The Honorable JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Human Life of Washington, Inc., Plaintiff, v. Chair Bill Brumsickle, Vice Chair, et al., Defendants.	NO. 08-CV-00590-JCC STATE DEFENDANTS' RESPONSE TO HLW'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Human Life of Washington, Inc. (HLW) seeks to undermine Washington's historical and deep culture of openness and transparency in government and campaigns. As one of the founders of Washington's campaign finance disclosure laws testifies:

> 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

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knowledge can impact the outcome of elections.

Unsoeld Decl. (Dkt. No. 51) ¶10.

As this Court recognized in its Order denying HLW's motion for a preliminary injunction, this case involves *disclosure*; no state requirement at issue purports to limit content or quantity of advocacy. Dkt. No. 59, at 6-7 & n.2. The Court concluded at 6 "that Plaintiff has not shown probability of success on the merits." In its motion, HLW provides neither new facts nor new legal argument that would give this Court any reason to alter that statement. As articulated below, Washington's disclosure laws serve important, even compelling, interests and are crafted to place no constitutionally relevant burdens on HLW. State Defendants urge this Court to deny HLW's motion and dismiss this case.

II. MOTION TO STRIKE

HLW filed with its motion a pleading titled "Plaintiff's Statement of Material Undisputed Facts" (Dkt. No. 68). Few of the assertions are facts at all. *E.g.,* Dkt. 68, ¶¶10-13, 18, and 25. Because this pleading is not among those authorized by Fed. R. Civ. P. 7 and Local Rule 7, and because this Court's July 15 Minute Order (Dkt. No. 65) did not allow any overlength briefs, State Defendants move to strike this pleading pursuant to Local Rule 7(g).

III. EVIDENCE RELIED UPON

HLW submitted few background facts in its Verified Complaint (that were actually verified) and no others in support of its summary judgment motion. HLW disputes none of the evidence provided by State Defendants in the record. This evidence, which supports State Defendants' request that the Court deny HLW's motion and dismiss this case, is contained in the declarations and exhibits filed in response to the preliminary injunction motion and the motions to expedite and consolidate. Those are the Declarations of Unsoeld, Rippie, Parker, Smith, Perkins, Anderson, Dalton, and Goltz, and attached exhibits (Dkt. Nos. 51, 47, 53, 52, 50, 49, 46, and 48 respectively). There are two Dalton declarations – one filed in response to the HLW motion to expedite/consolidate ("Dalton Decl. #1), and a second filed in response to

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the HLW motion on preliminary injunction ("Dalton Decl. #2"). Dkt. Nos. 27, 46. State Defendants also submit a Supplemental Declaration of Vicki Rippie, Declaration of Nancy Krier, Supplemental Declaration of Jeffrey D. Goltz and Third Declaration of Linda A. Dalton ("Dalton Decl. #3") and their attached exhibits.

IV. STATEMENT OF THE CASE

A. Washington's Campaign Finance Laws Enable Disclosure

1. History of Washington's Campaign Finance Laws

Washington's campaign finance laws were enacted by initiative in 1972. The drafters of Initiative 276 (I-276) determined that, based on recent experience with a 1970 initiative, the public had a strong interest in "the disclosure of money raised and spent on legislative lobbying and ballot measure campaigns." Unsoeld Decl. ¶¶ 4-5. Accordingly, section 1 of I-276 explained "that the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private." RCW 42.17.010(10); *see also id.* (1); Rippie Decl. ¶5. While the law has been modified by additions or amendments since its original enactment, including through another initiative in 1992 to add to the campaign finance provisions such as contribution limits (Rippie Decl. ¶6), the fundamental purpose of the Act has never been changed or modified. That purpose is implemented by the state Public Disclosure Commission (PDC), which has as part of its mission to provide campaign, lobbying and other information to the public in a "timely and meaningful" manner, using modern Internet technology, in order to enable the public to follow the money with respect to campaigns and lobbying. Rippie Decl. ¶¶7-9; Smith Decl. ¶2.

2. Registration and Disclosure Requirements

Washington, like most other states and the federal government, requires committees involved in political campaigns to register with an oversight agency, appoint a treasurer, and

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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. RCW 42.17.020(39); RCW 42.17.020(4) (definition of ballot proposition). Once an entity becomes a political committee under either of the two prongs of that test, it must "file a statement of organization with the commission" (RCW 42.17.040) 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. Rippie Decl. ¶¶26-27 (outlining registration information).

State law only requires disclosure of anything of value for the purpose of assisting in furthering or opposing any election campaign, which in turn is defined to include a ballot measure or a contribution given "for the purpose of assisting any candidate or political committee". RCW 42.17.020(15), (18), (22); WAC 390-05-210(1). For a political committee, that includes contributions and expenditures into and out of its campaign account as well as 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. To avoid entanglement of campaign and non-campaign activities and expenditures, entities that engage in activities that would qualify them as a political committee, including solicitation of contributions, typically create a separate political committee account, as HLW has done. Rippie Decl. ¶38; Dalton Decl. #3, Attach. 1 at 27-29.

Once registered, reporting of the receipt and expenditure of money occurs at defined intervals and on specific forms. Rippie Decl. ¶¶28, 33-38. Reports typically occur on a monthly basis, although, as the election approaches, due dates are typically more frequent if there is reportable activity. *Id.* ¶¶30-31.

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Even if a group did not meet the definition of political committee, but made expenditures from its general fund to support or oppose a ballot measure or candidate which was not coordinated with another committee, it would be required to disclose that expenditure as an "independent expenditure." RCW 42.17.100; Rippie Decl. ¶¶39-42, 48.

RCW 42.17 provides two methods of enforcing the law, the first through an administrative procedure before the PDC, and the second through actions brought in superior court. RCW 42.17.395. At the administrative level, the PDC's penalty authority is limited to $1,700 for a single violation and $4,200 for multiple violations of the law. RCW 42.17.395(4). 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. *See also* RCW 42.17.360(5).

3. The Public and Voters In Washington Rely Upon Access to Campaign Finance Information

In 1974, technological developments in television triggered the public's demand for more campaign information. Unsoeld Decl. ¶8. That demand has only increased with the onset of the Internet. *Id.*; *see also* Smith Decl. ¶11; Rippie Decl. ¶¶ 9-10. The PDC website provides the public with easily accessible information related to laws and rules, filer assistance (including training videos), and access to the searchable database. Smith Decl. ¶4. With the PDC's commitment to and success in meeting its statutory directive of full public access, the ease of access to campaign finance information has become an integral part of the state's electoral culture. Rippie Decl. ¶12; Rippie Supp. Decl. ¶5. In fact, HLW's website page for 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." Rippie Supp. Decl. ¶8, Ex. C. The end of that page further states, "Funding makes a significant impact on general elections." *Id.* State Defendants agree.

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The PDC website has been so successful that it has received national recognition. Smith Decl. ¶3; Rippie Decl. ¶11. Since its inception in 2000 and as of May 2008, the 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. Smith Decl. ¶6.

The vast majority of the reports filed with the PDC are now done electronically, using the ORCA program (Online Reporting of Campaign Activity). Following a 1999 legislative mandate for electronic filing and access, the PDC has been moving towards full electronic filing and access. Rippie Decl. ¶¶12, 15. Currently, the vast majority of filers meet the statutory filing deadlines with little to no incident. Smith Decl. ¶10; Parker Decl. ¶4. With these and other upgrades, the public can see and analyze where and when millions of dollars are received and spent in campaigns, including those related to ballot measures. Rippie Decl. ¶¶14, 20; Rippie Supp. Decl. ¶7; Smith Decl. ¶12.

4. Filer Assistance

The PDC provides assistance to any group questioning whether it should file and how to file the reports. These methods include accessing information on the PDC website (such as links to statutes, rules, manuals, and brochures), free PDC-provided electronic filing software and training, and consultations using a toll-free telephone number or by electronic mail. Rippie Decl. ¶¶21-22; Parker Decl. ¶4.

B. Initiative 1000 and Predecessor Initiative 119

Initiative 1000 (I-1000) is an initiative to the people and is similar to an earlier "death with dignity" measure, Initiative 119 (I-119), an initiative to the Legislature in 1991. *See* Wash. Const. Art. II, §1 which describes the two types of initiatives under Washington law. Because the Legislature failed to enact I-119, it was placed on the November 1992 ballot. HLW was among the opponents of I-119. Parker Decl. ¶¶8, 9, 11; Krier Decl. Ex. A-1-A-12. After a hard-fought and expensive political and media campaign, (Rippie Decl. ¶18, Ex. D-1 -

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$1,734,100 was spent in support of the initiative, $516,562 against and another $1 million opposing I-119 and another initiative), the voters rejected I-119.

In 2007, the topic started receiving attention as a possible initiative measure when former Governor Booth Gardner publicly stated that he "would use whatever strength he had left to ensure that physician-assisted suicide become legal in Washington." Dalton Decl. #1 Attach. 2. He formed a committee to support such an initiative in August 2007, and then formally filed the measure as an initiative with the Washington State Secretary of State on January 9, 2008, receiving national media attention. Dalton Decl. #1 Attach. 6.

Proponents of I-1000 have filed sufficient signatures with the Secretary of State to qualify the initiative for the November 2008 ballot (Dalton Decl. #2 ¶¶3-4, Ex. A; Rippie Supp. Decl. ¶3) and both proponent and opponent committees have registered with the PDC. Parker Decl. ¶13; Rippie Supp. Decl. ¶4. The I-1000 campaign promises to be expensive and contentious. Parker Decl. ¶13; Rippie Decl. ¶54; Rippie Supp. Decl. ¶4.

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

1. Human Life of Washington and its Associated Entities

HLW admits to a long history of opposing ballot measures such as I-1000. Comp. ¶17; PI Mot. at 2; Krier Decl. ¶A-1-A-12. HLW was incorporated in 1971 under the name of "Human Life," changing its name to Human Life of Washington in 1998. Goltz Decl. Exs. A, B. HLW's Articles of Incorporation state that its purpose is "[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.*" *Id.* Ex. A (emphasis added).

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HLW has created two such "other entities." In 1984, HLW established Human Life of Washington Educational Foundation. *Id.* ¶3, Ex. C. Its purpose is: "Through educational, legislative, and judicial efforts, we seek reform in our culture's understanding of personhood, view of life and freedom." *Id.* Ex. E. This is identical to the stated purpose of HLW. The other related organization is Human Life PAC (HL PAC). Created in 1980, it is a "political committee connected to Human Life" and has engaged in fundraising to support or oppose campaigns. Krier Decl. Ex. A-1. Through it, HLW has engaged in both candidate and ballot measure advocacy, and HL PAC has filed reports with both the PDC and the FEC. Parker Decl. ¶7, ¶11-12, Exs. F-1 through G-13; Krier Decl. Ex. E. According to CEO Dan Kennedy, HL PAC is an "internal PAC" of HLW. Dalton Decl. #3, Attach. 1 at 27. A review of the Secretary of State's records did not yield any corporation documents registering HL PAC. Goltz Decl. ¶2.

All three entities have the same mailing address, phone number, fax number, website, CEO, and some common board members and staff. Goltz Decl. Exs. D, E; Krier Decl. at C-1, C-2; Dalton Decl. #3, Attach. 1 at 14, 15-16, 20-21, 25, 28, 29, 40. The attorney for the Vote No 119! Committee (Kenneth VanDerhoef) is the incorporator for HLW and is on the HLW board of directors, and is the HL PAC treasurer. Parker Decl. ¶¶5, 7, 8, 11, 12 and their referenced exhibits; Goltz Decl. Exs. A, C. Mr. VanDerhoef is also the attorney for several persons and entities opposing I-1000 and who sought to file an amicus brief in the case challenging the title of I-1000. Dalton Decl. #1 Attach. 7. CEO Dan Kennedy is on the boards of all three organizations and is consulted by HL PAC on any advocacy the political committee may engage in, including endorsements. Dalton Decl. #3, Attach. 1 at 28-29.

Accordingly and contrary to its claim in its Complaint, it is not true that HLW "is fully independent of any candidate, political party, or political committee in its planned First Amendment activities." Comp. ¶5. Though frequently the funding for campaign advocacy

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was done by HL PAC, it appears that HLW itself undertook the funding of that advocacy. Parker Decl. ¶¶8-9; Exs. D-1 through D-10; Krier Decl. Exs. A-11, A-12.

In recent years, HLW has stated it received approximately $200,000 per year in revenue, slightly more than its Foundation. Goltz Decl. Ex. D (2006 revenue reported to IRS on IRS Form 990 stated on HLW Annual Report as $203,762); Krier Decl. Ex. C-1; *see also* Comp. ¶31. HLW alleges that its anticipated activities would be less than 20 percent of its budget regarding I-1000. Comp. ¶31; Dalton Decl. #3, Attach. 1 at 75, 99, 124-25. However, CEO Kennedy has inquired with the National Right to Life organization about production of HLW radio ads in the range of up to $50,000. Krier Decl. Ex. B-15; Dalton Decl. #3, Attach. 1 at 126-27.

2. HLW Contacts with the PDC

HLW is familiar with the workings of the campaign finance and the PDC. Rippie Decl. ¶53. CEO Kennedy has used the PDC's website. Dalton Decl. #3, Attach. 1 at 131. In fact, HLW's website provides a link to the PDC website, on the HL PAC page. Rippie Supp. Decl. ¶8. HLW and HL PAC have a long history of successfully filing with the PDC. HLW has also registered and been filing with the Federal Election Commission. Parker Decl. ¶¶ 7, 11-12. Additionally, HLW and HL PAC staff have contacted PDC staff over the years for technical assistance. These contacts include help with filings and rule interpretation. Perkins Decl. ¶3 (question from CEO Kennedy about notification regarding HL PAC endorsements); Parker Decl. ¶5 (HL PAC electronic filings). What HLW has not done is bring its current questions in its Complaint to the PDC staff or the Commission for consideration or review. Rippie Decl. ¶23.

3. HLW Role in the Initiative 119 Campaign in 1991

HLW states it wants to engage in advocacy regarding physician assisted suicide, "as it has in the past." Comp. ¶1. HLW's proposed scripts remind listeners of the one prior ballot

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measure in Washington State on that topic, Initiative 119. Comp. Exs. 2, 4. In 1991, HLW actively opposed I-119, both directly and through its political committee, HL PAC, making contributions and expenditures, contributing to other political committees, and filing reports. Parker Decl. ¶¶8-9, 11; *see* Comp. ¶18. Its newsletters repeatedly called upon readers to "oppose," "defeat," "stop," and "reject" I-119, while calling for volunteers to doorbell and make contributions. Krier Decl. Exs. A-1 - A-12. 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. Krier Decl., Ex. A-12.

4. HLW's Proposed Role in Initiative 1000 Campaign in 2008

As CEO Kennedy testified, HLW opposes I-1000. Dalton Decl. #3, Attach. 1 at 90. 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." Krier Decl. Ex. A-14. HLW continued to confirm its opposition to those on its mailing list and to the public. *E.g.*, Parker Decl. Ex. E (January 10, 2008 article titled "Oppose Assisted Suicide – Resources" posted on website including link to site of political committee opposing I-1000); Krier Decl. Ex. B-9 (June 2, 2008 email to specialized HLW listserv with a posting by Alex Schadenburg 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"); *Id.* Ex. B-14 (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* Krier Decl. Exs. B-1 - B-16.

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HLW wants to solicit and expend funds on this topic now because of I-1000. Comp. ¶26 (2008 will be a "special opportunity" for HLW "people are particularly receptive to arguments about the issue.") It freely admits that it wants 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* PI Mot. at 2. In sum, one could conclude that HLW's "advocacy" is also in opposition to I-1000, and its desire is to raise and expend money in that opposition effort. Indeed, it appears HLW has already taken other steps with respect to possible future production of ads. Dalton Decl. #3, Attach. 1 at 76-77; Krier Decl. Exs. B-2, B-15; Goltz Supp. Decl. Ex. A.

V. ARGUMENT

A. Standard for Summary Judgment

This Court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether there is an issue of material fact, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). In denying a motion for summary judgment, a court may grant summary judgment against the moving party, if that party has had a "full and fair opportunity to ventilate the issues involved in the matter." *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir.), *cert. denied*, 540 U.S. 948 (2003), *citing Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982).

B. HLW Has Not Demonstrated that This Action Is Justiciable

For the reasons set forth in State Defendants' Response to Plaintiff's Motion for a Preliminary Injunction (PI Response Br.) (Dkt. No. 44) at 15-18, this Court should dismiss this

case. HLW has failed to state facts of sufficient specificity to demonstrate an actual controversy. 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 verifies 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" (Comp. ¶10), they are not admissible. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995). In any event, mere concerns are not sufficient to raise a justiciable controversy. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 851 (9th Cir. 2007). HLW's Complaint, standing alone, does not establish *facts* supporting HLW's allegations as to a real controversy, much less provide the requisite level of facts to support a summary judgment motion. *See e.g.,* Dalton Decl. #3, Attach. 1 at 101 (first draft of the proposed radio ads were prepared by legal counsel); 132 (CEO Kennedy's allegation of a "multiplier" in ¶10 of the Complaint was based on a statement of his counsel); 85 (CEO Kennedy's decision to initiate lawsuit finalized in November 2007); 91-92 (CEO Kennedy states that HLW is not "tied to specific ads"); Krier Decl. Ex. D (Request for Admission No. 5 concerning role of legal counsel).

Despite its claim that this action is both a facial and an as-applied challenge (Comp. Prayer for Relief ¶1), the manner in which HLW is litigating this matter demonstrates that this is not an as-applied challenge. For example, although HLW attaches proposed texts for its advertising plan to its Complaint, upon further inquiry, HLW is uncertain about whether it would run with the specific scripts or run "substantially similar" or "materially similar" scripts with the same "theme." Dalton Dec. #3, Attach. 1 at 46-47. Typically, an "as applied challenge" would necessitate an application of the challenged law to concrete facts. Here, there is nothing concrete about the "facts" HLW asks the Court to examine. Therefore, the essence of this action is a facial challenge, and such actions are disfavored. *Washington State*

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Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190-91 (2008).

C. Washington's Disclosure Requirements Are Constitutional on Their Face

1. The Supreme Court and Ninth Circuit Court of Appeals Have Regularly Upheld Laws Requiring Disclosure of Relevant Campaign Information

As explained in prior briefing, Supreme Court and Ninth Circuit precedent supports this Court's recognition (Dkt. 59 at 6-7; Dkt. 38 at 4) 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 v. Federal Election Comm'n*, 540 U.S. 93, 201 (2003) (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 v. Valeo*, 424 U.S. 1, 66-67, 81-82 (1976); *Alaska Right to Life Committee v. Miles*, 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"). 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 Education Comm. v. Washington State Public Disclosure Comm'n*, 161 Wn.2d 470, 483, 166 P.3d 1174 (2007), *cert. denied*, 128 S.Ct. 2898 (2008); *Bare v. Gorton*, 84 Wn.2d 380, 387-91, 526 P.2d 379 (1974) (Finlay,

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J., concurring); *Fritz v. Gorton*, 83 Wn.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.") Washington's Disclosure Requirements Should Be Reviewed Under "Intermediate" or "Exacting" Scrutiny

HLW argues that its claims should be evaluated under "strict scrutiny." SJ Br. at 5-10. If true, Washington's disclosure requirements would need to be supported by "compelling state interests" and be "narrowly tailored" in relation to those interests. While Washington's requirements survive such scrutiny under relevant case law, it is well established that the correct level of scrutiny is "intermediate," sometimes referred to as "exacting," scrutiny. *Buckley,* 424 U.S. at 64, 66; *McConnell,* 540 U.S. at 196, 231; *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 201-02 (1999) (citing *Buckley v. Valeo*). Under this level of scrutiny, Washington's disclosure requirements must be upheld if they are supported by "important state interests" and a "substantial relation" be shown "between the governmental interest and the information required to be disclosed." *Alaska Right to Life v. Miles*, 441 F.3d at 787.

HLW incorrectly argues that whenever "PAC status is imposed," the Supreme Court has "consistently required strict scrutiny." SJ Br. at 5 (citing *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) (*MCFL*), *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999)). However, none of these cases involved campaign disclosure statutes. *MCFL*, 479 U.S. at 241; *Austin*, 494 U.S. at 654-55. *American Constitutional Law Foundation* involved a requirement that circulators of petitions wear identification badges. 525 U.S. at 186.

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Further, HLW's use of the term "PAC status" to connote some insurmountable burdens beyond typical disclosure requirements is misleading. Under Washington law, if an organization meets the definition of "political committee," it must report expenditures and contributors. To do this, it must register with the PDC and designate a person responsible for the complying with the disclosure requirements, termed a "treasurer." The *Buckley v. Valeo* Court made clear that these types of requirements are reviewed under "exacting scrutiny." 424 U.S. at 61-64. The *McConnell* Court also applied this less intensive level of scrutiny to disclosure requirements (540 U.S. at 194-96) as well as to limits on campaign contributions. *Id.* at 137. Indeed, it would be illogical to conclude that review of disclosure requirements must be under a more intense standard than review of actual limits on contributions, which the Court has clearly determined to be reviewed under the lesser standard.

Despite HLW's claims to the contrary (SJ Br. at 7-9), the Ninth Circuit has not held that the standard of review is higher. In *Miles*, the Ninth Circuit reviewed some ambiguities in statements in various cases and "assume[d] without deciding that strict scrutiny applies to all of the challenged disclosure requirements." 441 F.3d at 788. More recently, the Ninth Circuit in *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Circ. 2007) (*CPLC II*), applied strict scrutiny, but did so because it was "bound" by law of the case, as established in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101, n.16 (9th Cir. 2003) (*CPLC I*), which was decided prior to *McConnell*.

Nor does *Davis v. Federal Election Comm'n*, 127 S.Ct. 2759 (2008), support HLW's position. SJ Br. at 5. The opposite is true. In *Davis*, the Supreme Court invalidated the so-called "Millionaires' Amendment" to the Bipartisan Campaign Reform Act (BCRA) that relaxed some fundraising limits on opponents of self-financed federal candidates. The Court found that a different contribution limit for competing candidates was unconstitutional. To be valid, the asymmetrical limits had to be justified by a compelling state interest, because the

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provision "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech." 127 S.Ct. at 2772. The Court invalidated the disclosure provisions because they "were designed to implement the asymmetrical contribution limits . . . it follows that they too are unconstitutional." *Id.* at 2775. In so doing, the Court described the *Buckley* test in this way:

> [W]e have closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individual's speech. [*Citing Buckley*, 424 U.S. at 75.] To survive this scrutiny, significant encroachments "cannot be justified by a mere showing of some legitimate governmental interest." *Id.* at 64. Instead, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," and the governmental interest must reflect the seriousness of the actual burden on First Amendment rights. *Id.* at 68.

127 S.Ct. at 2775 (emphasis added.) As discussed below, HLW establishes neither significant encroachments nor serious actual burdens.

3. Regardless of the Degree of Scrutiny, Washington's Disclosure Statutes Are Constitutional

HLW challenges four separate provisions of Washington's disclosure statutes and rules. Although HLW argues them separately in its brief, because of the issues common to them, State Defendants provide one argument. However, one of HLW's challenges should be dismissed for a separate reason. HLW challenges the PDC regulation that requires reporting of a measurable expenditure of funds for communications containing "a rating, evaluation, endorsement, or recommendation for or against a candidate or ballot measure." SJ Br. at 22-23. There is nothing in those portions of HLW's Complaint that Mr. Kennedy verified that indicates that HLW intends to take any of these actions. Accordingly, State Defendants' argument focuses on the allegations common to the statutory definitions of "political committee," "independent expenditure," and "political advertising."

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a. Washington's Disclosure Requirements Are Supported by Important, Even Compelling Interests

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 Wn.2d at 482-83, *quoting Buckley*, 424 U.S. at 68. These interests are embedded in Washington's political culture. Unsoeld Decl. ¶¶ 3-10; Rippie Decl. ¶¶4-8, 13-20.

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.") The Ninth Circuit has recognized such interests as "compelling" in *Alaska Right to Life v. Miles*, 441 F.3d at 788, and, more recently, in *CPLC II*, 507 F.3d at 1178-79.[1] In sum,

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[1] HLW cites *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), perhaps as an illustration of a case in which the Supreme Court invalidated a ban on anonymous leafleting. SJ Br. at 4. *McIntyre* is inapposite to the instant case as it predates *McConnell*, which upheld disclosure provisions in face of arguments based on *McIntyre*. 540 U.S. at 206, n. 88. *See Federal Election Comm'n v. Public Citizen*, 268 F.3d 1283 (11th Cir. 2001) (distinguishing *McIntyre* from campaign disclosure cases). *McIntyre* is also a case about an individual using her own modest resources to publish a pamphlet. This is not the situation presented by HLW, or I-1000. Justice Ginsberg noted this point in concurring separately in *McIntyre* where she expressly stated that the Supreme Court "did not thereby hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity." *McIntyre,* 514 U.S. at 358.

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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. The Burdens of So-Called "PAC Status" Are Slight, Bear a Substantial Relation to the Public Interest, and Are Narrowly Tailored

As previously briefed (PI Response Br. at 17-20), a political committee is defined at RCW 42.17.020(39). HLW argues that the "PAC burdens" imposed by Washington's disclosure laws are "not narrowly tailored in this context." SJ Br. at 10. Citing to no evidence as to how it is specifically burdened, it generally complains of procedures that include: "registering as a PAC, appointing a treasurer, using a designated account, keeping detailed records, reporting contributions and expenditures at prescribed intervals, disclosing information about persons making contributions over $100, keeping account books current and available for public inspection, and being subject to random PDC audits." SJ Br. at 2-3. In light of HLW's recordkeeping and reporting procedures for non-profits in other contexts, HLW does not say why these procedures fail constitutionally. 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 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. Rippie Decl. ¶¶9-12; 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. Rippie Decl. ¶¶13-20. In short, there is a "relevant correlation" between these requirements and the public interest. *Davis,* 127 S.Ct. at 2775.

HLW's concern about the "PAC-like" burdens is belied by the fact that HLW has complied with all of these in the past, and still does. As CEO Kennedy testified that 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. Dalton Decl. #3, Attach. 1 at 14-15, 44, 68, 69, and 133 (accountant); 72, 123 (software); 22-23, 27 (bank accounts). It also files required reports with other government agencies such the IRS, and the Washington Secretary of State. Dalton Decl. #3, Attach. 1 at 41-43, 133.

Since this 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. Krier Decl. Ex. B-14. And if there is any difficulty in understanding the relatively straightforward requirements, PDC is available to assist, as it has done in the recent past with HLW and its "internal PAC." Parker Decl. Ex. 5; Perkins Decl. Ex. 3. To use the terminology of *Davis*, Washington's disclosure requirements make "no significant encroachments" nor create any "serious" "actual burdens" upon HLW.

HLW cites *CPLC II* as striking down "PAC-style requirements" imposed by California on what was termed a "multi-purpose organization." *See* 507 F.3d at 1187; SJ Br. at 10-11. State Defendants agree with the Court that this issue "is something of a red herring." Order Denying Preliminary Injunction (Dkt. No. 59) at 7. 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. Dalton Decl. #3, Attach. 1 at

27. 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. Dalton Decl. #3, Attach. 1 at 19-20.

While not argued in their current brief, the test is not, as HLW has alleged whether an entity has as its "major purpose" the support or opposition of a ballot measure based on a percentage of budget expenditures. *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 601, 49 P.3d 894 (2002). The test is whether an entity has as "a primary purpose" or "one of its primary purposes" such support or opposition. *State v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 546 P.2d 75 (1976); 1973 WL 153939 (AG Op. 1973 No. 14). In any event, HLW's argument that because it anticipates spending only 20% of its annual budget for the ads, and such an effort would never be a "major purpose" sufficient to trigger reporting requirements simply is inconsistent with the facts for three reasons. First, because the details of the ad campaign are uncertain, it is impossible to tell what the budget will be. Second, the record reflects that HLW has already been in discussion for an expenditure that could be as high as $50,000, which is more than its alleged 20% ceiling. (And, given that the proposed actions would take place in a two month period, a $50,000 expenditure would dominate HLW's budget for that period.) Finally, given that more than $2,042,487 dollars has already been received by the political committees supporting and opposing I-1000 (Rippie Supp. Decl. ¶4), it is quite unlikely that this litigation, with all its associated costs, is designed simply to permit a $50,000 ad purchase. *See* Krier Decl. Ex. B-15.

In sum, Washington's 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").

1
c. There Is No Unconstitutional Burden on Potential Contributors

2 HLW hints at another argument, stating that "burdens on contributors could become so 3 severe that no disclosure could be required," citing *McIntyre v. Ohio Elections Comm'n*, 514 4 U.S. 334 (1995). SJ Br. at 4. However, HLW must make the "requisite proof" for such an 5 argument (*Buckley*, 424 U.S. at 69); it neither meets that proof standard here nor pleads it in its 6 Complaint. This "hint" must be entirely disregarded, as HLW admits that "[s]uch a level of 7 harm is not asserted here . . . ." SJ Br. at 4.

8
d. The Washington Disclosure Provisions Are Not Unconstitutionally Vague or Overbroad

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10 RCW 42.17.020(39) defines "political committee" as "any person . . . having the 11 *expectation* of receiving contributions or making expenditures *in support of, or opposition* to, 12 any . . . ballot proposition." HLW argues that the italicized terms are unconstitutionally vague, 13 relying on *Buckley*. SJ Br. at 2, 11-18. HLW's argument must fail because *Buckley* dealt with 14 language very different from the "support" or "oppose" language HLW places at issue here.

15 The first provision of concern to the *Buckley* Court was that which limited "any 16 expenditure . . . *relative to*" a clearly identified candidate. 424 U.S. at 41-42. The other was in 17 the definitions of "contributions" and "expenditures," each of which used the term "for the 18 purpose of . . . influencing" the election. The Court held that the ambiguity of that term had 19 the potential of encompassing "both issue discussion and advocacy of a political result." *Id.* at 20 79. The Washington Supreme Court has rejected this same vagueness argument in *Voters* 21 *Education Committee*. 161 Wn.2d at 488-89, 491. Critically, HLW fully understood the terms 22 "support" and "oppose" (as well as synonyms such as "reject" or "defeat" or "stop" or others) 23 in the past and used them in communications to members (Krier Decl. Exs. A-5, A-7, A-8, A- 24 9, A-11, A-14), yet professes here the terms are now unconstitutionally vague. *See also* Dalton 25 Decl. #3, Attach. 1 at 47 (CEO Kennedy defines "oppose" and "support"). Why this is so, 26 HLW again does not say.

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Perhaps, the crux of HLW's claim 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. HLW seeks to mislead this Court when it states that "both *McConnell*, 540 U.S. at 193, and *WRTL II*, 127 S.Ct. at 2669 n.7 . . . affirmed that 'express advocacy' requires so-called 'magic words' such as 'vote for,' and *CPLC I* recognized the necessity of the 'magic words' . . . ." SJ Br. at 8. *McConnell* did nothing of the sort. In fact, the *McConnell* Court stated that the distinction between "express advocacy" 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." *Id.* at 206. Assuming for the sake of argument that *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007) (*WRTL II*) applies in a disclosure setting, *WRTL II* focused on this new term, holding that advocacy is the "functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S.Ct. at 2667. Again, *WRTL II* involved a corporate funding ban – not disclosure requirements – so its relevance, if any, on this point is limited at best. *See* Order Denying Preliminary Injunction (Dkt. No. 59) at 7, n.2. Further, to the extent the Ninth Circuit in *CPLC I* used the term "explicit words" to mean "magic words" (a proposition that is not true), because *CPLC I* predated *McConnell*, the latter case controls.

HLW also seeks support from other cases, such as cases involving loyalty oaths. SJ Br. at 15. Those cases do not address the campaign issues here, pre-date all campaign finance law with respect to disclosure, and offer HLW no support. Finally, HLW cites the recent case of *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), which held certain provisions of North Carolina law unconstitutionally vague. SJ Br. at 12. However, the Fourth

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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.

D. This Is A Disfavored Facial Challenge; Nevertheless, Washington's Disclosure Requirements Are Constitutional If Applied to HLW's Proposed Ad Campaign

For all intents and purposes, HLW has abandoned its argument that this is an as applied challenge. To sustain an as applied challenge, actual facts must be presented as to what has been applied. Beyond its Complaint, which is of extremely limited usefulness on any facts and presents primarily legal argument, HLW provides the Court no evidence of what has been applied. Though HLW takes great pains in its Complaint to spell out an ad campaign it states it intends to run (or one that will be "substantially" or "materially" similar), it devotes no argument in its brief to an analysis of whether the scripts constitute so-called express or issue advocacy. As CEO Kennedy testified, it is not even certain that these scripts or communications, or different ones, will in fact be the ones used, if an ad plan proceeds. Dalton Decl. #3, Attach. 1 at 91-92. Should the Court nevertheless opt to rule on an as-applied basis, there is now more evidence to indicate that the proposed ad campaign could be determined to oppose I-1000. Certainly, HLW opposes I-1000 (see Part C-4 above) and has assisted HL PAC to that end. In an email dated July 15, 2008 to "Affiliate Presidents" with the subject "RE: Initiative 1000," Mr. Kennedy 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.

Krier Decl. Ex. B-14 (bolding in the original, emphasis added.)

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VI. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, State Defendants request this Court to deny HLW's motion for summary judgment. Further, because HLW has had a "full and fair opportunity to ventilate the issues involved in the matter" (*see Gospel Missions of America*, 328 F.3d at 553), the Court has the authority to enter judgment for the State Defendants and dismiss this case.

DATED this 25th day of August, 2008.

ROBERT M. MCKENNA
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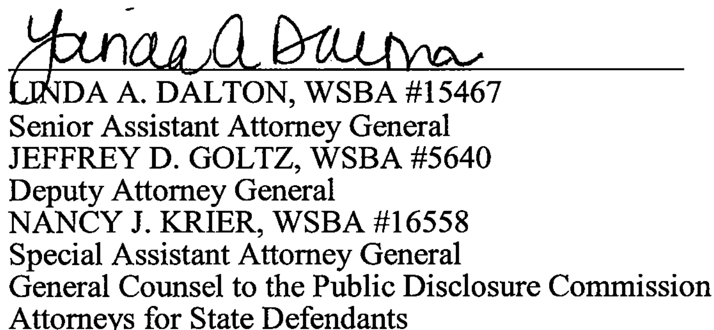

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