No. _____

In The
Supreme Court of the United States

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; and OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company,

Petitioners,

v.

GRANT DEGGINGER, Chair; KATRINA ASAY, Vice Chair; AMIT RANADE, KATHY TURNER, and JOHN BRIDGES, in Their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; and ANDREA MCNAMARA DOYLE, in Her Official Capacity as Executive Director of the Washington State Public Disclosure Commission,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Washington caps the amount of money any one person may contribute to a campaign to recall a public official even though, in Washington, a recall campaign cannot coordinate with a candidate or a candidate's committee. This is because there are no candidates in Washington recall elections – if the voters recall an official, a governmental entity designated by law appoints the official's replacement. Under the holding of *Citizens United v. FEC*, 558 U.S. 310 (2010), and uniform decisions of the courts of appeals, the government may not cap contributions to political committees that operate independently of a candidate or a candidate's committee. Because there are no candidates in Washington recall elections, Washington's law is unconstitutional on its face. The Ninth Circuit nonetheless refused to consider the facial constitutionality of the statute. Instead, it concluded that the law was unconstitutional as applied to the Petitioners now and in the future so long as there is no evidence or appearance of corruption and that this result provided Petitioners with all the relief to which they were entitled. Thus, Petitioners – concerned citizens who sought to recall a controversial local official – may make or accept unlimited contributions in recall campaigns, but only if they are able to prove to a court that their political activities are not or do not appear corrupt, however that is to be determined. All other speakers in Washington remain bound by a law that is unquestionably unconstitutional. This incongruous and unworkable

QUESTION PRESENTED – Continued

outcome results from the Ninth Circuit's failure to properly apply the holding and reasoning of *Citizens United* to the statute at hand. The question presented is:

> Must federal courts consider the facial validity of a statute after deciding that the statute is unconstitutional as applied to the plaintiffs when the only reason the statute is unconstitutional as applied to the plaintiffs is that the law is unconstitutional as applied to everyone?

PARTIES TO THE PROCEEDINGS

The Petitioners are Robin Farris, Recall Dale Washam, and Oldfield & Helsdon, PLLC. Petitioners were plaintiffs and appellants below.

The Respondents are the members of the Washington Public Disclosure Commission (Grant Degginger, chair, Katrina Asay, Amit Ranade, Kathy Turner, and John Bridges) and its executive director (Andrea McNamara Doyle), each sued in his or her official capacity. Respondents were defendants and appellees below.

CORPORATE DISCLOSURE STATEMENT

Recall Dale Washam has no parent company and there is no publicly held company that has a 10% or greater ownership interest in Recall Dale Washam.

Oldfield & Helsdon, PLLC, has no parent company and there is no publicly held company that has a 10% or greater ownership interest in Oldfield & Helsdon, PLLC.

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PETITION FOR A WRIT OF CERTIORARI

Robin Farris, Recall Dale Washam, and Oldfield & Helsdon, PLLC, respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended decision of the court of appeals is unreported and appears in the Appendix ("App.") at App. 1-8. The original decision of the court of appeals is unreported and appears in the Appendix at App. 9-16. The decision of the U.S. District Court for the Western District of Washington is unreported and appears in the Appendix at App. 17-44. The Ninth Circuit's order amending its memorandum disposition and denying the petition for rehearing en banc appears in the Appendix at App. 45-47.

JURISDICTION

The court of appeals denied rehearing en banc on October 2, 2014, and issued judgment that day. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." The relevant portion of the statute capping contributions to recall elections in Washington, Wash. Rev. Code § 42.17A.405, is reproduced at App. 50. Washington's laws regarding the removal of the recalled official and the appointment of a replacement official, Wash. Rev. Code §§ 29A.56.260 and 36.16.110, are reproduced at App. 48-50. Pierce County's charter provision setting out the process for replacing recalled officials is reproduced at App. 52-53. The administrative code provision setting the limit for contributions to recalls is reproduced at App. 51.

STATEMENT

This case asks whether the federal courts may preserve a law by granting as-applied relief to a plaintiff and refusing to consider the law's facial validity even though the reason the law is unconstitutional as applied to the plaintiff is because it restricts the speech and association of a substantial number of, if not all, speakers to whom it applies. In *Citizens United v. FEC*, 558 U.S. 310 (2010), this Court held that the courts may not do so and that courts should not force plaintiffs to challenge laws that broadly suppress speech *seriatim*. Despite this

holding, however, the Ninth Circuit refused to reach the issue of the facial validity of Washington's cap on contributions to recall campaigns and concluded that Petitioners' as-applied relief granted them all the relief to which they were entitled. This decision is utterly unworkable, leaves Petitioners unsure of their rights, and cannot be squared with *Citizens United*.

The Ninth Circuit's decision reflects that court's mechanical resort to an as-applied remedy, even though that remedy creates an untenable result that preserves a law that chills speakers on the whole. Thus, Petitioners may make and receive unlimited contributions in recall elections, but only if they can prove that there is no evidence or appearance of corruption, however that may be accomplished. The rest of the state must comply with a law that is unconstitutional at its core. The Ninth Circuit's decision purports to apply this Court's preference that courts favor narrow constitutional rulings over broad ones, but this preference does not mean that courts should halt their analysis of a law once it is clear that the plaintiffs will win. Either Respondents can defend Washington's law under the relevant legal test or they cannot. If they cannot, then the law cannot be applied to anyone in a constitutional manner. The Ninth Circuit's failure to faithfully interpret the law leaves an unconstitutional law in place and guarantees an ongoing chill of "archetypical political speech." *Citizens United*, 558 U.S. at 329. This Court's guidance is urgently needed in light of the Ninth Circuit's failure to apply *Citizens United* and the likelihood

that laws that suppress speech will continue to avoid review.

I. Washington's Recall Process

Like nineteen other states, Washington permits its citizens to remove an elected official from office prior to the completion of his or her term of office through a recall election. At least twenty-nine states, including Washington, also permit the people to recall local officials. However, Washington is one of five states that do not hold an election to name the successor to the recalled official. Instead, in Washington (as in Alaska, Idaho, Kansas, and Oregon), a governmental entity designated by state law appoints a successor. This means that, in Washington, there is no candidate or candidate's committee in a recall campaign. Instead, the voters are presented only with a ballot question that asks them if they wish to recall the named official.

Washington has a complex process to place a recall measure on the ballot. A person wishing to recall an elected official must prepare written charges accusing the official of malfeasance, misfeasance, or a violation of their oath of office and file these charges with the appropriate government official (in this case, the county elections officer). Wash. Rev. Code §§ 29A.56.110, .120. Then, another government official (here, the county prosecutor) must prepare a ballot synopsis detailing the allegations and file this synopsis with the state superior court. Wash. Rev.

Code § 29A.56.130. That court then holds a hearing to determine whether the charges are sufficient and meet the constitutional and statutory standards for recall. Wash. Rev. Code § 29A.56.140. The losing side may then appeal to the Washington Supreme Court. *Id*.

If the recall effort survives the judicial "sufficiency" proceedings, then the process of gathering signatures for the ballot question begins. Washington law provides the recall sponsor with a set amount of time in which to gather sufficient signatures to place the measure on the ballot. Wash. Rev. Code §§ 29A.56.150, .180. Signatures must then be canvassed and verified. Wash. Rev. Code §§ 29A.56.190, .200. Assuming the ballot question is certified, a special election on the ballot question is held. Wash. Rev. Code § 29A.56.210.

II. The Petitioners

Petitioner Robin Farris is a retired Naval officer who, prior to her effort to recall then-Pierce County Assessor-Treasurer Dale Washam, had never been involved in politics. After reading stories in her local paper detailing serious allegations against Assessor Washam, she organized an effort to recall him as set out in the state constitution. Wash. Const. art. I, §§ 33 and 34. A detailed description of the allegations against Assessor Washam is found in *In re Recall of Washam*, 257 P.3d 513 (Wash. 2011).

To recall Assessor Washam, Farris established Petitioner Recall Dale Washam (RDW), a "political

committee" under Washington law, of which she is chair. RDW did not seek to elect a new Assessor-Treasurer, but to place the following question on the ballot: "**SHOULD DALE WASHAM BE RECALLED FROM OFFICE BASED ON THIS CHARGE?**" *In re Recall of Washam*, 257 P.3d at 516. Had the voters recalled Assessor Washam, the Pierce County Council would have chosen his successor. Wash. Rev. Code § 36.16.110; Pierce County, Wash., Charter art. 4, § 4.70.

Thomas Oldfield and Jeffrey Helsdon of the local law firm of Oldfield & Helsdon, PLLC, were also alarmed by the reports of Assessor Washam's actions in office. When they learned of Farris's recall efforts, they volunteered to provide her with free legal help for the superior court proceeding and any appeal. The superior court found all of Farris's charges to be sufficient except one. Assessor Washam appealed that decision to the Washington Supreme Court, which affirmed on March 3, 2011.

III. Washington's Cap On Contributions To Recall Campaigns

Although Oldfield & Helsdon's help allowed RDW to move forward with the recall, it led to this litigation. *Pro bono* legal representation during and after the litigation regarding the sufficiency of the charges constitutes an "in-kind" contribution under Washington law. Wash. Rev. Code § 42.17A.005(13)(c). At that time, Washington law restricted contributions to

recall committees to $800 from any one source (except for contributions from a political party or caucus political committee). Today, the law is the same, except that the law now caps contributions at $950. Wash. Rev. Code § 42.17A.405(3) ("Section 405(3)"); Wash. Admin. Code § 390-05-400 (2014).

Washington's campaign finance laws are primarily enforced by the Washington Public Disclosure Commission (PDC), the members and executive director of which are Respondents in this case. On February 9, 2011, the PDC issued a "Notice of Administrative Charges" alleging that RDW had violated the cap on contributions by accepting more than $800 in in-kind contributions from Oldfield & Helsdon in the form of *pro bono* legal services for the superior court proceedings. Even though Respondents eventually withdrew the notice, the PDC staff nonetheless warned: "The fact that [PDC] Staff does not intend to allege a violation of [the cap] should not be construed to mean that the contribution limits . . . are not applicable to the recall election. The statute, as written, is to be followed during the recall campaign." C.A. Excerpts of Record (ER) 163, 206.

Petitioners then filed the instant case in federal court. While it was being litigated, the deadline for Petitioners' collection of signatures passed and they did not collect enough signatures to qualify for the ballot. In 2012, Washington held the regularly scheduled election for Pierce County Assessor-Treasurer. Assessor Washam ran for reelection and lost.

IV. The Proceedings Below

On June 7, 2011, Petitioners (Farris, RDW, and Oldfield & Helsdon) filed a complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 in the U.S. District Court for the Western District of Washington. The complaint sought an entry of judgment "declaring that [Section 405(3)] and the PDC's regulations and interpretations implementing that statute with regard to recall campaigns are unconstitutional on their face and as applied to Plaintiffs." ER 221. On June 21, 2011, Petitioners filed a motion seeking an order preliminarily enjoining Respondents' enforcement of Section 405(3). In July 2011, the district court granted a preliminary injunction prohibiting Respondents from enforcing Section 405(3) against Petitioners until a trial could be had. Respondents appealed this order to the Ninth Circuit. On April 11, 2012, the Ninth Circuit affirmed the district court's preliminary injunction order holding that "the State did not identify a sufficiently important interest to justify [Section 405(3)'s] $800 limit on contributions to recall committees." *Farris v. Seabrook*, 677 F.3d 858, 867 (9th Cir. 2012) (as amended).[1]

[1] Even though Petitioners had not collected a sufficient number of signatures in their effort to recall Assessor Washam, the Ninth Circuit concluded that Petitioners had standing to prosecute their appeal because their claims were capable of repetition, yet evading review. *Farris*, 677 F.3d at 863.

In August 2012, Petitioners moved for summary judgment in the district court. In addition to arguing that Section 405(3) violated the Constitution as it was applied to them, Petitioners also specifically briefed the issue of whether Section 405(3) was unconstitutional on its face. C.A. Supp. Excerpts of Record 276-77. On November 6, 2012, the district court issued an order granting summary judgment to Petitioners and held "[Section] 405(3) unconstitutional as applied to [Petitioners]." App. 43. The court, however, "permanently enjoined [Respondents] from enforcing [Section] 405(3) against [Petitioners] in this case only." App. 44. The district court then concluded that because it had held the statute was unconstitutional as applied to Petitioners, "the Court need not address whether [Section] 405(3) is unconstitutional on its face." App. 43.

Petitioners then filed a timely appeal to the Ninth Circuit, arguing that the district court had not given them all the relief to which they were entitled because the court's order limiting relief to "this case only" did not provide any practical relief. Specifically, Petitioners noted that the effort to recall Assessor Washam was long since over and the district court's order did not apply to future recalls.

In an unpublished memorandum opinion, a three-judge panel of the Ninth Circuit rejected that argument. In an opinion issued July 11, 2014, the court construed the district court's order as "precluding enforcement of [Section] 405(3) against the plaintiffs

in all similar circumstances, where there is no evidence or appearance of corruption." App. 13.[2] Citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008), and *U.S. v. Raines*, 362 U.S. 17, 21 (1960), the court found that this result "comports with the general notion that courts should favor narrow constitutional rulings over broad ones." App. 14.

Petitioners sought rehearing en banc, arguing that *Citizens United* required the court to consider Petitioners' facial challenge and that the Ninth Circuit's interpretation of the injunction to only apply where there was no evidence of corruption or the appearance of corruption made it impossible for Petitioners to know when they could make, or receive, contributions of more than $950 in future recall elections. On October 2, 2014, the panel issued an amended opinion rejecting Petitioners' argument and stating "*Citizens United* . . . does not require facial invalidation when a narrower remedy is sufficient." App. 6 (citing *Citizens United*, 558 U.S. at 333). The Ninth Circuit also issued an order denying the petition for rehearing en banc. App. 45-47.

[2] Because Petitioners are still bound by the law to the extent that they participate in recall elections and someone alleges that there is evidence of corruption or the appearance of corruption, they have standing to maintain this appeal. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) (speakers subject to a law affecting political speech have standing to challenge it prior to enforcement).

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari because the Ninth Circuit's decision directly conflicts with *Citizens United* in both its holding and its methodology.

First, the Ninth Circuit's decision conflicts with the holding in *Citizens United*, which required that Section 405(3) be struck down on its face because it restricts a substantial amount of political speech without sufficient justification.

Second, the Ninth Circuit's decision conflicts with the methodology the Court used to arrive at the holding in *Citizens United*. Here, the law at issue is unconstitutional as applied to Petitioners because it is unconstitutional at its core. Nonetheless, the Ninth Circuit stopped its analysis after it granted relief to Petitioners, leaving the statute intact. If this approach is correct, statutes that broadly suppress speech could escape review simply because there would never be a plaintiff to whom the statute could constitutionally be applied and courts could avoid ever reaching the issue of the statute's facial validity. This Court specifically rejected this approach in *Citizens United*.

This Court should grant the petition for a writ of certiorari and reverse with instructions that, when dealing with a statute that is unconstitutional with regard to a particular plaintiff because it inherently and broadly chills the fundamental free speech rights of a vast number of speakers, including the plaintiff,

the federal courts have an obligation to (i) apply the relevant substantive legal standard, and (ii) if that application demonstrates inherent constitutional problems in the law, issue an order that makes clear that the statute cannot be constitutionally applied to others.

I. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Citizens United*.

A. Washington's Law Unconstitutionally Caps Contributions To Political Committees That Do Not Coordinate With A Candidate Or Candidate's Committee.

As discussed above, unlike in other states, there are no candidates or candidate committees in Washington recall elections. The lack of a candidate or a candidate's committee in Washington recall elections determines the question of whether Section 405(3) is constitutional. Under precedent from this Court and the uniform holdings of the courts of appeals, Washington cannot limit contributions to recall committees as a means to battle corruption or its appearance. And because battling corruption or its appearance are the only justifications that can support a cap on contributions, Washington cannot cap contributions in recall campaigns at all.

This Court has held that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far

identified for restricting campaign finances." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). In *Citizens United*, this Court made clear that the concept of "corruption or the appearance of corruption" was limited to *quid pro quo* corruption between a candidate and a donor. *Citizens United*, 558 U.S. at 359.

Since *Citizens United* – and even before that decision – the federal courts have uniformly struck down limits on contributions to groups that make expenditures independently from candidates because such contributions and expenditures do not implicate *quid pro quo* corruption. *See, e.g.*, *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) ("contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates" cannot be limited under the anti-corruption rationale); *Republican Party of N.M. v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013) ("[T]he question before us is whether political committees that are not formally affiliated with a political party or candidate may receive unlimited contributions for independent expenditures. On this question the answer is yes."); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013) ("The Supreme Court held in *Citizens United v. FEC* that the government has no anti-corruption interest in limiting independent expenditures. It follows that a donor to an independent expenditure committee such as NYPPP is even further removed from political candidates and may not

be limited in his ability to contribute to such committees. All federal circuit courts that have addressed this issue have so held.") (internal citations and footnotes omitted); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013) ("every federal court that has considered the implications of *Citizens United* on independent groups . . . has been in agreement" that there is both no threat of corruption from independent groups and no threat of corruption by contributions to such groups); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011) ("On the merits, after *Citizens United* . . . , [the Wisconsin campaign finance law] is unconstitutional to the extent that it limits contributions to committees engaged solely in independent spending for political speech."); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011) (on an appeal of a preliminary injunction order, contribution limits are found likely to be unconstitutional because they apply to independent committees that do not coordinate with candidates because they "lack the direct donor relationship that is the defining feature of a multi-candidate committee, or the historical interconnection with candidates that distinguishes political parties"); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010) ("Nor has the City shown that contributions to the Chamber PACs for use as independent expenditures raise the specter of corruption or the appearance thereof."); *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) ("Given this analysis from *Citizens United*, we must conclude that

the government has no anti-corruption interest in limiting contributions to an independent expenditure group. . . ."); *EMILY's List v. FEC*, 581 F.3d 1, 9-11 (D.C. Cir. 2009) (discussing why corruption is not addressed by contribution limits on political committees that only make independent expenditures); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (declaring unconstitutional a contribution limit to independent expenditure political committees because no anti-corruption interest was furthered).

Even the Ninth Circuit here recognized as much, at least at the preliminary injunction stage of the case:

> [A]s Washington law is structured, expenditures by recall committees are similar to independent expenditures. Given that recall committees do not coordinate or prearrange their independent expenditures with candidates, and they do not take direction from candidates on how their dollars will be spent, they do not have the sort of close relationship with candidates that supports a threat of actual or apparent corruption. Neither the State nor amici, moreover, has presented any evidence showing that contributions to recall committees in Washington raise the specter of corruption, and certainly not in this case.

Farris, 677 F.3d at 867 (citation and quotation marks omitted).[3]

Under the First Amendment, the government cannot place a limit on how much money someone may contribute to a group that acts independently of candidates or candidate committees. As the Second Circuit put it, "[f]ew contested legal questions are answered so consistently by so many courts and judges." *N.Y. Progress & Prot. PAC*, 733 F.3d at 488. Nonetheless, the Ninth Circuit refused to find Section 405(3) unconstitutional on its face. Its failure to do so put it directly in conflict with this Court's decision in *Citizens United* and the uniform decisions of the courts of appeals applying that case.

[3] Nor does it matter that recall committees in Washington are not expressly classified as "independent expenditures groups." As Professor Elizabeth Garrett explained, in discussing the decision of the Ninth Circuit in this case at the preliminary injunction stage, "independent political committees actively making expenditures in all parts of recalls, but refraining from contributing to candidates, are mirror images of independent expenditure-only committees in typical candidate elections: if one cannot be restrained by contribution limits, then neither can the other." Elizabeth Garrett, *Campaign Finance in the Hybrid Realm of Recall Elections*, 97 Minn. L. Rev. 1654, 1679 (2013).

B. The Ninth Circuit's Decision Conflicts With *Citizens United*, Which Requires That Laws That Broadly Chill Speech Be Struck Down On Their Face.

"In the First Amendment context . . . , a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 473 (2010) (citation and quotation marks omitted). In this case, Petitioners conclusively demonstrated the facial invalidity of Washington's contribution limits to recall committees. Neither Respondents nor the Ninth Circuit identified *any* evidence that Washington's cap had ever been constitutionally applied, much less in a substantial number of circumstances. In suggesting that there might be instances of corruption or the appearance of corruption that justified the law's continued existence, the Ninth Circuit, at most, relied on the sort of "mere conjecture" that this Court has made clear has never been "adequate to carry a First Amendment burden." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (citation and quotation marks omitted).

Under these facts, the Ninth Circuit should have struck down Section 405(3) on its face. This Court's ruling in *Citizens United* is directly on point. There, this Court held that, when speakers "ha[ve] a constitutional right to speak," the courts should not undertake a case-by-case determination using an "unsound, narrow argument" in order to "avoid another argument with broader implications." *Citizens United*, 558

U.S. at 329. "[A] statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." *Id.* at 336. Any other approach "would prolong the substantial . . . chilling effect" caused by the law at issue. *Id.* at 333.

The Ninth Circuit disregarded this holding, however. The Ninth Circuit's approach here was especially egregious when viewed in relation to the unanimous precedent holding restrictions like Washington's to be unconstitutional. *See* Section I.A. In contrast to the statute at issue in *Citizens United* – which required this Court to overrule prior precedent to address a claim that Citizens United had previously abandoned – the courts have uniformly struck down statutes like Washington's for years and Petitioners here have been vigorously pressing their facial claim throughout this litigation. By permitting Washington's law to remain in effect – and forcing speakers in Washington to undertake case-by-case challenges to vindicate their rights – the Ninth Circuit's decision effectively mandates that "archetypical political speech . . . be chilled in the meantime." *Citizens United*, 558 U.S. at 329.

As *Citizens United* made clear, "[i]t is not judicial restraint" for courts to make unsound conclusions simply to avoid making broad, but necessary, decisions to protect core political speech. *Id*. By identifying a procedural mechanism to avoid deciding cases involving statutes that broadly chill speech, the Ninth Circuit has given other courts the means to undermine *Citizens United*. It has also given state

and local governments an incentive to gamble with passing constitutionally unsound laws in the hopes that those affected by them will be forced by the courts to challenge them *seriatim* (assuming they can afford to do so).

This Court should grant this Petition in order to make clear to the Ninth Circuit and other courts that *Citizens United* means what it says. Indeed, the disregard for this Court's precedent is so extreme here that this case is a candidate for summary disposition and remand directing the Ninth Circuit to apply this Court's decision in *Citizens United*.

II. The Ninth Circuit's Decision Erroneously Applies A Categorical And Arbitrary Preference For As-Applied Relief In Contrast To This Court's Decision In *Citizens United*.

The Ninth Circuit's decision not only failed to apply the holding of *Citizens United*, it disregarded the methodology the Court used to arrive at that holding. Rather than fully consider whether this law broadly and unconstitutionally suppresses speech, it crafted a bizarre remedy that preserves the law while leaving Petitioners uncertain of their rights. The Ninth Circuit asserted this outcome was dictated by this Court's preference for narrow rulings over broader ones. However, that preference does not mandate that the federal courts simply stop their analysis once the court can craft the narrowest ruling possible.

That ruling still must be correct, and *Citizens United* instructs that if the correct application of the law means that it produces a decision that forecloses application of the law in future cases, the court must make that decision.

It is true that the traditional approach taken by this Court is to favor resolving claims as narrowly as possible. *See Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 328-29 (2006) ("We prefer . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force. . . ."). As this Court stated in *Raines*, "This Court as in the case with all federal courts, has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." 362 U.S. at 21-22 (citation and quotation marks omitted).[4] Similarly, in *Stevens*, Justice Alito stated that "[t]he 'strong medicine' of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court." *Stevens*, 559 U.S. at 484 (Alito, J., dissenting).

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[4] A corollary to this rule is that the Court "tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder [of the statute] intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation and quotation marks omitted). That rule does not come into play here because Section 405(3) is wholly unconstitutional.

Here, both the district court and the Ninth Circuit correctly concluded that Section 405(3) could not be constitutionally applied to Petitioners, but then decided that that was as far as they could go. But examining the as-applied challenge first, concluding the statute cannot be applied to Petitioners, and then simply stopping without examining *why* it could not be applied to Petitioners was making a narrow decision solely for the sake of making a narrow decision. That approach leaves a statute that is unconstitutional at its core in place and creates the absurd result of giving Petitioners the ability to make or accept unlimited contributions in Washington recall elections but only if they are able to convince a judge that there is no evidence of corruption or its appearance. This cannot be the correct result and it is not.

The problem with the Ninth Circuit's approach is that it did not finish its analysis. There was nothing about Petitioners that made the government's application of the statute to them uniquely unconstitutional. Rather, the problem is that the statute limits contributions to all recall committees in order to fight corruption or the appearance of corruption and political committees in Washington recall campaigns do not raise concerns about corruption. The statute was unconstitutional as applied to Petitioners because it is unconstitutional as applied to everyone, including them.

In contrast to the Ninth Circuit's approach, in *Citizens United*, this Court recognized that the facial/as-applied distinction is not a separate legal question,

but a question of remedy that stems from the application of the proper legal standard in the case. There, the Court stated that "the distinction between facial and as-applied challenges is not so well-defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United*, 558 U.S. at 331. Instead, the distinction between facial and as-applied claims "goes to the breadth of the remedy employed by the Court, not what must be pleaded in the complaint." *Id*. In other words, if a party challenges the law's application to her and succeeds, and the remedy requires full or partial invalidation, then the federal court must grant that remedy. Thus, in *Citizens United*, the Court held that it could not address Citizens United's argument about how the statute suppressed its speech without addressing the underlying validity of the statute itself. *Id*. Chief Justice Roberts expanded on this notion in his concurrence, noting that "[w]hen constitutional questions are 'indispensably necessary' to resolving the case at hand, 'the court must meet and decide them.'" *Id.* at 375 (Roberts, C.J., concurring) (quoting *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J.)). In other words, labeling a claim as facial or as-applied is "largely beside the point." *Citizens United*, 558 U.S. at 375 (Roberts, C.J., concurring).

This is because facial claims are not a separate legal theory; they develop from as-applied challenges,

"the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quoting Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). Under this view, what matters is the application of the substantive legal doctrine to the legal dispute at hand, not some artificial distinction between as-applied and facial challenges. Sometimes the application of a substantive doctrine will result in the conclusion that the statute at issue can never be constitutionally applied. Sometimes the application of the substantive legal test at issue will yield the result that the statute can be constitutionally applied to others, but not to the plaintiffs. But that result comes about because of the underlying legal issue and not because of some rigid, categorical preference for a narrow remedy. *See* Fallon, 113 Harv. L. Rev. at 1336 ("[T]he application of doctrine – including the processes of reasoning necessary to resolve the dispute – will sometimes unmistakably, even necessarily yield the conclusion that a statute is invalid, not merely as applied to the facts, but more generally or even in whole. In such cases, facial invalidation occurs as an outgrowth of as-applied adjudication.").[5]

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[5] This is also the approach urged by Judge Dennis of the Fifth Circuit in a recent dissent in a First Amendment case where the majority declined to invalidate on its face a university's seven-day-permit requirement for speakers. *Sonnier v. Crain*, 613 F.3d 436, 443 (5th Cir. 2010). In dissent, Judge Dennis argued that the majority's rigid preference for the

(Continued on following page)

This approach is also consistent with the approach urged by Justice Alito in *Stevens* and Justice Scalia in dissent in *City of Chi. v. Morales*, 527 U.S. 41 (1999). In *Morales*, after quoting from *Raines* at length, Justice Scalia noted that, "It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion. . . ." *Id.* (Scalia, J., dissenting). A plaintiff presenting a challenge to a law that is inherently unconstitutional – like the one here – will result in a decision that will effectively prevent application of the law in the future. The court must, however, first apply the proper substantive standard and not simply

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narrowest remedy possible conflicted with this Court's approach in *Citizens United*. *Sonnier*, 613 F.3d at 458 (Dennis, J., dissenting). After quoting Professor Fallon's article at length, Judge Dennis concluded:

> The key point is that facial and as-applied challenges are not categorically different types of cases to which different rules of decision apply. On the contrary, in order to adjudicate constitutional challenges, courts apply whatever constitutional doctrines and tests are relevant to the substance of each particular case, and the results of that analysis determine whether a challenged law is unconstitutional, either on its face or as applied to a particular situation.

Id. (Dennis, J., dissenting).

forego examining the implications of its analysis based on an artificial preference for a narrow remedy. *See Citizens United*, 558 U.S. at 376 (Roberts, C.J., concurring) ("Even if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United . . . would mean that any other corporation raising the same challenge would also win. Likewise, a conclusion that the Act may be applied to Citizens United . . . would similarly govern future cases. Regardless, whether we label Citizen United's claim a 'facial' or 'as-applied' challenge, the consequences of the Court's decision are the same.").[6]

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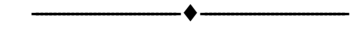
[6] This is not a new approach. *Citizens United* is simply the most explicit expression of it. This Court has long recognized that "there is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984). In *Joseph H. Munson*, this Court expressly recognized that facial relief is available to a litigant with a valid as-applied claim and identified ten earlier First Amendment cases in which plaintiffs had viable as-applied challenges and yet the Court did not "limit[ ] itself" to as-applied relief "on a case-by-case basis." Instead, the Court struck down the laws on their face "because it was apparent that any application of the legislation 'would create an unacceptable risk of the suppression of ideas.'" *Id.* (citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984); *New York v. Ferber*, 458 U.S. 747, 768, n.21 (1982); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Saia v. New York*, 334 U.S. 558 (1948); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939); *Hague v. CIO*, 307 U.S. 496, 516 (1939) (plurality opinion); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Stromberg v. California*, 283 U.S. 359 (1931)).

The Ninth Circuit here failed to consider anything beyond the question of whether the law restricted Petitioners' free speech rights. Of course it does, but it does so because the statute itself is inherently unconstitutional. What the court should have done is consider whether the government's defense saved the law or not. If the Ninth Circuit had, it would have seen that the government has no defense for this law. Applying the correct First Amendment doctrine, this law either rises or falls as a whole because the interest in preventing corruption either is or is not sufficient to justify it. Applying the correct standard, the court should not have simply stopped once it made its as-applied conclusion. Instead, the Ninth Circuit had an obligation to "meet and decide" the issue of whether the statute was unconstitutional at its core.

Until this Court corrects the Ninth Circuit, outcomes like the one in this case will continue to occur, leaving laws that broadly burden free speech intact. Instead of the approach used by the Ninth Circuit here, a federal court should apply the applicable legal standard to the case before it and if the application of that standard results in a conclusion that the statute at issue is inherently unconstitutional, the court should issue a decision to that effect. What the court should not do is simply stop its analysis once it concludes that the plaintiffs will win if doing so will leave in place a law that unconstitutionally and broadly chills free speech.



CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court grant their petition for a writ of certiorari and either summarily vacate and remand or consider the full case on the merits.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

IN THE NINTH CIRCUIT

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company, Plaintiffs-Appellants, v. AMIT D. RANADE, Chair; GRANT S. DEGGINGER, Attorney, Vice Chair; KATHY TURNER; KATRINA ASAY, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; ANDREA MCNAMARA DOYLE, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission, Defendants-Appellees.	No. 12-35949 D.C. No. 3:11-cv-05431-RJB AMENDED MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company,

Plaintiffs-Appellants,

v.

AMIT D. RANADE, Chair; GRANT S. DEGGINGER, Attorney, Vice Chair; KATHY TURNER; KATRINA ASAY, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; ANDREA MCNAMARA DOYLE, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission,

Defendants-Appellees.

No. 12-35940

D.C. No. 3:11-cv-05431-RJB

Appeal from the United States District Court
for the Western District of Washington,
Robert J. Bryan, Senior District Judge, Presiding

Argued and Submitted February 6, 2014
Seattle, Washington

Before: FISHER, GOULD and CHRISTEN, Circuit Judges.

The plaintiffs appeal the district court's summary judgment order, insofar as it declined to address the plaintiffs' facial challenge to Washington Revised Code § 42.17A.405(3). They also appeal the district court's ruling that their motion for attorney's fees was untimely and that they did not demonstrate excusable neglect warranting an extension of the deadline. We have jurisdiction under 28 U.S.C. § 1291. We affirm the summary judgment order but vacate and remand on the attorney's fees issue.

1. In *Farris v. Seabrook* (*Farris I*), 677 F.3d 858, 867 (9th Cir.2012), we affirmed the district court's preliminary injunction order, concluding that "the State did not identify a sufficiently important interest to justify [§ 42.17A.405(3)'s] $800 limit on contributions to recall committees."[1] Most of the underlying facts relevant to the current appeal are fully set forth in *Farris I* and need not be repeated. Of particular relevance here, we acknowledged the State's interest in preventing the actuality or appearance of quid pro quo corruption in recall elections, but likened Washington recall committees to political action committees making independent expenditures to support or oppose candidates, for which contribution limits had been invalidated because of tenuous connections or no connection to the candidates themselves. *See id.* at

[1] The limit has since been raised to $950. *See* Wash. Admin. Code § 390-05-400.

865-67. We explained that "[n]either the State nor amici . . . presented any evidence showing that contributions to recall committees in Washington raise the specter of corruption, and certainly not in this case," but noted that "the outcome might be different if there were evidence that contributions were being made with a 'wink and a nod' from Council members indicating that a particular candidate would be appointed." *See id.* at 867 & n.8.

On remand, the district court's summary judgment order applied *Farris I* to the evidence presented and entered a permanent injunction, stating that the court would "grant summary judgment for Plaintiffs and hold RCW § 42.17A.405(3) unconstitutional as applied to Plaintiffs." The court found that "[t]here is no evidence of coordination of expenditures or 'a wink and a nod' to justify the State's anti-corruption interest. The Government has presented no evidence demonstrating an issue of material fact regarding the appearance of or actual corruption." The district court also determined that "[b]ecause this Court should provide Plaintiffs' requested relief and hold that RCW § 42.17A.405(3) is unconstitutional as applied to Plaintiffs, the Court need not address whether RCW § 42.17A.405(3) is unconstitutional on its face."

We agree with the district court's decision not to address the plaintiffs' broader facial challenge. Given the record in this case, the plaintiffs have received all the relief to which they are entitled. The district court's order was somewhat ambiguous as to the scope of its injunctive relief, insofar as its application beyond the immediate case. The court stated that

§ 42.17A.405(3) was unconstitutional as applied to the plaintiffs, but also that the defendants were enjoined from enforcing § 42.17A.405(3) "against Plaintiffs *in this case only*" (emphasis added). We construe the district court's order and corresponding injunction as precluding enforcement of § 42.17A.405(3) against the plaintiffs in all similar circumstances, where there is no evidence or appearance of corruption. The defendants themselves have acknowledged that "the [Washington Public Disclosure] Commission read the order in the broadest manner possible, *i.e.,* that it is enjoined from ever enforcing Wash. Rev. Code § 42.17A.405(3)'s contribution limits against the Recall Proponents."[2] Even if there may be non-parties to this litigation who generally may enforce § 42.17A.405(3) and who theoretically might not be bound by the district court's injunction, *see* Fed. R. Civ. P. 65(d)(2), *Farris I* and the district court's order clearly preclude enforcement of § 42.17A.405(3) against the plaintiffs when there is no evidence or appearance of corruption, because the provision is unconstitutional in such instances. Accordingly, the plaintiffs have received all the relief to which they are entitled.

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[2] The defendants also said that "until a court directs that the Commission may interpret the order more narrowly, the Commission remains permanently enjoined from enforcing the contribution limits against the Recall Proponents." We conclude that the Commission is enjoined from enforcing § 42.17A.405(3) against the plaintiffs in the future, but, consistent with *Farris I* and as we have emphasized, only in cases where there is no evidence or appearance of corruption.

This interpretation comports with the general notion that courts should favor narrow constitutional rulings over broad ones.[3] *See, e.g., Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 (2008) ("Facial challenges are disfavored for several reasons."); *United States v. Raines,* 362 U.S. 17, 21 (1960) ("This Court . . . is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (internal quotation marks omitted)); *Colo. Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1144-45, 1155-56 (10th Cir. 2007) (holding that an as-applied ruling on part of a campaign finance reform amendment was sufficient and that the court did not need to reach a facial challenge, as "the nature of judicial review constrains a federal court to consider only the case that is actually before it").

Finally, even if the district court abused its discretion in striking declarations concerning standing that the plaintiffs filed with their reply brief, the additional recall campaign Jeffrey Helsdon described

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[3] Plaintiffs argue that *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), requires invalidating Wash. Rev. Code § 42.17A.405(3) on its face. *Citizens United,* however, does not require facial invalidation when a narrower remedy is sufficient. *See id.* at 333 (invalidating statute only after rejecting narrower remedies as insufficient).

in his declaration did not include evidence or the appearance of corruption. Accordingly, *Farris I* and the district court's order extend to this second recall campaign, so the plaintiffs' challenge to this portion of the court's order is moot.

2. The district court correctly ruled that the plaintiffs' motion for attorney's fees was filed after the applicable 14-day deadline. *See* Fed. R. Civ. P. 54(d)(2)(B) ("Unless a statute or a court order provides otherwise, the motion [for attorney's fees] must: (i) be filed no later than 14 days after the entry of judgment. . . ."). On the other hand, the court erred in analyzing whether the plaintiffs' error was the result of excusable neglect and they were entitled to an extension of the deadline. *See* Fed. R. Civ. P. 6(b)(1) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time: . . . (B) on motion made after the time has expired if the party failed to act because of excusable neglect.").

The court relied primarily on *Kyle v. Campbell Soup Co.,* 28 F.3d 928 (9th Cir. 1994), and the three judge panel opinion in *Pincay v. Andrews* (*Pincay I*), 351 F.3d 947 (9th Cir. 2003), in evaluating possible excusable neglect. But we reversed *Pincay I* in our en banc decision in the same case, *see Pincay v. Andrews* (*Pincay II*), 389 F.3d 853, 860 (9th Cir. 2004) (en banc), and *Pincay II* cited *Kyle* as part of "[o]ur circuit's confusion" on excusable neglect, *id.* at 857. Moreover, the district court listed all four factors from *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380 (1993), but did not address

the first and fourth in its analysis. *See Pioneer,* 507 U.S. at 395 (A court typically considers four factors in determining whether a moving party engaged in excusable neglect: (1) "the danger of prejudice" to the opposing party; (2) "the length of the delay and its potential impact on judicial proceedings"; (3) "the reason for the delay, including whether it was within the reasonable control of the movant"; and (4) "whether the movant acted in good faith."); *see also Ahanchian v. Xenon Pictures, Inc.,* 624 F.3d 1253, 1261-62 (9th Cir. 2010) ("[T]he district court here neither cited nor applied the *Pioneer* [ ] test, but instead based its decision solely on whether the reason for the delay – the third *Pioneer* [ ] factor – could establish excusable neglect. By ignoring the other three factors, the district court abused its discretion."); *Lemoge v. United States,* 587 F.3d 1188, 1194 (9th Cir. 2009) ("[W]e conclude that it will always be a better practice for the district court to touch upon and analyze at least all four of the explicit *Pioneer* [ ] factors.").

On remand, the district court should reevaluate the excusable neglect issue by addressing all four factors of the *Pioneer* test under our current law.

Costs on appeal awarded to the plaintiffs.

The panel will retain jurisdiction of these cases.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

IN THE NINTH CIRCUIT

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company,

Plaintiffs-Appellants,

v.

AMIT D. RANADE, Chair; GRANT S. DEGGINGER, Attorney, Vice Chair; KATHY TURNER; KATRINA ASAY, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; ANDREA MCNAMARA DOYLE, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission,

Defendants-Appellees.

No. 12-35949

D.C. No. 3:11-cv-05431-RJB

MEMORANDUM*

(Filed Jul. 11, 2014)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company,

Plaintiffs-Appellants,

v.

AMIT D. RANADE, Chair; GRANT S. DEGGINGER, Attorney, Vice Chair; KATHY TURNER; KATRINA ASAY, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; ANDREA MCNAMARA DOYLE, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission,

Defendants-Appellees.

No. 13-35040

D.C. No. 3:11-cv-05431-RJB

Appeal from the United States District Court
for the Western District of Washington,
Robert J. Bryan, Senior District Judge, Presiding

Argued and Submitted February 6, 2014
Seattle, Washington

Before: FISHER, GOULD and CHRISTEN, Circuit Judges.

The plaintiffs appeal the district court's summary judgment order, insofar as it declined to address the plaintiffs' facial challenge to Washington Revised Code § 42.17A.405(3). They also appeal the district court's ruling that their motion for attorney's fees was untimely and that they did not demonstrate excusable neglect warranting an extension of the deadline. We have jurisdiction under 28 U.S.C. § 1291. We affirm the summary judgment order but vacate and remand on the attorney's fees issue.

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connection to the candidates themselves. *See id.* at 865-67. We explained that "[n]either the State nor amici . . . presented any evidence showing that contributions to recall committees in Washington raise the specter of corruption, and certainly not in this case," but noted that "the outcome might be different if there were evidence that contributions were being made with a 'wink and a nod' from Council members indicating that a particular candidate would be appointed." *See id.* at 867 & n.8.

On remand, the district court's summary judgment order applied *Farris I* to the evidence presented and entered a permanent injunction, stating that the court would "grant summary judgment for Plaintiffs and hold RCW § 42.17A.405(3) unconstitutional as applied to Plaintiffs." The court found that "[t]here is no evidence of coordination of expenditures or 'a wink and a nod' to justify the State's anti-corruption interest. The Government has presented no evidence demonstrating an issue of material fact regarding the appearance of or actual corruption." The district court also determined that "[b]ecause this Court should provide Plaintiffs' requested relief and hold that RCW § 42.17A.405(3) is unconstitutional as applied to Plaintiffs, the Court need not address whether RCW § 42.17A.405(3) is unconstitutional on its face."

We agree with the district court's decision not to address the plaintiffs' broader facial challenge. Given the record in this case, the plaintiffs have received all the relief to which they are entitled. The district court's order was somewhat ambiguous as to the

scope of its injunctive relief, insofar as its application beyond the immediate case. The court stated that § 42.17A.405(3) was unconstitutional as applied to the plaintiffs, but also that the defendants were enjoined from enforcing § 42.17A.405(3) "against Plaintiffs *in this case only*" (emphasis added). We construe the district court's order and corresponding injunction as precluding enforcement of § 42.17A.405(3) against the plaintiffs in all similar circumstances, where there is no evidence or appearance of corruption. The defendants themselves have acknowledged that "the [Washington Public Disclosure] Commission read the order in the broadest manner possible, *i.e.,* that it is enjoined from ever enforcing Wash. Rev. Code § 42.17A.405(3)'s contribution limits against the Recall Proponents."[2] Even if there may be non-parties to this litigation who generally may enforce § 42.17A.405(3) and who theoretically might not be bound by the district court's injunction, *see* Fed. R. Civ. P. 65(d)(2), *Farris I* and the district court's order clearly preclude enforcement of § 42.17A.405(3) against the plaintiffs when there is no evidence or appearance of corruption, because the provision is unconstitutional in such

[2] The defendants also said that "until a court directs that the Commission may interpret the order more narrowly, the Commission remains permanently enjoined from enforcing the contribution limits against the Recall Proponents." We conclude that the Commission is enjoined from enforcing § 42.17A.405(3) against the plaintiffs in the future, but, consistent with *Farris I* and as we have emphasized, only in cases where there is no evidence or appearance of corruption.

instances. Accordingly, the plaintiffs have received all the relief to which they are entitled.

This interpretation comports with the general notion that courts should favor narrow constitutional rulings over broad ones. *See, e.g., Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 (2008) ("Facial challenges are disfavored for several reasons."); *United States v. Raines,* 362 U.S. 17, 21 (1960) ("This Court . . . is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (internal quotation marks omitted)); *Colo. Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1144-45, 1155-56 (10th Cir. 2007) (holding that an as-applied ruling on part of a campaign finance reform amendment was sufficient and that the court did not need to reach a facial challenge, as "the nature of judicial review constrains a federal court to consider only the case that is actually before it").

Finally, even if the district court abused its discretion in striking declarations concerning standing that the plaintiffs filed with their reply brief, the additional recall campaign Jeffrey Helsdon described in his declaration did not include evidence or the appearance of corruption. Accordingly, *Farris I* and the district court's order extend to this second recall campaign, so the plaintiffs' challenge to this portion of the court's order is moot.

2. The district court correctly ruled that the plaintiffs' motion for attorney's fees was filed after the applicable 14-day deadline. *See* Fed. R. Civ. P. 54(d)(2)(B) ("Unless a statute or a court order provides otherwise, the motion [for attorney's fees] must: (i) be filed no later than 14 days after the entry of judgment. . . ."). On the other hand, the court erred in analyzing whether the plaintiffs' error was the result of excusable neglect and they were entitled to an extension of the deadline. *See* Fed. R. Civ. P. 6(b)(1) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time: . . . (B) on motion made after the time has expired if the party failed to act because of excusable neglect.").

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delay and its potential impact on judicial proceedings"; (3) "the reason for the delay, including whether it was within the reasonable control of the movant"; and (4) "whether the movant acted in good faith."); *see also Ahanchian v. Xenon Pictures, Inc.,* 624 F.3d 1253, 1261-62 (9th Cir. 2010) ("[T]he district court here neither cited nor applied the *Pioneer*[ ] test, but instead based its decision solely on whether the reason for the delay – the third *Pioneer*[ ] factor – could establish excusable neglect. By ignoring the other three factors, the district court abused its discretion."); *Lemoge v. United States,* 587 F.3d 1188, 1194 (9th Cir. 2009) ("[W]e conclude that it will always be a better practice for the district court to touch upon and analyze at least all four of the explicit *Pioneer* [ ] factors.").

On remand, the district court should reevaluate the excusable neglect issue by addressing all four factors of the *Pioneer* test under our current law.

Costs on appeal awarded to the plaintiffs.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; and OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company, Plaintiffs, v. DAVE SEABROOK, Chair; BARRY SEHLIN, Vice Chair; DOUGLAS ELLIS, Interim Executive Director; JENNIFER JOLY; and JIM CLEMENTS, in their official capacities as officers and members of the Washington State Public Disclosure Commission, Defendant.	CASE NO. 3:11-cv-5431 RJB ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Filed Nov. 6, 2012)

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment. Dkt. 61. The Court has considered the pleadings filed in support of and in opposition to the Motion and the file herein.

FACTS

This case arises from Plaintiffs' attempts to recall an elected official in Pierce County, Washington, and

implicates Washington's campaign finance laws. Dkt. 1. Plaintiffs challenge the constitutionality of two Washington statutes which limit campaign contributions, RCW §§ 42.17A.405(3) and 42.17A.420(1) (the statutes were codified as 42.17.640(3) and 42.17.105(8), respectively, when Plaintiffs filed the Complaint). *Id.*

A. LEGAL PROCEEDINGS TO RECALL DALE WASHAM

In 2010, Plaintiff Robin Farris became concerned about the conduct of an elected official, Dale Washam, in Pierce County, Washington. Dkt. 13-1, at 2. Mr. Washam was elected as the Pierce County, Washington Assessor-Treasurer in November of 2008. *Id.* Prompted by her concern about Mr. Washam's behavior, Ms. Farris decided to try to recall him. *Id.* She created a political committee called Recall Dale Washam ("RDW") and registered RDW as a "mini reporting" committee with Washington's Public Disclosure Commission. *Id.* Mini reporting committees are subject to fewer reporting requirements if the committee's contributions and expenditures remain below a certain threshold. *Id.*

On October 29, 2010, Ms. Farris, acting *pro se,* filed six written charges against Mr. Washam with the Pierce County Auditor seeking to place on the ballot the question of whether Mr. Washam should be recalled. Dkt. 13-1, at 2. The auditor arranged for Mr. Washam to be served with the recall charges and referred the matter to the Pierce County, Washington

Prosecutor's Office. *In Re Recall of Washam,* 171 Wash.2d 503 (2011). A Special Deputy Prosecuting Attorney formulated a ballot synopsis, arranged for Washam to be served with charges, and on November 12, 2010, petitioned the Pierce County Superior Court to review the adequacy of the charges. *Id.*

In November of 2010, Ms. Farris set up a Recall Dale Washam campaign website (recalldalewasham.org), and a Recall Dale Washam Facebook page that was originally attached to her personal Facebook page. Dkt. 73, at 37. Ms. Farris closed to the public the Facebook page attached to her personal page after a copy of a posting surfaced during the litigation before this Court. *Id.* Ms. Farris then set up a separate Recall Dale Washam Facebook page that could be seen by the public. *Id.* at 39, 257 P.3d 513.

Plaintiff Oldfield & Helsdon, PLLC, is a law firm whose principals, Tom Oldfield and Jeff Helsdon, practice law in Pierce County, Washington. Dkts. 13-2; 13-3. They state that they also became aware of numerous allegations regarding Mr. Washam's conduct in office after reading about them in the *Tacoma News Tribune* in 2009 and 2010. Dkts. 13-2, at 1; 13-3, at 1. They state that they also came to believe that for the good of Pierce County, Mr. Washam should be recalled. Dkts. 13-2, at 2; 13-3, at 3.

After reading in the newspaper about the start of recall proceedings in the superior court, on November 16, 2010, Mr. Oldfield and Mr. Helsdon contacted Ms. Farris to offer pro bono legal services for the superior

court's sufficiency hearing and the recall effort in general. Dkt. 13-1, at 2. She accepted their offer. *Id.* On November 17, 2010, Ms. Farris, "by then assisted by pro bono counsel, filed an amended request that contained a proper verification under RCW 29A.56.110 and corrected a few typographical errors." *In Re Recall of Washam,* 171 Wash.2d 503 (2011).

The superior court held a hearing on the factual and legal sufficiency of the charges on December 16, 2010. *In Re Recall of Washam,* 171 Wash.2d 503 (2011). The superior court found five of the six charges sufficient. *Id.* The superior court corrected the ballot synopsis by striking one of the charges and by inserting dates. *Id.* The ballot synopsis now reads:

> The charge that Dale Washam, as Pierce County Assessor-Treasurer, committed misfeasance in office, malfeasance in office and/or violated his oath of office alleges that he violated state and local law by (1) retaliating against an employee for filing a complaint against him between January 22, 2009 and March 16, 2010, (2) grossly wasting public funds in pursuing criminal charges against his predecessor as Assessor-Treasurer from January 2, 2009 until October 29, 2010, (3) failing to protect the employee from retaliation, false accusations or future improper treatment between January 22, 2009 and March 16, 2010, and by failing thereafter to rectify his retaliatory actions against his employee, (4) refusing to participate in investigations of whether he had discriminated

> and retaliated against his employees between January 22, 2009 and March 16, 2010, and (5) discharging his duties in an unlawful and biased manner from January 2, 2009 until October 29, 2010.
>
> Should Dale Washam be recalled from office based on this charge?

In Re Recall of Washam, 171 Wash.2d 503 (2011). Ms. Farris and RDW were represented by Mr. Oldfield and Mr. Helsdon at the hearing. Dkt. 13-2, at 3.

On March 3, 2011, the Washington Supreme Court affirmed the superior court's sufficiency determination and the superior court's corrections to the ballot synopsis. *In Re Recall of Washam,* 171 Wash.2d 503 (2011). A written opinion followed on May 12, 2011. *Id.* Ms. Farris and RDW were again represented by Mr. Oldfield and Mr. Helsdon during the Supreme Court proceedings. Dkt. 13-2, at 3. Ms. Farris states that she would not have been able to afford to hire legal assistance for the recall campaign at that point. Dkt. 13-1, at 4.

B. WASHINGTON'S CONTRIBUTION LIMITS ON RECALL CAMPAIGNS AND THE PUBLIC DISCLOSURE COMMISSION

RCW § 42.17A.405(3), states that

> No person, other than a bona fide political party or a caucus political committee, may make contributions to a state official, a county official, a city official, a school board member,

> or a public official in a special purpose district against whom recall charges have been filed, or to a political committee having the expectation of making expenditures in support of the recall of the state official, county official, city official, school board member, or public official in a special purpose district during a recall campaign that in the aggregate exceed eight hundred dollars if for a legislative office, county office, school board office . . .

As implemented by WAC 390-05-400, RCW § 42.17A.405(3) now prohibits contributions over nine hundred dollars.

RCW § 42.17A.420(1) states that

> It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17A.240 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election

Under then-RCW § 42.17.020(15)(c), campaign contributions other than money "are deemed to have monetary value." Services furnished at less than their fair market value for the purpose of assisting a political committee are deemed a contribution. *Id.* "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." *Id.*

After contacting Plaintiffs informally, on February 9, 2011, Washington's Public Disclosure Commission ("PDC") issued a "Notice of Administrative Charges" to RDW. Dkt. 13-1, at 12. The PDC alleged that RDW exceeded the limitations for mini campaign reporting before requesting a change in reporting options. *Id.* The PDC also alleged that RDW "violated RCW 42.17.640 (now 42.17A.405(3)) by exceeding the $800 per-election limit on contributions from any one source (other than a bona fide political party or a caucus political committee) to a political committee supporting the recall of an elective county officeholder." *Id.* The PDC stated that it considered that "early contributions to and expenditures by a recall committee, including legal expenses, are subject to reporting." *Id.* at 13, 257 P.3d 513. The PDC asserted that as of December 31, 2010, RDW had exceeded the "$500 limit of the mini reporting option on contributions from one source by $21,116.25 and exceeded the $5,000 limit of mini reporting on total contributions by $19,556.25. Oldfield & Helsdon, PLLC's in kind contributions exceeded the $800 per-election limit in RCW 42.17.640 by $20,816.25." *Id.* at 15.

After receiving correspondence from Plaintiffs, the PDC, by letter, withdrew the February 9, 2011 Notice of Administrative Charges against RDW. Dkt. 13-1, at 35-36. The PDC stated that it intended to

reissue charges alleging violations of the reporting requirements. *Id.* at 35. It further stated that

> PDC staff does not intend to allege that Recall Dale Washam violated RCW 42.17.640 by exceeding the $800 per-election limit on contributions from any one source (other than a bona fide political party or a caucus political committee) to a political committee supporting the recall of an elective county officeholder. The fact that the PDC staff does not intend to allege a violation of RCW 42.17.640 should not be construed to mean that the contribution limits of RCW 42.17.640 are not applicable to the recall election. The statute, as written, is to be followed during the recall campaign.

Id.

After the PDC issued amended charges regarding the mini committee reporting violations, on April 25, 2011, the PDC and RDW entered into a stipulation. Dkt. 13-2, at 34-40. As part of that stipulation, the PDC recognized that "pro bono legal services rendered by Oldfield & Helsdon, PLLC to RDW after the December 16, 2010, hearing with regard to assisting RDW with the Supreme Court appeal by Dale Washam do not constitute a contribution as defined in RCW § 42.17.020(15)(c)." *Id.* at 39. In addition to the payment of a civil penalty of $500, RDW agreed to not commit "further violations of RCW 42.17 through the election campaign for which RDW was formed." *Id.* The stipulation concluded the charges issued against

RDW. *Id.* The stipulation provided that "[b]y virtue of the Commission's issuance of an order approving this stipulation, Recall Dale Washam surrenders all rights to appeal, or otherwise seek judicial review of, such order." *Id.*

The Stipulation, however, did not address the constitutionality of the two statutes at issue.

C. RECALL PETITION RESULTS

If Washington's courts find the charges sufficient, sponsors of a recall petition can then begin to collect signatures of legal voters who support the petition. RCW § 29A.56.180. In the case of a county official whose county's population exceeds forty thousand, signatures "equal to twenty-five percent of the total number of votes cast for all candidates for the office to which the officer whose recall is demanded was elected at the preceding election" must be collected. RCW § 29A.56.180(2). Signatures in support of recalling a county officer must be collected and filed within one hundred eighty days after the issuance of a ballot synopsis by the superior court. RCW § 29A.56.150. If the superior court decision is appealed, the period for collecting and filing "signatures begins on the day following the issuance of the decision by the supreme court." *Id.* The county auditor then determines if the petition bears the required number of signatures and verifies the signatures. RCW § 29A.56.210. If enough signatures are properly gathered, the county auditor certifies the petition as

sufficient and fixes a "date for the special election to determine whether or not the officer charged shall be recalled and discharged from office." *Id.* If the recall is successful and the office is vacated, the county board of commissioners appoints a successor. RCW § 36.16.110.

RDW had to collect 65,495 valid signatures. Dkt. 75-1, at 14. RDW collected 84,602 signatures. *Id.* The Pierce County Auditor's Office invalidated 20,215 signatures, leaving a total of 64,387 valid signatures. *Id.* The recall petition failed. After late August 2011, once the recall effort failed, Ms. Farris closed down the Recall Dale Washam campaign website that had been used to organize the recall effort. Dkt. 73, at 31.

D. RDW CONTACTS WITH PIERCE COUNTY COUNCILMEMBERS, ASSESSOR-TREASURER CANDIDATES, AND POTENTIAL CANDIDATES

One of the issues in this Motion for Summary Judgment is whether Plaintiffs had sufficient contacts and communications with members of the local political community to create the appearance of or actual corruption during the recall effort. Plaintiffs had contacts with several individuals, which will be outlined below.

1. Pierce County Councilmember Tim Farrell

Before August of 2011, RDW, through Ms. Farris, had four contacts with Tim Farrell. Dkt. 75, at 21. Ms. Farris exchanged a message with Mr. Farrell on Facebook, met him at a legislative district meeting, met him at a parade, and had a telephone conversation with him. *Id.* Ms. Farris states that she asked Mr. Farrell a question on Facebook about the process for replacing the Assessor-Treasurer if Mr. Washam were recalled. *Id.* at 22. Mr. Farrell responded and explained the process. *Id.* At the time of the Facebook communication, Ms. Farris had heard rumors that Mr. Farrell was a candidate for the Assessor-Treasurer position in 2012. *Id.* at 24. Ms. Farris learned that Mr. Farrell was actually a candidate for the position when she attended the legislative district meeting, sometime after the Facebook contact. *Id.* at 24. After the legislative district meeting, Ms. Farris and Mr. Farrell communicated during a parade regarding a copy of the Facebook post, which surfaced in this litigation. Dkt. 74, at 12. RDW never asked Mr. Farrell to contribute to RDW and Mr. Farrell never contributed to RDW. Dkt. 75, at 25.

2. Pierce County Councilmember Dick Muri

Before the recall effort ended in August of 2011, Ms. Farris had five contacts with Mr. Muri, including one e-mail, three telephone conversations, and one interaction at the RDW closing event. Dkts. 74, at

6-9; 75, at 34; 75-1, at 1-2. First, Mr. Muri e-mailed Ms. Farris and asked her to contact him. Dkt. 75, at 34. Ms. Farris then called Mr. Muri and they spoke about Ms. Farris's background and motivation for initiating the recall petition. *Id.* In the second telephone conversation, Mr. Muri asked Ms. Farris what her plans were for deploying volunteers to collect signatures for the recall petition and gave advice about collecting signatures. Dkt. 75-1, at 1. During the third telephone conversation, Mr. Muri offered to collect signatures. *Id.* at 2. In their final contact, Mr. Muri attended RDW's closing party. *Id.* Ms. Farris states that at no time did she and Mr. Muri discuss possible replacement candidates that the Council would appoint in the event of a successful recall. Dkt. 74, at 8.

3. Candidate Corrigan Gommenginger

Mr. Gommenginger contacted Ms. Farris through the RDW website, volunteering to help with the campaign finance reporting requirements. Dkt. 74, at 23. After Ms. Farris did not hear from him regarding his request to volunteer, Ms. Farris contacted him. Dkt. 75-1, at 3. Mr. Gommenginger told Ms. Farris that he could not volunteer after all because he was thinking of running for the Assessor-Treasurer position in 2012. *Id.* On May 15, 2012, Mr. Gommenginger posted on his website (voteforcorrigan.com) that he was dropping out of the race and that he was endorsing candidate Billie O'Brien. *Id.* at 17.

4. Candidate Billie O'Brien

Ms. Farris had five contacts with Ms. O'Brien, an employee of the Assessor-Treasurer's Office, which included telephone conversations, text massages [sic], one meeting at a public auction, and one meeting after the recall campaign failed. Dkts. 74, at 14; 75, at 26. Ms. Farris stated that Ms. O'Brien never expressed to Ms. Farris an interest in running for the Assessor-Treasurer position. Dkt. 74, at 23. Ms. O'Brien eventually filed her candidacy in June of 2012. *Id.* at 25. Ms. Farris and Ms. O'Brien first contacted each other on the telephone, during which Ms. O'Brien provided background information to Ms. Farris about the function of the Assessor-Treasurer's Office. Dkt. 75, at 26. In November of 2010, Ms. Farris attended an Assessor-Treasurer's property auction where she interacted with Ms. O'Brien in a group setting with other employees of the Assessor-Treasurer's Office and talked about Dale Washam's absence at the auction. Dkts. 75, at 25-27; 74, at 24-25. Ms. Farris also texted Ms. O'Brien and other employees to update them on the results of RDW's litigation in superior court. Dkts. 75, at 26; 74, at 25. RDW never asked for nor did Ms. O'Brien give any contributions to RDW. Dkt. 75, at 28. Finally, Ms. Farris and Ms. O'Brien met after the recall petition failed and discussed why Ms. O'Brien was running for Assessor-Treasurer. *Id.*

5. Candidate Mike Lonergan

Ms. Farris had two contacts with Mr. Lonergan, one during the recall campaign and one after the campaign. Dkt. 74, at 26-27. First, in the spring of 2011, Ms. Farris acted as a call-in guest on Mr. Lonergan's radio talk show, during which Ms. Farris talked for two or three minutes about the recall. *Id.* at 26. Later, in June of 2012, Ms. Farris and Mr. Lonergan met for coffee. *Id.* at 27. Ms. Farris stated that, during this meeting, she believed that Mr. Lonergan wanted her to endorse him, which she did not. *Id.* During the recall campaign, no one indicated to Ms. Farris that Mr. Lonergan was considering running for the Assessor-Treasurer position. *Id.*

6. Candidate Spiro Manthou

Ms. Farris and Mr. Manthou had one contact. In June of 2012, they met, and Mr. Manthou asked for Ms. Farris's endorsement. Dkt. 74, at 28. She did not give him an endorsement. *Id.* Ms. Farris had no contact with Mr. Manthou during the recall campaign and no one indicated to her that Mr. Manthou was considering running for the Assessor-Treasurer position. *Id.*

7. Candidate Dale Washam

Ms. Farris and Mr. Washam never made contact with each other, except during the two recall petition sufficiency hearings in superior court. Dkt. 74, at 29.

During the recall campaign, Ms. Farris did not know that he was running for re-election. *Id.*

8. Contacts with Assessor-Treasurer Office Employees and the Office's Union

During the recall campaign, RDW and Ms. Farris had several communications with Assessor-Treasurer Office employees (Dkt. 74, at 13-14) and Teamsters Local 117, the union representing the Office's employees (Dkt. 75-2, at 10-25). The Office's employees provided Ms. Farris with background information about the Office. Dkt. 74, at 13-14. Also, Ms. Farris produced a strategic program for the Teamsters to identify, train, and mentor Teamster 117 candidates to run for local political office in the future. Dkt. 75-2, at 21-25.

PROCEDURAL HISTORY

A. MOTION FOR PRELIMINARY INJUNCTION

On June 21, 2011, Plaintiffs filed a Motion for Preliminary Injunction, arguing that enforcement of RCW § 42.17.640(3) (now 42.17A.405(3)) violates Plaintiffs' free speech protections under the First Amendment of the United States Constitution by limiting the amount of contribution that a person may donate to a recall committee. Dkt. 13. On July 15, 2011, this Court granted Plaintiffs' Motion. Dkt. 30. On January 19, 2012, the Ninth Circuit Court of Appeals affirmed (case no. 11-35620). Dkt. 48. The appeals court reasoned that Plaintiffs would likely

succeed on the merits and would suffer irreparable harm by engaging in protected political speech because Defendants had not shown any evidence of the appearance of or actual corruption between RDW and any candidates, potential candidates, or councilmembers. Dkt. 48.

B. MOTION FOR SUMMARY JUDGMENT

On August 28, 2012, Plaintiffs filed this Motion for Summary Judgment. Dkt. 61. Plaintiffs argue that RCW §§ 42.17A.405(3) and 42.17A.420(1) are unconstitutional facially and as applied to Plaintiffs because (1) the structure of Washington's recall process prohibits recall committees from coordinating their campaigns with replacement candidates, which negates the appearance of quid pro quo corruption; (2) a disproportionate influence from recall committees is not a sufficient justification for enforcing contribution limits on recall campaigns; and (3) lack of voter access to contributor information is not a sufficient justification for enforcing contribution limits on recall campaigns. Dkt. 61.

In response, Defendants first argue that Plaintiffs request to enjoin enforcement of RCW §§ 42.17A.405(3) and 42.17A.420(1) is moot because (1) there is no live controversy, given that the recall campaign has ended; (2) RCW § 42.17A.420(1) never applied to Plaintiffs, given that the campaign ended prior to the date when RCW § 42.17A.420(1) would have taken effect; and (3) RCW § 42.17A.420(1) has already been

declared unconstitutional. Dkt. 70, at 9-12. Alternatively, Defendants argue that the provisions at issue are facially constitutional because Plaintiffs cannot show that the provisions are substantially overbroad by infringing on protected speech because the government has a legitimate interest in deterring the appearance of corruption. *Id.* at 13-15. Last, Defendants argue that the provisions are constitutional as applied to Plaintiffs because there are issues of material fact regarding an appearance of corruption between RDW, Ms. Farris, existing and subsequent candidates, candidate committee staff, and to and from the Council that would appoint a successor in the event of a successful recall. *Id.* at 17.

In reply, Plaintiffs argue that the case is not moot because it is capable of repetition and would evade review if not reviewed by this Court. Dkt. 76, at 5-6. Second, Plaintiffs argue that RCW § 42.17A405(3) is unconstitutional on its face and as applied to Plaintiffs because (1) there is no actual or appearance of corruption, given that no evidence exists showing RDW contributed to or coordinated with candidates; and (2) the provision is overbroad by prohibiting a substantial amount of protected speech. *Id.* at 6-12.

In their Surreply, Defendants request that the Court strike several declarations filed in support of Plaintiffs' Reply: the declarations of (1) Robin Farris (Dkt.77); (2) Jeanette Peterson (Dkt.78); (3) Jeffrey P. Helsdon (Dkt.79); (4) Thomas Oldfield (Dkt.80); and (5) Tracey Apata (Dkt.81). Dkt. 83. Defendants also request that the Court strike those portions of

Plaintiffs' Reply that rely on these declarations. *Id.* Defendants argue that the declarations (1) are not properly sworn; (2) are not attested to being made from personal knowledge; and (3) assert new issues based on previously undisclosed facts. *Id.*

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.,* 477 .S. [sic] 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific*

Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at 254, *T.W. Elect. Service Inc.,* 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.,* 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888-89 (1990).

DISCUSSION

A. Motion to Strike

Defendants argue that the declarations supporting Plaintiffs' Reply (1) are not properly sworn; (2) are not attested to being made from personal knowledge; and (3) assert new issues based on previously undisclosed facts. Dkt. 83.

"It is well established that new arguments and evidence presented for the first time in Reply are waived." *Docusign, Inc. v. Sertifi, Inc.,* 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006). Here, Plaintiffs presented the new issue of standing that was not contained in their original Motion. Nor were the facts regarding Plaintiffs' current recall efforts disclosed in the filings with Plaintiffs' original Motion. For these reasons, the Court should grant Defendants' Motion to Strike the declarations of (1) Robin Farris (Dkt.77); (2) Jeanette Peterson (Dkt.78); (3) Jeffrey P. Helsdon (Dkt.79); (4) Thomas Oldfield (Dkt.80); (5) Tracey Apata (Dkt.81); and those portions of Plaintiffs' Reply that rely on these declarations.

B. Standing

Defendants argue that RCW § 42.17A.405(3) is moot because RDW has ceased operations. Defendants also argue that RCW § 42.17A.420(1) is moot because RDW efforts failed and never reached the general election ballot, and because the court in *Family PAC v. McKenna,* 685 F.3d 800 (9th Cir. 2012) already ruled that RCW § 41.17A.420(1) is unconstitutional.

Plaintiffs argue that RCW § 42.17A.405(3) is not moot because Plaintiffs' actions are capable of repetition and would evade review if not reviewed by this Court. Plaintiffs do not argue against the mootness of the challenge to RCW § 42.17A.420(1).

"A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751 (1984). To determine if a case is moot, a court must decide if it can give any effective relief in the event that it decides the matter on the merits; if a court can grant such relief, the matter is not moot. *Enyart v. Nat'l Conference of Bar Examiners, Inc.,* 630 F.3d 1153, 1159 (9th Cir. 2011). "The exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (citation omitted)

1. RCW § 42.17A.420(1): $5,000 Limit

The Ninth Circuit in *Family PAC v. McKenna,* 685 F.3d 800 (9th Cir. 2012) ruled that RCW § 42.17A.420(1) is unconstitutional. It is unnecessary for this Court to review the constitutionality of RCW § 42.17A.420(1). The Plaintiffs' challenge to RCW § 42.17A.420(1) is moot and, therefore, they do not have standing. To the extent Plaintiffs' Motion is based on a challenge of RCW § 42.17A.420(1), it should be denied.

2. RCW § 42.17A.405(3): $900 Limit

On appeal from this Court's preliminary injunction, the Ninth Circuit held that the exception to the

mootness doctrine applied in this case because "[t]he parties could not practically obtain appellate review of the district court order within this time. Furthermore, if the plaintiffs attempt another recall, they will be subject to the same $800 contribution limit." *Farris v. Seabrook,* 677 F.3d 858, 863-64 (9th Cir. 2012) (citation omitted). Nothing has changed this rationale for applying the exception to the mootness doctrine in this case. This Court should find that Plaintiffs' challenge to RCW § 42.17A.405(3) is not moot and, therefore, they have standing.

C. Constitutionality of RCW § 42.17A.405(3): $900 Limit

1. As-Applied Challenge

Defendants contend that Plaintiffs have had sufficient contact and communication with candidates, potential candidates, councilmembers, union representatives, and employees of the Assessor-Treasurer's Office to create the appearance of corruption. Plaintiffs argue that these contacts are insufficient to create the appearance of corruption because RDW did not coordinate expenditures during any of these contacts and communications.

On appeal from this Court's preliminary injunction, the Ninth Circuit outlined the law governing First Amendment challenges to contribution limits for recall committees. "Under the First Amendment, contribution limitations are permissible as long as the Government demonstrates that the limits are

closely drawn to match a sufficiently important interest. . . . [S]tates have an important governmental interest in preventing the actuality or appearance of quid pro quo corruption. . . . This anticorruption interest justifies limits on contributions to political committees operated by candidates themselves. . . . It also justifies limits on contributions to committees that, although formally separate from the candidate, are sufficiently close to the candidate to present a risk of actual or apparent corruption." *Farris,* 677 F.3d at 865 (internal citations omitted).

The *Farris* Court continued

> On the other hand, both this court and the Supreme Court have rejected contribution limits as applied to committees having only a tenuous connection to political candidates. In *Citizens United,* the Court held that a federal law restricting corporate and union spending on electioneering communications that support or oppose a political candidate could not be sustained by the anticorruption interest. The Court reasoned that the absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.
>
> Similarly, in *Long Beach,* we invalidated contribution limits as applied to political

action committees making independent expenditures to support or oppose candidates for office. We explained that:

> the strength of the state's interest in preventing corruption is highly correlated to the nature of the contribution's recipient. Thus, the state's interest in the prevention of corruption – and, therefore, its power to impose contribution limits – is strongest when the state limits contributions made directly to political candidates. . . . As one moves away from the case in which a donor gives money directly to a candidate, however, the state's interest in preventing corruption necessarily decreases.

We observed that the Supreme Court has upheld limitations on contributions to entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance thereof. Because the political action committees made independent expenditures and were several significant steps removed from the case in which a donor gives money directly to a candidate, we held that the state's anticorruption interest was insufficient to uphold the contribution limits.

Like independent expenditure committees, recall committees in Washington have at most a tenuous relationship with candidates. The contribution limit here is thus materially indistinguishable from the limit

> we invalidated in *Long Beach*. Under Washington's recall system, political committees seeking to recall officials do not coordinate their spending with candidates for office. In the event a recall is successful, the successor to office is appointed by a governmental entity designated by state law – in this case, the Pierce County Council. *See* Wash. Rev. Code § 36.16.110; Pierce County, Wash., Charter art. 4, § 4.70. Thus, as Washington law is structured, expenditures by recall committees are similar to independent expenditures. Given that recall committees do not coordinate or prearrange their independent expenditures with candidates, and they do not take direction from candidates on how their dollars will be spent, they do not have the sort of close relationship with candidates that supports a threat of actual or apparent corruption.

Farris, 677 F.3d at 866-67 (internal citations and quotations omitted).

The Ninth Circuit, however, left open the possibility that "the outcome might be different if there were evidence that contributions were being made with a 'wink and a nod' from Council members indicating that a particular candidate would be appointed." *Farris,* 677 F.3d at 867 n.8. Therefore, although Washington law is structured to prevent recall committees from coordinating expenditures with candidates, the Ninth Circuit recognized that the possibility of coordination does exist. That possibility

is at issue in the Motion for Summary Judgment before this Court.

Here, there is no evidence in the record that that contributions were made with 'a wink and a nod' from Council members about who the Council would appoint in the event of a successful recall. RDW's communication with Councilmember Farrell only involved relaying information about the recall process via Facebook. RDW's communication with Councilmember Muri only involved explaining Ms. Farris's motivation for starting the recall, and relaying information and advice about plans to collect signatures for the recall effort.

There is no evidence that Plaintiffs coordinated expenditures with candidates or potential candidates. RDW's communication with Candidate Gommenginger only involved a withdrawn request to volunteer for RDW. RDW's communication with Candidate O'Brien only involved providing information on how the Assessor-Treasurer's Office functioned, questioning why Dale Washam was not present at a property auction, updating Candidate O'Brien and other Assessor-Treasurer employees about RDW's litigation in superior court, and, after RDW ceased operations, why Candidate O'Brien was running for office. Further, RDW's communications with Candidate Lonergan only involved Ms. Farris informing Mr. Lonergan's radio show listeners about RDW's recall efforts, and, after RDW ceased operations, Ms. Farris's denied endorsement of Mr. Lonergan. Also, RDW's communication with Candidate Manthou,

after RDW ceased operations, only involved Ms. Farris's denied endorsement of Mr. Manthou.

Finally, there is no evidence of coordination between Plaintiffs and employees of the Assessor-Treasurer's Office or union representatives in regards to contributions, expenditures, or election of a new Assessor-Treasurer.

In sum, the only evidence presented regarding RDW communications concerns exchanges of information about the recall process, the progress of RDW's recall efforts, denial of requests for endorsements after RDW ceased operations, and innocuous exchanges between local political professionals. There is no evidence of coordination of expenditures or 'a wink and a nod' to justify the State's anti-corruption interest. The Government has presented no evidence demonstrating an issue of material fact regarding the appearance of or actual corruption.

For these reasons, the Court should grant summary judgment for Plaintiffs and hold RCW § 42.17A.405(3) unconstitutional as applied to Plaintiffs.

2. Facial Challenge

Because this Court should provide Plaintiffs' requested relief and hold that RCW § 42.17A.405(3) is unconstitutional as applied to Plaintiffs, the Court need not address whether RCW § 42.17A.405(3) is unconstitutional on its face.

Accordingly, it is hereby **ORDERED** that Plaintiffs' Motion for Summary Judgment (Dkt.61) is **GRANTED**. Defendants are permanently enjoined from enforcing RCW § 42.17A.405(3) against Plaintiffs in this case only.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 6th day of November, 2012.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

IN THE NINTH CIRCUIT

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company,

Plaintiffs-Appellants,

v.

AMIT D. RANADE, Chair; GRANT S. DEGGINGER, Attorney, Vice Chair; KATHY TURNER; KATRINA ASAY, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; ANDREA MCNAMARA DOYLE, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission,

Defendants-Appellees.

No. 12-35949

D.C. No. 3:11-cv-05431-RJB

ORDER AMENDING MEMORANDUM DISPOSITION AND DENYING PETITION FOR REHEARING EN BANC

(Filed Oct. 2, 2014)

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company, Plaintiffs-Appellants, v. AMIT D. RANADE, Chair; GRANT S. DEGGINGER, Attorney, Vice Chair; KATHY TURNER; KATRINA ASAY, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; ANDREA MCNAMARA DOYLE, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission, Defendants-Appellees.	No. 13-35040 D.C. No. 3:11-cv-05431-RJB

Before: FISHER, GOULD and CHRISTEN, Circuit Judges.

The memorandum disposition, filed July 11, 2014, is **AMENDED**.

An amended memorandum disposition is filed concurrently with this order.

Judges Gould and Christen have voted to deny Appellants' petition for rehearing en banc, and Judge Fisher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellants' petition for rehearing en banc, filed July 25, 2014, is **DENIED**.

No further petitions for rehearing will be accepted.

Wash. Rev. Code § 29A.56.260

Ascertaining the result – When recall effective.

The votes on a recall election must be counted, canvassed, and the results certified in the manner provided by law for counting, canvassing, and certifying the results of an election for the office from which the officer is being recalled. However, if the officer whose recall is demanded is the officer to whom, under the law, returns of elections are made, the returns must be made to the officer with whom the charge is filed, and who called the special election. In the case of an election for the recall of a state officer, the county canvassing boards of the various counties shall canvass and return the result of the election to the officer calling the special election. If a majority of all votes cast at the recall election is for the recall of the officer charged, the officer is thereupon recalled and discharged from the office, and the office thereupon is vacant.

Wash. Rev. Code § 36.16.110

Vacancies in office.

(1) The county legislative authority in each county shall, at its next regular or special meeting after being appraised of any vacancy in any county, township, precinct, or road district office of the county, fill the vacancy by the appointment of some person qualified to hold such office, and the officers thus appointed shall hold office until the next general

election, and until their successors are elected and qualified.

(2) If a vacancy occurs in a partisan county office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified as defined in RCW 29A.04.133 and shall continue through the term for which he or she was elected.

(3) If a vacancy occurs in a nonpartisan county board of commissioners elective office or nonpartisan county council elective office, the person appointed to fill the vacancy must be from the same legislative district, county, or county commissioner or council district as the county elective officer whose office was vacated, and must be one of three persons who must be nominated by the nonpartisan executive or nonpartisan chair of the board of commissioners for the county. In case a majority of the members of the county legislative authority do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for in this section, appoint someone to fill the vacancy.

(4) If a vacancy occurs in a nonpartisan county board of commissioners elective office or nonpartisan county council elective office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the

successor may commence once he or she has qualified as defined in RCW 29A.04.133 and shall continue through the term for which he or she was elected.

Wash. Rev. Code § 42.17A.405

Limits specified – Exemptions.

* * *

(3) No person, other than a bona fide political party or a caucus political committee, may make contributions to a state official, a county official, a city official, a school board member, a public hospital district commissioner, or a public official in a special purpose district against whom recall charges have been filed, or to a political committee having the expectation of making expenditures in support of the recall of the state official, county official, city official, school board member, public hospital district commissioner, or public official in a special purpose district during a recall campaign that in the aggregate exceed eight hundred dollars if for a legislative office, county office, school board office, public hospital district office, or city office, or one thousand six hundred dollars if for a special purpose district office or a state office other than a legislative office.

* * *

Wash. Admin. Code § 390-05-400

Changes in dollar amounts.

Pursuant to the requirement in RCW 42.17A.125 that the commission biennially revise the dollar amounts found in Initiative 134 and RCW 42.17A.410 to reflect changes in economic conditions, the following revisions are made:

Code Section	Subject Matter	Amount Enacted or Last Revised	2014 Revision
	* * *		
.405(3)	Contribution Limits – State official up for recall or pol comm.supporting recall –		
	State Legislative Office	$900	$950
	Other State Office	$1,800	$1,900
	* * *		

PIERCE COUNTY CHARTER

Section 4.70 – Vacancies

(1) An elective office shall become vacant when one of the following occurs:

(a) death;

(b) total permanent incapacity as determined by a panel of three physicians;

(c) resignation;

(d) recall of the officer;

(e) a Councilmember's absence from three consecutive regular meetings of the Council, without being excused by the Council;

(f) absence from the County for 30 days without being excused by the Council; or

(g) failure to maintain residence within the district from which elected.

(2) The Council shall fill a vacancy from a list of three people submitted by the County central committee of the party represented by the official in office immediately prior to the declaration of vacancy. In the event that this official was elected as an independent, the vacancy shall be filled by the Council with an individual who certifies to be of the same affiliation.

(3) Vacancies in an elective position shall be filled at the next November general election, unless the vacancy occurs after the last day for filing declarations

of candidacy, in which case the vacancy shall be filled at the next succeeding November general election. The person elected shall take office upon certification of the results of the election, and shall serve the unexpired term of the vacated office. Until a successor has been elected and certified, a majority of the Council shall fill the vacancy by appointment. All persons appointed to fill vacancies shall meet the qualifications set in Section 4.30.

(4) An elective official shall be suspended with pay upon an information or indictment for a felony being filed against the official, such suspension continued until conviction, acquittal or dismissal of such charges, and shall be removed from office upon being convicted thereof.

(Originally Adopted November 4, 1980)