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; JENNIFER JOLY; and JIM CLEMENTS, in their official capacities as officers and members of the Washington State Public Disclosure Commission; and DOUG ELLIS in his official capacity as Interim Executive Director of the Washington State Public Disclosure Commission,

Defendants.

CASE NO. 11-5431 RJB

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on the Plaintiffs' Motion for Preliminary Injunction. Dkt. 13. The Court has considered pleadings filed regarding the motion, the oral argument heard on 15 July 2011, and the remaining record.

I. FACTS AND PROCEDURAL HISTORY

This case arises from Plaintiffs' attempts to recall an elected official in Pierce County, Washington and Washington's campaign finance laws. Dkt. 1. Plaintiffs challenge the constitutionality of two Washington statutes which limit campaign contributions, RCW § 42.17.640(3) and RCW § 42.17.150(8). *Id*. In the instant motion, Plaintiffs seek a preliminary injunction against the enforcement of RCW § 42.17.640(3), arguing that it violates the First and Fourteenth Amendments to the United States Constitution. Dkt. 13.

A. WASHINGTON'S RECALL PROCESS

Washington's Constitution Article I, Sections 33 and 34 provide that elected officials may be recalled for malfeasance, misfeasance, and/or a violation of their oath of office. When a Washington voter desires to demand recall of an elected official, under RCW 29A.56.110, they

> . . . shall prepare a typewritten charge, reciting that such officer, naming him or her and giving the title of the office, has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated the oath of office, or has been guilty of any two or more of the acts specified in the Constitution as grounds for recall. The charge shall state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, be signed by the person or persons making the charge, give their respective post office addresses, and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.

If the officer is a county official, the recall charges are filed with the county auditor. RCW 29A.56.120. The county auditor then is directed to "promptly (1) serve a copy of the charge upon the officer whose recall is demanded, and (2) certify and transmit the charge to the preparer of the ballot synopsis." *Id.* Under RCW 29A.56.130(1)(b), the prosecuting attorney of the county prepares the ballot synopsis. That statute further provides that:

> The synopsis shall set forth the name of the person charged, the title of the office, and a concise statement of the elements of the charge. Upon completion of the ballot synopsis, the preparer shall certify and transmit the exact language of the ballot synopsis to the persons filing the charge and the officer subject to recall. The preparer shall additionally certify and transmit the charges and the ballot

> synopsis to the superior court of the county in which the officer subject to recall resides and shall petition the superior court to approve the synopsis and to determine the sufficiency of the charges.

RCW 29A.56.130 (2). The superior court is required to conduct a hearing within 15 days and make a decision on the sufficiency of the charges. RCW 29A.56.140. The court does not consider the truth of the charges, but only their sufficiency. *Id.* The superior court can also correct any ballot synopsis it deems inadequate. *Id*. An appeal of a sufficiency decision can be filed in the supreme court pursuant to RCW 29A.56.270. *Id*.

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.

B. LEGAL PROCEEDINGS TO RECALL DALE WASHAM

In 2010, Plaintiff Robin Farris became concerned about the conduct of an elected official in Pierce County, Washington, Dale Washam. 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.*

Plaintiff Oldfield & Helsdon, PLLC, is a law firm whose principals, Tom Oldfield and Jeff Helsdon, practice law in Pierce County, Washington. Dkts. 13-2 and 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 and 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 and 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 and 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.

C. WASHINGTON'S $800 LIMIT ON CONTRIBUTIONS FOR OR AGAINST RECALL CAMPAIGNS, THE PDC, AND PLAINTIFFS' RECALL EFFORTS

The relevant portion of the statute at issue here, RCW § 42.17.640(3), prohibits contributions over eight hundred dollars to a county official "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 . . . county official . . . during a recall campaign." Under 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 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. 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 states 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 otherwise 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.*

D. CURRENT RECALL CAMPAIGN EFFORTS

In the mean time, Ms. Farris states that now that the recall charges have been deemed sufficient by Washington courts, she and RDW have begun the process of collecting sufficient signatures to place the recall petition on either the August 2011 or November 2011 ballot. *Id.* She asserts that she must collect 65,495 signatures of registered voters by July 1, 2011, to place the question on the August 16, 2011, ballot. *Id.*, at 7. (That deadline passed before this motion was noted for consideration.) Ms. Farris states she has until August 31, 2011, to make the November 8, 2011, ballot. *Id.* RDW has thirty people volunteering to collect signatures. *Id.* RDW also pays signature gatherers, in part, due to the county's size. *Id*, at 8. Ms. Farris also asserts that she has lost some volunteers because of Mr. Washam's reputation for retaliating against people. *Id.* She alleges that in light of his reputation, having money to pay signature gatherers is important. *Id.* Ms. Farris asserts that Pierce County is 1,800 square miles, and states that they cannot place volunteers in many areas of the county. *Id.* In an effort to reach voters in other areas of county, RDW has also paid for a copy of the recall petition to run as an insert in the local newspaper, the *Tacoma News Tribune*. *Id.*

E. PENDING MOTION

Plaintiffs now move for a preliminary injunction, enjoining Defendants from enforcing RCW § 42.17.640(3).

II. DISCUSSION

A party seeking a preliminary injunction has the burden to show that (a) it is likely to succeed on the merits of the claim, (b) it will suffer irreparable harm absent injunctive relief, and (c) that the balance of the equities and (d) the public interest favor granting the injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The Ninth Circuit has recently held, that under *Winter*, where there are "'serious questions going to the merits' and a balance of

hardships that tips sharply towards the plaintiff" a preliminary injunction can be issued, "so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

A. SUCCESS ON THE MERITS

The First Amendment prohibits laws "abridging the freedom of speech." An inherent tension exists for courts asked to grant a preliminary injunction on First Amendment grounds - "the moving party bears the burden of showing likely success on the merits—a high burden if the injunction changes the status quo before trial—and yet within that merits determination the government bears the burden of justifying its speech-restrictive law." *Thalheimer v. City of San Diego*, --- F.3d ----, 2011 WL 2400779 (9th Cir. June 9, 2011). The first issue to be decided is whether Plaintiffs have asserted a "colorable claim that their First amendment rights have been infringed." *Id*. The burden then shifts to the government to justify the law. *Id*.

1. Rights Infringed?

The statute at issue here, RCW § 42.17.640(3), fully provides,

> 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, 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, 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, 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.

Plaintiffs here have pointed to sufficient evidence of a colorable claim that their First Amendment rights have been implicated. "Restrictions on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, -- S.Ct. --, 2011 WL 2518813, 13 (June 27, 2011)(*internal citations omitted*). Mr. Oldfield and Mr. Helsdon state that

they would both like to be able to continue to provide pro bono legal representation to RDW. Dkt. 13-2, at 6 and 13-3, at 7. They would like to contribute money to the campaign as well, but feel they are prohibited from doing so because of the operation of the RCW § 42.17.640(3). *Id.* They indicate that they would like to participate in future recall campaigns. *Id.* In support of their motion, Plaintiffs also file the Declaration of Pierce County, Washington resident Joan K. Mell. Dkt. 13-4. Ms. Mell states that she would have contributed $3,000 to RDW, in particular, to pay for a copy of the recall petition to appear in the *Tacoma News Tribune*. *Id.*, at 2. Ms. Mell states that she did not make the $3,000 contribution as she had planned because of the $800 limit set out in the statute. *Id.* Instead she contributed $800 to RDW. *Id.* Ms. Mell asserts that if the court strikes down the statute or the PDC stops enforcing it, she would contribute more than $800 to recall campaigns she supports in the future. *Id.*, at 3. Plaintiffs have met their burden to show that their First Amendment rights have been implicated, and the burden shifts to Defendants to justify RCW § 42.17.640(3).

2. Government's Justification

The standard of review for examining the government's justification in limiting political speech is driven by the Supreme Court's distinction between expenditures for political expression, and campaign contributions to candidates or political committees. *Buckley v. Valeo*, 424 U.S. 647 (1976). In explaining the lower standard applicable to campaign contributions, the Court found,

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of

> the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Buckley v. Valeo, 424 U.S. 647, 20-21 (1976). Differing tests are applied in reviewing the government's justification of the law depending on whether the Court viewed the law at issue as one that limited expenditures for political expression or contributions to candidates or political committees. *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, -- S.Ct. --, 2011 WL 2518813, 9 (June 27, 2011).

Although there is some uncertainty regarding the proper standard of review of Washington's justification here because of recent Supreme Court cases, including *Citizens United v. FEC*, 130 S.Ct. 876 (2010) and *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, -- S.Ct. --, 2011 WL 2518813 (June 27, 2011), the original expenditure – contribution distinction announced in *Buckley v. Valeo*, 424 U.S. 647 (1976), appears to continue to frame the constitutional analysis.

Complicating this case though, is the fact that contributions to a committee supporting the recall of an elected official are not strictly campaign contributions to a candidate, but neither are they strictly campaign contributions to a ballot measure, but are a hybrid of the two. The Ninth Circuit, in *Citizens for a Clean Gov't*, addressed the issue of the proper standard of review regarding a First Amendment challenge to campaign contribution limits in the context of a recall campaign. *Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007). It held that "[l]imits on contributions to political campaigns are permissible under the First Amendment as long as the Government demonstrates that the limits are closely drawn to match a sufficiently important governmental interest." *Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007) (applying the less rigorous scrutiny test in

evaluating state's interest in imposing contribution limits during signature phase of recall effort) (*citing Randal v. Sorrell*, 548 U.S. (2006) and *Buckley v. Valeo*, 424 U.S. 1 (1976)). In distinguishing the case before it, the Ninth Circuit again emphasized the "unique nature" of restrictions to campaigns in the recall context in *Thalheimer v. City of San Diego*, --- F.3d ----, 2011 WL 2400779 (9th Cir. June 9, 2011)(*citing Citizens for a Clean Gov't*, at 653-54). Further, the parties argue the case using that standard, and so it will be applied. Dkts. 13 and 22.

Corruption or the appearance of corruption in the political process have long been accepted as sufficient state interests under *Buckley* for limitations on campaign contributions. *Citizens for Clean Gov't*, at 652 (*internal citations omitted*). "Limits on political contributions serve the government's interest in preventing corruption because they reduce the risk of quid pro quo arrangements and mitigate the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* (*internal quotations omitted*). In *Citizens for a Clean Gov't*, a citizens' group that sought to recall a city council member challenged a San Diego ordinance which banned contributions over $250 to any committee supporting or opposing a candidate in a recall election. The Court held that the less rigorous scrutiny test was appropriate, but that the district court erred in finding that the City had demonstrated its "sufficiently important interest with 'hypothetical situations not derived from any record evidence or governmental findings' and 'vague allusions to practical experience.'" *Thalheimer v. City of San Diego*, --- F.3d ----, 2011 WL 2400779 (9th Cir. June 9, 2011)(*citing Citizens for a Clean Gov't*, at 653-54). The *Citizens for a Clean Gov't* Court "focused on the unique nature of San Diego's restriction in the recall context," reflecting the "Supreme Court's admonition in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000), that the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and

plausibility of the justification raised.'" *Thalheimer*, at 10. The Ninth Circuit held that San Diego offered "no evidence of deliberation on the issue of campaign finance in recall elections, and it ha[d] no recourse to legal authority addressing these exact issues because none exists." *Id.* (*citing Citizens for a Clean Gov't*, at 653-54). The *Citizens for a Clean Gov't* Court "held only that the district court erred by failing to require evidence clarifying the analogy between the state interest in *Buckley* and the one asserted" there. *Id*. The matter was remanded to the district court for further evidentiary development. *Citizens for a Clean Gov't*, at 654. In finding a sufficiently important state interest the Court can rely on evidence provided by the state of Washington in the record, "including news accounts and affidavits from the legislative history." *Citizens for Clean Gov't*, at 653.

Defendants argue that corruption or the appearance of corruption justifies the limits RCW § 42.17.640(3) places on Plaintiffs' First Amendment rights. Applying the heightened evidentiary requirement from *Citizens for Clean Gov't* here, the Defendants have failed to meet their burden to justify the RCW § 42.17.640(3) limit as it applies to Plaintiffs' political speech in this early stage of the litigation. Defendants offer several bases for their anti-corruption rationale which will be examined below.

a. Legislative History of Washington's Campaign Finance Laws

Defendants point to the general legislative history of Washington's campaign finance laws in support of its anti-corruption as justification. Dkt. 22, at 3. In 1992, the people of Washington, concerned about unlimited campaign contributions and the impact on elected officials, adopted Initiative 143. Laws of 1993, ch.2, § 2 (RCW § 42.17.620). The limits applied to recall elections. *Id.* The "Intent" section of the measure provides, "By limiting campaign contributions, the people intend to: (1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes; (2) Reduce the influence of

large organizational contributors; and (3) Restore public trust in governmental institutions and the electoral process." *Id.* The Washington legislature extended campaign contribution limits to other offices, including county offices, in 2006. Laws of 2006, ch. 348, § 3. RCW § 42.17. As enacted, the contribution limits also applied to recall elections. *Id.* Defendants note that in support of the bill, the Legislature heard testimony that:

> Currently Washington limits campaign contributions running for state legislative offices and statewide executive officers. These laws have been enacted due to the potential for undue influence from individuals and groups making large campaign contributions. Additionally, real or perceived influence threatens public confidence in government. It is essential that we protect the election process and our government by limiting campaign contributions to candidates for any office for which the realistic potential for this problem exists.

Dkt. 22, at 4, n. 2.

This proffered evidence does not meet the heightened evidentiary standard requiring "deliberation on the issue of campaign finance in recall elections" under *Citizens for Clean Gov't.* While generally providing evidence of the voters' intent and concern with the effect of large monetary donations to campaigns, it does not address the specific concern required under *Citizens for Clean Gov't.* "The heightened evidentiary requirement in *Citizens for Clean Gov't* stemmed from the novelty of limiting contributions to recall campaign committees, as opposed to limiting the sort of direct candidate contributions in normal campaign cycles addressed in *Buckley*." *Citizens for Clean Gov't*, at 654.

b. Corruption Concerns in Washington Politics Generally

Defendants refer to Washington's experience with political action committees for ballot measures as support for their concerns of corruption. Dkt. 22. They point to *In State ex rel. Washington State Public Disclosure Comm'n v. Permanent Offense*, 150 P.3d 568 (Wash. Ct. App. 2006). *Id.* In that case, the officers of a ballot measure committee formed a corporation to secretly compensate the campaign manager with campaign contributions. *Permanent Offense*, at

280. The corporation would then bill the political action committee. *Id*. The political action committee did not disclose its payments to the corporation. *Id*.

While certainly a sign of irregularities in the context of ballot measures, *Permanent Offense* does not provide sufficient evidence of corruption in the context of recall elections. It does not provide the kind of evidence required by *Citizens for Clean Gov't.*

c. Corruption Concerns in the Recall Process

Defendants argue that in Washington, "the ultimate reality of recall elections, unlike a ballot measure, directly involves real persons – the elected official subject to the recall, the officers of the recall campaign, and if the recall is successful, the appointed replacement and the officials responsible for appointing the replacement." Dkt. 22, at 12. Defendants argue that Washington has an interest "in ensuring that systems used to remove an elected official and select a new official, or to finance these efforts, are adequately shielded from corruption or the appearance of corruption." *Id.* Defendants express concern that the recall process in Washington allows "opportunities for individuals who are involved in the recall, and as well as those who are deciding who should fill the vacant position, to seek the position." Dkt. 25, at 19. Defendants offer an additional hypothetical which is intriguing: they argue that when a single entity is able to finance a recall effort, "the persons subject to recall, as well as the persons who would be appointing the successor, would be or could be making decisions not based upon what is best for the people, but instead what is best for themselves or best for the for the recall funder." Dkt. 25, at 26. But, because "'hypothetical situations not derived from any record evidence or governmental findings' and 'vague allusions to practical experience,'" *Thalheimer v. City of San Diego*, --- F.3d ----, 2011 WL 2400779 (9th Cir. June 9, 2011)(*citing Citizens for a Clean Gov't*, at 653-54), are not sufficient evidence under *Citizens for a Clean Gov't*, the Court can not conclude that these hypotheticals meet the state's burden.

d. Corruption Concerns Based on Recall Elections in Other States

Defendants point out that "while recall campaigns frequently present themselves as local citizen efforts, the reality in jurisdictions that allow unlimited contributions is that these efforts are bankrolled by wealthy individuals or special interest groups." Dkt. 22, at 14. In support of their position, Defendants point events in other jurisdictions. *Id.* For example, they refer to a newspaper editorial discussing an effort to recall the mayor of the City of Miami: "While that may conjure up the image of a grass-roots campaign to throw out a tyrant who raised taxes, consider the move to oust him was led by a billionaire former owner of the Philadelphia Eagles who spent more than $1 million on the effort." Dkt. 22, at 15 n. 17 (*citing* Dkt. 25, at 14-15). Defendants also proffer several other articles regarding the risk of corruption in recall campaigns, including one article from the Los Angeles Times, dated June 22, 2011, which stated "[i]f anybody who thought that politicians are in thrall to special interest now, just wait until they can get yanked out of office anytime they cross the big boys." Dkt. 22, at 15 (*citing* Dkt. 25, at 14-15).

The state points to the evidence provided by Wisconsin Democracy Campaign, as amicus curiae, which the Court can consider under *U.S. v. E. I. du Ponte de Nemours & Co.*, 366 U.S. 316, 346 (1961). In support of their justification of corruption, they provide several examples of participants in recall campaigns showing an interest (or eventually filling) the office at issue themselves. Dkt. 26, at 13-19. For example, in Nashville, Michigan, in August of 2009, Jamie Hollin led the attempt to recall councilwoman Pam Murray. Dkt. 27-3, at 33-34. In November, Hollin defeated Murray in the recall election. *Id.*, at 35-36. These examples support using the less exacting standard of review announced by the Ninth Circuit in *Citizens for a Clean Gov't.* They provide evidence that there is concern that recall committees may be "coordinating their expenditures" with potential candidates, and sometimes even be "taking direction" from potential

candidates on how their dollars will be spent. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010). They do not, however, provide evidence of corruption or the appearance thereof, endangering all recall elections.

The amicus curiae point out that "large contributions to recall campaigns are likely to present a strong appearance of corruption." Dkt. 26, at 19. They note that in the 2003 recall of California Governor Gray Davis, contribution limits were imposed on the office holder. *Id.*, at 20. Recall committees, even those associated with and controlled by declared candidates, were not subject to the contribution limitations. *Id.* They point to an article which stated:

> The bifurcated campaign finance system [] allowed candidates for governor to form separate pro-recall committees and raise unrestricted money for those efforts. For example, Schwarzenegger's "Total Recall" committee raised over $4.5 million that it spent largely on advertisements supporting the recall . . . [T]he Total Recall advertisements featured Schwarzenegger as a spokesman. Unless a viewer noticed the fine print . . . she would be hard-pressed to tell the difference between one funded by the Schwarzenegger campaign committee and one paid for by the "Total Recall" committee. . . .
>
> Thus, the recall campaign presented an unusual example of the usual machinations apparent when candidates devise strategies within a system of some limitations, many loopholes and unregulated channels of money, and different rules for different kinds of campaigns that can nonetheless be run to complement each other. Some loopholes can be closed . . . [T]he California Fair Political Practices Commission (FPPC) has announced plans to apply contribution limits to ballot-initiative campaign committees controlled by candidates and office holders. Effective after November's elections, the new regulations are clearly a response to Schwarzenegger's aggressive exploitation of the bifurcated rules.

Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. Rev. 239, 251 (2004).

e. Conclusion on State's Justification

Washington may have an important interest in preventing corruption or the appearance of corruption when recall committees are run by or closely tied to potential replacement candidates (as it appears they sometimes are). The risks of corruption are the same for contributions to

candidates whether they are hiding behind a recall committee or not. That important state interest of anti-corruption announced in *Buckley* and which has continued to be upheld, is still valid. At this stage in this case, however, Washington has not shown that it has an important state interest which would justify limiting Plaintiffs' First Amendment rights, particularly in light of the heightened evidentiary standard announced in *Citizens for Clean Gov't.* There is no evidence showing that Plaintiffs are closely aligned with any candidate (or even any potential candidate). Defendants point out that a Pierce County Council member, who is a part of the body that will appoint a successor if the recall is successful, has indicated that he is running for Mr. Washam's position in 2012. Dkt. 25, at 18. That is not sufficient evidence of a tie between the Plaintiffs and this council member. Defendants assert that according to RWD's website, "honorary co-chairs" include two of the candidates who ran unsuccessfully against Mr. Washam in 2008. Dkt. 25, at 18. Defendants argue that "all these individuals, who are actively participating in the recall campaign, could be corrupted or subject to the appearance of corruption if limits on contributions made directly to the recall campaign were removed." Dkt. 22, at 15. However, these parties' association with RWD is not evidence of corruption, or even the appearance of corruption. There is no evidence that any of the people connected to RDW are candidates or even potential candidates. Further, there is insufficient evidence that RDW is coordinating or prearranging its "independent expenditures with candidates," or taking "direction from candidates on how their dollars will be spent." *Long Beach Area Chamber of Commerce v. City of Long Beach,* 603 F.3d 684, 969 (9th Cir. 2010). This motion is limited to the application of RCW § 42.17.640(3) to Plaintiffs at this stage in the proceedings. That is, this analysis is limited to an as applied challenge to the limits of RCW § 42.17.640(3) to Plaintiffs' free speech rights. It should not be construed as affecting other parties or circumstances.

Further, the State has failed to show that the $800 limit, as applied to a recall committee that is not closely tied to a replacement candidate, is "closely drawn to match" the state's interest in preventing corruption or the appearance of corruption. This is particularly true in light of Washington's legal process that proponents of a recall must go through before they may begin to gather signatures.

Plaintiffs have, at least, raised "serious questions" going to the merits. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

B. IRREPARABLE HARM

As to irreparable harm, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Thalheimer v. City of San Diego*, --- F.3d ---, 2011 WL 2400779 (9th Cir. June 9, 2011) (*internal quotations omitted*). "The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics' and '[a] delay of even a day or two may be intolerable." *Id*.

Plaintiffs, at this stage in the case, have articulated sufficient irreparable harm if the injunction does not issue. Plaintiffs have shown that they are under considerable time pressure. Ms. Farris alleges that most people will not contribute to a recall campaign until after the courts find recall charges sufficient. Dkt. 13-1, at 9. She asserts that due to the limited time frame within which signatures must be gathered (180 days after the courts find charges sufficient), it is difficult to raise adequate funds to run the campaign in light of the $800 limitation in RCW § 42.17.640(3). *Id*., at 9. Ms. Farris alleges that the limitations are "especially onerous because people may be afraid to contribute or volunteer given that the target of the recall may retaliate against them." *Id*., at 9-10. Plaintiffs have alleged sufficient irreparable harm.

C. PUBLIC INTEREST AND BALANCE OF THE EQUITIES

"The public interest inquiry primarily addresses impact on non-parties rather than parties. The potential for impact on nonparties is plainly present here." *Sammartano v. First Judicial District Court, in and for County of Carson*, 303 F.3d 959, 974 (9th Cir. 2002). The people of Washington have many, and sometimes competing, interests in this case. On one hand, "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition For Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). As was discussed in the section regarding the state's "important governmental interest" in justifying the law, the people of Washington have an interest in preventing corruption in their government. Washington's people also have an interest in integrity of the electoral system, particularly in the context of a recall election, which may result in the unseating of a popularly elected official. On the other hand, "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano*, at 974 (citing *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir.2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression.")). Supreme Court precedent recently has greatly restricted the use of campaign finance laws as applied to organizations other than to candidates or political committees closely associated with candidates on First Amendment grounds. *Citizens United v. FEC*, 130 S.Ct. 876 (2010)(holding statute which prohibited independent expenditures for electioneering communications violated corporation's First Amendment rights) and *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, -- S.Ct. --, 2011 WL 2518813 (June 27, 2011)(holding Arizona's matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, and is not justified by any "compelling state interest," not even

corruption). Though a close question, and in light of the recent and somewhat troubling Supreme Court precedent, the "public interest in upholding free speech and association rights outweighe[s] the interest in continued enforcement of these campaign finance provisions." *Thalheimer v. City of San Diego*, --- F.3d ----, 2011 WL 2400779 (9th Cir. June 9, 2011) (*internal quotations omitted*).

The balance of the equities also tips in Plaintiffs favor. The infringement on Plaintiffs' First Amendment rights, considering the time frame within which they are operating, outweighs the public's interest in not having a disruption in the enforcement of RCW § 42.17.640(3) until a trial on the merits can be had.

D. CONCLUSION

"Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system." *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, -- S.Ct. --, 2011 WL 2518813, 22 (June 27, 2011)(*Kagan, J., dissenting*). The First Amendment rights of our citizens are often in tension with that laudable goal. Bound by precedent and for the reasons stated above, the undersigned concludes that Defendants should be preliminarily enjoined from enforcing RCW § 42.17.640(3) against Plaintiffs pending a trial on the merits. This ruling on RCW § 42.17.640(3) does not apply to other parties not before the Court.

Federal Rule of Civil Procedure. 65 (d)(1) requires that every order granting an injunction must: "(A) state the reasons why it issued (B) state its terms specifically; and (C) describe in reasonable detail . . . the act . . . restrained." Further, under Rule 65 (c), "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

Plaintiff's motion should be granted subject to their posting of reasonable security, which, in this case, should be in the nominal amount of $100.00.

III. ORDER

It is hereby **ORDERED** that:

- Plaintiffs' Motion for Preliminary Injunction (Dkt. 13) is **GRANTED,** subject to Plaintiffs' posting a bond in the amount of $100.00**.**
- Pursuant to Fed. R. Civ. P. 65 (d), for the reasons stated above, Defendants **ARE PRELIMINARILY ENJOINED** from enforcing RCW § 42.17.640(3) against Plaintiffs pending a trial on the merits.

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 15th day of July, 2011.

ROBERT J. BRYAN
United States District Judge