UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

INSTITUTE FOR FREE SPEECH, a Virginia non-profit corporation,

Plaintiff,

v.

FRED JARRETT, in his official and personal capacities as Chair of the Washington Public Disclosure Commission; NANCY ISSERLIS, in her official capacity as Vice-Chair of the Washington Public Disclosure Commission; WILLIAM DOWNING, in his official and personal capacities as a member of the Washington Public Disclosure Commission; RUSSELL LEHMAN, in his personal capacity as a former member of the Washington Public Disclosure Commission; PETER LAVALLEE, in his official capacity as Executive Director of the Washington Public Disclosure Commission; and ROBERT FERGUSON, in his official capacity as Washington's Attorney General,

Defendants.

No. 3:21-cv-05546 BJR

PLAINTIFF'S COMBINED RESPONSE AND REPLY RE THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

Oral Argument Requested

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

INTRODUCTION

At the conclusion of the Institute for Free Speech's (IFS's) opening presentation to the Washington Public Disclosure Commission (PDC), the undersigned counsel asked, "[w]hat possibly could be the State of Washington's legitimate interest in requiring the registration of IFS or the reporting of any information about the provision of *pro bono* legal services in an enforcement action? What is the legitimate state interest for doing that?" PDC Meeting Video, https://bit.ly/3wXu82k at 5:22:09-5:22:38.

To this day, no one from the PDC has provided a convincing answer. Defendants go through contortions to avoid answering the question. They know that the state cannot justify requiring the reporting and disclosure of *pro bono* legal services provided in a defense posture, but would rather the Court ignore the central issue in this case.

IFS's motion for summary judgment squarely raises the issue of whether the FCPA's registration, reporting, and disclosure requirements are unconstitutional as-applied to *pro bono* legal services provided in a defense posture. If the FCPA is unconstitutional as-applied to this scenario, then IFS prevails.

Defendants seek to avoid this central question by obfuscating their actions and changing the subject. First, they claim that IFS actually obtained complete relief from the PDC, but then they also assert that IFS should have sought further advice from the state court. Second, the PDC expressly refused "to issue a binding Declaratory Order absolving IFS from any and all future FCPA registration or reporting requirements in relation to representing Mr. Eyman in his role as a continuing political committee." Dkt. 6-8 at 9.

Defendants also hide behind deference to the state court and refuse to take a position on the meaning of the state court's order, even though the AGO wrote the

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

order, including the provision regarding the exemption for legal defense contributions.

Defendants further theorize that IFS lacks standing because perhaps Tim Eyman wouldn't accept free legal services from a national non-profit with expertise in First Amendment litigation. They also claim the commissioners enjoy quasi-judicial immunity even though they are the campaign finance rule-makers and enforcers. As a fallback, they ask for qualified immunity, despite the long line of cases establishing a First Amendment right to associate for purposes of *pro bono* litigation—especially for non-profit attorneys litigating against the government.

This lawsuit, indeed IFS's petition, would have been unnecessary if either the AGO or the PDC would have just told IFS that they didn't think IFS needed to register, report, or disclose their *pro bono* legal work for Eyman's appeal of the enforcement action, even if he's deemed to be an continuing political committee. Even at this stage, the PDC and the AGO wish to keep their options open, knowing full well that dodging this question will create uncertainty and cause IFS, and organizations like it, to steer clear of helping Eyman, a despised regime critic, and anyone else that they wish to target.

This Court should cut through Defendants' obfuscations and require that they answer the question they so desperately seek to avoid: what are the state's legitimate interests in burdening First Amendment associational rights by requiring the reporting and disclosure of *pro bono* legal services provided to those who are defending against a government enforcement action? Defendants' ongoing, serial failure to do so is fatal to the FCPA's application to this situation.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

ARGUMENT

I. MANDATING THE REPORTING AND DISCLOSURE OF *PRO BONO* LEGAL SERVICES IN DEFENSE OF AN ENFORCEMENT ACTION DOES NOT ADVANCE AN IMPORTANT STATE INTEREST IN A MANNER NARROWLY TAILORED TO RESPECT FIRST AMENDMENT RIGHTS

Although you might not know it from reading Defendants' brief, IFS's lawsuit squarely asserts that the FCPA's disclosure regime cannot be applied to the provision of *pro bono* legal services in a defense posture because such an application fails exacting scrutiny. Dkt. 1 at 12-16; Dkt. 4 at 17-23. In their 31-page brief, Defendants devote all of 19 lines of text (less than a page) to exacting scrutiny. Dkt. 29 at 28:17-29:8. They also fail to mention, much less analyze, *Ams. for Prosperity Found. v. Bonta*, Nos. 19-251, 19-255, 2021 U.S. LEXIS 3569, at *24 (July 1, 2021) *("AFPF"),* which is binding Supreme Court precedent on exacting scrutiny for disclosure regimes that burden First Amendment rights. This silence speaks loudly.

It is also important to note this lawsuit's outer contours. Despite Defendants' attempts to mischaracterize our claims, IFS is not attacking the facial validity of any part of the FCPA or WAC 390-17-405 (volunteer services); this is an as-applied challenge only.[1] We are also not alleging that the state could not require the disclosure and reporting of *pro bono* legal services provided in a non-defense posture. For example, this suit does not ask whether the state can require the reporting of services provided to advise an initiative campaign outside the context of defending or appealing an enforcement action. This case presents only an as-applied

[1] Defendants' reliance on *Doe v. Reed*, 561 U.S. 186 (2010) is misplaced. In *Doe*, the plaintiffs alleged two counts – one broad and one narrower. "Count I of the complaint contends that the PRA 'violates the First Amendment as applied to referendum petitions.' Count II asserts that the PRA 'is unconstitutional as applied to the Referendum 71 petition.' The District Court decision was based solely on Count I; the Court of Appeals decision reversing the District Court was similarly limited. … Neither court addressed Count II." *Id.* at 194 (citations omitted). IFS's claim is much more analogous to count II in *Reed* because we are not seeking to invalidate the disclosure of *pro bono* legal services in all contexts, just those provided in a defense posture. *Reed* dealt only with the broader Count I. But even if this Court disagrees, Defendants still have not met exacting scrutiny.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

challenge to the application of the FCPA and WAC 390-17-405 to the provision of *pro bono* legal services to Mr. Eyman or any defendant in a campaign-finance enforcement action. The typical way to challenge the unconstitutional application of a state statute is to initiate an official-capacity suit against the state officials who are responsible for its enforcement. Hence, the present action.

IFS will forego repeating the entirety of its prior briefing on exacting scrutiny (Dkt. 4 at 17-23), but as the FCPA's primary enforcers, it is Defendants' burden to prove that a substantial relation exists between the disclosure requirement and a sufficiently important governmental interest *and* that the disclosure requirement is *narrowly tailored* to the interest it promotes. *AFPF* at *24. This Court should reject Defendants' attempt to turn the burden on its head by shifting it to IFS.

The only government interests Defendants offer amount to the regulatory interests in requiring disclosures about political committees' support of candidates and informing the public about who stands to benefit from ballot initiatives. Dkt. 29 at 28:17-29:8. These interests play no role whatsoever in Mr. Eyman's case or in the case of anyone provided *pro bono* legal defense services in an enforcement action. Eyman is litigating, not campaigning, and the voters will not have a say on his appeal.

Thus, Defendants have completely failed to bear their burden of showing an important government interest. In fact, they have shown no government interest at all.

In addition to lacking any relevant governmental interest, Defendants have failed to show narrow tailoring. To be sure, a tailoring analysis requires examining the linkage between the state interest and the means of promoting those interests. As Defendants have shown no applicable interest, the tailoring analysis necessarily

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

fails too. As applied to *pro bono* legal services provided in a defense posture, the FCPA and WAC 390-17-405 are wildly overinclusive.

Defendants have failed to meet their burdens under exacting scrutiny and, as a result, this Court should permanently enjoin the application of the FCPA and WAC 390-17-405 to the provision of *pro bono* legal services provided in a defense posture.

II. THIS CASE FITS NEATLY INTO THE *EX PARTE YOUNG* EXCEPTION TO SOVEREIGN IMMUNITY BECAUSE ITS CENTRAL COMPONENT IS A CLASSIC OFFICIAL-CAPACITY CLAIM AGAINST THE UNCONSTITUTIONAL APPLICATION OF A STATE STATUTE

IFS primarily seeks pre-enforcement injunctive and declaratory relief based on the First Amendment to the U.S. Constitution. As such, its central claims fall squarely within the *Ex parte Young* doctrine. Defendants are not immune from suit in federal court against allegations that they violate the First Amendment by threatening to enforce their disclosure regime against IFS.

In determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, this Court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Commission of Maryland,* 535 U.S. 635, 645-46 (2002); *see also Rogers v. Dep't of Children,* No. C21-5248-RAJ-MLP, 2021 U.S. Dist. LEXIS 179820, at *12-13 (W.D. Wash. July 22, 2021); *Slater v. Clarke*, No. C10-05822-RBL, 2013 U.S. Dist. LEXIS 106734, at *10-11 (W.D. Wash. July 30, 2013).

Here, IFS easily meets this requirement. Dkt. 1, ¶¶ 54-55, 59-62. Moreover, the ongoing nature of the harm is highlighted by the fact that neither the Defendants nor any other PDC or AGO representatives will state in plain and unequivocal terms that they will never seek to enforce the FCPA against IFS for providing free legal services to Eyman in his appeal.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

III. DEFENDANTS SQUANDERED THEIR OPPORTUNITY TO ARTICULATE A NARROWING CONSTRUCTION THAT WOULD AVOID UNCONSTITUTIONAL APPLICATION OF THE FCPA

From the moment that the undersigned counsel first emailed Assistant Attorney General Eric Newman, IFS has been asking the state's representatives a simple question: can we represent Tim Eyman the man, and the *de jure* continuing political committee, for free, in his appeal, without having to register, report our services, or disclose our donors? Neither the AGO's litigation team against Eyman, nor the PDC or its legal counsel has provided a straightforward answer. Even the brief filed in this lawsuit avoids taking a firm position, simultaneously asserting that IFS was granted full relief, but then indicating that IFS should have asked the state court to clarify the AGO-drafted injunction. *See* Dkt. 29 at 11:1-11; Second Declaration of Endel Kolde, ¶ 3; Ex. A at 31:25-32:2 (state's updated proposed findings requiring that Eyman report all gifts "unless the funds are (1) segregated and used only to pay for legal defense…"). It is somewhat perplexing, to say the least, that the AGO's attorneys would come into court now and claim that IFS had an obligation to seek clarification of language that the AGO itself drafted and in a lawsuit to which IFS is neither a party nor representing a party, while the AGO itself takes no position on what the language it drafted should mean.

In justifying the PDC's failure to address IFS's concerns in the declaratory order, Commissioner Downing stated that the commission could not issue an order that the provision of *pro bono* services was never an in-kind contribution or prevent complaints from being filed. Dkt. 31 at 5:9-13 ("That just can't be done."). But Commissioner Downing appears to have misunderstood, or at least misstated, the scope of IFS's request and also the commission's powers.

First, IFS was not requesting that the PDC declare *all pro bono* legal services as exempt from reporting; only those, as in Eyman's situation, provided in a legal defense posture in an enforcement case. Dkt. 4 at 11:11-17. Second, it has long been

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

recognized that public agencies may impose limiting constructions on their laws and regulations to avoid constitutional conflicts. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (noting that administrative interpretation and implementation are highly relevant to constitutional analysis and finding the any inadequacies on the face of the guidelines was remedied by the city's narrowing construction); *Yamada v. Snipes*, 786 F.3d 1182, 1188 (9th Cir. 2015) ("In evaluating A-1's challenges, we must consider 'any limiting construction that a state court or enforcement agency has proffered'").

The PDC is the state agency with primary responsibility for enforcing the FCPA and adopting regulations related to its enforcement. RCW 42.17A.105. The AGO also has authority to enforce the FCPA, both independently and upon referral by the PDC. RCW 42.17A.765 ("The attorney general should use the enforcement powers in this section in a consistent manner that provides guidance in complying with the provisions of this chapter[.]"). Moreover, under state law, the declaratory order process allows a person to "petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency." RCW 34.05.240(1).

IFS was clear about what it was requesting and the PDC had the authority, and opportunity, by way of the declaratory order process or otherwise, to issue a limiting construction of the FCPA and WAC 390-17-405, in order to categorically avoid their application to free legal services provided in a defense posture against the government. If the PDC had done so, this constitutional problem could have been avoided. Instead, the PDC feigned helplessness, quibbled, and issued a narrow order that did not protect IFS's First Amendment rights of association.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

IV. ACTUAL SUCCESS ON THE MERITS REQUIRES ISSUING A PERMANENT INJUNCTION WHERE A STATE STATUTE UNCONSTITUTIONALLY BURDENS FIRST AMENDMENT RIGHTS

Defendants' attempt to re-cast IFS's official-capacity claims as one for nominal damages instead of injunctive relief is misleading and ignores a well-developed body of case law providing for injunctive relief where a state law violates free speech rights. *See* Dkt. 29 at 21:10-15 ("the *only* relief that IFS seeks in its summary judgment motion is $17.91 against the individual defendants") (emphasis added). IFS spent over ten pages of its motion arguing that Defendants' regulatory regime was unconstitutional because it failed exacting scrutiny as-applied. Dkt. 4 at 12-14. Moreover, Defendants apparently ignore IFS's call for a permanent injunction based on the content-based nature of the regulatory regime. Dkt. 4 at 26:9-11 ("Applying strict scrutiny, this Court should enjoin the application of RCW42.17A.005(15) or WAC 390-17-405(2) to *pro bono* legal services to any party as an impermissible content-based regulation."). To claim, as they do, that IFS requests only nominal damages, is not an accurate reading of Plaintiff's motion.

In cases such as this, once the plaintiff proves that a state law or regulation is unconstitutional as applied, the other permanent injunction factors fall away. The standard for granting a permanent injunction is essentially the same as a preliminary injunction, except that the moving party must show actual success, instead of probable success on the merits. *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n.12 (1987). When actual success is shown, the inquiry is over. A party is entitled to relief as a matter of law irrespective of the amount of irreparable injury that may be shown. *Sierra Club v. Penfold,* 857 F.2d 1307, 1318 n.16 (9th Cir. 1988); *Walsh v. City & Cty. of Honolulu*, 460 F. Supp. 2d 1207, 1211 (D. Haw. 2006).

A permanent injunction is appropriate when: (1) a plaintiff will suffer an irreparable injury absent injunction, (2) non-equitable remedies are inadequate (3) the balance of hardships between the parties supports an equitable remedy, and (4)

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

the public interest is not disserved. *Sierra Club v. Trump*, 977 F.3d 853, 888 (9th Cir. 2020). When the government is party to a case, the balance-of-equities and public-interest factors merge. *Id.*

In the Ninth Circuit, a deprivation of constitutional rights categorically constitutes irreparable harm. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"); *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) ('Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."), *rev'd on other grounds*, 562 U.S. 134 (2011).

Moreover, it should go without saying that the government cannot suffer an irreparable harm for ending an unlawful practice or that the public interest is not promoted by unconstitutional government action. *Sierra Club v. Trump*, 977 F.3d 853, 889 (9th Cir. 2020) ("The fact an important interest is at stake does not permit the government to use unlawful means to further that end"); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("Finally, by establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction"); *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("it is always in the public interest to prevent the violation of a party's constitutional rights").

This is especially true, where, as here, Defendants have offered only thin platitudes about election information in a lawsuit where Mr. Eyman is neither a candidate nor promoting a ballot initiative, and the voters will have no say. In defending their disclosure regime, Defendants have offered insufficient public interest to survive exacting scrutiny. As a result, their disclosure regime is

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

unconstitutional as applied to free legal services provided in a defense posture and this Court should permanently enjoy application of their regime, as applied to such services.

V. IFS HAS STANDING BECAUSE THE TEXT OF THE FCPA AND WAC 390-17-405 CREATE A LATENT THREAT OF ENFORCEMENT AND NEITHER THE PDC NOR THE AGO HAS EXPRESSLY DISAVOWED ENFORCEMENT

Defendants question IFS's standing because IFS has allegedly not proven that the disclosure regime would apply to its services, that Eyman would want free help from IFS, or that the Defendants would ever seek to enforce the regime against IFS or other *pro bono* legal-defense providers. Defendants also claim that IFS misreads the PDC's order, which they allege granted IFS full relief. But Eyman is keenly interested in obtaining IFS's assistance. Declaration of Tim Eyman, ¶¶ 6-8. And Defendants gloss over the relaxed standing requirements in First Amendment cases, ignore their own history of aggressive enforcement against the provision of free legal services, and ignore the record of tactical silence and narrowing of IFS's requests for clarification. Defendants were given multiple opportunities to state unequivocally that they did not intend to enforce the FCPA against IFS for taking on Eyman's appeal, but they couldn't bring themselves to give a straight answer. Instead, they kept their options open. It is the ongoing openness of Defendants' enforcement options against IFS that keeps this controversy alive.

IFS has standing here because Defendants' previous enforcement actions against public interest law firms, and subsequent strategic silence and carefully parsed reservations with respect to IFS's proposed representation of Eyman, have invited self-censorship.

A. Standing requirements are relaxed in First Amendment pre-enforcement challenges.

To avoid the chilling effect of speech restrictions, both the Supreme Court and the Ninth Circuit have endorsed a hold-your-tongue-and-challenge-now approach,

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

rather than requiring litigants to speak first and take their chances with the consequences. *Wolfson v. Brammer*, 616 F.3d 1045, 1058-59 (9th Cir. 2010) (citing *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)); *see also Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"); *Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases[.]"). That is because the plausible threat of enforcement invites self-censorship. "[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry *tilts dramatically* toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (emphasis added).

B. IFS faces a credible threat of adverse state action.

In evaluating whether a plaintiff has alleged a credible threat of adverse state action sufficient to establish standing, the Ninth Circuit looks at (1) whether there is a reasonable likelihood the government will enforce the law against the plaintiff; (2) whether the plaintiff has a concrete plan that would violate the law; and (3) whether the law is inapplicable to the plaintiff by its terms or as interpreted by the government. *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010); *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *see also Stavrianoudakis v. United States Dep't of Fish & Wildlife,* 435 F. Supp. 3d 1063, 1081-82 (E.D. Cal. 2020) (citing *Lopez* and *Wolfson).* The Ninth Circuit does not require an explicit, direct threat of enforcement against the plaintiff. *Lopez*, 630 F.3d at 786; *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003).

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

C. The FCPA and WAC's plain text creates an inherent threat of enforcement.

In this inquiry, an important factor is whether the law's text appears to cover the plaintiff's concrete plan of conduct—whether the "threat of enforcement may be inherent in the challenged statute." *Wolfson,* 616 F.3d at 1059; *see also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) ("[T]he threat [of prosecution] is latent in the existence of the statute"). Thus, in *Getman*, the Ninth Circuit found the plaintiff's fear was reasonable because the state statute appeared to regulate the expenditures in question. 328 F.3d at 1094-95 ("The statutory definition of 'independent expenditure,' on its face, is not limited to including only those communications with explicit words of advocacy. We therefore hold that CPLC suffered the constitutionally recognized injury of self-censorship."); *see also Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1001 (9th Cir. 2010) (finding standing where "Human Life produced evidence of planned communications that arguably fall within the ambit of the statute it is challenging").

In our case, the FCPA's definitions of "contributions" and "expenditures" can plausibly be read to apply to IFS's proposed provision of free legal services. *See* RCW 42.17A.005(15) and (22). The plain text of the FCPA's definition of "contribution" includes gifts and anything of value, including professional services for less than full consideration. RCW 42.17A.005(15). "Services or property or rights furnished at less than their fair market value for the purpose of assisting any candidate or political committee are deemed a contribution. Such a contribution must be reported as an in-kind contribution at its fair market value and counts towards any applicable contribution limit of the provider." RCW 42.17A.005(15)(c). Similarly, the plain text of the FCPA's definition of "expenditure" appears to cover IFS's proposed services because it covers both a "contribution" and a "gift of money or anything of value." RCW 42.17A.005(22).

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

The PDC's regulation, WAC 390-17-405, is even more granular, warning plainly that neither the FCPA nor the WAC "authorizes the services of an attorney…to be provided *to a political committee* without a contribution ensuing, unless the political committee is a candidate's authorized committee, political party or caucus political committee… or unless the political committee pays the fair market value of the services rendered" (emphasis added).

Both the FCPA's definitions and the WAC would plausibly apply to IFS's concrete plan to provide Tim Eyman with free legal services. Free legal services are a thing of value and, by definition, are offered at less than fair market value. And although IFS disputes the legality of the finding, no party disputes that Mr. Eyman has been designated an "ongoing political committee" at the AGO's request. Thus, the threat of enforcement is latent in the existence of the FCPA's definitions and WAC 390-17-405. Moreover, the State has failed to cabin these definitions in a way so as to prevent their application to IFS.

D. Neither the PDC nor the AGO have expressly disavowed enforcement against IFS.

Another important factor is whether the relevant enforcement authorities have indicated that they intend to enforce the law *or have disavowed enforcement* against the plaintiff. *Lopez,* 630 F.3d at 788 ("we have held that plaintiffs did not demonstrate the necessary injury in fact where the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities"); *LSO,* 205 F.3d at 1155 ("Courts have also considered the Government's failure to disavow application of the challenged provision as a factor in favor of a finding of standing"); *compare Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983) (no standing for teachers where Oregon Attorney General and school district's lawyer "disavowed" any interpretation of statute that would make it applicable to teachers) *with Bland*

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

v. Fessler, 88 F.3d 729, 737 (9th Cir. 1996) ("The Attorney General of California has not stated affirmatively that his office will not enforce the civil statute").

Defendants do not dispute that they are (or in the case of Mr. Lehman were at the time of the petition vote) responsible for the FCPA's enforcement. *See, e.g.*, 42.17A.105 (Commission—Duties); 42.17A.765 (Enforcement—Attorney general); 42.17A.750 (Civil remedies and sanctions—Referral for criminal prosecution). Defendants now implausibly claim that they did give IFS full relief, but the text of the PDC's order falls short of the sort of express disavowal of enforcement that is necessary for that to be true. Indeed, Defendants expressly reserved the right to enforce their reporting and disclosure regime against IFS: "the Commission is unable to issue a binding Declaratory Order absolving IFS from any and all future FCPA registration or reporting requirements in relation to representing Mr. Eyman in his role as a continuing political committee." Dkt. 6-8 at 9.

This Court should look at what Defendants and their agents have said and done, and also declined to say or do. First, the declaratory order process was initiated only after the AGO's lead counsel against Mr. Eyman declined to take any position on whether IFS would need to register and report if it represented Eyman. Dkt. 6-2 at 2. That was not disavowing enforcement.

Next, IFS "sought guidance from the PDC" by filing its petition. During the lead up to the PDC hearing, its general counsel and attorney advisor attempted to get IFS to agree to a stipulation that did not address the issue of Eyman's status as a continuing political committee and even floated a further delay of the decision-making process. Second Kolde Dec. ¶ 4; Ex. B; PDC Hearing Record at 5:08:55 to 5:09:43; 5:17:30 to 5:17:53.

At the hearing, the PDC's general counsel stated that it was the staff's recommendation that the Commission's "conclusion would be qualified by the

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

commission *not giving any opinion* as to whether the service, whether services provided Tim Eyman as a political co… any political committee of Tim Eyman's or Tim Eyman as a political committee…" PDC Hearing Record at 4:55 to 4:55:52 (emphasis added; verbal fillers omitted).

During the hearing this colloquy took place between Assistant Attorney John Meander and PDC General Counsel Sean Flynn:

> John: This is John, maybe I can re-phrase the question for the Chair or for Bill, so, according to your proposal, providing pro bono legal services to Mr. Eyman as an individual, raises no concern. We want to know what the distinction is if Mr Eyman is determined to be a political committee, as far as IFS's duty to register or report? Does that change in status change how you view their reporting or registration obligations?
>
> Sean: *Potentially yes* and I think that would a matter that would be properly before the court. Determining the extent to which the reporting requirements of Mr. Eyman would effect the status or the characteristic of the of the contribution being made to him.
>
> John: But from IFS's perspective, how does enforcement at the PDC look at their duty to register depending on Mr. Eyman's status?
>
> Sean: Well I'll say this. If the court were to determine that the legal services were excluded from reporting then I think the proposed order that we've provided would stand and there wouldn't be any reason to believe that there'd be a reporting requirement. If the other condition would be true that let's say that the court determined that it is a reportable contribution again I think there would be a question open for the court as to what extent that would qualify as from the contributors perspective of what they would what they need to report and I think that would be a matter for the court to weigh in on.
>
> *So I don't want to give an opinion about that because that is part of what's in the court's jurisdiction and potentially something that's going to be raised on appeal; so I don't think that would be proper to give an interpretation of.*"

PDC Hearing Record at 6:03:06 to 6:05:38 (emphasis added; verbal fillers omitted).

None of these statements amount to an express disavowal of enforcement. On the contrary, they leave the door open for enforcement.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Similarly, it is telling that Defendants are fighting so hard to maintain the right to require the reporting and disclosure of such services. If IFS truly obtained complete relief from the declaratory order and neither the PDC or the AGO intend to ever require a legal service provider to disclose and report such services, Defendants could have just said so in plain English. If they now agree with IFS, then they should just concede that they do.

E. The state court's order, drafted by the AGO, does not supplant either the PDC's or AGO's role in enforcing the FCPA.

Defendants make much of the state court's "jurisdiction" and attempt to hide behind it, while giving IFS the runaround. First, the AGO's litigation counsel referred IFS to the PDC. Now the AGO suggests that IFS should have gone to the state court. But Defendants' brief avoids telling this Court that the AGO's litigation team drafted and proposed the Court's injunction setting forth Mr. Eyman's reporting requirements; the very same language that the AGO and PDC are now inexplicably unable to interpret or opine on. Second Kolde Dec., ¶ 4; Ex. A at 31:25-32:5. Defendants also neglect their own pivotal role, both in enforcing the FCPA *and* the state court's order. If that order is ever to be enforced, it will be because the AGO has gone to court and sought to enforce it. Dkt. 6-5 at 4:24-5:7 (judgment granting AGO enforcement ongoing authority to monitor compliance with the injunction). Moreover, the operative text of the injunction indicates that Eyman shall report gifts and donations "in compliance with the FCPA[.]" The FCPA's interpretation is squarely within Defendants' purview.

This Court should view with skepticism any attempt by Defendants to portray the PDC as disinterested or uninvolved in the state-court enforcement action against Mr. Eyman. No one disputes that the AGO filed the action against Eyman after a PDC investigation and upon referral by the PDC. IFS's petition process involved at least two Assistant Attorneys General – John Meander and Chad

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Standifer. Defendants' legal team in this lawsuit is also cross-staffed with a member of the litigation team against Eyman – Assistant Attorney General S. Todd. Sipe. *See, e.g.,* Dkt. 6-2 at 2:19; Dkt. 6-5 at 6:18; Dkt. 29 at 32:7.

These relationships, and the AGO's role in drafting the specific language of the state court order, leave any reasonable observer wondering how the PDC's General Counsel could state, in a public hearing, that he didn't want to "presume to know what the court's intent was and I don't want to speak to that, what it was attempting to do in that language…" PDC Hearing Record at 5:04:45 at 5:04:58 (verbal fillers omitted). It doesn't look good when neither the PDC's chief lawyer nor anyone from the AGO is willing to say what an order the AGO drafted means or even to take a position on what it should mean or whether it should be modified. That studied, deliberate noncommittal is tactical; and the uncertainty generated by such behavior benefits only the State.

Hypothetically, let's say Eyman (or even IFS, which was not a party to Eyman's case) had sought clarification of the court's order. By refusing to take a position, the State was leaving itself free to oppose modification or to cross-appeal the issue. Moreover, in the absence of taking a position, the PDC would remain free to seek enforcement on its own terms and in its role as the agency responsible for construing and enforcing the FCPA. If the PDC and the AGO had been acting in good faith, they should have come forward and offered to agree to modify the court's findings. That they did not do so, and instead directed IFS to try its luck (probably over their opposition, including through years of appeals), is telling. But IFS needs certainty. It cannot enter into a representation, only to find out years later that in doing so it triggered ruinous reporting and disclosure requirements.

Defendants also conveniently overlook the PDC and AGO's central roles in their disclosure regime's enforcement. The order against Eyman won't enforce itself. The

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

AGO will need to act to enforce it. And with regard to the plausible threat of third-party complaints, the FCPA provides that the PDC screen such complaints, prior to allowing a citizen to proceed with their own legal action. RCW 42.17A.755; RCW 42.17A.775; WAC 390-37-060. Thus, all roads toward enforcing the FCPA or WAC 390-17-405, lead through the PDC or the AGO and go nowhere without them. Defendants cannot absolve themselves of responsibility here, and their attempts to avoid stating a position do not amount to an express disavowal of enforcement that is sufficient to vitiate standing.

F. The PDC has previously sought to enforce the FCPA against pro bono legal service providers.

Past enforcement of the challenged regime can also be a factor in standing, although it may have little weight where novel circumstances are present. *See Wolfson,* 616 F.3d at 1060. The enforcement history stretches back to at least 2013. The PDC has litigated a related issue on free legal services to a recall campaign with another non-profit legal provider. *See* Washington Recall 2: Lawyer Free Speech - Institute for Justice (ij.org), https://ij.org/case/ijvspdc/ (last visited July 13, 2021); Dkt. 6-3 at 4. And the PDC's website lists at least several instances of enforcement actions involving the provision of free legal services. *See* PDC Enforcement Case #53454 against One Washington Equality Campaign for failure to report in-kind contributions for legal services, https://www.pdc.wa.gov/browse/cases/53454 (last visited September 28, 2021); PDC Enforcement Case #23519 against Respect Washington for failure to report legal services, https://www.pdc.wa.gov/browse/cases/23519 (last visited September 28, 2021). This factor, while not determinative, cuts in favor of standing for IFS.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

G. IFS has presented a concrete plan to represent Eyman that could violate the FCPA.

The final factor in determining whether IFS faces a credible threat of adverse enforcement action is whether IFS has articulated a concrete plan to do something that could plausibly violate the FCPA. IFS easily meets this requirement. This case is similar to *Wolfson,* where the plaintiff expressed an intention to run for judicial office in the future and also an intent to engage in two kinds of campaigning that would likely have been prohibited by the code at issue. 616 F.3d at 1059. The Ninth Circuit there found his intent to be "more than hypothetical." *Id.* Similarly, the Ninth Circuit found standing in other cases where the plaintiff had indicated an intent to speak in a certain manner that could implicate the challenged statute. *Getman,* 328 F.3d at 1095 ("CPLC's intended communication for the November 2000 election was arguably subject to the PRA's reporting and disclosure requirements as an 'independent expenditure.' It follows that CPLC has standing to challenge the allegedly vague definition of 'independent expenditure' as it relates to express ballot-measure advocacy"); *Brumsickle*, 624 F.3d at 1001 ("Human Life produced evidence of planned communications that arguably fall within the ambit of the statute it is challenging").

Here IFS has repeatedly indicated that it would like to represent Mr. Eyman (or his bankruptcy estate) for free in his appeal of the enforcement action, but that it has so far refrained from doing so due to the possible burden of reporting and threat of disclosure of its donors. Dkt. 5, ¶¶ 6-10. Indeed, it would like to also represent other similarly situated parties in the future. Second Declaration of David Keating, ¶¶ 4-6. Defendants' have made a somewhat frivolous suggestion that Eyman may not want free legal help from IFS on his case, but this issue has now also been put to rest. Eyman Dec., ¶¶ 6-8. These facts taken together establish a sufficiently concrete plan to provide standing.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Moreover, this Court should not be misled by Defendants' other red herrings. First, they brazenly suggest that IFS might "only" need to report its top ten donors if it were deemed to be an incidental committee. Dkt. 29 at 23:8-11. The unjustified disclosure of any donor burdens First Amendment rights. *AFPF,* 2021 U.S. LEXIS 3569, at *30-31 (Our cases have said that disclosure requirements can chill association "[e]ven if there [is] no disclosure to the general public"). Here the state apparently seeks to chill IFS in two of its associations: the right to associate with Eyman for purposes of public-interest litigation and the right to associate with its own donors.

Furthermore, this Court should not give credence to Defendants' unfounded surmise that IFS seeks to represent Eyman on matters other than the appeal of his enforcement action. *See* Dkt. 29 at 9:18-21 (describing a mandamus action to place a ballot proposition on the ballot). IFS has no interest in providing such services, and has never suggested otherwise.

VI. THE FCPA IS UNCONSTITUTIONALLY VAGUE AS-APPLIED TO THE PROVISION OF *PRO BONO* LEGAL SERVICES PROVIDED IN A DEFENSE POSTURE BECAUSE DEFENDANTS WENT TO EXTRAORDINARY LENGTHS TO AVOID TELLING US WHAT THEY THINK.

IFS set forth its argument on vagueness in its open brief. Dkt. 4 at 26-28. Defendants respond that the FCPA is "not vague, IFS just does not like what it says." Dkt. 29 at 31:4-5. To a degree, Defendants are onto something. The plain text of the FCPA's definition of "contribution" and "expenditure" and WAC 390-17-405 plausibly appear to cover IFS's proposed representation of Eyman. But Defendants cannot on the one hand claim that the declaratory order vindicated IFS's rights and then also claim that the FCPA clearly covers IFS's proposed actions.

The problem, as discussed repeatedly above*, infra,* is the PDC order's equivocal language and what was omitted from it. Both the PDC and AGO could have expressly disavowed any intent to enforce the FCPA against IFS for representing

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Eyman the man and the *de jure* continuing political committee. As the enforcers of the FCPA, they have the authority to pronounce limitations on its application, but they repeatedly declined to do so here.

Thus, the unconstitutional vagueness is expressed in the silence, statements, and lack of clarification offered by the PDC, the AGO and their agents. And they will continue with such behavior unless this Court makes them stop. The goal is to delay the provision of *pro bono* legal services to Mr. Eyman, or to deprive him of such services altogether, only adding to his debt burden. *See* Eyman Dec., ¶¶ 6-8.

In addition, this Court should consider former Commissioner Lehman's admission that the application of the FCPA in this area is "clearly unclear." Dkt. 31 at 3:3-17. Sure, Lehman discussed the possibility of seeking clarification from the state court, "But my *other* issue —I just want to share with you, is that to the extent you're asking us for prospective—declaration—that's—for me, that's a challenge. Especially in an area that is clearly unclear…" *Id.* at 3:11-15 (emphasis added; verbal fillers omitted). This admission appears to state the obvious, but it also indicates an unwillingness to fulfill the duties of a PDC commissioner. The goal of a declaratory order is to provide prospective guidance before an FCPA violation has occurred. The PDC commissioners' unwillingness to provide such guidance (save one, who voted against the PDC staff's proposed order), only exacerbated that vagueness.

VII. THE FCPA'S REGULATION OF *PRO BONO* LEGAL SERVICES PROVIDED IN A DEFENSE POSTURE IS AN UNCONSTITUTIONAL CONTENT-BASED REGULATION THAT FAVORS THE POLITICAL ESTABLISHMENT

IFS's argument that the FCPA's definitions constitute a content-based regulation are set forth in its summary judgment brief. Dkt. 4 at 23-26. Defendants respond that these are not content-based regulations because the definition of "contribution" does "not target speech at all[.]" Dkt. 29 at 25:23-24. But Defendants

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

selectively quote from the statute and ignore WAC 390-17-405 altogether. RCW 42.17A.005(15)(b)(vii) identifies that certain (but not all) legal services provided to particular favored entities are not included in the definition of "contribution." WAC 390-17-405(1), the PDC's implementing regulation, is even more direct, discussing a variety of core speech activity including doorbelling, political fundraising, and telephone bank activities. WAC 390-17-405(2) discusses attorney donations of "professional services" and creates favored, exempt-from-contribution reporting requirements for candidates, political parties and various other entities so long as certain conditions are met. Importantly, this WAC explicitly states that an attorney cannot donate professional services to a plain-vanilla "political committee" without a contribution ensuing.

Legal professional services, by definition, always involve a strong speech component, whether that be advocacy or advice. For example, legal research would not matter if it weren't conveyed to the client or crafted into a legal brief. And litigation is a form of First Amendment speech. *See, e.g., NAACP v. Button*, 371 U.S. 415, 428-31 (1963). Defendants simply err in claiming that the FCPA's definitions and WAC do not reach speech. They do.

Defendants also claim that their regulatory regime cannot be content based because IFS hasn't proven that they look at the legal briefs to see what they say or who is represented when enforcing the statute. Dkt. 29 at 27:4-7. But this, too, seems implausible.

For example, in the investigation involving *pro bono* legal services provided to the One Washington Equality Campaign, the complainant attached the Foster Pepper firm's legal brief on behalf of the campaign to his complaint. #53454 Complaint, PDC ENFORCEMENT CASES, https://bit.ly/3ohPA1E (last visited September 28, 2021). Indeed, Mr. Lavalee's letter to Jesse Wineberry indicated that

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

staff had conducted a "review and assessment" of the complaint (which contained the legal brief) and opened a "formal investigation." #53454 Initial Hearing Results, PDC ENFORCEMENT CASES, https://bit.ly/2ZA6BcV (last visited September 28, 2021). The PDC's practice contradicts its briefing.

Finally, Defendants offer scant justification for favoring candidates and political parties over plain-vanilla political committees. They claim that the distinction is "constitutionally rooted" because, under *Citizens United v. FEC,* 558 U.S. 310 (2010), political committees may receive unlimited contributions. But that does not justify disfavoring political committees, which come in all shapes and sizes, when it comes to their exercise of First Amendment rights through litigation. Indeed, *Citizens United* expressly forbids speaker-based discrimination:

> the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.

Id. at 340-41. If these reporting and disclosure requirements are somehow valid as-applied to the defense of some PDC enforcement targets, the PDC still cannot grant preferential treatment to some litigants, but not others.

VIII. THE DEFENDANT COMMISSIONERS LACK QUASI-JUDICIAL IMMUNITY BECAUSE THEY ACT AS RULE-MAKERS AND ENFORCERS AND WERE NOT CONDUCTING AN ADJUDICATORY HEARING

Defendants Jarrett, Lehman, and Downing claim quasi-judicial immunity for the personal capacity claims against them. Dkt. 29 at 17; Dkt. 33. Such immunity, if it applies, would insulate them from nominal damages only and would not cover the official-capacity claims. *Pulliam v. Allen,* 466 U.S. 522, 541-42 (1984); *see also VanHorn v. Oelschlager,* 502 F.3d 775, 778-79 (8th Cir. 2007); *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996) (distinguishing between state and federal officials).

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Any claim of immunity, therefore, could only apply to their past action of failing to clarify the scope of their disclosure regime, not to the ongoing harm caused to IFS from the threat of the regime's enforcement against it, and the self-censorship that causes. Even if this Court finds that immunity applies for the decisions in the declaratory order, the order is still evidence of an ongoing threat of enforcement against IFS for purposes of both the individual and the official-capacity claims.

Immunity analysis "begins with a central tenet of American jurisprudence – no one is above the law[.]" *Buckles v. King County*, 191 F.3d 1127, 1133 (9th Cir. 1999). Accordingly, Defendants Downing, Lehman, and Jarrett bear the burden of showing that quasi-judicial immunity applies here. *Id.* The question is whether, in acting as agency officials in this matter, they performed functions sufficiently analogous to those performed by judges. *Id*. The "touchstone" for the doctrine's applicability has been "performance of the function of resolving disputes *between parties,* or of authoritatively adjudicating private rights." *Id.* (citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36) (1993)) (emphasis added). To be sure, there are other factors, as noted in *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985),[2] but the absence of an adversarial process is outcome determinative here. The commissioners were acting as executive branch officials, purportedly clarifying the scope of their own enforcement authority and providing guidance.

Defendants admit that the petition process was non-adversarial. Indeed, it stands in contrast to the PDC's adjudicatory proceedings involving allegations of FCPA violations, which are subject to specific requirements under the state's Administrative Procedure Act, including the separation of functions and limits on *ex*

[2] "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal."

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

parte communications between staff and the commission. RCW 34.05.455, 34.05.458; WAC 390-37-100 (Enforcement procedures—Conduct of hearings (adjudicative proceedings)).

The case for quasi-judicial immunity would be stronger in an adversarial adjudicatory proceeding, but those important procedural safeguards were absent from the petition process. Indeed, a document obtained from a public disclosure request shows that Defendant Lavallee was communicating with at least two commissioners about the state court's orders in the Eyman lawsuit before hearing IFS's petition. Second Kolde Dec., ¶ 6; Ex. C. IFS was not included in that communication and in an adversarial, judicial process, this type of communication would typically be considered an impermissible *ex parte* communication. *See* RPC 3.5(b) (Comment 2: "During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges…").

Furthermore, in this situation, defendants Jarrett, Lehman, and Downing acted more like the commissioners of the Oregon Land Conservation and Development Commission (LCDC) in *Zamsky v. Hansell*, 933 F.2d 677, 678 (9th Cir. 1991). The LCDC had two primary functions: (1) adopting goals which become mandatory state-wide planning standards; and (2) review local land-use plans for conformity with the commission's goals. *Id.* The plaintiff sued the commission for singling out his property and demanding that the local legislature amend its plan, impairing his property value. *Id.* at 679. In declining to find quasi-judicial immunity, the Ninth Circuit reasoned that (1) the commission's proceedings are often not adversarial; (2) that the commissioners don't just approve plans, but advise on bringing plans into compliance; and (3) are not insulated from the agency that promulgates the rules to be applied. *Id.* "Instead, they are the same individuals who promulgate the 'goals' in

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

the first place; they combine the functions of lawmaker and monitor of compliance[,]" functions that are inconsistent with the judicial role. *Id.*

The same lack of insulation and combining of functions is present here. First, there was no bar on *ex parte* contact between commission staff and Defendants Downing and Jarrett in IFS's petition process. Second, the PDC commissioners are themselves responsible for developing and enforcing the regulations implementing the FCPA. RCW 42.17A.105(8) ("The commission shall…[e]nforce this chapter according to the powers granted it by law…"); RCW 42.17A.110 ("In addition to the duties in RCW 42.17A.105, the commission may…[a]dopt, amend, and rescind suitable administrative rules to carry out the policies and purposes of this chapter…"); *How to Participate in the Rule Making Process*, https://www.pdc.wa.gov/engage/rule-making (last visited September 28, 2021).

Moreover, RCW 34.05.240 provides that any "person may petition an agency for a declaratory order with respect to the *applicability* to specified circumstances of a rule, order, or statute *enforceable* by the agency" (emphasis added). Commissioner Downing similarly stated that a declaratory order "is appropriate when there is uncertainty under the law and the person is trying to decide how to comport themselves in order to remain in compliance. Helpful guidance is provided in that way." Dkt. 31 at 4:23-5:1 (verbal fillers omitted). This is akin to the compliance-advising function exercised by the commission in *Zamsky*.

Thus, the declaratory order process is more analogous to an executive (enforcement) function and distinct from an adversarial adjudicative process. Official acts committed in executive capacities may potentially be subject to qualified immunity, but not absolute quasi-judicial immunity. *See Mesquite Grove Chapel v. Pima Cty. Bd. of Adjustment, Dist. 4,* No. 4:10-cv-00769-JR, 2013 U.S. Dist. LEXIS 190329, at *14-18 (D. Ariz. June 19, 2013) (distinguishing between

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

executive and judicial capacity and listing Ninth Circuit cases where quasi-judicial immunity was lacking); *Guru Nanak Sikh Soc'y v. Cty. of Sutter*, 326 F. Supp. 2d 1128, 1136 (E.D. Cal. 2003) (following *Zamsky* due to Board of Supervisors' combined functions as maker and enforcer of laws).

Defendants have also asserted that their jobs as commissioners would become "almost impossible" if they had to anticipate defending their decisions in federal court every time they granted or denied a declaratory order. Dkt. 29 at 18:2-5. But this claim is highly exaggerated. In the entire history of the PDC since 1972, only 18 declaratory orders have been issued. DECLARATORY ORDER INDEX, https://www.pdc.wa.gov/learn/declaratory-order-index (last visited September 29, 2021). The commissioners aren't going to be paralyzed with fear if this Court imposes nominal damages for a failure to protect core civil rights. They may never see another petition for declaratory order during their remaining terms. And government officials should be mindful of constitutional rights when they enforce laws or provide advice related to enforcement.

Finally, it is notable that Commissioner Isserlis voted against the staff-proposed declaratory order, yet her no vote was not recorded in the order and no dissenting opinion or other explanation was provided. *Compare* PDC Minutes for May 27, 2021 Regular Meeting, https://bit.ly/3xYHP2r, at 5 (last September 30, 2021) ("The motion passed 3 - 1. Commissioner Isserlis voted No"), *with* Dkt. 6-8 at 10. The omission of a dissenting opinion illustrates just how different the PDC's process was from what is typical in any multi-judge panel in contemporary American courts.[3]

[3] "Written separate opinions are now commonplace across the judiciary." Cosette Creamer & Neha Jain, *Separate Judicial Speech*, 61 Va. J. Int'l L. 1, 9 (Fall 2020). "Most commentators agree that one of the primary values of a dissent rests with its future corrective power, in that it reveals perceived flaws in the majority's legal analysis[.]" *Id.* at 18.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

That's because the commissioners were acting as executive-agency law enforcers, not judges.

Defendant commissioners bear the burden of showing that their actions were part of a judicial, court-like process. In a close case, the benefit of the doubt cuts against a finding of immunity. *See Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n,* 597 F. App'x 342, 347-52 (6th Cir. 2015). As a result, Jarrett, Lehman, and Downing are not entitled to quasi-judicial immunity.

IX. QUALIFIED IMMUNITY IS UNAVAILABLE TO JARRETT, LEHMAN, AND DOWNING BECAUSE A LONG LINE OF CASES DEFINE A CLEARLY ESTABLISHED RIGHT TO ASSOCIATE FOR PROVIDING *PRO BONO* LEGAL SERVICES WHEN LITIGATING AGAINST THE GOVERNMENT.

Even if quasi-judicial immunity is unavailable, the defendant commissioners assert that they may enjoy qualified immunity typically accorded to executive officials. *See* Dkt. 29 at 19-20; Dkt. 33. Analyzing qualified immunity involves a two-step process, where the court must determine (1) whether the plaintiff has alleged or shown a violation of a constitutional right; and (2) whether that right was clearly established at the time of the official's misconduct. *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). This Court may analyze either prong first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

With respect to the first prong, IFS relies on its prior briefing that Defendants' actions have burdened its First Amendment right to associate with Tim Eyman for the purposes of public interest litigation. Dkt. 4 at 12-23; Section I, *infra.*

With respect to the second prong, the commissioners allege that any right IFS might have enjoyed was not sufficiently established because of the unique nature of designating an individual to be a continuing political committee. Dkt. 29 at 20. At best, that argument proves too much.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

The singularity of designating a regime critic to be an ongoing political committee subject to disfavored treatment under the FCPA points to a systematic effort by Washington's political establishment to silence a dissenting voice.[4] And the more novel a prosecution, the more likely its target would require additional counsel. Defendants cannot point to the extremity of their prosecutorial tactics as a basis for undermining their target's First Amendment rights and the rights of his would-be attorneys. The First Amendment does not just protect the provision of counsel in easy or routine cases. After all, the right was well-established in cases such as *Button*.

Indeed, officials can still be on notice that their conduct violates established law in novel circumstances. *Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009). The mere application of settled law to a new factual permutation does not get officials off the hook. *Id.* Thus, in *Eng,* the Ninth Circuit denied qualified immunity for officials who retaliated against a deputy district attorney (DDA) when his attorney spoke to the press, alleging that the DDA was himself being prosecuted for failing to file criminal charges in a politically controversial school project. 553 F.2d at 1065, 1069-70, 1076 ("Because this case involved 'mere application of settled law to a new factual permutation,'…we conclude that Eng's personal First Amendment interest in Geragos's speech was clearly established by 2003").

Decades of precedent, stretching back to the twilight of the Jim Crow era, establish that state officials may not interfere with the right of non-profit legal service providers to associate with parties for the purposes of public interest litigation against the government. *See, e.g., Button,* 371 U.S. at 438–39; *In re Primus,* 436 U.S. 412, 427-28 (1978). Just a few years ago, this Court re-asserted

---

[4] Defendants apparently do not dispute that the designation of Eyman is unprecedented.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

those rights in *Nw. Immigrant Rts. Project v. Sessions*, No. C17-716 RAJ, 2017 U.S. Dist. LEXIS 118058, at *8-9 (W.D. Wash. July 27, 2017) (citing *Button,* 371 U.S. at 437). By 2021, this right was as clearly established as any, but as is often the case, constitutional rights are not self-executing. Each new generation needs to re-assert them against government actors who, since the beginning of time, don't like being criticized or sued or having their power limited.

This Court should also discount Commissioner Downing's self-serving comments regarding free speech and *pro bono* legal representation. By the time they were made, the PDC was on notice IFS might sue them. PDC Hearing Record at 5:30:27 to 5:31:15. Commissioner Isserlis, who voted against the declaratory order, seems to have known better, although we do not have the benefit of her opinion, because apparently the PDC does not provide for the explication of dissent. Because Commissioners Lehman, Downing, and Jarrett violated IFS's clearly established rights, this Court should deny qualified immunity.

Tim Eyman has been a thorn in the side of many in Washington government for decades. He's now saddled with debt and shackled by an injunction that was written by the AGO and signed by a state court judge. IFS has simply requested to exercise a time-honored right to represent a person, free of charge, against the government, without being subject to additional burdens of regulation or disclosure or of fending off an FCPA complaint. That Defendants wouldn't give IFS a straightforward, simple answer to its request tells this Court all it needs to know.

CONCLUSION

This Court should grant summary judgment in favor of plaintiff IFS and deny Defendants' cross-motion for summary judgment.

INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
202-301-3300

Dated: October 1, 2021

Respectfully submitted,

s/Endel Kolde

Endel Kolde, WSBA #25155[5]
INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, NW, Suite 801
Washington, DC 20036
(202) 301-1664
Facsimile: (202) 301-3399
dkolde@ifs.org

Counsel for Plaintiff

[5] Admitted in Washington State. Application to D.C. bar pending. Currently supervised by D.C. licensed attorneys.