "enormous amounts of money" was one of the successful tools in defeating the initiative, and Human Life "nearly depleted itself" financially in the effort. ER 412-14.

HLW then wanted to oppose I-1000.[17] ER 365-66. In filing this lawsuit, HLW sought the permission of the federal court to solicit and expend funds because of I-1000 without disclosing those activities to the public, calling 2008 a "special opportunity" for HLW because "people are particularly receptive to arguments about the issue." ER 76 at ¶26. HLW freely admitted that it wanted to expend funds to "advocate" on the topic. *Id.*("And the inability to effectively advocate on the [topic] adversely affects HLW's ability to advocate for the prolife ethic as a whole . . ."); *see also* Dkt. No. 8 at 2.[18] The topic was I-1000.

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[17] The day the initiative was filed, HLW sent out a "Special News Report" titled "Assisted Suicide Initiative Filed" directing actions by readers in three ways: (1) asking them to "encourage others not to sign the initiative," (2) linking them to entities opposing the initiative, including to the website of the Washington Coalition Against Assisted Suicide, and (3) providing links to "important resources to help you defeat this initiative." ER 416-17. HLW continued to confirm its opposition to those on its mailing list and to the public. *E.g.*, ER 260-67 (January 10, 2008 article titled "Oppose Assisted Suicide – Resources" posted on website including link to site of political committee opposing I-1000); ER 437-38 (June 2, 2008 email to specialized HLW listserv with a posting asking readers to "join the campaign to oppose I-1000" and to go to the No On Assisted Suicide website to "donate money or offer support today"); ER 446 (email to "Affiliate Presidents" with the subject "RE: Initiative 1000" confirming HLW's opposition to the I-1000, and stating that until the case here is resolved, HLW's opposition would be "direct" and through the PAC). *See also* ER 419-50.

[18] HLW asserts at footnote 5 of its opening brief that the State Defendants "interpret[ed] HLW's proposed communications as not issue advocacy, but express advocacy" and then cites to the State Defendants' Answer. A careful review of the Complaint and Answer language demonstrates that the State Defendants took no position whatsoever on HLW's proposal, going as far as to challenge the justiciability of the case. Dkt. No. 1 (Complaint); 35 (Answer); 44 (Preliminary Injunction Response).

D. Procedural History

In anticipation of what it believed state campaign finance disclosure law would require it to do, on April 16, 2008, HLW filed a "Verified Complaint" challenging the constitutionality of three Washington State campaign finance disclosure laws and one rule. ER 69-93. On the same day, HLW filed requests for a preliminary injunction, consolidation of the injunction hearing with a hearing on the merits of its complaint, and expedition of the proceeding. Dkt. Nos. 6, 7, and 8. HLW stated that it wished to engage in advocacy it deemed "issue advocacy" while efforts were being made to sponsor I-1000. Dkt. No. 1at 1. It also wished to have its complaint resolved so that it could raise and spend money to engage in an ad campaign directed at I-1000 in the months leading up to the November 2008 election. Dkt. No. 1 at 3, 7.

Following the State's objection (Dkt. No. 26), the District Court denied HLW's request for consolidation and expedition of the proceedings. Dkt. No. 38. The District Court denied HLW's motion for a preliminary injunction on July 9, 2008 based on HLW's failure to satisfy the injunction criteria. Dkt. No. 59.

HLW moved for summary judgment. Dkt. No. 67. The State Defendants responded, requesting the District Court deny the summary judgment and dismiss the action. Dkt. No. 70-75. HLW filed a reply brief on August 29, 2008 (Dkt. No. 78) and a supplemental authority brief (Dkt. No. 79) on September 9, 2008.

HLW did not and has not refuted any of the factual assertions presented by the State Defendants nor did it add any facts other than those it purported to verify in its complaint.[19] By decision dated January 8, 2009, the District Court denied HLW's summary judgment motion, and then later entered judgment for the State Defendants and dismissed the action with prejudice.[20] Slip Copy, 2009 WL 62144 (W.D. Wash.); (Dkt. Nos. 82, 85); ER 1-2, 4-45. HLW timely filed this appeal. Dkt. No. 86.

IV. STANDARD OF REVIEW

The standard of appellate review is *de novo* because a final judgment was entered following the Court's ruling on a summary judgment motion. In either the grant or denial of summary judgment, appellate court review is *de novo*. *Prison Legal News v. Lehman,* 397 F.3d 692, 698 (9th Cir. 2005). On appeal, the Court applies the same standard used by the trial court under Rule 56 of the Federal Rules of Civil Procedure. *Meade v. Cedar Rapids, Inc.,* 164 F.3d 1218, 1221 (9th Cir. 1999). The Court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material

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[19] HLW CEO Kennedy could not verify those sections of the Complaint that were legal argument and agreed that he did not have the personal knowledge to verify other sections of the complaint. ER 369, 376, 377.

[20] Because HLW had a "full and fair opportunity to ventilate the issues involved in the matter" final judgment could be entered for the State Defendants. *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir. 2003).

fact and whether the District Court correctly applied the relevant substantive law. *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir. 2000).

In this case, Washington satisfied its burden under First Amendment jurisprudence. HLW, on the other hand, failed to justify why summary judgment was not appropriate given its failure to dispute the factual submissions by the State Defendants and failure to demonstrate why the District Court's application of relevant substantive law was flawed.

V. SUMMARY OF ARGUMENT

State and federal courts have long held that campaign finance disclosure laws that allow the public to "follow the money" in elections satisfy the First Amendment. Washington's campaign disclosure provisions shed light on the financing of ballot measure campaigns to allow the public to determine who is attempting to affect its vote on any particular ballot measure. In doing so, these provisions satisfy the First Amendment.

The First Amendment allows Washington to enact laws that require groups to disclose their campaign financing as long as those requirements are to support a compelling state interest and are narrowly tailored, or are substantially related to the state interests. The First Amendment also protects the recipients of information, not just the speakers, and in this case, the key recipients are voters. Washington's interests in shedding light to the public on who and how ballot

measure campaigns are financed are well documented and, as the District Court found, are important, compelling, and even "extremely compelling."

In contrast, HLW's arguments to this Court fail to correctly set forth the established constitutional tests and holdings of this and other courts. It constructs its own theories from fragments of words and phrases from cases that it then asks this Court to adopt and apply. It misapplies existing Ninth Circuit and Supreme Court precedents; it ignores the undisputed factual record; and it fails to show how Washington law unconstitutionally infringes on the First Amendment. It makes these claims despite Washington's long history of compliance by filers including HLW, and despite Washington's long history and dedication to transparency in state elections. Moreover, HLW fails to demonstrate how state reporting requirements are in any way unduly onerous or infringe its right to free speech.

Washington comfortably establishes that its campaign finance disclosure provisions are constitutional even under the highest level of scrutiny. If the relief that HLW seeks is granted, Washington voters would be unable to receive the information that allows them to understand who seeks to affect their vote, who seeks their contributions in that effort, and how much they are spending, particularly if it is a special interest group. The ultimate countervailing force to the impact of disguised electoral funding by secret special interest groups in American

democracy is an informed electorate.[21] For these reasons, HLW's appeal should be rejected by this Court.

VI. ARGUMENT

In its argument, HLW relies upon unsupported constitutional theories to defend its claims. State Defendants will dispel these theories by providing the Court the relevant jurisprudence governing campaign finance disclosure laws and why Washington's statutes and rule satisfy those decisions under either intermediate or strict scrutiny. State Defendants will explain why the District Court correctly upheld Washington's provisions.

A. HLW Misstates The Applicable Law

1. HLW's Reliance on Its "First Principles" To Challenge The Constitutionality of Washington's Laws Is Misplaced.

HLW's arguments are premised on a series of "first principles" it extracts from a confusing medley of concepts or phrases taken out of context from federal case law. In doing so, HLW leaves State Defendants and this Court to speculate on exactly how Washington's laws and rule are unconstitutional by trying to decipher

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[21] *See generally Initiative and Referendum in the 21st Century: Final Report and Recommendations of the NCSL I & R Task Force.* Available at: http://www.ncsl.org/programs/legismgt/irtaskfc/final_report.htm. (States have a responsibility to ensure that voters receive high-quality, transparent information about the sponsorship and financial support of initiative proponents and opponents. Such information not only minimizes abuse and manipulation of the initiative process, but also provides voters with key tools necessary for deciphering the sometimes veiled motives of initiative proponents. Voters cannot make a fully informed decision without campaign finance information about initiatives.)

the meaning of these cobbled together "principles." HLW also fails to identify from the record what facts, if any, it believes supports its claims besides its "Verified Complaint."[22] HLW's theories lack any legal basis and call for speculation as to HLW's meaning as to several arguments; State Defendants decline to engage in such a guessing game. State Defendants, however, will provide a few illustrations of HLW's confusion as to the proper standards, its reliance on obscure references, and its lack of recitation to the record. State Defendants will then focus on the relevant jurisprudence guiding this case and why the District Court properly upheld the challenged requirements under that case law and the undisputed facts.

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[22] In *California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1176 (9th Cir. 2007) (*CPLC II)*, the Court stated that a "verified complaint" may serve as an affidavit for purposes of summary judgment if (1) it is based on personal knowledge, and (2) sets forth the requisite facts with specificity. In that case, the Court concluded that due to lack of personal knowledge of the CPLC Executive Director, along with the fact that the verified complaint was "impermissibly heavy on legal conclusions and light on 'facts relevant to a summary judgment motion'" CPLC's verified complaint did not qualify as an affidavit for summary judgment purposes.

HLW's "Verified Complaint" contains a litany of legal conclusions, and many statements could not be verified by HLW CEO Kennedy during his deposition. ER 369, 376. 377. Certainly, allegations in HLW's Verified Complaint relating to possible enforcement action by the PDC are not within the scope of Mr. Kennedy's verification, as he only verified that "the factual statements in the Complaint concerning HLW and its intended activities are true and correct." Further, to the extent that the alleged facts are based on "information and belief" (ER 71), they are not admissible. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995).

HLW points to few, if any, specific errors by the District Court. Instead, HLW generally asserts that the District Court disagreed with HLW's arguments and appears to conclude that fact alone is error.[23] HLW heavily relies upon certain phrases to support its constitutional challenges to Washington law, including, for example, "unambiguously-campaign-related." HLW's claim that the Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976), applied an "unambiguously-campaign-related" standard as a "principle" to evaluate four federal campaign finance provisions, or indeed, all campaign finance law, is simply incorrect. HLW Br. at 13, 19. The phrase appeared in only one section of *Buckley*, and the Court's reference was incidental merely to describe the Supreme Court's narrowing construction of a federal statute's expenditure disclosure requirement. *Buckley,* 424 U.S. at 79, 81. The Court never elevated the phrase to the status of a constitutional "principle" or "threshold test" which "all campaign-finance regulations" must pass as HLW asserts. HLW Br. at 13, 19.

The phrase "unambiguously-campaign-related" was a description of the express advocacy standard at that time, not a stand-alone constitutional command.

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[23] To illustrate, HLW contends that the District Court "misunderstood" and "did not understand" the law (HLW Br. at 15, 21), "demonstrated a misunderstanding of precedent" (HLW Br. at 21, n. 13), was "confused" (HLW Br. at 24, n. 15), mistakenly believed HLW's political committee's activities "legally relevant" (HLW Br. at 6-7, n. 3-4), and, oddly, that the District Court even "argued" or made an "argument" about the law (HLW Br. at 20, n. 13; HLW Br. at 21, n. 13).

The Court in *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*") did not recognize this phrase a "bright line" requirement as HLW argues (HLW Br. at 20) and the phrase is never mentioned in that case. Finally, the Court in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), did not "recognize this principle" as HLW argues (HLW Br. at 26); the majority opinion in *McConnell* never mentions the phrase. What the *McConnell* Court did recognize, however, was that *Buckley's* express advocacy "magic words" reference was "functionally meaningless." *Id.* at 193-94. The *McConnell* Court was careful to describe that the *Buckley* "express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell* at 190.

HLW similarly depends upon other phrases, such as "dissolving-distinction problem" and "first principle" to support its view that the Supreme Court created a "bright line test to protect issue advocacy groups" in an effort to resolve "the problem." HLW Br. at 23; *passim.* HLW pulls the "dissolving-distinction" phrase from pieces of a quote from *Buckley*, and cobbles them together to allege a new "test" that it then asks this Court to accept as a well-established legal principle. HLW Br. at 19. The *Buckley* Court used the words "distinction" and "dissolve" in this manner, to describe a candidate campaign: "[T]he distinction between the discussion of issues and candidates and advocacy of election or defeat of

candidates may often dissolve in practical application." *Buckley,* 424 U.S. at 42. Like HLW's attempt with "unambiguously-campaign-related," this effort to elevate these fragments of a sentence into an analytical test that it then claims this Court must apply in review of campaign disclosure statutes is entirely without merit. State Defendants do not agree that any of these "constitutional standards" exist or that they should be adopted by the Court here.

In another example of the ambiguity regarding the meaning of HLW's arguments, HLW asserts that, because this case "follows" *California Pro-Life v. Randolph,* 507 F.3d 1172 (9th Cir. 2007) (*CPLC II*), Washington's challenged statutes and rule must fall. HLW Br. at 1. What is meant by "follows" is unknown. More importantly, if the *CPLC II* findings are what are being referred to by HLW, the District Court held that HLW's arguments concerning *CPLC II* were "somewhat disingenuously" made and regardless, Washington's statutes are in fact valid under *CPLC II.* 2009 WL 62144 at *20, *22.

Another demonstration of HLW's hazy arguments is its challenge to a PDC rule. Beyond asserting the ratings/endorsements rule (WAC 390-16-206) is vague and overbroad (HLW Br. at 55) and thus arguing it may capture "issue advocacy," HLW does not explain why it is challenging this rule. It does not argue, and there is nothing in the record to suggest, HLW was impeded in doing ratings or endorsements with respect to I-1000, or even sought to do so. Again, State

Defendants decline to speculate as to HLW's reasons; without more, this Court should conclude that the rule is constitutional, and as the District Court decided, a "commendable exception" to reporting that appropriately protects First Amendments interests.[24] 2009 WL 62144 at *26.

Finally, HLW had a duty to present evidence to support its challenge to the validity of the State Defendants' motion for summary judgment and the District Court's granting of the same. *See CPLC II,* 507 F.3d at 1176; *compare Canyon Ferry Road Baptist Church v. Unsworth,* 556 F.3d 102, 1023 (9th Cir. 2009) (noting that California in *CPLC II* provided "formidable" evidence mandating the conclusion that disclosure of financiers of ballot measures was "important.") Here,

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[24] The District Court found:

> The record makes clear that this provision [WAC 390-16-206] was not intended to create new reporting requirements, but rather to clarify that certain "ratings, evaluations, endorsements, and recommendations" would *not* need to be disclosed to the PDC or reported as contributions by candidates or initiatives being endorsed. (*See* Rippie Decl. ¶ 50 (Dkt. No. 47 at 26).) In particular, ratings and endorsements made without "a measurable expenditure of funds" or made in the form of a news media item, commentary, editorial, etc., need not be disclosed as expenditures or reported as contributions. (*Id.*) … In carving out this commendable exception, the state employs language no more vague than the "support" and "oppose" language approved by the Supreme Court in *McConnell.* 540 U.S. at 170 n. 64. In sum, the Court holds that §390-16-206 does not violate the First Amendment; instead, it is a laudable attempt to *protect* traditional First Amendment interests within Washington State's campaign finance framework.

2009 WL 62144 at *26.

HLW fails to direct this Court or State Defendants to which, if any, part of the factual record supports its claims, beyond its own "Verified Complaint"[25] that contains primarily legal argument. ER 69-93. Even the District Court described as "cursory" the facts set forth by HLW and noted they derived chiefly from its Verified Complaint. 2009 WL 62144 at *5, n.2.[26] HLW's Statement of Facts is likewise comprised chiefly of legal argument, the source of which is also the Verified Complaint. HLW Br. at 4-13.[27] With the exception of citations to its own "Verified Complaint," HLW points to nothing in the factual record to shore up its arguments. For example, HLW cites to no facts demonstrating that Washington's provisions "burden" HLW in any way, much less in an unconstitutional way. HLW also argues that it was "chilled" in engaging in advocacy activities regarding

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[25] Large portions of the "Verified Complaint" could not be confirmed by the HLW CEO in his deposition. ER 369, 376, 377.

[26] Perhaps that is why HLW now attempts on appeal to expand the record, by citing to materials outside the record in its brief. *See, e.g.,* HLW Br. at 33 (reference to the PDC political committee manual), 44 (reference to PDC Declaratory Ruling), 56 (reference to repealed PDC interpretation). The reason there is no docket number or excerpt of record listed is that these written materials are not in the record. This Court's review is confined to the record made below.

[27] Perplexingly, HLW's brief reads as if I-1000 will soon be, or is, still on the ballot. The Statement of Facts repeatedly describes what HLW "intends" to do in 2008 with respect to I-1000, for which an effort "is underway" to qualify the measure for the ballot. HLW Br. at 5. However, HLW's brief was filed in 2009. I-1000 did qualify for the ballot in 2008, and was enacted by the voters following its passage in the election conducted November 2008. As the District Court described, "the November 8, 2008 election has come and gone." 2009 WL 62144 at *7. HLW's only explanation is that it simply decided to leave the facts in their "prospective language" from the Verified Complaint filed in April 2008. HLW Br. at 4.

Initiative 1000 (HLW Br. at 3) because of disclosure requirements, yet cites to nothing in the record showing that was true.[28]

2. Cases Governing the Constitutionality of Campaign Finance Disclosure Laws Contrast Markedly From HLW's Representations.

In making its arguments, HLW either misconstrues or ignores the campaign finance disclosure cases relevant to this case. Because the relevant cases form the architecture to any analysis of a constitutional challenge to campaign finance statutes, the cases should be interpreted and applied as outlined below.

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[28] The record here shows quite the opposite. Rather than being "chilled" by Washington's disclosure provisions, HLW has been and continues to be active even while complying with them through its political committee. HLW and HLPAC were active in opposing I-119 in 1991 (ER 225, 271-272). In 2008, HLW's CEO confirmed that HLW was not chilled with respect to I-1000. In an email dated July 15, 2008 (prior to the election) to "Affiliate Presidents" with the subject "RE: Initiative 1000," the HLW CEO stated that until the case here is resolved, HLW's opposition would be "direct" and "through [the] PAC":

> Each Affiliate will be receiving 50 palm cards from the Coalition Against Assisted Suicide with talking points opposing the initiative. This is being orchestrated through HL PAC. Given the uncertain timing of a resolution regarding our court case, we will temporarily forgo educational issue ads, and directly oppose the initiative through HL PAC. This should not be an issue with the court case itself. If you have not done your fairs yet, you can pass these out, and discuss the initiative. What you **can not** do is expend any funds or receive any funds in fighting the initiative. That has to be done and reported through the PAC.

ER 446 (bolding in the original, emphasis added.)

a. Relevant Campaign Finance Disclosure Decisions Support The Constitutionality of Washington Disclosure Law

The Supreme Court and Ninth Circuit precedent supports the District Court's recognition that state requirements of disclosure that bring more information into the political marketplace are constitutionally valid and do not interfere with the content or quantity of advocacy. *See, e.g.*, *McConnell,* 540 U.S. at 201 (noting that disclosure requirements in §304 of the Federal Election Campaign Act "[do] not prevent anyone from speaking"); *id.* at 197 ("Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public."); *Buckley*, 424 U.S. at 66-67, 81-82; *Alaska Right to Life Committee v. Miles (AKRTL)*, 441 F.3d 773, 791 (9th Cir.), *cert. denied*, 127 S.Ct. 261 (2006); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650 (1985) ("Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech."); *Caruso v. Yamhill Cy.*, 422 F.3d 848, 857 (9th Cir. 2005) (upholding requirement that certain information be placed on ballot for measure that would result in increased taxes).

These and other cases recognize that the First Amendment protects the recipient of information, not just the speaker. *See Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1027, n.5 (9th Cir. 1998) ("the right to receive information is an inherent corollary of the rights of free speech and press").

Likewise, Washington courts have upheld Washington's disclosure laws in part based on this right to receive information, again recognizing the special role of transparency in Washington's political culture. *See Voters Educ. Comm. v. Washington State Public Disclosure Comm'n*, 161 Wash. 2d 470, 483, 166 P.3d 1174 (2007), *cert. denied*, 128 S.Ct. 2898 (2008); *Bare v. Gorton*, 84 Wash. 2d 380, 387-91, 526 P.2d 379 (1974) (Finlay, J., concurring); *Fritz v. Gorton*, 83 Wash. 2d 275, 283-84, 517 P.2d 911 (1974) ("It has been said time and time again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *sine qua non* in regard to a socially effective and desirable continuation of our democratic form of representative government.")

The Supreme Court, this Court, Washington courts, and the District Court here, find these interests compelling and constitutionally sufficient to uphold statutory campaign finance disclosure requirements such as Washington's. In Initiative 276, the voters of Washington found: "[T]he 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." RCW 42.17.010(10). The state interests in transparency and free flow of information support the goal of "curbing the evils of campaign ignorance and corruption." *Voters Education Comm.,* 161 Wash. 2d at 482-83,

quoting Buckley, 424 U.S. at 68. These interests are deeply embedded in Washington's political culture. ER 193-98; 147, 148-49, 152-53, 155.

The Supreme Court has long recognized that these interests are sufficient to uphold campaign disclosure requirements. *Buckley*, 424 U.S. at 66-67, 81-82; *McConnell*, 540 U.S. at 196, 200-01, 237-43. It also has upheld such interests outside the context of candidate elections, when advocacy about ballot measures and lobbying are involved. *See, e.g., United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding disclosure of lobbyist information, stating that the "full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792, n. 32 (1978) ("Identification of the source of [corporate] advertising may be required as a means of disclosure so that the people will be able to evaluate the arguments to which they are being subjected the analogous area of disclosure of lobbyist.")

Like elected officials who are lobbied, citizens voting on a ballot measure are entitled to know who is lobbying their vote, and how much they are spending. In *Harriss*, the Supreme Court upheld the disclosure requirements in the Federal Regulation of Lobbying Act of 1946, which applied to persons who solicit, collect, or receive money or any other thing of value to aid "[t]he passage or defeat of any legislation by the Congress of the United States" or "[t]o influence, directly or

indirectly, the passage or defeat of any legislation by the Congress of the United States." *Harriss*, 347 U.S. at 617-20. The Supreme Court construed the disclosure requirements to cover the contributions and expenditures having the purpose of attempting to influence legislators and legislation through direct communications with Congress, that is, with the persons voting on the legislation. In so doing, the Court upheld the statute against a First Amendment challenge. *See also Fritz*, 83 Wash. 2d at 309-11 (Washington's lobbying disclosure requirements are constitutional under the First Amendment and they aid the receiver and the general public in evaluating the influence of money upon legislative decision-making and related functions of government); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (the state has a compelling interest in "self protection" in the face of "coordinated pressure campaigns" directed by lobbyists); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of America*, 761 F.2d 509 (8th Cir. 1985) (upholding the state's interest in applying its reporting requirements to indirect communications between a lobbyist and members of an association for the purpose of influencing specific legislation).

The Ninth Circuit also recognized such interests as "compelling" in *AKRTL*, 441 F.3d at 788, and, more recently, in *CPLC II*, 507 F.3d at 1178-79. In sum, these interests are described as interests of the "highest importance." *Bellotti*, 435 U.S. at 788-89 ("Preserving the integrity of the electoral process, preventing

corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance.")

b. Under Any Reading of *FEC v. Wisconsin Right to Life,* Washington Statutes Pass Constitutional Muster.

HLW persistently contends that *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652 (2007) *(WRTL II)* mandates this Court invalidate the three state statutes challenged here. HLW Br. *passim.* It argues that *WRTL II*, a challenge to a corporate funding ban in federal candidate campaigns, is the "Supreme Court's latest instruction on the *analysis* that must be applied to protect issue advocacy" and the analysis "extends to *any* regulation of issue advocacy." HLW Br. at 16 (italic in the original, underlining added). *WRTL II* offers HLW no basis to seek this Court's restriction on disclosure, nor was it intended to.

First, *WRTL II* was not a case about disclosure. *See CPLC II*, 507 F.2d at 1177 n. 4 (*WRTL II* "did not undertake an analysis of statutory disclosure requirements.") The case involved a challenge to a specific section of federal law providing for a federal corporate funding ban with respect to federal candidate elections, and a discussion of how that impacted the corporation's "express advocacy" regarding a candidate, as opposed to "issue advocacy" featuring the candidate. In that particular as-applied challenge to a specific statute, the Court

held that the advertisements involved were not the "functional equivalent of express advocacy" and a communication is the functional equivalent only if it is "susceptible of no other reasonable interpretation other than an appeal to vote for or against a specific candidate." 127 S.Ct. at 2667.

The FEC, the agency charged with implementing *WRTL II*, directly rejected a proposal that *WRTL II* extends to anything beyond the impact on the challenged federal funding ban. 72 Fed. Reg. 72899 (Dec. 26, 2007). In its rulemaking to implement the decision, the FEC rejected a proposition to remove all reporting and disclaimer requirements from corporate campaign funding, noting that the plaintiffs in *WRTL II* did not challenge the reporting and disclaimer requirements. *Id.* at 72091, citing to *WRTL II,* 127 S.Ct. at 2658-59 and Plaintiff's "Verified Complaint" in *WRTL II.*[29] The FEC concluded, "Because *WRTL II* did not address the issue, *McConnell* continues to be the controlling constitutional holding regarding EC [electioneering communications] reporting and disclaimer requirements." 72 Fed. Reg. 72901.

Likewise, the District Court, too, recognized that instead of *WRTL II,* the last word from the Supreme Court on disclosure requirements was from *McConnell*,

[29] The Verified Complaint in *WRTL II* stated that "WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using corporate funds for its grass-roots lobbying advertisements." 72 Fed. Reg. 72901.

where the Court stated "without reservation" that the federal "disclosure requirements are constitutional." 2009 WL 62144 at *17.

Second, *WRTL II* did not concern ballot measures. Thus, the Court undertook no analysis of ballot measure campaigns or what ballot measures involve. The parties did not engage in a debate about whether disclosures in the ballot measure context were important and compelling. Additionally, nothing in *Buckley*, *McConnell*, or *WRTL II* suggested that "issue advocacy" is "sacred" or "*fundamentally* entitled to greater First Amendment protection than express political advocacy" and in "the ballot measure context ... there is little, if any, meaningful distinction between issue and express advocacy." *Buckley,* 424 U.S. at 15; *WRTL II,* 127 S.Ct. at 2673.

> Ballot initiatives present a single *issue* for public referendum. *See First Nat'l Bank of Boston v. Bellotti, First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 790, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ('Referenda are held on *issues*....' (emphasis added)). 'Campaign speech,' in this context, is speech intended to influence the voter's opinion as to the merits of this single issue-in other words, it is 'issue advocacy,' plain and simple. When an issue is presented to the public for referendum in this manner, the legitimate state interest in determining and reporting "where [the] money comes from," *Buckley,* 424 U.S. at 66 (internal quotation omitted), extends to all public debate on that issue.

2009 WL 62144 at **17-18.

In a footnote, HLW overreaches the holding in *WRTL II* by seeking to tie that decision to ballot measure campaigns. HLW asserts that "*CPLC-I*'s recognition of the express advocacy test for expenditures in connection with ballot

initiatives" after hinting that *WRTL II*'s "special solicitude" for issue advocacy applies in the ballot measure context. HLW Br. at 21, n. 13 (citing to *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1096-1100, (9th Cir. 2003) (*CPLC I*)). Those decisions reveal no such holdings; the closest the *CPLC I* Court came to that inference is that "express ballot measure advocacy is not immune from regulation." *Id.* at 1100.[30]

Lastly, perhaps the crux of HLW's claim regarding *WRTL II* is an attempt to resurrect an argument that for a state to regulate in any manner campaign advocacy, that advocacy must use "magic words" - "vote for" or "vote against" - and perhaps only those words. Neither *McConnell* nor *WRTL II* affirmed that 'express advocacy' requires so-called 'magic words' such as "vote for" or "vote against." HLW Br. at 27 n. 18. In fact, the *McConnell* Court stated that the distinction between "express" and "issue" advocacy is "functionally meaningless" (540 U.S. at 192), and applied the term "functional equivalent of express advocacy" to certain speech that may not have "magic words." 540 U.S. at 206.[31]

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[30] Additionally, HLW attempts to bootstrap *MCFL* into its *WRTL II* analysis by saying the *WRTL II* Court relied upon *MCFL*. However, this *WRTL II* reference to *MCFL* was in a footnote in the four-Justice plurality; it was not a central holding or finding in the case that mandates any different outcome here, even assuming that *WRTL II* applied in a disclosure challenge.

[31] HLW also seeks support from other cases, such as cases involving loyalty oaths. HLW Br. at 43-44, n. 30. Those cases do not address the campaign issues here, many pre-date *McConnell*, and also offer HLW no support. Finally, HLW cites the recent case of *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274

3. The *California Pro-Life Council* Decisions (*CPLC I* and *II*) Support the Constitutionality of Washington's Statutes and Rule

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(4th Cir. 2008), which held certain provisions of North Carolina law unconstitutionally vague, arguing the decision reflects the "true state of the law." HLW Br. at 42; *passim*. However, even if the case was binding, which it is not, the Fourth Circuit expressly distinguished the Washington statutes upheld in *Voters Education Committee* as "containing none of the infirmities" of the North Carolina statutes. 525 F.3d at 299. HLW's reliance is again misplaced.

Similar to its mischaracterization of several key campaign finance cases, HLW frequently engages in the same practice with other cited authority. For example, HLW cites to *Kolender v. Lawson,* 461 U.S. 352 (1983) to support the contention that because the challenged provisions of Washington law "reach a substantial amount of constitutionally protected conduct," they should be struck under the First Amendment. However, (1) the case involved the constitutionality of criminal laws that allowed police to demand that "loiterers"" and "wanderers" provide identification, not campaign finance disclosure; (2) no holding in *Kolender* supports the argument that a statute that covers 'a substantial amount of constitutionally protected conduct' is *per se* unconstitutional (instead, the Court in *Kolender* stated, in a footnote, that this situation is a sufficient reason to permit a facial challenge to the statute (*Kolender,* 461 U.S. at 358, n. 8.); and, (3) with respect to facial challenges, the decision pre-dates *Washington State Grange v. Washington State Republican Party,* 128 S.Ct. 1184 (2008). By way of further example, HLW cites to *Voters Educ. Comm.,* 166 P.3d 1174 (2007) for the proposition that the Washington Supreme Court held the PAC definition in RCW 42.17.020(30) is either not limited to express advocacy or that the "support or oppose" language in the statute does not mean to "expressly advocate". The Court actually concluded that the "support or oppose" language was not vague, after applying the Supreme Court's holding in *McConnell,* and therefore a determination of whether the VEC's advertisement's constituted express or issue advocacy was not necessary. *Voters Educ. Comm.,* 166 P.3d at 1186.

In addition to its mischaracterization of several key campaign finance cases, HLW frequently cites, as authority to support its theories, cases that are not binding on this Court, *e.g., Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004); *National Right to Work Legal Defense and Ed. Found'n, Inc. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008); *Broward Coalition of Condominiums, Homeowners Ass'ns and Community Orgs, Inc. v. Browning*, No. 4:08-cv-445, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008).

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HLW relies heavily upon *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (*CPLC I)* and *California Pro-Life, Inc. v. Randolph,* 507 F.3d 1172 (9th Circ. 2007) (*CPLC II*) (the decision after remand). HLW Br., *passim*. Its description of those cases is inaccurate and as the District Court found, somewhat "disingenuous." 2009 WL 62144 at *20.

HLW argues that *CPLC II* "held that PAC-style burdens could not be imposed" on "groups like CPLC…whose *major purpose* is not campaign advocacy, but who occasionally make independent expenditures." HLW Br. at 1-2; *passim. CPLC II* did not. The District Court, like this Court did in *CPLC II*, disposed of HLW's "major purpose" contention as follows:

> In fact, the Court in that case explicitly *rejected* CPLC's argument that "because its major purpose is not campaign advocacy, it was improper for California to 'treat [CPLC] like a PAC.'" 507 F.3d at 1180 n. 11. The Court cited *ARTLC* for the proposition that "*irrespective of the major purpose of an organization*, disclosure requirements may be imposed" and found "CPLC's argument to the contrary ... unpersuasive." *Id*. (emphasis added).

2009 WL 61244 at *20.

As HLW concedes, the Court in *CPLC II* specifically noted that the determination of CPLC's "major purpose" had no bearing on that decision because "the parties voluntarily stipulated to the dismissal of the major purpose claims." *CPLC II*, 507 F.3d at 1177 n. 3; HLW Br. at 37, n. 24, n. 25. HLW also argues *CPLC I* and *II* dictate what a state may not require in disclosure of the financing of

ballot measure campaigns, and thus Washington's statutes must fall. HLW Br. at 1-2 (describing what this Court said California may not do in the "ballot initiative context.") They do not.

First, *CPLC I* recognized that the "voters have a compelling interest in 'knowing who is lobbying for their vote…" (*CPLC I*, 328 F.3d at 1106; 2009 WL 62144 at *18 n. 5) and "[w]hen an issue is presented to the public for referendum in this manner, the legitimate state interest in determining and reporting 'where [the] money comes from, *Buckley*, 424 U.S. at 66 (internal quotation omitted) extends to all public debate on that issue." 2009 WL 62144 at *18. *See also CPLC II*, 507 F.3d at 1179 n. 8:

> We note that in the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well-established. *See, e.g., McConnell*, 540 U.S. at 196, 124 S.Ct. 619; *see also Buckley v. Valeo*, 424 U.S. 1, 66, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Goland v. United States*, 903 F.2d 1247, 1261 (9th Cir.1990); *ARLC,* 441 F.3d at 791.

Second, the Court in *CPLC II* was careful to determine that California had not met its burden to show its statute regarding "recipient committee" requirements was narrowly tailored; the Court did not decide or suggest that under other facts or statutes, a different conclusion may never be reached. 507 F.3d at 1187. The District Court was likewise careful to identify that fact, stating, "However, in holding that California to its failed burden, the Court never actually analyzed

whether the state's compelling interest could have justified its PAC-style requirements in the ballot initiative context." 2009 WL 62144 at *10. A review of the facts in this case, and the statutes that have been determined to withstand constitutional scrutiny, does lead to a different conclusion. Washington does satisfy its burden and thus the state provisions comport with *CPCL I* and *II*.

B. Washington Laws and Rule Constitutionally Protect the Rights of the Recipient of Campaign Related Speech

The public as the recipient of the speech has constitutional rights that must be protected under any campaign finance disclosure framework. This is especially important to consider when viewing ballot measure campaign activities. The District Court provided a detailed examination of the laws and case precedents as well as a scrupulous adherence to this Court's laws and relevant cases when it determined that Washington laws are constitutional. Nothing that HLW presents now contradicts this conclusion.[32]

1. The Challenged Washington Laws and Rule Pass Constitutional Muster Under Either Intermediate or Strict Scrutiny

The District Court struggled with the appropriate standard of review to apply. It determined that this Circuit has "recognized that 'the Supreme Court has

[32] For all intents and purposes, HLW has abandoned its argument that this is an as-applied challenge. To sustain an as-applied challenge, HLW must present facts as to what law has been applied to it. Beyond its "Verified Complaint," which is of extremely limited on any relevant facts, HLW provides the Court no evidence of what has been applied. The essence of this action is a facial challenge, and such actions are disfavored. *Washington State Grange*, 128 S.Ct. at 1190-91.

been less than clear as to the proper level of scrutiny' for PAC-style requirements" citing *CPLC I.* 2009 WL 62144 at *10. The District Court noted that State Defendants explained that the proper level of scrutiny is that the requirements at issue here need meet "exacting scrutiny" which requires a "substantial relation ... between the governmental interest and the information required to be disclosed" under *AKRTL.* And, the District Court agreed that the Supreme Court recently reviewed campaign disclosure requirements under "exacting scrutiny" citing *Davis v. FEC,* __ U.S. __, 128 S.Ct. 2759, 2775 (2008). 2009 WL 62144 at *24.[33]

The District Court observed that State Defendants' argument contrasted with HLW's argument which asserted that "strict scrutiny" was required and that "PAC-style" requirements must be "narrowly tailored" to achieve a "compelling" governmental interest.[34] The District Court ultimately concluded, however, that "strict scrutiny" applied, determining that the Ninth Circuit has resolved any ambiguity with respect to political committee requirements in favor of strict scrutiny. 2009 WL 62144 at *10.

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[33] *See also Canyon Ferry,* 556 F.3d at 1031; *McConnell,* 540 U.S. at 196, 231; *Buckley,* 424 U.S. at 64.

[34]HLW incorrectly argues that whenever "PAC status is imposed," the Supreme Court has held "strict scrutiny" is required. HLW Br. at 30 (citing *MCFL*, 479 U.S. at 256; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999)). However, none of these cases involved finance disclosure statutes. While this Court in *CPLC II* applied strict scrutiny, it appears it did so because it was "bound" by law of the case, as established in *CPLC I*, which was decided prior to *McConnell.*

Although the application of intermediate scrutiny would be appropriate here, Washington's requirements also survive strict scrutiny. HLW asserts that once strict scrutiny is applied, campaign finance disclosure statutes automatically fail, including those concerning political committees. For this point, HLW cites to no law, but argues that the District Court's analysis "was not truly strict" because the court failed to strike down Washington's statutes. HLW Br. at 30. HLW is incorrect.

As the Supreme Court has repeatedly admonished, a review under strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 237, (1995) (internal quotation marks and citation omitted); *Grutter v. Bollinger*, 539 U.S. 306 (2003). Instead, statutes certainly do survive strict scrutiny, including campaign finance disclosure requirements like Washington State's challenged provisions here. HLW did not then and does not now dispute the factual record that supports the determination that the state's interests are compelling, that the statutes and rule at issue are narrowly tailored to effect their campaign finance disclosure purposes, and those statutes are fully working to the satisfaction of the electorate who enacted them and who continue to use them extensively 35 years after they were first adopted through an initiative of the people. ER 149, 151, 152-55, 192-98.[35]

[35] Former Congresswoman and founder of I-276, Jolene Unsoeld, provided

2. The District Court Correctly Upheld The Compelling Interests Justifying Washington's Campaign Disclosure Provisions

The overarching purpose of access to information is to facilitate democracy. Washington's political committee requirements "impose only relatively minor burdens and focus those burdens on the political committees most able and willing to comply" (2009 WL 62144 at *12) and the state's interest in obtaining the disclosure of information to voters that these statutory provisions enable is "extremely compelling." *Id.* at *13.

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the following statement in the District Court:

> Campaign and similar disclosure efforts regarding lobbying such as Washington's are extremely important to the voters and the citizens. Laws such as those that were adopted by the passage of Initiative 276 provide information to voters and the media about who is attempting to influence the process of government decision-making, and what is their interest or connection to the matter being presented to the voters. Is it a monetary interest? Is there a conflict of interest? Is there an attempt to conceal information from the public and thereby deny the public the fullest knowledge before they decide on the outcome of an election? This applies with equal force to ballot measure campaigns, and particularly given the frequency of ballot measures in this state. I can look back on more than 35 years on this topic from my perspective as someone who has worked inside and outside of government to influence the legislative and political process, and someone who has run my own campaigns. From this perspective, I see the interest by the public in their access to disclosure of campaign contributions and expenditures, lobbying, public records, and similar information as high as it has ever been, perhaps higher. And I know such knowledge can impact the outcome of elections.

ER 197-98.

The District Court properly analyzed the relevant case law and the facts here, finding that at least two interests --- *informational* to enable voters to "follow the money" in the campaign, and the *prevention of fraud* to enable voters to follow their money --- clearly support Washington's statutory disclosure requirements under relevant Supreme Court case law. *Id.*

The District Court recognized the state's interest in informing the electorate about "where political campaign money comes from and how it is spent," is only amplified in the ballot initiative context as more and more money is poured into ballot measures nationwide. 2009 WL 62144 at *13 (citing *Buckley,* 424 U.S. at 66). The District Court found that the state retains an extremely compelling interest in "following the money" in ballot initiative elections so that the electorate's decision may be an informed one. *Id.*; *see also Canyon Ferry,* 556 F.3d at 1031 (describing these interests as important). The District Court recognized that contributors are entitled to verify that their funds were actually used for their intended purpose. The District Court cited to the state's interests behind other donor protection laws, as well as a high profile enforcement case in Washington State[36] where the public's contributions to the ballot measure

[36] *See, e.g., State of Washington ex rel. Public Disclosure Commission v. Permanent Offense, et al.,* 136 Wash. App. 277, 150 P.3d 568 (2006). In this case, a political committee formed an independent corporation to provide undisclosed compensation to co-founder in violation of RCW 42.17's provision prohibiting making of contributions and incurring expenditures in a manner to conceal the

committee were unlawfully used by an officer for his personal expenses for activities unrelated to the campaign, and those facts had been concealed from the public by the treasurer and the committee. 2009 WL 62144 at *13.

As already described, the Supreme Court and Ninth Circuit precedent supports the District Court's decision. *See supra* at Argument Section (A)(2). Information shines light into campaign finance for public policy decision makers (the voters), the participants in the campaigns, and the media. To argue differently disregards the electorate's well-established informational interest, a point which HLW apparently concedes. HLW Br. at 34 n. 23.

HLW contends that the District Court's separate finding that the protection of the fraudulent use of contributions "must be rejected" because it was an "impermissible consideration." *Id.* But by filing this action, HLW invited the federal courts to consider any or all of the state's justifications for providing

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identity of the source of the contribution. The co-founder "did not want the public to know he would profit from campaign work." *Id.* at 280. So, he formed a corporation that was the "nominal entity" to provide campaign services to the ballot measure committee, and did not disclose that fact. These facts became apparent in the resulting PDC enforcement action. *See also* Zephyr Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341 (2009) (**People—our actual citizens—are used to the idea that they take on special responsibilities once they enter the public sphere, whether they do so as an elected official or a non-elected citizen**. . . .There are many ways to fail these responsibilities; **one of them is corruption, when people use the privileges of public power to enrich themselves without considering the public good**. This idea is regularly invoked when people talk of "corrupt lobbyists" and "corrupt federal contractors." These are non-elected citizens who people condemn for legal but venal self-seeking abuse of their public rights to petition the government.) (emphasis added.)

information to the electorate. Washington State has, in fact, seen the misuse of campaign contributions in the context of ballot measure campaigns. ER 159-60. The reports filed with the PDC disclosing who is running a campaign, and where the money is going, enables the public, the media and the PDC to trace whether campaign contributions were used for lawful campaign purposes. *Id.*

3. The Use of "Support" and "Oppose" in Washington's Definitions of Political Committee, Independent Expenditure and Political Advertising is Constitutional

HLW argues here, as it did below, that the three challenged Washington's campaign finance disclosure definitions, i.e., political committee, independent expenditure and political committees, are vague and overbroad, specifically because of their use of the terms "support" and "oppose." HLW believes those words create constitutional defects. HLW is mistaken and for the reasons outlined below, HLW's argument fails. As the District Court concluded, Washington's definitions are properly precise, and are also explained and narrowed through opinions of the state appellate courts. "The requirements that Washington imposes on 'political committees' enforce the disclosure necessary to maintain a well-functioning political process, and no more." 2009 WL 62144 at *23.

a. Political Committee

First, HLW argues that Washington's definition of "political committee" is unconstitutional. HLW is mistaken. The statutory definition reads: "'Political

committee' means any person (except a candidate or an individual dealing with his or her own funds or property) having the *expectation* of receiving contributions or making expenditures *in support of, or opposition to,* any candidate or any ballot proposition." RCW 42.17.020(30) (emphasis added).[37] HLW challenged this definition, and its use in a ballot measure context. The District Court extensively analyzed the statutory terms, the relevant state and federal case law, HLW's arguments below, and the undisputed facts of this case. The District Court concluded that HLW's arguments did not withstand scrutiny, and the political committee definition was wholly constitutional. State Defendants request this Court to adopt the District Court's well-reasoned analysis.

(1) "In Support of or Opposition To"

The terms "in support of or opposition to" are neither vague nor overbroad, do not improperly require disclosure of "issue advocacy" and are certainly appropriate in the ballot measure context. 2009 WL 62144 at *14. The Supreme

[37] *State v. Dan Evans Campaign Comm.,* 86 Wash. 2d 503, 546 P.2d 75, 79 (Wash. 1976) (The primary or one of the primary purposes of the person making the contribution is to affect, directly or indirectly, governmental decision-making by supporting or opposing candidates or ballot propositions, then that person becomes a 'political committee' and is subject to the Act's disclosure requirements); *Evergreen Freedom Found. v. Wash. Educ. Ass'n (EFF),* 111 Wash. App. 586, 49 P.3d 894, 902-03 (2002) (The Act sets forth two alternative prongs under which an individual or organization may become a political committee and subject to the Act's reporting requirements. A person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.)

Court has "explicitly held" that the terms support and oppose are not unconstitutionally vague. *McConnell,* 540 U.S. at 170 n. 64; 2009 WL 62144 at *14. In addition, anyone who has questions about filing requirements can contact the PDC to obtain an advisory opinion, declaratory order, or other assistance. ER 155-56, 223.

While HLW relies upon *Buckley*, that decision offers HLW no support here. The first provision of concern to the *Buckley* Court was that which limited "any expenditure . . . *relative to*" a clearly identified candidate. 424 U.S. at 41-42. The other was in the definitions of "contributions" and "expenditures," each of which used the term "for the purpose of . . . influencing" the election. The Court held that the ambiguity of that term had the potential of encompassing "both issue discussion and advocacy of a political result." *Id.* at 79. The same is not true for "support" or "oppose." The *Buckley* Court went as far as identifying the words "support" and "oppose" as examples of words with a clear meaning. *Buckley,* 424 U.S. at 44 n. 52. The Washington Supreme Court rejected this same vagueness argument in *Voters Educ. Comm.,* 161 Wash. 2d at 488-89, 491. Indeed, HLW concedes the *McConnell* Court "did find support/oppose language not vague." HLW Br. at 44 n. 30.

Critically, HLW fully understood the terms "support" and "oppose" (as well as synonyms such as "reject" or "defeat" or "stop" or others) in the past and used

them in communications to members. ER 398, 402-07, 409-11, 416-17. *See also* ER 357 (HLW CEO Kennedy defines "support" and "oppose"). HLW's claim that the terms "support" or "oppose" are vague should be rejected.

(2) "Maker of Expenditures" Prong – The Primary or One of the Primary Purposes Test Is Appropriate.

The Washington political committee definition contains two alternative prongs: an organization can qualify based on an expectation of "receiving contributions" or an expectation of "making expenditures." *EFF,* 111 Wash. App. at 598. Under Washington appellate court analysis, the first prong of the state's political committee definition (makers of campaign expenditures) applies when the organization has as its primary *or one of the primary purposes* to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions. *EFF*, 111 Wn. App. at 599. The District Court correctly determined that "the state courts and agencies have significantly narrowed each of the definition's prongs and, in the process, despite HLW's claims, have stripped the definition of "ambiguity." 2009 WL 62144 at *23.

This analysis is consistent with Supreme Court and Ninth Circuit case law regarding examination of an organization's major purpose, and as the statute has been interpreted by Washington courts in *EFF,* 49 P.3d at 903 and *Evans Campaign Comm.,* 86 Wash. 2d at 508-09. 2009 WL 62144 at **19-21. Organizations can have more than one significant purpose and applying campaign

finance disclosure requirements when they engage in financing campaign activities is constitutional and logical. 2009 WL 62144 at ** 20-21.

No different result is compelled by HLW's arguments here. HLW's argument that *CPLC I* rejects applying PAC-style requirements on groups like HLW whose "major purpose" is not campaign advocacy is an incorrect reading of *CPLC I*. The District Court correctly analyzed Washington's "a primary purpose test", finding it well within the constitutional requirements, and disposed of HLW's "major purpose" contention. 2009 WL 61244 at *20.

(3) "Receiver of Contributions" Prong – Actual or Constructive Knowledge Is Clear, as is "Expectation"

The District Court also upheld the alternative prong of the political committee definition (receiver of contributions), rejecting --- as this Court previously did in *CPLC II* ---- HLW's argument that a contribution is only a contribution when it is "earmarked" for a campaign purpose. 2009 WL 62144 at *22:

> The state's compelling interest in informing the electorate about the source of political advocacy easily extends to contributions made with the knowledge that the contributed funds will be used for political ends. Moreover, a contributor is only deemed to have "constructive knowledge" of an organization's political intentions if that organization has taken some explicit action to make those intentions clear, such as (1) soliciting contributions for political advocacy, (2) segregating funds for political purposes, (3) registering as a "political committee" with the PDC, or (4) indicating in the organization's bylaws that it intends to receive political contributions. (Rippie Decl. ¶ 35 (Dkt. No. 47 at 18).) As a result, Washington's treatment of

"contributions" is far less vague than that in the FECA, which turned on the hard-to-discern "purpose" of the contribution.

The District Court rejected HLW's argument that the term "expectation" of receiving contributions or making expenditures is unconstitutionally vague because the Washington State appellate courts have narrowed the definition. HLW offers nothing to refute this analysis, and it should be adopted by this Court.

b. Independent Expenditure

Next, HLW challenges the state definition of "independent expenditure." HLW Br. at 47–50. An entity that does not have to report as a political committee may have to report its "independent expenditures." RCW 42.17.100. Independent expenditures are those made by a person or entity independent of (not in consultation or coordination with) a candidate or political committee and that supports or opposes a candidate or ballot measure. ER 167-69. An "independent expenditure" is defined as "any expenditure that is made in support of or in opposition to any candidate or ballot proposition" and is not already required to be disclosed under the rules governing political committees. RCW 42.17.100(1). HLW challenges these disclosure requirements for the same reasons it challenges the political committee-style reporting requirements: it argues that "support" and "opposition" are unconstitutionally vague and that the definition as a whole is overbroad because it is not limited to "express advocacy" as applied in *Buckley*.

But that question has been resolved. The District Court reviewed this independent expenditure definition, described that the Supreme Court had found "support" and "oppose" not vague, and upheld the definition, stating:

> The Court finds it evident that requiring disclosure of independent expenditures is "substantially related" to Washington's compelling interests; indeed, simple disclosure is one of the least restrictive means of furthering the state's interests. *See McConnell,* 540 U.S. at 201 (noting that disclosure requirements "do not prevent anyone from speaking" (internal quotation omitted)).

2009 WL 62144 at *24; *see also McConnell,* 540 U.S. at 170 n.64, 184.

Independent expenditures are an increasingly common method by which businesses, unions, organizations and political committees in Washington support or oppose candidates and political committees. The use of independent expenditures has skyrocketed in Washington in the last several years. ER 175. Reporting of independent expenditures enables the public to more completely "follow the money" in their elections. Under relevant case law and the established facts, and because the terms "support" and "oppose" are sufficiently precise, HLW fails to present to this Court sufficient justification to enjoin this important and compelling state disclosure provision.

c. Political Advertising

Finally, HLW challenges the statutory definition of "political advertising" at RCW 42.17.020. HLW Br. at 51-52. It argues that, under its own "unambiguously-campaign related principle," the Supreme Court has "only recognized two types of

communications" and they are "independent expenditures" and "electioneering communications." However, HLW provides no credible source for such a holding.

The political advertising definition reads that political advertising includes: "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." RCW 42.17.020(38). HLW again asserts that the terms, including "support or oppose" are vague.

The District Court properly rejected this argument, finding that "support or oppose" are clear. This Court has also upheld the phrase "directly or indirectly" when it affirmed an Alaska statute containing this same term. *AKRTL,* 441 F.3d at 782-83. Finally, the District Court found that while "mass communication" is not defined by the PDC, HLW's proposed ad campaign described in its Verified Complaint would fall squarely within a definition of "mass communication." 2009 WL 62144 at * 25 (HLW fails to carry its "heavy burden" of showing the term "mass communication" renders the definition of "political advertising" unconstitutional.).

4. HLW Failed to Establish Any "Burdens" Much Less "Onerous" Burdens Are Related to Washington's Disclosure Provisions

HLW's use of the term "PAC status" to connote some insurmountable burden beyond typical disclosure requirements is misleading, as well as devoid of facts to support it in the record here. In this record, HLW never establishes any burdens that are "onerous." Under Washington law, if an organization meets the definition of "political committee," it must report expenditures and contributions. To do this, it must register with the PDC and designate a person responsible for complying with the disclosure requirements, termed a "treasurer." Nothing in the record here[38], or the relevant case law, leads to the conclusion HLW seeks: that

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[38] The facts in the present case are unlike the situation in *Canyon Ferry*, 566 F.3d at 1029–30. In *Canyon Ferry*, zero dollar expenditures ("*de minimis*" in-kind expenditures) were at issue, involving a church's endorsement concerning a Montana ballot measure and the use of the church's copying machine to reproduce fliers and place a "few sheets" in the foyer. With HLW, the undisputed record shows an entirely different level of activities, an expressed desire to solicit contributions and make expenditures, and different reporting already available in rule. For example, the record shows:

(a) a history of significant contributions and expenditures by HLW and HL PAC in opposing I-119 in 1991 (ER 224-31);

(b) the planned ad campaign by HLW, which would include at least $50,000 regarding I-1000, and an overall estimate by HLW of 20 percent of its $200,000 annual budget for the ad campaign (Dkt. No. 1 at ¶31; ER 77, 361);

(c) the option for HLW and other filers to use "mini reporting" when they raise or spend no more than $5,000 and receive no more than $500 from any on contributor (ER 166; RCW 42.17.370(8) and WAC 390-16-105), an option HLW did not seek; and,

(d) the rule HLW challenges here at WAC 390-16-206 which already exempts from reporting those expenditures that are not "measurable" and

given the electorate's well-documented interest in the information such provisions produce, these provisions fail constitutional muster.

HLW argues generally that Washington's provisions are not the "least restrictive means for fulfilling a disclosure interest," are "vague and overbroad," and are not based on "the major purpose" of an organization. HLW Br. at 30-47; ER 78-80. In *CPLC II,* this Court specifically held, that to be narrowly tailored for First Amendment purposes, a statute need not be the least restrictive means of furthering government's interests. *CPLC II* at 1186; *see also* 2009 WL 62144 at *23. Even with that determination, the District Court concluded that Washington State's requirements were, in fact, narrowly tailored. 2009 WL 62144 at *23. Noting HLW provides here suggests a different conclusion.

HLW cites to no evidence as to how it is or might be, specifically burdened by Washington's filing and disclosure requirements, particularly for what is undisputed in the record regarding HLW and its "internal PAC." HLW generally complains of procedures that include registering as a PAC, appointing a treasurer, using a designated account, keeping records, reporting contributions and expenditures at prescribed intervals, disclosing information about persons making contributions over $100, and keeping account books current and available. HLW Br. at 31-32. Nothing here supports the view that these are "significant" much less

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which are used to make ratings, evaluations, endorsements or recommendations.

"onerous" activities in light of HLW's current recordkeeping and reporting procedures for non-profits in other contexts.[39] HLW's argument challenging appointment of a treasurer is likewise without merit. HLW asserts that requiring appointment of a treasurer "cannot be imposed." This statement is simply not true. There was no such holding in *CPLC I* or *II*. There is nothing in the record to support that HLW demonstrated treasurer duties are unconstitutionally "onerous." Certainly, for organizations handling money, designating a treasurer is a logical and practical step, and a good business practice at minimum. HLW assumedly agrees: as the record indicates; HLW already has a CEO and accountant, and its PAC has designated a treasurer for the last two decades or more. ER 339-40. Why this treasurer requirement is suddenly unconstitutionally intolerable, HLW does

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[39] HLW's concern about the "PAC-like" burdens is belied by the fact that HLW, through its political committee (HL PAC), has complied with all of these in the past, and still does. As CEO Kennedy testified, HLW already has (1) an accountant who tracks contributions and expenditures for HLW, HL PAC, and the HLW Educational Foundation (who also works with HLW treasurer to file reports), (2) software ("Donor Works") to assist HLW in those activities, and (3) separate bank accounts for HLW, HL PAC, and HLW Educational Foundation. ER 339-40, 355, 358, 359, 377 (accountant); 360, 370 (software); 345-46, 348 (bank accounts). HLW also files required reports with other government agencies such the IRS, and the Washington Secretary of State. ER 352-54, 377.

After the District Court's decision denying HLW's motion for a preliminary injunction, HLW shifted its activities to oppose I-1000 to its political committee, which has the same office, contacts and CEO as HLW. ER 446. And if there is any difficulty in understanding the relatively straightforward filing requirements, the PDC staff is available to assist, as it has done in the recent past with HLW and what it describes as its "internal PAC." ER 223; 190.

not further state. These obligations are nothing more than the basic administrative infrastructure necessary to implement the disclosure requirements.

There could not be disclosure without reports, and there could not be effective disclosure without the provision of some standardized information from the committee to the PDC and the ability of the PDC and the public to review it to ensure that committees are complying properly with the disclosure requirements. ER 149-52; RCW 42.17.360, .365. The required information about the committee's structure, officers, and treasurer has further value. It enables the public and the media to compare the organization of one committee to the organization and officers of another to determine if there are overlaps. It also gives information to the contributors themselves so they can inquire about how their money has been spent. ER 152-53. In short, there is a relevant correlation between these requirements and the public interest.

RCW 42.17 does not require that HLW report contributions and expenditures entirely unrelated to the campaign activities, and, even so, HLW already maintains a separate bank account for its political committee, and separately tracks donations received in response to particular solicitations. ER 348. Further, it has the means to apportion other expenditures, such as deciding which part of CEO Kennedy's salary will be paid for by HLW and which part will

be paid for by the Foundation. ER 342-43.[40] There was no hardship here, and certainly not one of a magnitude to result in a violation of the First Amendment.

VII. CONCLUSION

In sum, Washington's interests in disclosure of campaign finance information, including information concerning ballot measures, is important, indeed compelling. Its reporting requirements are "substantially related" to the state interests in disclosure of campaign finance information (which would satisfy "exacting scrutiny") and they are narrowly tailored (which would satisfy "strict scrutiny.")

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[40] When faced with case law confirming that political committee requirements are in fact "not particularly onerous," HLW responds by asking that the decision be overruled. HLW's sole argument on this point looks to be that because Alaska's political committee requirements were found to be "not particularly onerous" and because any political committee requirement appears to be onerous in HLW's view, and inconsistent with HLW's incorrect explanation of *CPLC I* and *II*, the *AKRTL* case is "constitutionally inaccurate." HLW Br. at 32. However, a 3-judge panel cannot overrule circuit precedent. *See In re Complaint of Ross Island Sand & Gravel,* 226 F.3d 1015, 1018 (9th Cir.2000) ("[A]bsent a rehearing en banc, we are without authority to overrule [circuit precedent]"); *see Montana v. Johnson,* 738 F.2d 1074, 1077 (9th Cir.1984).

For the foregoing reasons, State Defendants request this Court to affirm the District Court's order on summary judgment.

RESPECTFULLY SUBMITTED this 28th day of May, 2009.

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STATEMENT OF RELATED CASES

There are no related cases in this action. State Defendants disagree with the Appellant, Human Life of Washington, Inc., that its cited cases are related.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points and contains 13,862 words.

DATED this 28th day of May, 2009.

/s/ Linda A. Dalton
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RE: *Human Life of Washington, Inc. v. Brumsickle et al.*
9th Circuit Court of Appeals No. 09-35128

Dear Counsel:

This letter is to confirm that the Court of Appeals for the Ninth Circuit has granted Appellees' request for a 14-day extension for filing its responsive brief in the above-captioned matter. Appellees' responsive brief is now due May 28, 2009, and Appellant's reply, if any, is due within 14 days of the filing of the response.

Thank you.

Sincerely,

Linda A. Dalton
Senior Assistant Attorney General

LAD:nk
cc: Nancy J. Krier,
Gordon Karg

NO. 09-35128

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMAN LIFE OF WASHINGTON, INC.,

Plaintiff - Appellant,

v.

CHAIR BILL BRUMSICKLE, VICE CHAIR KEN SCHELLBERG; SECRETARY DAVE SEABROOK; JANE NOLAND; JIM CLEMENTS, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; ROB MCKENNA, in His Official Capacity as Washington Attorney General,

Defendants - Appellees.

CERTIFICATE OF SERVICE

I, Nerissa Raymond, hereby certify that on May 28, 2009, I electronically filed the *Brief of Appellees*, along with this *Certificate of Service*, on Behalf of Defendants Brumsickle, Schellberg, Seabrook, Noland, Clements and McKenna with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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A true and correct copy has been served on the following by placing the same in the U.S. mail, affixed with proper postage to:

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DATED this 28th day of May, 2009, at Olympia, Washington.

Nerissa Raymond

NERISSA RAYMOND
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