UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

WISCONSIN FAMILY ACTION,	)	
Plaintiff,	)	Civ. No. 21-C-1373 (WCG)
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In *Buckley v. Valeo*, the Supreme Court considered a First Amendment challenge to a campaign finance disclosure provision that required the public identification of every "'person (other than a political committee or candidate) who makes contributions'" of more than "$100 in a calendar year." 424 U.S. 1, 74-75 (1976) (per curiam) (quoting 2 U.S.C. § 434(e) (1974)). The Court held that the provision satisfied the exacting First Amendment scrutiny required of compelled disclosure requirements, and, after applying a limiting construction, was not void for vagueness. *Id.* at 74-81. Wisconsin Family Action ("WFA") now seeks to enjoin the Federal Election Commission ("FEC" or "Commission") from enforcing the successor to that statute, 52 U.S.C. § 30104(c), in precisely the way *Buckley* directed. After a prior regulation that had limited the scope of required disclosures was struck down, the FEC announced it would enforce the statutory disclosure requirements using the very same language supplied by *Buckley*. Under *Buckley* and subsequent case law, section 30104(c) is a valid campaign finance disclosure provision that is narrowly tailored to provide the public with information about the sources of contributions intended to influence federal elections to persons engaging in express advocacy.

WFA's arguments to the contrary cite the wrong standard for injunctive relief, misread on-point case law from the Supreme Court, and misconstrue the scope of the challenged disclosure provision. Section 30104(c) does not require the disclosure of all donors to groups that, like WFA, do not meet the definition of a political committee. Rather, section 30104(c) requires disclosure only of: (1) its independent expenditures expressly advocating for an electoral result; (2) its donors who give to influence federal elections and whose contributions are earmarked for a political purpose; and (3) its donors who contributed for the purpose of furthering an independent expenditure. Those limited disclosures meet the exacting scrutiny applied to campaign finance disclosure requirements.

WFA's additional request to be exempted from disclosing any contributor due to a risk of retribution should also be denied. No group should face violence based on their participation in the public debate. WFA, however, has not established the kind of systematic, specific, and serious threats of harassment and reprisals that would warrant an exception to the generally applicable disclosure rules. WFA's motion for a preliminary injunction should be denied.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election Commission

The FEC is an independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of Federal Election Campaign Act ("FECA"). Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate and enforce FECA violations, *id.* § 30109(a)(1)-(2).

B. FECA's Disclosure Requirements

Congress enacted the comprehensive disclosure provisions of FECA as part of an effort to establish a system of "total disclosure" of the financing of campaigns for federal elective office. *Buckley*, 424 U.S. at 76 (citing S. Rep. No. 92-299, at 57 (1971)). The requirements of that system vary depending upon the type of entity involved and the event that triggers the statutory obligation to disclose. Candidates, their campaigns, political parties, and other groups that raise or spend more than a minimum in "contributions" or "expenditures" and have the major purpose of the election or nomination of federal candidates are required to report to the Commission on a regular basis detailed information about all receipts and distributions. *See* 52 U.S.C. § 30104(a); *Buckley*, 424 U.S. at 79. Those groups, which are defined by FECA as

"political committees," are also required to meet additional registration and organizational requirements. 52 U.S.C. §§ 30102-30103; *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 253-54 (1986) ("*MCFL*") (describing additional requirements political committees must meet).

Persons desiring to spend to influence federal elections that fall outside the definition of a political committee face no organizational and only sporadic reporting requirements.[1] Those persons are not required to file regular disclosure reports; rather the obligation to file disclosures with the FEC is triggered only if they engage in specified election-related spending. *See* 52 U.S.C. § 30104(c), (f). Moreover, those persons need not disclose all receipts and disbursements; they need only disclose "contributions" and "independent expenditures," as those terms are defined by FECA, above minimum amounts. *Id.* § 30104(c).

FECA defines a "contribution" to include giving anything of value "for the purpose of influencing any election for Federal office." *Id.* § 30101(8)(A)(i). In rejecting a vagueness challenge to FECA's disclosure provisions, the Supreme Court construed the term "to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee," but also to "contributions made to other organizations or individuals but earmarked for political purposes." *Buckley*, 424 U.S. at 78. "So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." *Id.* An "independent expenditure" is a communication made without coordination with a candidate, campaign, or political party that "expressly advocat[es] the election or defeat of a clearly identified candidate." 52 U.S.C. § 30101(17)(A).

WFA's motion seeks an injunction barring the FEC from enforcing FECA's requirements

[1] FECA defines "person" to include individuals and organizations like WFA. 52 U.S.C. § 30101(11).

to disclose "any contributions" to WFA "other than those that are earmarked for specific independent expenditures expressly advocating the election or defeat of an identified candidate for Federal office." (Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. ("Mem.") at 26, Docket No. 6.) As currently constructed, two provisions of FECA require the identification of certain donors to persons, like WFA, that do not meet the definition of a political committee. First, section 30104(c)(1) requires "every person (other than a political committee) who makes independent expenditures" totaling greater than $250 during a calendar year to "file a statement containing the information required under subsection (b)(3)(A) for all contributions received." 52 U.S.C. § 30104(c)(1). The cross-referenced subsection (b)(3)(A) requires political committees to identify each "person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year." *Id.* § 30104(b)(3)(A). Second, section 30104(c)(2)(C) requires reporting entities to include "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." *Id.* § 30104(c)(2)(C).

C. Commission Guidance and its Vacatur

In 1980, the Commission promulgated a regulation regarding the scope of reporting requirements for persons making independent expenditures. *See* 11 C.F.R. § 109.10. As relevant here, that regulation required persons who do not meet the "major purpose" requirement to be a political committee but whose independent expenditure activity met the statutory threshold to trigger a reporting requirement to identify: (1) the person to whom the expenditure was made; (2) the amount, date, and purpose of each expenditure; and (3) whether the expenditure was in support of, or in opposition to, a candidate and identifying that candidate. *Id.* § 109.10(e)(1)(ii)-(iv). The regulation also required the reporting entity to identify "each person

who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure." *Id.* § 109.10(e)(1)(vi).

On August 3, 2018, the District Court for the District of Columbia held that 11 C.F.R. § 109.10(e)(1)(vi) was contrary to the "unambiguous disclosure obligation" Congress provided in 52 U.S.C. § 30104(c)(1) and (c)(2)(C) and vacated the regulation. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 410-11 (D.D.C. 2018) ("*CREW I*"). That court determined that the FEC's regulation "permitted reporting . . . committees to evade the statutory disclosure requirements in significant ways." *Id.* at 423. Specifically, the court found that the regulation "wholly fails to implement" the disclosure requirement in 52 U.S.C. § 30104(c)(1), which requires persons other than political committees "to identify non-trivial donors, as well as the date and amount of their contributions, when the contributions were made for political purposes to influence any election for federal office." *CREW I*, 316 F. Supp. 3d at 422. In addition, the *CREW I* district court concluded that the regulation conflicted with the statute because the regulation required groups other than political committees to report only those contributions "made for the purpose of furthering *the reported* independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). According to the court, that disclosure rule "impermissibly narrows the mandated disclosure in 52 U.S.C. § 30104(c)(2)(C), which requires the identification of such donors contributing for the purpose of furthering [the reporting person's] own express advocacy . . . even when the donor has not expressly directed that the funds be used in the precise manner reported." *CREW I*, 316 F. Supp. 3d at 423.

Although the FEC did not appeal this decision, an intervenor filed an emergency motion for a stay pending an appeal. The D.C. Circuit denied that motion, concluding that the intervenor

was "unable to demonstrate any 'likelihood' of success, and certainly not a 'substantial' one" on its argument that the FEC's limited view of the required disclosures was a permissible construction of FECA. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1017-18 (D.C. Cir. 2018) (per curiam) ("*CREW II*"). The Supreme Court similarly denied the intervenor's request for a stay. *Crossroads Grassroots Policy Strategies v. Citizens for Responsibility & Ethics in Wash.*, 139 S. Ct. 50 (2018) (Mem.).

On October 4, 2018, the Commission issued a statement acknowledging that 11 C.F.R. § 109.10(e)(1)(vi) had been vacated and providing guidance regarding the filing obligations for persons other than political committees who make independent expenditures. (*See* Docket No. 5-2.) That guidance followed the *CREW I* court's reasoning closely. (*See id.*) Going forward, the Commission announced that persons other than political committees should report "the information required by 52 U.S.C. § 30104(c)(1) and (c)(2)(C), which includes" identifying "each person (other than a political committee) who made a contribution . . . during the reporting period" and whose contributions exceeded $200 for the calendar year and indicating "which of these persons made a contribution in excess of $200 . . . for the purpose of furthering any independent expenditure." (*Id.* at 3; *see also id.* at 2-4.)

The Commission further explained that not all donors to persons that make independent expenditures must be disclosed under subsection (c)(1). Rather, that section requires disclosure only of all "'donors of over $200 annually making *contributions* earmarked for political purposes,' which contributions are 'intended to influence elections.'" (*Id.* at 4 (quoting *CREW I*, 316 F. Supp. 3d at 389 (internal quotation marks and citations omitted)).) These disclosures cover not just contributions used by the reporting entity to finance independent expenditures, but also '"contributions used for other political purposes in support or opposition to federal

candidates by the organization for contributions directly to candidates, candidate committees, political party committees, or super PACs.'" (*Id.* at 4-5 (quoting *CREW I*, 316 F. Supp. 3d at 392).) Similarly, the Commission explained that subsection (c)(2)(C) requires reporting persons to identify "a subset of those contributors required to be identified in subsection (c)(1)"; that is, those contributors "of over $200 who contribute for the purpose of further *an* independent expenditure" rather than only those whose contribution is expressly linked to the specific independent expenditure being reported. (*Id.* at 4 (internal quotation marks omitted).)

On August 21, 2020, a merits panel of the D.C. Circuit affirmed the district court, agreeing that the regulation conflicted with the plain terms of the statute. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 971 F.3d 340 (D.C. Cir. 2020) ("*CREW III*"). As the D.C. Circuit held, the Commission's regulation "conflicts with the FECA's unambiguous terms twice over." *Id.* at 350. First, the D.C. Circuit concluded that the prior regulation "disregards (c)(1)'s requirement that" persons making independent expenditures "disclose each donation from contributors who give more than $200, regardless of any connection to [independent expenditures] eventually made." *Id.* at 350-51. "Second, by requiring disclosure only of donations linked to a particular" independent expenditure, the regulation "impermissibly narrows (c)(2)(C)'s requirement that contributors be identified if their donations are 'made for the purpose of furthering *an* independent expenditure.'" *Id.* at 351.

II. FACTUAL BACKGROUND

WFA is a nonprofit founded in 2006, whose stated mission is "to advance Judeo-Christian principles and values in Wisconsin by strengthening, preserving, and promoting marriage, family, life, and religious liberty." (Decl. of Julaine Appling ("Appling Decl.") ¶ 4, Docket No. 4.) On December 2, 2021, WFA concurrently filed a Complaint and the instant preliminary injunction motion to challenge the constitutionality of the disclosure requirement in

section 30104(c). (*See generally* Complaint ("Compl."), Docket No. 1; Mem.) WFA claims that it generally "focuses on state level elections, and its activities include lobbying and voter education. (Appling Decl. ¶¶ 4-6, 10-11.) WFA's Complaint alleges that, despite never previously making any independent expenditures, it "intends to make independent expenditures in support of candidates for federal office." (Compl. ¶ 23; *see also* Mem. 1, 25-26.) In support of its preliminary injunction motion, WFA's President indicates only that the group "would like to support candidates for federal office" in the "upcoming election cycle," without mention of the nature of that "support." (Appling Decl. ¶ 7.)

To remedy its claimed First Amendment injury, WFA seeks an order exempting it from the disclosure requirements of section 30104(c) to the extent it requires disclosure of contributions not "earmarked for specific independent expenditures." (Mem. 26.)

ARGUMENT

I. WFA CARRIES A SIGNIFICANT BURDEN TO QUALIFY FOR THE EXTRAORDINARY REMEDY OF A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citations omitted). It is "never awarded as of right." *Id.* at 24. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (quoting *Winter*, 555 U.S. at 20), cert. denied, 141 S. Ct. 1754 (2021).

An applicant for a preliminary injunction must make a "strong showing" that it is likely to succeed on the merits. *Ill. Republican Party*, 973 F.3d at 762. This showing "normally

includes a demonstration of how the applicant proposes to prove the key elements of its case." *Id.* at 763. That requires WFA to present "evidence, not merely allegations" to establish its entitlement for relief. *Bergeron Davila v. Schmaling*, No. 16-cv-1665-JPS, 2017 WL 2275004, at *3 (E.D. Wis. May 24, 2017); *cf. Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020) (noting that applicant for preliminary injunction "must set forth by affidavit or other evidence specific facts, rather than general factual allegations" (citation and internal quotation marks omitted)). Similarly, even in First Amendment cases, "the balance of equities must 'tip[] in [the applicant's] favor,' and the 'injunction [must be] in the public interest.'" *Ill. Republican Party*, 973 F.3d at 763 (quoting *Winter*, 555 U.S. at 20) (alterations in original).

WFA's argument that it need only show a "'better than negligible'" chance to succeed (Mem. 13 (quoting *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2017)) is based on superseded case law. That "standard was retired by the Supreme Court." *Ill. Republican Party*, 973 F.3d at 763. As the Seventh Circuit noted, the Supreme Court "expressly disapproved" the formula used in prior Circuit cases, "including one the Court singled out." *Id.* at 762. Indeed, the appeal in the case WFA cites for its outdated standard was directly abrogated. *Id.* (abrogating *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017)); *see* Mem. 13 (citing *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-cv-943, 2016 U.S. LEXIS 129678, at *10 (E.D. Wis. Sept. 22, 2016)). "The Supreme Court has invoked a higher standard." *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020), cert. denied, 142 S. Ct. 69 (2021).

II. WFA IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS FIRST AMENDMENT CLAIM

The disclosure provision at issue here is subject to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important'

governmental interest." *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (quoting *Buckley*, 424 U.S. at 64, 66)). As the Supreme Court recently made clear, while exacting scrutiny "does require that they be narrowly tailored to the government's asserted interest," it "does not require that disclosure regimes be the least restrictive means of achieving their ends." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) ("*AFPF*"). Section 30104(c) readily satisfies this standard.

A. Section 30104(c) Furthers Important Governmental Interests

Since the seminal decision in *Buckley*, the Supreme Court has consistently recognized that campaign finance disclosure laws generally advance the "important state interests" of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (discussing *Buckley*); *see also Citizens United*, 558 U.S. at 371 ("[Campaign finance] transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."). It is, therefore, "well accepted that disclosure requirements in the campaign-finance context serve important governmental interests by providing the public with information about who is speaking about a candidate shortly before an election and the sources of funding for campaign-related ads." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014) (citation and internal quotation marks omitted); *see Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 478 (7th Cir. 2012).

The public's interest in learning about the sources of campaign financing applies even when the disclosure involved relates to those contributing to minor parties and independent candidates, as well as campaign-related spending independent of a candidate or political party. *See Buckley*, 424 U.S. at 72-73, 76; *Citizens United*, 558 U.S. at 369 (upholding constitutionality

of campaign finance disclosure requirements as-applied to independent corporate communications); *SpeechNow.org v. FEC*, 599 F.3d 686, 697-98 (D.C. Cir. 2010).

The government's information interest also extends to contributions given to reporting persons to influence federal elections, even if not expressly tied to a particular express advocacy communication. As WFA recognizes, section 30104(c) is the successor to a disclosure provision upheld in *Buckley*. (Mem. 5 (citing provision of FECA formerly codified at 2 U.S.C. § 434(e)). Section 434(e) required every "'person (other than a political committee or candidate) who makes contributions or expenditures' aggregating over $100 in a calendar year 'other than by contribution to a political committee or candidate' to file a statement with the Commission.'" *Buckley*, 424 U.S. at 74-75 (quoting 2 U.S.C. § 434(e) (1974)). Thus, contributors to persons other than a political committee were required to report their own contributions to the FEC, whereas FECA now requires that information to come from the person making sufficient independent expenditures. *See CREW I*, 316 F. Supp. 3d at 374. The *Buckley* Court concluded that this requirement was designed to "insure that the voters are fully informed" about the sources of funding of federal campaign-related spending and "responsive to the legitimate fear that efforts would be made" to avoid the "disclosure requirements" provided by "the general provisions of the Act." *Buckley*, 424 U.S. at 76.

Responding to vagueness concerns, the *Buckley* court applied a limiting construction to the statutory terms "contribution" and "expenditure" that triggered reporting requirements under section 434(e). *Buckley*, 424 U.S. at 78-79; *see supra* p. 3. As to "contribution," the Court construed that term to include both contributions to candidates and political parties and "contributions made to other organizations or individuals but earmarked for political purposes." *Buckley*, 424 U.S. at 78; *see also id.* at 80 (holding that section 434(e) required individual

reporting of "contributions earmarked for political purposes . . . to some person other than a candidate or political committee"). The Court's construction of "expenditure" as applied to reporting requirements for persons other than a political committee was even more limited. Section 434(e), the Court concluded, required reporting only of "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *i.e.*, independent expenditures. *Id.* at 80 (footnote omitted). The Court then held, "even as construed," section 434(e)'s requirement of disclosure of contributions to persons other than political committees made "for political purposes" served the government's informational interest by "increase[ing] the fund of information concerning those who support the candidates." *Id.* at 80-81.

WFA, therefore, is highly unlikely to succeed in establishing that section 30104(c), as interpreted, does not further *any* important interests. At a minimum, the provision furthers an informational interest. As did section 434(e), section 30104(c) "aid[s] the voters in evaluating those who seek federal office" by "allow[ing] voters to place each candidate in the political spectrum more precisely" and, through requiring disclosure of the "sources of a candidate's financial support," by "alert[ing] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* at 66-67. Even assuming that the "corruption potential of [independent] expenditures may be significantly different," "the informational interest" in disclosures of contributions to persons other than political committees "can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Id.* at 81.

Moreover, while the government's informational interest alone is sufficient to uphold section 30104(c), the provision furthers other important interests as well. *See McConnell*, 540 U.S. at 196 (upholding disclosure requirement as constitutional in light of the interest in

"gathering the data necessary to enforce more substantive electioneering restrictions"). For example, the required disclosures will "deter[] and help[] expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals." *SpeechNow*, 599 F.3d at 698; *see also* 52 U.S.C. § 30121(a)(1)(A), (C) (prohibiting foreign nationals, directly or indirectly, from making "a contribution or donation . . . in connection with a Federal . . . election" or an independent expenditure); *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 1204 (2017).

B. Section 30104(c) Substantially Relates and Is Narrowly Tailored to the Government's Interests

Section 30104(c) is proportionate and narrowly tailored to the governmental interests it is designed to serve. Its limited focus is on the disclosure of the sources of funds used in federal elections that would not otherwise be disclosed. It imposes reporting obligations only on those persons that make sufficient express advocacy expenditures but who would otherwise be exempt from disclosure because they lack the major purpose of a political committee. *See* 52 U.S.C. § 30104(c)(1). Those filers are not required to make ongoing disclosures about all receipts and disbursements, they are required to disclose only (1) "contributions" of more than $200 made "for the purpose of influencing any [federal] election," 52 U.S.C. §§ 30101(8)(A)(i), 30104(b)(3)(A), (c)(1), and "earmarked for political purposes," *Buckley*, 424 U.S. at 78; (2) the "identification of each person" who contributed more than $200 "for the purpose of furthering an independent expenditure," 52 U.S.C. § 30104(c)(2)(C); and (3) disbursements "in connection with an independent expenditure by the reporting committee," *Id.* § 30104(b)(6)(B)(iii), (c)(2)(A). FECA imposes no organizational or ongoing registration requirements on these filers. They need not file any reports in years they do not meet the statutory threshold. *See id.* § 30104(c)(2).

These limited disclosures are functionally identical to the predecessor disclosure provision, section 434(e), that *Buckley* concluded satisfied exacting scrutiny. Section 434(e) required every "'person . . . who makes contributions'" of more than $100 in a calendar year "'other than by contribution to a political committee or candidate' to file a statement with the Commission" disclosing those contributions. *Buckley*, 424 U.S. at 74-75 (quoting section 434(e)); *see CREW I*, 316 F. Supp. 3d at 372. As described above, the Court limited those "contributions" that must be disclosed to groups other than political committees to those that are "earmarked for political purposes." *Buckley*, 424 U.S. at 80. So construed, the Court held that section 434(e) was "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81. Though *Buckley* acknowledged that "compelled disclosure" can infringe on associational rights, the Supreme Court concluded that section 434(e) satisfied "exacting scrutiny" because it was "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 64, 82.

Those conclusions apply with equal force to section 30104(c). The statute provides important transparency regarding extensive election-related spending made by groups that need not report as political committees, which in turn, "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371; *see also* Mem. 22 (acknowledging the "informational interest in the public knowing" the sources of candidate support from 501(c)(4) express advocacy spending). And it does so in a limited fashion by requiring disclosures only from persons that make sufficient independent expenditures, and only when their affirmative conduct meets the statutory threshold.

Section 30104(c)'s event-driven disclosure requirements ratify its status as a narrowly

tailored disclosure provision. These sporadic disclosure requirements are "a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369. In fact, the Supreme Court has pointed to section 30104(c) as a provision that "provide[s] precisely the information necessary" to meet the "state interest in disclosure" in a "manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *MCFL*, 479 U.S. at 262. And the Seventh Circuit has recognized that periodic disclosure "for occasional express-advocacy spending by 'nonmajor-purpose groups' would be constitutionally permissible" as an alternative to "full PAC-like burdens" on those groups. *Barland*, 751 F.3d at 841.

FECA also "provides off-ramps for individuals who wish to engage in some form of political speech but prefer to avoid attribution." *Gaspee Project v. Mederos*, 13 F.4th 79, 89 (1st Cir. 2021). Those who wish to give to WFA can do so without disclosure by choosing to give less than the reporting threshold or by declining to earmark their donations for federal political purposes such as by opting out of having "their monies used for independent expenditures." *Id.* And no disclosure would result from individuals choosing to associate with WFA in other ways, including by volunteering or providing other non-monetary support that is excluded from the statutory definition of contribution. 52 U.S.C. § 30101(8)(B)(i).

Section 30104(c)'s monetary thresholds for contributor disclosure also fall solidly within constitutional bounds, contrary to WFA's argument otherwise. (Mem. 22.) The only citation WFA offers in support of this argument is to a case rejecting a $200 threshold to qualify as a "political committee" subject to "various administrative, organizational, and reporting requirements." *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1153 (10th Cir. 2007). While such low spending may not justify full-blown political-committee status, the same

logic does not apply to event-driven disclosure requirements. *See Barland*, 751 F.3d at 836, 841 (distinguishing between "event-driven disclosure requirement[s]" from comprehensive regulations on political committees). "Once reporting requirements are triggered, states may constitutionally mandate disclosure of even small contributions." *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019). Thus, in *Vermont Right to Life Committee, Inc. v. Sorrell*, the Second Circuit upheld a disclosure law that required groups exceeding an expenditure threshold to disclose contributions of more than $100, despite also declining to impose a major purpose requirement before those groups were required to disclose. 758 F.3d 118, 138 (2d Cir. 2014). In any event, WFA does not offer any workable alternative, much less a basis to supplant the legislative judgment involved in setting a threshold for disclosure. *Cf. Buckley*, 424 U.S. at 83 (concluding that $100 disclosure threshold was not "wholly without rationality" and within "congressional discretion").

Today, the government's informational interest in disclosing the sources of support for the makers of independent expenditures that do not qualify as political committees is exponentially stronger than when *Buckley* was decided. As the D.C. Circuit explained, after *Citizens United* struck down the prohibition on corporations making or supporting independent expenditures, "overall [independent expenditure] spending exploded," and that spending is "dominated" by 501(c)(4) organizations, like WFA, and independent-expenditure-only political committees (so called super PACs). *CREW III*, 971 F.3d at 344. WFA itself notes that the administrative respondent in *CREW*, which was similarly a 501(c)(4) organization, had, "[i]n its short existence," "made independent expenditures of well over $100 million and, in addition, contributed over $75 million to other entities that make their own independent expenditures." (Mem. 21.)

In fact, the public record establishes that independent expenditures have only continued their upward trajectory after the *CREW I* ruling in 2018. Total independent expenditures nearly doubled between the 2016 and 2020 election cycles, from $1.6 billion to $3.1 billion. (*Compare* Decl. of Jayci Sadio ("Sadio Decl.") Exh. A, *with id.* Exh. B.) Those expenditures result in more contributor disclosure, as the spending has shifted toward super PACs that must disclose all their contributors. (*Id.*)

Recent experience with campaign finance disclosures confirms that section 30104(c) provides information that is useful to the voting public. "With modern technology," section 30104(c) disclosure requirements "now offer[] a particularly effective means of arming the voting public with information . . . to a degree not possible at the time *Buckley*, or even *McConnell*, was decided." *McCutcheon v. FEC*, 572 U.S. 185, 223-24 (2014) (plurality op.). Indeed, even under the prior Commission regulation that required reporting of more-limited contributor data, the FEC's independent-disclosure-related data has been *extensively* used by the public and press to inform voters. (*E.g.*, Sadio Declaration Exh. K.).

The value in disclosure of contributors to persons making independent expenditures inheres in its very disclosure, which permits voters to fully understand the bases of candidates' support. Section 30104(c) is, therefore, in stark contrast to the compelled disclosure of contributors that was struck down in *AFPF*. That case involved compelled disclosure to a state attorney general of information about donors to charities "just in case" that information might become relevant in a future fraud investigation. 141 S. Ct. at 2387. The attorney general could not point to "a single, concrete instance" in which its dragnet "did anything to advance" enforcement efforts. *Id.* at 2386. Section 30104(c), however, provides direct information of interest to voters participating in the electoral process.

The important information section 30104(c) provides would be drastically undermined by WFA's proposal to limit required disclosures of contributors to only those expressly tied to a "specific independent expenditure." (Mem. 26.). Such a construction would be contrary to both the plain language of the statute, *see CREW III*, 971 F.3d at 354, and the intent of Congress to "achieve 'total disclosure' by reaching 'every kind of political activity,'" *Buckley*, 424 U.S. at 76 (quoting S. Rep. No. 92-299, at 57 (1971)). It would also permit savvy donors to evade relevant disclosure even if they contributed with the declared intent to finance independent expenditures in support of a candidate, so long as they did not tie their contribution to a specific advertisement. *See CREW III*, 971 F.3d at 345-46. And the Supreme Court has consistently rejected the argument that disclosure provisions must in all cases be limited to disclosures related solely to express advocacy. *Citizens United*, 558 U.S. at 369; *see Mangan*, 933 F.3d at 1113; *Madigan*, 697 F.3d at 484.

WFA's relatively modest annual budget does not eliminate the informational interest in disclosure of its federal contributors. *Buckley* rejected a similar claim from minor political parties, who argued that "FECA's disclosure requirements could not constitutionally be applied to minor parties and independent candidates because the Government's interest in obtaining information from such parties was minimal and the danger of infringing their rights substantial." *McConnell*, 540 U.S. at 198. As *Buckley* recognized, the state's disclosure interest applied to contributors to even relatively less financed minor party or independent candidates because "a minor party sometimes can play a significant role in an election," and spending to support those candidates may "divert votes from other major-party contenders." 424 U.S. at 70.

In the same vein, targeted electoral spending in a few congressional districts, as WFA proposes, may have an outsized impact. WFA points to only two specific congressional districts

in which it may make independent expenditures. (Appling Decl. ¶ 7 (identifying the Wisconsin Sixth and Seventh congressional districts).) In 2020, total spending in the Sixth district — including candidate and independent spending — amounted to just over $2 million. (*See* Sadio Decl. Exh. F.) The same categories of spending in the Seventh district totaled $7.8 million. (*Id.* Exh. G.) And, according to FEC reports, congressional candidates spent an average of approximately $866,302 on primary and general election campaigns during the 2020 election cycle. (*See id.* Exh. C.) Even WFA's "modest" spending plans could represent a significant percentage of those totals.

WFA's other arguments that section 30104(c) is insufficiently tailored are predicated on a misunderstanding of the scope of the provision and precedent. WFA repeatedly assails "[t]he FEC's interpretation" of section 30104(c) (Mem. 1), but there is no daylight between the FEC's guidance and the *CREW* courts' plain reading of the statutory text, *compare* Docket No. 5-2, at 2-6, *with CREW III*, 971 F.3d at 353. To the contrary, it is WFA that seeks to constitutionalize the Commission's prior interpretation that the *CREW* courts rejected as textually unsupportable. *See CREW III*, 971 F.3d at 354 (rejecting prior FEC regulation that "exempts from disclosure any contribution intended to support IEs in general, rather than a particular IE").

WFA is also incorrect that section 30104(c)'s disclosure requirements "would encompass contributions that are unambiguously *un*related to any campaign." (Mem. 15-16.) Section 30104(c)(1) and (c)(2)(C) require disclosure only of "contributions," and are therefore limited to those funds donated "for the purpose of influencing [an] election for Federal office," 52 U.S.C. § 30101(8)(A)(i), and "earmarked for political purposes," *Buckley*, 424 U.S. at 78. Those contributions are, therefore, "unambiguously campaign related but would not otherwise be reported." *Buckley*, 424 U.S. at 81.

WFA acknowledges the required federal electoral link (Mem. 16-17), but then asserts that the FEC's guidance somehow removes the statutory limit requiring a connection to a federal election. (*Id*. at 18-19). It does not. The guidance expressly incorporates the statutory definition and states that section 30104(c)(1) requires disclosure only of contributions to persons that are not a political committee that are "'earmarked for political purposes,'" which covers "'contributions used for other political purposes in support or opposition to federal candidates by the organization for contributions directly to candidates, candidate committees, political party committees, or super PACs.'" (Docket No. 5-2, at 4-5 (quoting *CREW I*, 316 F. Supp. 3d at 392).) The guidance further makes clear that section 30104(c)(2) requires identification of "donors of over $200 who contribute for the purpose of furthering *an* independent expenditure," rather than the specific independent expenditure being reported. (*Id.* at 4 (internal quotation marks omitted).) The D.C. Circuit, likewise, held that section 30104(c)'s disclosure requirements, as construed by the district court (and now the Commission), "cover[ed] only those who donate money *for the intended purpose of influencing an election*." *CREW II*, 904 F.3d at 1019. All information disclosed has the requisite link to campaign activity.

In sum, WFA's tailoring argument is precluded by *Buckley*. That Court held that construing FECA's definition of "contribution" to require the disclosure of donors who give to influence a federal election, and which are "earmarked for a political purpose" was sufficient to pass First Amendment exacting scrutiny. WFA's additional limiting constructions are not constitutionally required. For that reason, WFA has not — and cannot — establish any likelihood of success on the merits of its First Amendment claim. *Buckley*, 424 U.S. at 78.

C. Section 30104(c) Gives A Person of Ordinary Intelligence Reasonable Opportunity to Know What Must Be Disclosed

WFA's is also wrong that section 30104(c) is vague. A law is impermissibly vague if it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Madigan*, 697 F.3d at 478-79 (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

Section 30104(c) provides that fair notice and limiting standards by limiting disclosure to contributions "earmarked for political purposes," which are "for the purpose of influencing any election for Federal office." (*See* Docket No. 5-2, at 4 (citations and internal quotation marks omitted).)[2] That limiting construction comes directly from *Buckley*, which applied to the functionally identical disclosures in the predecessor section 434(e). 424 U.S. at 23 n.24, 78, 80; *see CREW III*, 971 F.3d at 352 ("Before the 1979 FECA Amendments, each previous version of the FECA called for IE makers to disclose all contributors."). So construed, the Court rejected the argument that section 434(e)'s contribution-related disclosure requirement was unconstitutionally vague. *Buckley*, 424 U.S. at 78, 80.[3] Because the FEC's guidance incorporates identical language, *Buckley* precludes WFA's argument that it is unconstitutionally vague.

WFA's reliance on an inapposite out-of-circuit case to argue otherwise is misconceived.

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[2] It was uncontested in *Barland* that a Wisconsin statute defining "political purposes" that "trigger[ed] PAC duties" was vague and overbroad, but that was because it did not adhere to the limiting construction supplied by *Buckley*. 751 F.3d at 832-34. The Commission's guidance on section 30104(c) expressly included *Buckley*'s limitations.

[3] FECA originally required contributors to persons other than political committees to file their own disclosures. *See CREW I*, 316 F. Supp. 3d at 372-74 & nn.17, 21. *Buckley*'s holding on the constitutionality of section 434(e), however, did not depend on the source of the disclosure.

(Mem. 19-20 (citing *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995)).) In that case, the court applied a narrowing construction to avoid uncertainty as to the application of a FECA provision requiring certain disclaimers on direct mailings that "'solicits any contribution.'" *Survival Educ. Fund*, 65 F.3d at 293 (quoting 52 U.S.C. § 30120(a)). Whatever the merits of *Survival Education Fund* in the disclaimer context, it cannot overrule the Supreme Court's directly applicable holding about the disclosure of contributors to persons other than a political committee. The disclaimer provision, moreover, applied even when the solicitation at issue did not itself contain express advocacy. *Id.* at 295. Groups were therefore concerned that solicitations containing issue advocacy could be interpreted as requesting contributions that triggered a disclaimer requirement. *Id.* Section 30104(c), however, does not apply unless the reporting entity engages in sufficient express advocacy, further limiting its application. No further limiting construction is required.

The current disclosure regime is the result of direction from the D.C. Circuit that the FEC's prior regulation differed from "FECA's unambiguous terms." *CREW III*, 971 F.3d at 350. As a result, that court has already rejected WFA's argument that the statutory text fails to provide sufficient guidance on what must be disclosed. *Id.* at 351-356. Indeed, that court could not have concluded that the FEC's rule was inconsistent with section 30104(c)'s plain text if it were ambiguous in the way WFA suggests.

The FEC's guidance has been in place since 2018, and WFA has submitted no record that any reporting entity has had difficulty complying with it. WFA provides no record of actual confusion about the scope of reporting entities' disclosure requirements and no examples of overly aggressive FEC enforcement action. As WFA notes, its counsel petitioned the Commission to engage in rulemaking in response to the *CREW I* decision. (Mem. 6-7.) That

petition resulted in only fourteen comments, far from an outcry of uncertainty about the scope of the FEC's guidance. (*See generally* Sadio Decl. Exh. L (listing comments).) There is simply no basis for revisiting *Buckley*'s holding.

D. WFA Has Not Established a Likelihood of Demonstrating a Reasonable Possibility that Federal Campaign Finance Disclosures Will Result in Threats and Reprisals

Even if section 30104(c) passes constitutional scrutiny as a general matter, WFA suggests its contributors should be exempt from disclosure because of the possibility of reprisal. (Mem. 23-24.)[4] To mount this type of challenge, a party must show "a reasonable probability that the compelled disclosure . . . will subject [donors] to threats, harassment, or reprisals." *Buckley*, 424 U.S. at 74. WFA has not shown that it is likely to succeed on this claim.[5]

WFA's exemption argument rests on conclusory assertions that it faces a risk of public backlash and loss of donors in the future simply because it is an organization that has in the past taken positions on matters of public debate that some view as controversial. (*See* Appling Decl. ¶¶ 14-16; Mem. 23-24.) However, these vague examples do not remotely rise to the level of threats and harassment sufficient to warrant an exception to the generally applicable disclosure rule. The conduct WFA cites generally falls into two categories: (1) phone calls, voicemails, and social media posts regarding WFA's positions on social issues; and (2) allegations of property destruction against WFA supporters and WFA's president.

First, WFA references "menacing messages directed at them in phone calls and on social media." (Mem. 9; *see also* Appling Dec. ¶ 13 & Exh. A.) The sample of social media posts and

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[4] Notably, WFA could have, but did not seek a reporting exemption through the advisory opinion process with the FEC, and instead filed the instant motion seeking emergency relief.

[5] To the extent that WFA could show that it was entitled to an exemption from disclosure under *NAACP*, *but see infra* pp. 25-27, it would no longer be required to disclose any donors and its claims regarding the scope of section 30104(c) would be moot.

other messages WFA submits in connection with its preliminary injunction motion, however, lack the specificity and seriousness that have caused courts to exempt organizations from generally applicable disclosure regimes. None of the social media posts included in WFA's papers contain actual threats of violence, property damage, or retaliation. (*See id.* Exh. A.) While the messages contain crude language and crass images, they appear to involve private parties expressing heated disagreement with WFA's positions on issues of public concern. Without endorsing the expressions at issue, "words are often chosen as much for their emotive as their cognitive force" and "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25, 26 (1971). The responsive speech WFA identifies may be harsh, but "harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance." *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring). Similarly here, the episodes that WFA describes are "typical of any controversial campaign," and "do not necessarily rise to the level of 'harassment' or 'reprisals.'" *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 934 (E.D. Cal. 2011); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 n.46 (1982) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969) (citation omitted)) ("The language of the political arena . . . is often vituperative, abusive, and inexact."). Indeed, the only other first-hand evidence of harassment or threats involves conclusory descriptions of phone calls and letters that similarly fall short of truly threatening conduct. (Appling Decl. ¶ 13.)

Second, WFA asserts that "its supporters have experienced ugly, hateful harassment, threats to their lives, and property damage." (Mem. 23.) Yet the examples described rely only on unspecified "reports." (*See* Appling Decl. ¶ 14 ("We have had reports of our supporters having yard signs, which promoted traditional marriage and were created by a WFA affiliate,

destroyed and the tires on their cars slit."); *see id.* ¶ 13 (citing alleged serious "threats" against a political advisor).) And of the "reports" of alleged destruction of property or other allegations of criminal behavior, *see id.* ¶ 14, WFA notes that at least one incident was brought to the police who provided additional security, whereas others fail to mention whether law enforcement responded.

Without diminishing concerns of criminal behavior, none of WFA's allegations demonstrate that WFA "lack[s] adequate recourse to pursue means short of non-disclosure" to protect against any unlawful interference with its messaging. *ProtectMarriage.com*, 830 F. Supp. 2d at 933.[6] While Appling asserts she was singled out with phone messages fifteen years ago and a harassing letter nearly a decade ago based on her association as president of WFA (*see* Appling Decl. ¶13), plaintiff's speculation that it is theoretically possible that in the future 30104(c)'s narrowly tailored disclosure requirements could subject their disclosable contributors to retaliation is "a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s." *Citizens United v. Schneiderman*, 882 F.3d 374, 385 (2d Cir. 2018).

The record in *NAACP* included evidence of systematic violence and repression faced by the NAACP for years, including a "[y]ear-long series of bombings and shootings"; "major acts of violence," "physical[] attack[s]," and "Ku Klux Klan activity, demonstrations, and cross burnings." Brief for Petitioner, *NAACP v. Alabama*, 357 U.S. 449 (1958) (No. 91), 1957 WL 55387, at *16 n.12. African Americans had "been refused official protection from threats of

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[6] The ability of law enforcement to adequately respond to threats of violence is another factor that weighs against a need for a WFA-specific exemption. *See, e.g., Doe*, 561 U.S. at 215 (exemption may be warranted "in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control") (Sotomayor, J., concurring); *id.* at 218 (Stevens, J., concurring).

physical violation." *Id.* at 17. Similarly, in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, the Socialist Workers Party detailed "a past history of government harassment," including "massive" FBI surveillance and a concerted effort to interfere with an organization's political activities, and that "in the 12-month period before trial 22 SWP members . . . were fired because of their party membership." 459 U.S. 87, 99 (1982). AFPF also presented evidence of bomb threats, stalking, and physical violence against itself and numerous other groups that spanned the ideological spectrum. *AFPF*, 141 S. Ct. at 2388. WFA has not presented anything close to these extreme examples.

Both *NAACP* and *AFPF* also noted the lack of governmental interest in disclosing "ordinary rank-and-file members" to the government, *NAACP*, 357 U.S. at 464, or all major donors, *AFPF*, 141 S. Ct. at 2380. But section 30104(c) does not require these "indiscriminately sweeping" disclosures, *AFPF*, 141 S. Ct. at 2388; it instead requires certain disclosures from organizations that meet specific contribution thresholds tied to federal election activity. *See supra* pp. 3-4. In the absence of "evidence of the sort proffered in *NAACP v. Alabama*," the mere expression of some individuals' fears of retaliation will not outweigh the public interest in disclosure. *Buckley*, 424 U.S. at 71. Faced with whether to provide as-applied relief to the parties in *Buckley*, the Court noted that "fears of reprisal may deter contributions to the point where the movement cannot survive." *Id.* Yet, it concluded that evidence that "one or two persons" had refused to make contributions to a minor party for fear of being disclosed was insufficient to merit an as-applied exemption. *Id.* at 71-72; *id.* at 68 ("It is undoubtedly true that public disclosure of contributions . . . will deter some individuals who otherwise might contribute").

Furthermore, none of WFA's submissions involve people using campaign finance data to

identify targets of harassment. WFA has been operating a state PAC and disclosed dozens of donors since 2010, and yet cites no specific examples of retaliation resulting from its state-law disclosures. (*See* Sadio Decl. Exh. D.) WFA's federal reporting may be even more limited regardless of the purpose of the donation, as many of the previously disclosed donations are well below section 30104(c)'s reporting threshold, and others disclose no donors at all.[7] WFA also has an independent expenditure entity called Wisconsin Family Action, Inc. – 1.91 Account that is solely funded by Wisconsin Family Action, Inc. (*See id.* Exh. E.) To the extent WFA seeks to avoid disclosing certain donors, it has demonstrated it is capable of creating a separate campaign-related account such that donors may opt out of 30104(c)'s disclosure requirements by directing that their funds not be used for independent expenditures.

Nor does WFA hold the fringe views that have led courts to grant limited disclosure exemptions. For example, in *FEC v. Hall-Tyner Election Campaign Committee*, the Second Circuit exempted the Communist Party from federal campaign finance disclosure requirements, finding that it met *Buckley*'s high bar because it was a "disfavored minority part[y]" whose very existence would be threatened by disclosure. 678 F.2d 416, 419-20 (2d Cir. 1982). But that is not the case here where WFA has played a prominent role in Wisconsin state politics and has backed many winning candidates in state elections. (*See, e.g.*, Sadio Decl. Exh. H (listing contributions and winning candidates to which its PAC contributed)); *id.* Exh. I (listing winning candidates supported by its PAC); *id.* Exh. J (same)).

[7] *See, e.g.*, Sadio Decl. Exh. D at 88, Wisconsin Family Action PAC Fall pre-primary 2014 Campaign Finance Report (disclosing a single individual donor of $100); *id.* at 29,Wisconsin Family Action PAC January Continuing 2011 Campaign Finance Report (disclosing only two $25 donors); *id.* at 46, Wisconsin Family Action PAC January Continuing 2012 Campaign Finance Report (disclosing only one $250 donor among other donors); *id.* at 171, Wisconsin Family Action PAC July Continuing 2020 Campaign Finance Report (disclosing a single $20,000 donor).

III. WFA HAS FAILED TO DEMONSTRATE IRREPARABLE HARM

Plaintiff fails to meet its burden to show that it will suffer irreparable harm without the extraordinary remedy it seeks. *Winter*, 555 U.S. at 22. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citation and internal quotation marks omitted). And an "applicant must also demonstrate that 'irreparable injury is *likely* in the absence of an injunction . . .'" *Ill. Republican Party*, 973 F.3d at 763 (quoting *Winter*, 555 U.S. at 22) (emphasis added); *see Mays*, 974 F.3d at 822 (same).

WFA fails to make this showing in the single paragraph in its brief that it devotes to irreparable harm. (Mem. 24.) Instead, WFA wrongly assumes that its contention of First Amendment infringement automatically establishes irreparable harm. (Mem. 24.) While it is true that "[t]he loss of First Amendment Freedoms . . . constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.), WFA has not established that it will imminently suffer such a loss without an injunction even accepting its view of the merits. WFA declares that it has never before run an independent expenditure or otherwise participated in federal elections (Appling Decl. ¶ 6), yet now has an urgent need for injunctive relief. The most proximate federal elections in Wisconsin do not occur until the partisan primary on August 9. *See* Wisconsin Elections Commission, Elections Page, https://elections.wi.gov/index.php/elections-voting/elections. Thus, there appears to be no imminent irreparable harm.

Moreover, WFA's vague allegation about how it "intends to make independent expenditures" is inadequate to establish irreparable harm. (Compl. ¶ 23.) WFA does not specify any context regarding a candidate it would support or the manner in which it would support that candidate. The only evidence WFA submits — a declaration that asserts that it "would like to support candidates" (Appling Decl. ¶ 7) — does not show that it will be supporting candidates with independent expenditures or even that it has a single donor that would meet the standard for

disclosure. WFA does not establish how it would support candidates or establish whether any expenditures will qualify as independent expenditures under Section 30104(c). WFA's vague intentions without any description of concrete plans do not satisfy the demanding requirements for the extraordinary relief WFA seeks here. *Gill v. Wis. Dep't of Corr.*, No. 20-974, 2020 WL 6449107, at *7 (E.D. Wis. Nov. 3, 2020) (denying motion for preliminary injunction because of speculative harm). As to its request to be exempted from FECA's general disclosure rules, WFA claims its supporters "would risk all manner of retribution" (Compl. ¶ 24), but it does not attempt to distinguish between responsive protected speech and other actions.

In sum, "[p]laintiffs are not likely to suffer irreparable harm; rather, 'they will simply be required to adhere to the regulatory regime that'" governs disclosure of campaign finance. *Holmes v. FEC*, 71 F. Supp. 3d 178, 188 (D.D.C. 2014) (quoting *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014)).

IV. THE INJUNCTION WFA SEEKS WOULD HARM THE GOVERNMENT AND UNDERCUT THE PUBLIC INTEREST

The balance of harms and the public interest also weigh heavily in favor of preserving the status quo and denying plaintiff's request for extraordinary injunctive relief. There is a "presumption of constitutionality which attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). "'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Winter*, 555 U.S. at 24 (quoting

Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)). That presumption is at its apex here because the Supreme Court has found constitutional a functionally identical disclosure provision.

Enjoining enforcement of section 30104(c) would also substantially injury the public interest by denying voters critical information about the funding of express advocacy communications. *See Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin.*, 14 F.4th 624, 633 (7th Cir. 2021) (per curiam) (staying preliminary injunction in First Amendment case whole noting "[e]ach side faces a threat of irreparable harm"); *CREW II*, 904 F.3d at 1019 ("[W]here the complained-of disclosure covers only those who donate money *for the intended purpose of influencing an election*, the interest in anonymity does not [outweigh] the public's countervailing interests in receiving important voting information and in transparency."). Prior to an election, the public also has "a heightened interest in knowing who [is] trying to sway [its] views . . . and how much they were willing to spend to achieve that goal." *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010).

The plaintiff here shoulders a particularly heavy burden because its request is at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 50 (D.D.C. 2012) ("[P]laintiffs do not seek a preservation of the status quo, but rather they seek fundamental change in how [separate segregated funds] are regulated by the FEC . . . ."). Instead, WFA seeks to upend the status quo by asking this Court, to invalidate a longstanding federal statute.

CONCLUSION

For the foregoing reasons, WFA's motion for a preliminary injunction should be denied.

Respectfully submitted,

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