NO. 22-35112

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

FRED JARRETT, in his official and personal capacities as Chair of the Washington Public Disclosure Commission; et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

No. 3:21-cv-05546
The Honorable Barbara J. Rothstein
United States District Court Judge

DEFENDANTS-APPELLEES' JOINT ANSWERING BRIEF

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I. INTRODUCTION

"This is a case in search of a controversy." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1137 (9th Cir. 2000) (en banc). The Institute for Free Speech (IFS) seeks to represent a Washington resident, Tim Eyman, *pro bono* in an appeal from a campaign finance enforcement action, and it wishes to do so without any requirement to register or make disclosures under Washington's campaign finance laws. It may do so. Washington law and a declaratory order from the Public Disclosure Commission are clear and unequivocal: IFS may represent Mr. Eyman in the state court appeal without being required to register or make disclosures. The briefing in this case and the district court's order further confirm that IFS faces not even a remote possibility of enforcement. IFS simply refuses to take "yes" for an answer.

Because IFS's proposed representation does not arguably violate state law, and because the Commission has explicitly committed not to take action against IFS for representing Mr. Eyman in the enforcement action at issue, IFS does not face a credible threat of prosecution. As a result, IFS cannot satisfy its burden to establish an injury in fact, as required to invoke Article III jurisdiction. The district court correctly granted summary judgment in favor of Defendants-Appellees.

Even if IFS had established a case or controversy, its claims would fail on the merits. IFS's arguments rely on its misreading of the declaratory order, incomplete analysis of Washington campaign finance laws, and misrepresentation of the district court's order. Washington's campaign finance registration and disclosure requirements readily satisfy exacting scrutiny, which is the standard that applies to IFS's challenge. Washington's campaign finance laws are also not vague; IFS just declines to engage with relevant provisions beyond the definition section. And IFS's personal-capacity claims fail in light of the absence of any deprivation of federal rights as well as the applicability of quasi-judicial immunity and qualified immunity.

This Court should affirm the district court.

II. JURISDICTIONAL STATEMENT

Neither the district court nor this Court possess jurisdiction under Article III.

If IFS were able to establish Article III jurisdiction, the district court would have had subject matter jurisdiction under 42 U.S.C. § 1983, and this Court would have subject matter jurisdiction under 28 U.S.C. § 1291.

III. ISSUES PRESENTED

1. The statutory scheme and a binding declaratory order establish that IFS's representation of Tim Eyman in a state enforcement action would not violate state law. Has IFS established the existence of an Article III case or controversy?

2. IFS provides no meaningful argument regarding the application of exacting scrutiny in any circumstances other than its proposed representation of Mr. Eyman. Has IFS satisfied the standard for a facial challenge to Washington's registration and disclosure statutes?

3. Washington's definition of "contribution" unambiguously includes donated professional services. The statutory scheme also makes clear that registration and disclosure requirements would not be triggered by IFS's proposed representation of Mr. Eyman. Are the challenged provisions unconstitutionally vague?

4. Has IFS overcome quasi-judicial immunity with respect to the personal-capacity claims?

5. Has IFS overcome qualified immunity with respect to the personal-capacity claims?

6. Does the declaratory order violate any federal right?

IV. STATUTORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

V. STATEMENT OF THE CASE

A. The Eyman Campaign Finance Enforcement Litigation

IFS's claims in this case are primarily based on its stated desire to represent Tim Eyman in an appeal from a judgment of the Superior Court for the State of Washington. SER-70–71 (¶ 21). The State filed that campaign finance enforcement action against Mr. Eyman in his individual capacity in 2017. SER-4; SER-6 (¶ 2.2). The superior court made extensive findings detailing Mr. Eyman's scheme to obtain illegal kickbacks, among other campaign finance violations. *E.g.*, ER-124–130. This action followed two earlier successful enforcement actions against Mr. Eyman for similar violations. ER-118 (¶¶ 2.1, 2.2).

During the superior court proceeding in March 2019, IFS filed an untimely motion seeking leave to file an amicus brief and provide argument in support of Mr. Eyman. SER-32; *see also* SER-25–31. The superior court denied IFS's motion "without prejudice." SER-32.

Following trial, the superior court entered its Court's Findings of Fact and Conclusions of Law and Injunction on February 10, 2021, ER-117, and a judgment on April 16, 2021, ER-105. The Washington Supreme Court denied Mr. Eyman's request for direct review, and the matter is currently pending at the Washington Court of Appeals.[1] Mr. Eyman is represented in that matter by former Washington Supreme Court Justice Richard Sanders and attorney Carolyn Lake. ER-90–93.

Neither Mr. Eyman nor IFS has sought clarification from the superior court regarding the scope of its injunction with respect to IFS's asserted desire to represent Mr. Eyman. SER-38 (¶ 4).

B. IFS Receives a Favorable Declaratory Order from the Commission

In late April 2021, IFS, through counsel, submitted a petition to the Public Disclosure Commission (Commission or PDC) requesting an expedited declaratory order. ER-149–60. In the petition, IFS indicated that it "proposes to provide *pro bono* legal services on appeal to tax-activist Tim Eyman, who is currently involved in litigation with the State of Washington . . . over allegations that he violated the FCPA." ER-149. The petition made clear that IFS does not

[1] Defendants-Appellees have filed a motion requesting that this Court take judicial notice of the status of the state-court appeal.

intend to represent Mr. Eyman "in any active political campaign"; its proposal is limited to "the appeal of an enforcement action, which pertains to past events." ER-157. IFS identified two "questions presented": (1) "[w]ould IFS's proposed provision of *pro bono* legal services to Tim Eyman, or his bankruptcy estate, require IFS to file any reports under the FCPA," and (2) "Would IFS's proposed provision of *pro bono* legal services to Tim Eyman, or his bankruptcy estate, require IFS to disclose the identity of its donors, the value of its services, its cost of providing services, or any other information?" ER-149–50; *see also* ER-154–55. The relief requested by IFS was "a declaratory order that its provision of *pro bono* legal services to Mr. Eyman would not require IFS to (1) make any registration under the FCPA; (2) file any reports under the FCPA; or (3) disclose the identity of its donors, the value of its services, its cost of providing services, or any other information." ER-150. In short, IFS's petition sought assurance that its representation of Mr. Eyman in his state court appeal would not subject IFS to the FCPA's registration, reporting, or disclosure requirements.

Following discussions between IFS and the Commission's general counsel, Sean Flynn, the Commission considered IFS's petition a little over one month later, at its May 2021 regular commission meeting. SER-54 (¶ 7). During

the meeting, Commissioner William Downing, a retired judge, expressed support and appreciation for IFS's stated interest in representing Mr. Eyman:

> I would begin by saying that this body is nothing if not free speech advocates. Everyone on this body is desirous of having any case that raises first amendment issues litigated and litigated well by top-notch attorneys. It's nice that there is someone stepping forward who is eminently qualified to do that on behalf of Mr. Eyman and we all applaud and celebrate that fact and we want to do all that can be done to facilitate that.

ER-76 (¶ 8) (cleaned up).

At its May 2021 meeting, the Commission approved the issuance of a declaratory order addressing IFS's proposed representation of Mr. Eyman. The declaratory order, formally issued on June 9, 2021, stated that IFS's proposed representation of Mr. Eyman, "provided only to Mr. Eyman in his individual capacity on appeal, would not support or oppose any ongoing or prospective election campaign. Consequently, such services would not be reportable as an in-kind contribution by IFS, and would not trigger any registration or reporting requirement for IFS." ER-85 (¶ 4); *see also* ER-86 (¶ 1). As Commissioner Downing explained at the Commission meeting, "pro bono legal services provided prospectively . . . for the purpose of prosecuting an appeal, in Mr. Eyman's case, do not, in and of themselves, give rise to any reporting or

registration requirement for the entity that may be providing those pro bono services." ER-77 (¶ 8).

The declaratory order also clarified its scope was limited to the appeal from the superior court's order and judgment under Thurston County cause number 17-2-01546-34 and that it did not address legal services provided to Mr. Eyman's political committees. ER-85 (¶¶ 5, 6); ER-86 (¶ 2). These limitations reflect the limited scope of IFS's request for a declaratory order and limitations on the declaratory order process itself. The comments of Commissioner Downing confirm that the purpose of these limitations is to avoid a declaratory order that goes beyond IFS's proposed representation and says "on some broad basis that the provision of pro bono legal services is . . . never an in-kind contribution, or create some sort of framework that would, as was suggested, eliminate the possibility of there being complaints filed." ER-77.

IFS did not petition for judicial review of the declaratory order, as authorized by Washington law. SER-54 (¶ 6); *see also* ER-87 (citing Wash. Rev. Code § 34.05.542).

IFS filed this action in August 2021 and simultaneously filed a motion for summary judgment. SER-64–65. Defendants filed cross-motions for summary

judgment. SER-3; SER-56[2]. The district court entered summary judgment in favor of the defendants on the basis that "[t]here is no credible threat of enforcement against IFS based on its proposed *pro bono* representation of Mr. Eyman on the appeal," and IFS's "vague, qualified statements of possible future representation" present "nothing more than an 'hypothetical intent to violate the law' and, as such, do not give rise to a genuine threat of an enforcement action by Defendants." ER-12; ER-15.

VI. SUMMARY OF THE ARGUMENT

The district court correctly concluded that "IFS cannot satisfy Article III's standing requirement and this case must be dismissed as a matter of law." ER-15. IFS's proposed representation of Mr. Eyman does not arguably violate state law, as the Commission's binding declaratory order and state law make clear. And IFS has failed to establish that it will someday represent third parties in a manner that would violate state law. Because there is no realistic danger of enforcement of the FCPA against IFS, IFS cannot establish the injury-in-fact

[2] The defendants who were currently associated with the Commission filed a cross-motion for summary judgment. SER-56. Defendant Lehman, who was no longer a member of the Commission and was separately represented, filed an independent cross-motion for summary judgment. SER-3. The instant brief is filed jointly on behalf of all defendants.

requirement of Article III. *See San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

Contrary to IFS's argument, the district court did not apply an exhaustion of administrative remedies requirement. IFS simply misreads the district court's order.

IFS's constitutional arguments also fail on the merits. It is well established that campaign finance disclosure laws are subject to exacting scrutiny, not strict scrutiny. *E.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010). The statutory distinction that IFS identifies—which turns on the identity of the recipient of the donated legal services—is not content-based. And the disclosure requirements serve well-recognized States interests in a narrowly-tailored manner. Nor are Washington's campaign finance disclosure requirements vague. The definitional statute is clear, as are other statutes addressing when disclosure requirements apply.

Finally, at a minimum, IFS's personal-capacity claims lack merit. Even under IFS's misreading of the declaratory order, it was left no worse off than had there been no declaratory order. IFS's alleged injury—if it existed—would be traceable to the statute, not to any action of the individual commissioners.

Moreover, the commissioners are entitled to quasi-judicial and/or qualified immunity for their act of voting in favor of the declaratory order.

VII. STANDARD OF REVIEW

This Court reviews a district court's ruling on cross-motions for summary judgment de novo, applying the same standard used by the district court under Federal Rule of Civil Procedure 56(c). *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). Where cross-motions for summary judgment are at issue, this Court evaluates each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 790 (9th Cir. 2006). The Court may affirm a grant of summary judgment on any basis supported by the record. *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

VIII. ARGUMENT

A. IFS Lacks Standing

IFS lacks standing in this case because its proposed representation of Mr. Eyman does not violate state law and IFS cannot demonstrate a realistic threat that the challenged statute will be enforced against it. As the party invoking federal jurisdiction, IFS "bear[s] the burden of establishing [its]

standing to sue." *San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1126. One element of the "'irreducible constitutional minimum' of Article III standing" requires "an 'injury-in-fact' to a legally protected interest that is both 'concrete and particularized' and 'actual or imminent,' as opposed to 'conjectural or hypothetical.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

While standing requirements are relaxed in First Amendment challenges, they are not waived. *Lopez v. Canaele*, 630 F.3d 775, 785–86 (9th Cir. 2010). In the First Amendment context, "plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Id.* at 785. But "self-censorship alone is insufficient to show injury." *Id.* at 792 (citing *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972), and *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)). A plaintiff must still demonstrate a "'realistic danger'" of enforcement (i.e., that the threat of injury is "credible, not 'imaginary or speculative'"). *Id.* at 785–86 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). This Court has repeatedly held that plaintiffs raising First Amendment challenges lack standing when there is no realistic threat of enforcement in the specific circumstances of a case. *Id.* at 792 (holding that plaintiff failed to establish standing in First Amendment free

speech claim against university officials); *Wolfson v. Brammer*, 616 F.3d 1045, 1063 (9th Cir. 2010) (finding lack of standing in First Amendment challenge to code of judicial conduct provision); *Getman*, 328 F.3d at 1096 (holding that plaintiffs lacked standing to bring as-applied First Amendment vagueness challenge to definitional statute); *Thomas*, 220 F.3d at 1141 (holding that landlords bringing First Amendment claims did not establish a "threat of enforcement" that was "reasonable or imminent").

In pre-enforcement First Amendment challenges, this Court considers "whether the plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Thomas*, 220 F.3d at 1139 (quoting *Babbitt*, 442 U.S. at 298). This requires "a 'genuine threat of imminent prosecution.'" *Id.* (quoting *San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1126–27). In making this determination, the Court looks to (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) the existence of "a specific warning or threat to initiate proceedings," and (3) any history of "prosecution or enforcement under the challenged statute." *Id.* Each of these factors demonstrate that IFS lacks standing in this case.

1. IFS has not identified a concrete plan to violate state law

IFS has a concrete plan, but that plan does not violate state law. It is undisputed, for summary judgment purposes, that IFS has a concrete plan to represent Tim Eyman in his state court appeal without registering with or disclosing information to the Commission. *See* ER-152–53. IFS's plan, however, would not violate state law. This is abundantly clear from the Commission's binding declaratory order. *See* Wash. Rev. Code § 34.05.240(8). In addition, even absent the declaratory order, the Fair Campaign Practices Act (FCPA) makes sufficiently clear that IFS's proposed representation would not trigger any registration, reporting, or disclosure requirements. Because the Commission has "disavowed the applicability of the challenged law to" IFS, and because the challenged law "by its terms is not applicable to" IFS, its "claim[] of future harm lack[s] credibility." *Lopez*, 630 F.3d at 788. IFS's vague and qualified assertions of future intent to represent unknown third parties are even further from the mark, as are several assorted red-herring arguments.

a. The Commission expressly disavowed the applicability of the challenged laws

The Commission's declaratory order unambiguously establishes that the proposed representation of Mr. Eyman would not result in any registration, reporting, or disclosure requirements for IFS. The declaratory order stated that

IFS's proposed representation of Mr. Eyman, "provided only to Mr. Eyman in his individual capacity on appeal, would not support or oppose any ongoing or prospective election campaign. Consequently, such services would not be reportable as an in-kind contribution by IFS, and would not trigger any registration or reporting requirement for IFS." ER-85 (¶ 4); *see also* ER-86 (¶ 1). As Commissioner Downing explained at the PDC meeting, "pro bono legal services provided prospectively for the purpose of prosecuting an appeal, in Mr. Eyman's case, do not, in and of themselves, give rise to any reporting or registration requirement for the entity that may be providing those pro bono services." ER-77 (¶ 8) (cleaned up). In the declaratory order, the Commission expressly disavowed the applicability of the FCPA to IFS's proposed representation of Mr. Eyman.

After providing the relief sought by IFS (i.e., establishing that IFS's proposed representation would not require that it register, report, or disclose to the Commission), the declaratory order identified two limits to its scope. Both limits relate to the scope of the Commission's authority. First, the declaratory order is necessarily limited to addressing only IFS's proposed representation of Mr. Eyman in the specific state-court appeal identified in IFS's verified petition. If, in the future, IFS expands the scope of representation (for example, by

representing Mr. Eyman in a legal proceeding to place an initiative on the ballot), the declaratory order would not preclude application of FCPA registration and reporting requirements. The declaratory order reflects this limit in its statement that "the Commission is unable to issue a binding Declaratory Order absolving IFS from any and all future FCPA registration or reporting requirements in relation to representing Mr. Eyman in his role as a continuing political committee." ER-86 (¶ 2).

The second limit inherent to the declaratory order relates to the Commission's authority in relation to the Washington Supreme Court. The Commission has no authority to impinge on the jurisdiction of the Washington Superior Court in an ongoing legal action. The declaratory order thus makes clear that "[w]hether *[p]ro bono* legal services provided prospectively to Mr. Eyman in his role as a continuing political committee must be reported is a question reserved for the ongoing jurisdiction of the Superior Court." ER-86 (¶ 2). The superior court order includes a specific provision about Mr. Eyman's reporting requirements, including an exemption for legal defense funds.[3] ER-146. IFS urges this Court to read this sentence of the declaratory

[3] Even if the Washington Superior Court were to require that Mr. Eyman disclose donated legal services in the manner contemplated by the FCPA, the disclosure would require only information already disclosed in a notice of

order as declining to reach the issue of whether Mr. Eyman's status as a continuing political committee would trigger registration and disclosure requirements with the Commission. Opening Br. at 25–26. But the reference to "the ongoing jurisdiction of the Superior Court" makes it obvious that IFS is misreading the declaratory order; that sentence concerns any requirements imposed by the *superior court* order. The Commission is simply respecting the bounds of its own authority by addressing only IFS's registration and disclosure requirements and not purporting to interpret the Washington Superior Court's order.

IFS attempts to manufacture uncertainty where none exists. IFS contends that the clarifying paragraph rendered the Commission's disavowal illusory and meaningless. Opening Br. at 26–27. The crux of IFS's argument is that, under its reading of the declaratory order, if it were to represent Mr. Eyman, the Commission could cry "Gotcha" and demand that IFS register and disclose its donors because it was representing Mr. Eyman in his role as a continuing political committee. *Id*.

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appearance (i.e., the name and address of the provider), and the value and date of the services. Wash. Rev. Code § 42.17A.240(2). It would not implicate IFS's concerns about disclosing the identities of its donors or itself having to register or report. Opening Br. at 14; ER-169 (¶¶ 10–12).

IFS's reading of the declaratory order is implausible. IFS urges this Court to read particular phrases or sentences in isolation. Opening Br. at 24, 26. But the provisions of the declaratory order must be "[r]ead in context." *Lopez*, 630 F.3d at 789. Four critical pieces of context rebut IFS's reading. First, it would render illusory and meaningless the first paragraph of the declaratory order, in which the Commission states that IFS's proposed representation of Mr. Eyman does not trigger registration or disclosure requirements. That is not a reasonable reading. Second, because the campaign finance enforcement action was filed against Mr. Eyman in his individual capacity,[4] SER-4; SER-6 (¶ 2.2), IFS's representation of Mr. Eyman would necessarily be in his individual capacity, as Defendants-Appellees have repeatedly made clear. Third, the discussion of Mr. Eyman's "role as a continuing political committee" is expressly tied to "a question reserved for the ongoing jurisdiction of the Superior Court," not future proceedings before the Commission.[5] ER-86 (¶ 2). In context, this reference to Mr. Eyman's "role as a continuing political committee" simply clarified that the

[4] The caption of the complaint notes that, as an individual, Mr. Eyman was an officer of a political committee and the principal of a Washington limited liability company. SER-4.

[5] Despite the Commission's abundance of caution in drafting its declaratory order, the superior court order could not require IFS to register or make reports. IFS is not a party to the state-court litigation, and the superior court's order does not impose any obligations on IFS. *See* ER-117–48.

Commission did not purport to interpret or modify the superior court's order. Fourth, with respect to not "absolving IFS from any and all future FCPA registration or reporting requirements," ER-86 (¶ 2), Commissioner William Downing explained the intent as follows:

> What we can't do is go beyond that and say, you know, on some broad basis that the provision of pro bono legal services is never an in-kind contribution, or create some sort of framework that would, as was suggested, eliminate the possibility of there being complaints filed. That just can't be done. There's a single narrow question that's raised that I think we can answer, and I think in general terms, the language that's been proposed answers that question.

ER-76–77 (¶ 8) (cleaned up). This limitation simply made clear that the declaratory order was limited to IFS's proposed representation in the specific case.

Establishing clear limits was particularly important here. IFS had sought to "move the goalposts," demanding broader relief than initially sought in its petition and broader relief than the Commission was statutorily authorized to provide.[6] As carefully documented by the district court, IFS's petition requested relief exclusively limited to its proposed representation of Mr. Eyman. ER-13;

[6] Commission regulations allow for additional material and evidence at any time prior to issuance of a declaratory order, but not additional issues. Wash. Admin. Code § 390-12-250(4).

see also ER-150, ER-154–55, ER-159. Later, in an email exchange, IFS requested far broader relief, asking for a statement that the FCPA can *never* "reach the provision of legal services that are provided solely in a defense posture, such as to a party in an enforcement action or on appeal from an enforcement action." ER-24; Washington State Public Disclosure Commission, *5.27.21 Regular Meeting*, YouTube (May 27, 2021), at 5:08:32, https://www.youtube.com/watch?v=qE1uFgRWLTs&t=17083s (repeating broad request); 5:08:43 (same). In addition, while its petition focused on requirements applicable to IFS, ER-150; ER-154–55; ER-159, IFS broadened its argument to ask for a declaratory order invalidating any requirement of the Washington Superior Court that Mr. Eyman report the value of legal services received.[7] Washington State Public Disclosure Commission, *5.27.21 Regular Meeting*, at 5:14:30 through 5:17:20. This plainly went beyond the Commission's authority and beyond IFS's concrete plan to represent Mr. Eyman. In this context, it was particularly appropriate and prudent for the Commission to provide clear notice of the limits of its declaratory order.

[7] It is unlikely that the Washington Superior Court order would require that Mr. Eyman report services provided by IFS. The superior court order's reporting requirement included an exception for funds "segregated and used only to pay for legal defense" and required reporting only "in compliance with the FCPA." ER-6.

IFS wrongly argues that certain statements made before the issuance of the declaratory order somehow undermine the express disavowal. First, it objects that an assistant attorney general "declined to take any position on whether IFS would need to register and report if it represented Eyman." Opening Br. at 24. But an assistant attorney general has no authority to issue a declaratory order on the applicability of the FCPA; that authority resides with the Commission. *See* Wash. Rev. Code § 34.05.240 (granting agencies authority to issue declaratory orders). The assistant attorney general here correctly referred IFS to the Commission. ER-110. Next, IFS objects to certain opinions of Commission staff and advisors expressed in the lead-up to, and during, the Commission meeting. Opening Br. at 24–25. But it is the Commission's declaratory order that matters, not staff comments prior to the issuance of the declaratory order.

IFS's contention that the Commission is "keeping [its] options open," Opening Br. at 25, strains credulity. Had that been the Commission's intent, it could have declined to issue a declaratory order at all. Wash. Rev. Code § 34.05.240(5)(d); Wash. Admin. Code § 390-12-250(5). In addition to the declaratory order approving IFS's representation without incurring registration or disclosure obligations, Defendants-Appellees have repeatedly and unequivocally reiterated that IFS's proposed representation of Mr. Eyman would

not require it to register, report, or disclose to the Commission. SER-57 ("IFS may represent Mr. Eyman in his appeal without registering, filing reports, or disclosing its donors to the PDC."); SER-58 ("The PDC's declaratory order is binding, Wash. Rev. Code § 34.05.240(8), and establishes that IFS's proposed representation of Mr. Eyman would not require it to comply with the FCPA's registration and disclosure requirements."); SER-59 ("IFS may provide such representation without being subject to registration or disclosure requirements under the FCPA."); SER-61 ("The declaratory order . . . clarified that IFS's proposed representation of Mr. Eyman, in his individual capacity, would not result in any registration or disclosure requirements under the FCPA."); SER-62 ("[T]he Declaratory Order actually *confirmed* IFS's position that *pro bono* representation Mr. Eyman's state court appeal would *not* trigger registration, reporting, or disclosure obligations by IFS under the FCPA."); SER-63 ("The declaratory order expressly vindicated IFS's ability to represent Mr. Eyman in his appeal without registering, making reports, and disclosing its donors."). Judicial estoppel would surely preclude enforcement of the FCPA provisions against IFS. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 861–62, 281 P.3d 289 (2012) (identifying judicial estoppel factors). IFS's suggestion that the Commission is somehow "keeping its options open" is

simply dead wrong. The declaratory order disavowed application of the FCPA to IFS's proposed representation of Mr. Eyman.

The Commission provided IFS with the precise relief it sought, issuing a binding declaratory order stating that IFS's proposed representation of Mr. Eyman "does not require IFS to register or report the identity of its donors, the value of its services, its costs of providing services, or any other information to the PDC under the FCPA for these legal services." ER-86 (¶ 1); *see also* ER-150 (stating IFS's requested declaratory order). IFS's attempt to invent uncertainty lacks merit. As in *Getman*, this administrative guidance is conclusive of the fact that IFS "does not face a credible threat of prosection." *Getman*, 328 F.3d at 1096; *see also Wolfson*, 616 F.3d at 1063 (relying on formal advisory opinion by state ethics committee).

b. The FCPA, by its terms, does not apply to IFS's proposed representation

Even in the absence of the declaratory order, IFS's proposed representation of Mr. Eyman would not subject it to FCPA reporting or disclosure requirements. With limited exceptions not relevant here, IFS is not required to register, file reports, and make disclosures to the Commission unless it is a "political committee" or an "incidental committee." *See* ER-83–84; *see also* Wash. Rev. Code §§ 42.17A.205 (political committee registration),

42.17A.207 (incidental committee registration), 42.17A.235 (political and incidental committee reporting).

IFS mistakenly focuses on whether pro bono legal services fall within the definition of a "contribution." Opening Br. at 4–5, 21–22. It is undisputed that they do; the definition of "contribution" expressly includes donations of "professional services for less than full consideration." Wash. Rev. Code § 42.17A.005(15)(a)(i). But not all donated legal services create a requirement to register with or make disclosures to the PDC. Registration (and associated reporting and disclosure) would be required only if IFS is a "political committee" or an "incidental committee."[8] Wash. Rev. Code §§ 42.17A.205, .207; *see also* ER-84 ("IFS would have to itself qualify as either an incidental committee or political committee in order to invoke any registration requirement.").

IFS's proposed representation of Mr. Eyman would not make it a "political committee" or "incidental committee." IFS would not become a political committee because it has no expectation of "making expenditures in support of, or opposition to, any candidate or any ballot proposition." Wash.

[8] There is a separate requirement related to the reporting of certain independent expenditures "in support of or opposition to any candidate or ballot proposition." Wash. Rev. Code § 42.17A.255. Because IFS's proposed *pro bono* legal services are not related to a candidate or ballot proposition, this statute would not trigger any reporting requirement.

Rev. Code § 42.17A.005(41). Mr. Eyman is neither a candidate nor a ballot proposition. IFS would also not become an incidental political committee. An incidental political committee is a non-profit organization that makes contributions directly to an election campaign or "through a political committee." Wash. Rev. Code § 42.17A.005(28); Wash. Admin. Code §§ 390-16-013(1), (5)(a). Mr. Eyman is not an election campaign, nor, for purposes of IFS's representation in the state enforcement proceeding, is he a political committee. The enforcement proceeding was filed against Mr. Eyman as an individual, SER-4; SER-6, and that is the capacity in which IFS would represent him. The FCPA's provisions simply do not apply to IFS's proposed representation of Mr. Eyman.

In an effort to muddy the waters, IFS takes a quotation from former Commissioner Lehman out of context. IFS suggests that former Commissioner Lehman described the application of the FCPA to this case as "clearly unclear." Opening Br. at 12, 42-43. The lack of clarity identified by Commissioner Lehman related to the fact that there were proceedings in two forums (i.e., the Washington Superior Court and the Commission), not to application or interpretation of the FCPA:

> We are talking about a court proceeding here, and some of my colleagues here suggested that the appropriate measure is to go and

> ask the court for clarification, that seems reasonable to me. But my other issue I just want to share with you, is that to the extent you're asking us for prospective declaration, that's—for me, that's a challenge. Especially in an area that is clearly unclear, so you know, at least understand, and respect that others have different *opinions about . . . where is the correct forum to resolve this immediate issue*.

ER-75 (¶ 6) (emphasis added) (cleaned up). This followed a discussion by PDC commissioners and staff about Mr. Eyman's reporting duties pursuant to the order of the Washington Superior Court. Washington State Public Disclosure Commission, *5.27.21 Regular Meeting*, starting at 5:24:55. In context, Mr. Lehman's "clearly unclear" comment was related to concerns about the jurisdiction of the Commission vis-à-vis the Washington Superior Court and ensuring the Commission did not encroach on the superior court's jurisdiction; he was not opining on the clarity of the FCPA's applicability to IFS's proposed conduct. And regardless, Mr. Lehman and the Commission ultimately voted in favor of a declaratory order with prospective effect.

In sum, reading the statutory scheme as a whole, IFS's proposed representation of Mr. Eyman would not subject it to FCPA registration or reporting requirements. IFS's discussion, which focuses only on the definition of "contribution," is incomplete. And, regardless, for the reasons discussed above, the declaratory order removed any doubt.

c. IFS has no concrete plan to represent unidentified third parties

IFS's suggestion that it may represent "as-yet unidentified Washingtonians," Opening Br. at 20, is not an alternative basis for standing. IFS does not specify "when, to whom, where, or under what circumstances" it will provide such pro bono representation. *Thomas*, 220 F.3d at 1139. A mere "expressed 'intent' to violate the law on some uncertain day in the future" is insufficient. *Id.* at 1140. Far from being "concrete," IFS's suggestion is entirely speculative and hypothetical. IFS offers only qualified statements related to an intent to represent third parties. It states that it does "want to represent other parties in Washington . . . *if those cases fit with our mission*," ER-20 (¶ 4) (emphasis added), and that it does "intend to represent parties other than Mr. Eyman against the PDC and AGO in the future, *if the case is a good fit for us*," ER-20 (¶ 6) (emphasis added). The closest IFS comes to identifying a concrete plan is its statement that "*[i]f [the Grocery Manufacturers Association] were bankrupt, or had fewer resources*, we might want to represent them." ER-20 (¶ 5) (emphasis added).[9] These qualified, "'some day' intentions" are

[9] The *Grocery Manufacturers Association* case is resolved. *See State v. Grocery Mfrs. Ass'n*, 198 Wash. 2d 888, 502 P.3d 806 (2022). No petition for a writ of certiorari was filed.

woefully insufficient to "qualify as a concrete plan." *Thomas*, 220 F.3d at 1140; *see also San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1127 (quoting *Lujan*, 504 U.S. at 564) ("[S]uch 'some day' intentions—without . . . specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."). IFS wholly fails to satisfy its requirement to specify "when, to whom, where, or under what circumstances" it will violate the FCPA in the future. *Thomas*, 220 F.3d. at 1139. It is impossible to ascertain whether IFS's hypothetical representation would even violate Washington's FCPA.

IFS's assertion that its plan to represent "as-yet unidentified Washingtonians . . . is no less concrete than the plans of the plaintiffs in" the three other cases is demonstrably false. Opening Br. at 20 (citing *Wolfson*, 616 F.3d at 1059; *Getman*, 328 F.3d at 1095; *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1001 (9th Cir. 2010)). *Wolfson* actually illustrates why IFS's "as-yet unidentified Washingtonians" theory lacks merit. The *Wolfson* court separately analyzed standing for two challenges. As to the first challenge, the plaintiff identified an intent to engage in specific conduct that would violate the challenged code of judicial conduct: personally soliciting campaign contributions and endorsing other candidates. *Wolfson*, 616 F.3d at 1054–55,

1059. Unsurprisingly, this Court concluded that this challenge satisfied Article III requirements. *Id.* at 1060. As to the second challenge, the plaintiff challenged a provision prohibiting judicial candidates from commitments or promises about issues that are likely to come before the court. *Id.* at 1063. The plaintiff had self-censored past presentations to omit discussion of an initiative. *Id.* at 1062. Nonetheless, this Court held that the plaintiff had not satisfied standing requirements because the challenged provision "does not unambiguously reach his proposed conduct." *Id.* at 1063. The mere concern about "a *possibility*" of enforcement "is insufficient" to satisfy Article III requirements. *Id.*

IFS's "as-yet unidentified Washingtonians" theory is even more attenuated than the theory rejected in *Wolfson*. In *Wolfson*, the plaintiff's plan involved only a single contingency—whether the proposed conduct is prohibited. *Id.* Here, IFS's "plan" includes multiple contingencies, each based on pure conjecture: (1) whether there will ever be a plaintiff that it wishes to represent, (2) whether the plaintiff will qualify as a political or incidental committee, and (3) whether its proposed representation will trigger other FCPA requirements.

IFS's reliance on *Getman* and *Brumsickle* fares no better. In *Getman*, unlike here, the plaintiff organization offered a specific plan: to "issue a communication advocating the defeat of Proposition 34 without using explicit words of advocacy." *Getman*, 328 F.3d at 1095. Similarly, in *Brumsickle*, the plaintiff organization identified a detailed "planned educational campaign" about Initiative 1000 that "consisted of three proposed public communications." *Brumsickle*, 624 F.3d at 995. The plaintiff organizations in *Getman* and *Bumsickle* identified plans that were far more concrete than IFS's some-day intentions. Unlike those organizations, IFS has not established a concrete plan to violate state law.

2. There has been no threat to initiate proceedings

IFS also cannot establish standing because there is no threat to initiate proceedings. Neither the mere existence of a law, nor even a "general threat[ ] by officials to enforce those laws which they are charged to administer," is sufficient to create an injury in fact, even in the First Amendment context. *Lopez*, 630 F.3d at 787 (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947)). To be sure, the absence of a specific threat is not dispositive; this Court has held that "[i]n the context of First Amendment speech, a threat of enforcement may be inherent in the challenged statute." *Wolfson*, 616 F.3d

at 1059. But such implicit threat of enforcement does not exist where the challenged law "does not unambiguously reach [the] proposed conduct." *Id.* at 1063.

IFS has not been specifically threatened with an FCPA enforcement action for its proposed representation of Mr. Eyman. IFS does not suggest otherwise. Instead, IFS argues that the issuance of the declaratory order somehow "confirmed the threat." Opening Br. at 17–22. This is analogous to the argument rejected in *Wolfson*, where this Court rejected a plaintiff's argument that a formal advisory opinion had somehow heightened the alleged chilling effect of the challenge provision. *Wolfson*, 616 F.3d at 1063–64. Even if the Commission's declaratory order did not provide IFS "with the level of clarity [it] desired," that is different in kind from an affirmative threat of enforcement. *Id.* at 1064. Nor is this a situation where the challenged statute "unambiguously reach[es IFS's] proposed conduct." *Id.* at 1063. Far from it; as discussed above, the FCPA's registration and disclosure requirements do not arguably reach IFS's proposed representation of Mr. Eyman. *Supra* at 23-25.

In short, there is no evidence that the Commission has stated any intent to enforce FCPA requirements against IFS if it engages in its proposed representation of Mr. Eyman. Just the opposite; the Commission's binding

declaratory order expressly *disclaimed* any intent to enforce the FCPA requirements in these circumstances.

3. The history of enforcement does not support a finding of standing

The absence of any relevant history of enforcement of the FCPA in comparable circumstances further demonstrates that IFS does not face a genuine threat of imminent prosecution. This consideration is focused on "[a] history of past enforcement against parties *similarly situated* to the plaintiff[ ]." *Lopez*, 630 F.3d at 786–87 (emphasis added). There is no history of Commission enforcement of registration, reporting, or disclosure requirements where an organization provides "legal services to an individual that are unrelated to a specific ballot proposition or candidate." SER-54 (¶ 4). IFS has not and cannot demonstrate any history of enforcement of the FCPA against similarly situated parties; the past enforcement cases it cites involved materially different circumstances.

It is certainly true that the Commission has taken enforcement action based on the provision of donated legal services in the context of an election campaign. But this case does not involve an election campaign. The enforcement action involving the Institute for Justice, upon which IFS places the most reliance, Opening Br. at 6, is materially distinguishable. There, the Commission

sought to enforce FCPA requirements based on *pro bono* legal services that directly supported a ballot proposition (the recall of an elected official) by invalidating contribution limits in the recall campaign. *Farris v. Seabrook*, 677 F.3d 858, 862–63 (9th Cir. 2012); SER-34–36. In that case, there was a close nexus between the donated legal services and an electoral campaign.[10] Here, by contrast, IFS's proposed representation of Mr. Eyman is unrelated to any electoral campaign. This distinction is material both in terms of whether IFS would be required to report as a "political committee," *see* Wash. Rev. Code § 42.17A.005(41) (referring to "support of, or opposition to, any candidate or any ballot proposition"), and, if it were presented, to the strength of the State's governmental interest in requiring disclosure, *see infra* 36-45 (discussing exacting scrutiny argument).

IFS's reliance on the enforcement action in *State v. Evergreen Freedom Foundation*, 192 Wash. 2d 782, 432 P.3d 805 (2019), is similarly misplaced. There, Evergreen Freedom Foundation attorneys participated in lawsuits that sought to compel the placement of local initiatives on the ballot.

[10] Even so, the Commission was subsequently permanently enjoined from requiring political committees to report donated legal services in federal civil rights lawsuits as campaign contributions. ER-115. This further undermines any claim of a well-founded fear of imminent enforcement.

Id. at 786. The State brought an enforcement action to compel the Evergreen Freedom Foundation "to report independent expenditures it made in support of the . . . local ballot propositions." *Id*. at 787. The independent-expenditure reporting requirement applies only to expenditures "in support of or opposition to any candidate or ballot proposition." Wash. Rev. Code § 42.17A.255. Mr. Eyman is clearly neither. The enforcement action in *Evergreen Freedom Foundation* involved materially different circumstances and a different statute. IFS is not similarly situated to the Evergreen Freedom Foundation, so that case provides no support for IFS's claim of a history of enforcement against similarly situated parties.

* * * * *

In sum, IFS has not established an Article III case or controversy. IFS's proposed representation of Mr. Eyman would not require it to register with or make disclosures to the Commission, as reflected in the statute itself and the Commission's binding declaratory order. Nor does IFS have a concrete plan to represent anyone other than Mr. Eyman. There has been no specific threat to enforce the FCPA against IFS, nor is there any relevant history of enforcement. IFS simply has not demonstrated a "genuine threat of imminent prosecution." *Thomas*, 220 F.3d at 1139 (quoting *San Diego Cnty. Gun Rights Comm.*, 98 F.3d

at 1126). Because IFS has not established a sufficient injury for purposes of Article III standing, the district court correctly granted summary judgment in favor of Defendants. This Court should affirm on this basis and need go no further.

B. IFS's Exhaustion Argument is a Red Herring

IFS misreads the district court's order in suggesting that the district court imposed an exhaustion of administrative remedies requirement. *See* Opening Br. at 27–28. The district court did not rule—and Defendants did not argue—that IFS was required to exhaust administrative remedies prior to bringing an action under 42 U.S.C. § 1983. The word "exhaust" is conspicuously absent from the district court's order and Defendants' briefing. IFS's shifting arguments are relevant to explaining the scope of the declaratory order and why IFS is wrong to characterize the declaratory order as a threat of enforcement. IFS's shifting arguments explain the necessity of the limiting language in the declaratory order, *see supra* at 19–20.

Ultimately, IFS's exhaustion argument does not matter. IFS does not identify any material issue that the district court declined to consider. Even considering all the arguments, IFS failed to establish an Article III case or controversy.

C. IFS's Substantive Arguments Lack Merit

Even if IFS had established standing, its substantive arguments lack merit, and this Court should affirm the district court's summary judgment order on alternative grounds. *See Campidoglio LLC*, 870 F.3d at 973 (holding that this Court may affirm the district court on any ground supported by the record).

1. The FCPA's disclosure requirements satisfy constitutional requirements

IFS challenges the constitutionality of the FCPA as applied both to its proposed representation of Mr. Eyman and, more generally, as applied "to pro bono legal services to *any* party." Opening Br. at 33–41. It argues for either strict scrutiny or exacting scrutiny. IFS's arguments on this score are deeply flawed.

At the outset, IFS's argument that the FCPA is unconstitutional as to its proposed representation of Mr. Eyman is not presented here. Defendants-Appellees have consistently taken the position that the FCPA does *not* apply to IFS's proposed representation of Mr. Eyman. There is no need for Defendants-Appellees to satisfy the exacting scrutiny standard in a context where the challenged law does not apply.[11]

[11] This lack of adversity highlights why this case should be dismissed for lack of an Article III case or controversy.

IFS's facial challenge faces additional hurdles that it cannot surmount. IFS seeks to invalidate the application of the FCPA to circumstances beyond its proposed representation of Mr. Eyman. When a "plaintiff['s] claim and the relief that would follow . . . reach beyond the particular circumstances of" the plaintiff, that plaintiff must satisfy the standard "for a facial challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Accordingly, in order to obtain any relief beyond its proposed representation of Mr. Eyman, IFS would have to establish that the challenged law "'is unconstitutional in every conceivable application."[12] *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)). IFS cannot do so.

a. Disclosure laws need satisfy only exacting scrutiny, not strict scrutiny

It is well-established that campaign finance disclosure laws are subject to only exacting scrutiny and not strict scrutiny. *E.g.*, *Citizens United*, 558 U.S. at 366–67; *Buckley v. Valeo*, 424 U.S. 1, 64–68 (1976) (per curiam). IFS asks this Court to disregard this longstanding standard in favor of strict scrutiny by

[12] A different standard applies to overbreadth challenges, but IFS has not raised such a challenge. Nor could it in light of the FCPA's broad plainly legitimate sweep.

arguing that the FCPA is content-based. Opening Br. at 37–41. IFS is wrong for two reasons. First, exacting scrutiny has long applied to campaign finance laws that are inherently content-based. Second, the distinction that IFS relies upon is not a content-based distinction. For each of these independent reasons, exacting scrutiny is the appropriate standard.

For disclosure requirements, exacting scrutiny is the applicable standard even where such regulations are content-based in certain respects. *Ctr. For Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 288 (4th Cir. 2013) ("Although the Supreme Court typically applies strict scrutiny to content-based speech restrictions, disclosure and disclaimer requirements are subject to exacting scrutiny." (Citation omitted)). Campaign finance disclosure laws necessarily make content-based distinctions—they generally apply only to the topics of politics and elections. Nonetheless, courts apply exacting scrutiny. *See, e.g.*, *Citizens United*, 558 at 366–67 (applying exacting scrutiny to disclaimer and disclosure requirements for law targeting political advertising); *Buckley*, 424 U.S. at 64–84 (applying exacting scrutiny to provisions of the Federal Election Campaigns Act); *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1108, 1112 (9th Cir. 2019) (applying exacting scrutiny to statute where applicability depended on content). These content-based distinctions are

frequently a virtue, not a vice, as they ensure that regulations are narrowly tailored. *E.g.*, *Yamada v. Snipes*, 786 F.3d 1182, 1198 (9th Cir. 2015) (noting that purpose-based distinction "avoids reaching organizations engaged in only incidental advocacy"). In short, content-based distinctions in campaign finance disclosure laws do not automatically trigger strict scrutiny.

In any event, the specific distinction that IFS challenges is not content-based. IFS argues that the FCPA's definition of "contribution" is a content-based restriction on speech. Opening Br. at 39–40. But the definition does not itself impose any restriction on speech. IFS fails to engage with the actual operation of the FCPA, but that context is critical.

The FCPA governs multiple aspects of campaign finance. Some sections of the FCPA create disclosure requirements, serving the well-recognized "vital" interest in "[p]roviding information to the electorate," *Brumsickle*, 624 F.3d at 1005. *E.g.*, Wash. Rev. Code §§ 42.17A.205, .207, .235. Other sections of the FCPA impose contribution limits with respect to political candidates and political parties. *E.g.*, Wash. Rev. Code §§ 42.17A.405, .410. Yet another section prohibits contributions to candidates or political committees by foreign nationals. Wash. Rev. Code § 42.17A.417. The statutory definition of "contribution" applies to each of these sections. Wash. Rev. Code § 42.17A.005.

IFS's argument here is focused on a single aspect of the FCPA—disclosure requirements. Opening Br. at 37–41. It is true that, as a result of the definition of "contribution," disclosure requirements apply to some donated legal services (i.e., services donated to most political committees) but not others (i.e., services donated to political parties, candidates, and their closely associated political committees). *See* Wash. Rev. Code §§ 42.17A.005(15)(b)(viii), .205. But the distinction is entirely unrelated to the *content* of the speech.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A regulation can be content-neutral even if its application requires that a person read the content. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022). So long as the regulation is "agnostic as to content" (i.e., the topic discussed or idea expressed), it is content neutral. *Id*.

The FCPA's disclosure provisions do not depend on the topic, idea, or message expressed. Instead, they depend only on the identity of the recipient of the donated services. This distinction exists for good reason. In Washington, there are contribution limits for candidates, political parties, and their closely related committees. Wash. Rev. Code §§ 42.17A.405(1), (8); Wash. Admin.

Code § 390-05-400. If donated legal and accounting services counted as contributions, there would be a maximum limit on the amount of such services any one person could provide to candidates, political parties, and their closely related committees. In this way, the recipient-based definition of "contribution" *advances* First Amendment interests.

The recipient-based distinction is not *content* based. It does not matter whether the donated services address the constitutionality or applicability of laws or whether the topic is a candidate election, vote on a ballot measure, or a recall of an elected officer. To illustrate the principle, imagine that an attorney files identical copies of a brief on behalf of two clients. One client is a candidate and the other client is a political committee taking a position on a ballot proposition. Though the content is the same, the disclosure requirements may[13] apply differently based on the identities of the clients. The distinction that IFS challenges is agnostic as to content and concerns only the identity of the recipient. Recipient-based distinctions are not uncommon. For example, none of the FCPA provisions apply to federal candidates or precinct committee officers.

[13] The applicability of disclosure requirements may also turn on distinctions IFS does not challenge, such as the value of the services provided, Wash. Rev. Code § 42.17A.207, and the primary purposes of the entity donating the legal services, *e.g.*, *Brumsickle*, 624 F.3d at 997.

Wash. Rev. Code § 42.17A.200. IFS provides no authority for the proposition that recipient-based distinctions are categorically content-based, and that proposition is inconsistent with *City of Austin*. This is an independent reason that strict scrutiny does not apply.

b. The FCPA's disclosure requirements satisfy exacting scrutiny

There are multiple fatal flaws to IFS's exacting scrutiny argument. The exacting scrutiny argument is not properly presented because IFS provides no specific and distinct argument. Even if the issue were properly presented, the FCPA's requirements easily satisfy exacting scrutiny in appropriate circumstances.

IFS's exacting scrutiny argument is not properly presented because IFS limits its exacting-scrutiny argument to the constitutionality of applying the FCPA to IFS's proposed representation of Mr. Eyman. *E.g.*, Opening Br. at 33 (referring to "IFS's right to associate with Eyman"); Opening Br. at 34 ("Allowing IFS to represent Eyman presents no risk of quid pro quo corruption."); Opening Br. at 45 ("Defendants thus lack a legitimate interest in regulating the provision of pro bono legal services to Eyman in his appeal."). IFS casually mentions its "potential representation of other Washingtonians," *id.*, and it makes a bare assertion that "the FCPA's disclosure and reporting

regime is not narrowly tailored to avoid burdening the right to associate for the purposes of pro bono litigation against the government, particularly in a defense posture," Opening Br.7 at 34. But it provides no legal argument as to *why* that is so (outside the context of its proposed representation of Mr. Eyman).

This Court "will not 'consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief,' are argued only in passing, or that constitute bare assertions without supporting argument." *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 335 (9th Cir. 2017) (quoting *Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 487–88 (9th Cir. 2010)). IFS has not specifically and distinctly argued why the FCPA lacks narrow tailoring in any circumstance other than its proposed representation of Mr. Eyman. That issue is not before the Court, and IFS cannot raise it for the first time in its reply brief. *Vasquez v. Rackauckas*, 734 F.3d 1025, 1054 (9th Cir. 2013).

Because IFS does not provide a meaningful exacting-scrutiny argument as to third parties, it also completely fails to meet its burden of establishing that the challenged law "'is unconstitutional in every conceivable application." *Foti*, 146 F.3d at 635 (quoting *Taxpayers for Vincent*, 466 U.S. at 796). This is independently fatal to its exacting-scrutiny argument.

Further, there is little doubt that the FCPA can be constitutionally applied to the provision of donated legal services in appropriate circumstances. *See Evergreen Freedom Found.*, 192 Wash. 2d at 798–801 (holding that application of FCPA disclosure requirement to pro bono legal services satisfied exacting scrutiny). IFS attempts to evade this with an illusory distinction. IFS suggests that its argument is limited to donated legal services provided in a "defense posture." Opening Br. at 33–34. But IFS never defines the term "defense posture." The organization in *Evergreen Freedom Foundation* would surely contend that it was acting in "defense" of the initiative process, yet it is established that the FCPA can constitutionally be applied to donated legal services in such circumstances. *Evergreen Freedom Found.*, 192 Wash. 2d at 798–801.

Even if one assumes that IFS intended to limit its argument to donated legal services defending a political or incidental committee in an FCPA enforcement action, its argument would still lack merit. It is firmly-established that disclosure requirements serve a "sufficiently important, if not compelling, governmental interest." *Brumsickle*, 624 F.3d at 1005–06. IFS appears to concede this. Opening Br. at 34. And registration and reporting requirements for legal organizations are narrowly tailored because they apply only to a political

committee (which is, by definition, tied to "support of, or opposition to, any candidate or ballot proposition," Wash. Rev. Code § 42.17A.005(41)), an incidental committee (which is, by definition, tied to "an election campaign" or a "political committee," Wash. Rev. Code § 42.17A.005(28); Wash. Admin. Code §§ 390-16-013(1), (5)(a)), or an entity making an independent expenditure "in support of or in opposition to any candidate or ballot proposition," Wash. Rev. Code §§ 42.17A.255(1)–(2). In each instance, the registration or reporting requirement is closely tied to Washington's recognized interest in "[p]roviding information to the electorate." *Brumsickle*, 624 F.3d at 1005.

In appropriate circumstances, application of the FCPA's disclosure requirements to providers of donated legal services satisfies exacting scrutiny. IFS cannot—and does not even attempt to—establish that these requirements lack narrow tailoring "'in every conceivable application.'" *Foti*, 146 F.3d at 635 (quoting *Taxpayers for Vincent*, 466 U.S. at 796). IFS's challenge to circumstances beyond its proposed representation of Mr. Eyman therefore fails. And the FCPA does not apply to its proposed representation of Mr. Eyman, so there is no First Amendment burden to justify.

2. The challenged FCPA provisions are not vague

IFS's vagueness argument lacks merit. "A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Brumsickle*, 624 F.3d at 1019 (quoting *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir. 2004)). Even in the First Amendment context, "perfect clarity is not required." *Id.* 1019 (quoting *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir.2001)).

IFS contends that the terms "expenditure" and "contribution" are unconstitutionally vague. IFS's argument is incorrect and incomplete. The definitions are clear that they *do* include donations, including donated legal services. Wash. Rev. Code § 42.17A.005(15)(a) ("Contribution includes . . . professional services for less than full consideration."). The definitional statute is not vague; IFS just does not like what it says. And this is where IFS's argument is incomplete. While the statute is clear that donated legal services fall within the definition of "contribution," the statutory scheme is clear that IFS's proposed representation of Mr. Eyman would not require that it register or make disclosures. *See supra* at 24. Because IFS's proposed representation of Mr. Eyman would not result in it becoming a political committee or incidental

committee, the registration and disclosure requirements would not apply. IFS's decision to stop reading at the definitional statute does not render the statutory scheme vague.

3. IFS's damages claims are barred by quasi-judicial immunity

The personal-capacity defendants (Commissioners Jarrett and Downing and former Commissioner Lehman) are entitled to quasi-judicial immunity. "[S]uch absolute immunity" extends to "public officials who perform activities that are 'functionally comparable' to those of judges." *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008) (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)). The PDC's issuance of a declaratory order is functionally comparable to a court's issuance of a declaratory judgment order; PDC commissioners are effectively interpreting and applying the law prospectively in a binding manner. The six judicially-recognized factors are: "(1) the need to insulate the official from harassment or intimidation; (2) the presence of procedural safeguards to reduce unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent in the official's decision; (5) the adversary nature of the process; and (6) the correctability of error on appeal." *Id*. (citing *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985)). These factors demonstrate that the personal-capacity defendants are entitled to immunity.

To the first factor, it is essential that the PDC commissioners be insulated from harassment or intimidation. When acting on petitions for declaratory orders and other adjudicative matters, PDC commissioners are addressing important, often high-profile issues at the intersection of competing interests. They will often "excite strong feelings." *Sellars v. Procunier*, 641 F.2d 1295, 1303 (9th Cir. 1981). As in judicial cases, adjudicative decisions by PDC commissioners are likely to involve a dissatisfied party or interest group. If PDC commissioners "had to anticipate that each time they rejected" or granted a petition for a declaratory order "they would have to defend that decision in federal court, their already difficult task of balancing" the weighty interests "would become almost impossible." *Id*.

To the second and sixth factors, there are procedural safeguards around declaratory orders. As the declaratory order in this case reflects, Washington law provides for reconsideration by the PDC and for appeal of a declaratory order to the Washington Superior Court. ER-87–88. As in *Miller*, such an error "can be corrected on appeal." *Miller*, 521 F.3d at 1146. Further, if the PDC later pursues enforcement action, the affected party may appeal from an adjudicative order. Wash. Rev. Code § 42.17A.755(3)(d).

On the third factor, PDC commissioners also enjoy a large measure of insulation from political influence. Under Washington law, a commissioner may only be removed by the governor "upon grounds of neglect of duty or misconduct in office." Wash. Rev. Code § 42.17A.100(2). Further, while in office, commissioners are prohibited from participating or engaging in a wide variety of political activities. Wash. Rev. Code § 42.17A.100(3)(a).

As to the fourth factor, other aspects of the declaratory order process also resemble judicial proceedings. Because declaratory orders are binding, Wash. Rev. Code § 34.05.240(8), they are necessarily precedential. Further, judicial precedent interpreting FCPA provisions is precedential on the PDC when issuing declaratory orders. *See* SER-46–47 (reflecting consideration of "the existing applicable case law"). Petitioners may present arguments by oral or documentary evidence, and the transcripts and written submissions constitute the record of decision. *See* Wash. Admin. Code § 390-12-250(4).

The only one of the six factors that will not necessarily be present when PDC commissioners consider a declaratory order is "the adversary nature of the process." *Miller*, 521 F.3d at 1145. But while there will not necessarily be an adversarial party, the determination will involve adversarial interests. And, in any event, not all six factors need be present. In *Miller*, the Ninth Circuit

extended absolute immunity despite the fact that the process was not "adversarial in nature," did not involve consideration of precedent, and the governor was not insulated from political influence. *Id*. The PDC commissioners' role in considering petitions for declaratory orders is even more judicial in character than the governor's review of state parole board decisions at issue in *Miller*.

The PDC commissioners are entitled to absolute quasi-judicial immunity from IFS's personal-capacity request for damages.

4. IFS's damages claims are barred by qualified immunity

For the reasons discussed above, IFS misreads both the FCPA requirements and the declaratory order. *Supra* at 16–19, 23–26. But even if IFS's reading were accurate—and both the FCPA and the declaratory order required that IFS register and make disclosures based on its proposed representation of Mr. Eyman—the personal-capacity defendants would be entitled to qualified immunity with respect to IFS's individual-capacity damages claims.

IFS's argument in the case has always been that the FCPA provisions are unconstitutional. It does not contend that the Commission imposed any greater burden on its First Amendment rights than that created by statute; instead, it argues that the Commission's declaratory order failed to disavow enforcement of its (mis)reading of the statutory scheme. Opening Br. at 24. In other words, it

has sued the commissioners in their individual capacities for damages for failing to create an exception to statutory disclosure requirements.

This Court has recognized "that 'an officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity.'" *Tschida v. Motl*, 924 F.3d 1297, 1305 (9th Cir. 2019) (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994)). Exceptions exist "where (1) the statute 'authorizes official conduct which is patently violative of fundamental constitutional principles,' or (2) the official 'unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance.'" *Id*. (quoting *Grossman*, 33 F.3d at 1209–10). In *Tschida*, this Court held that qualified immunity applied despite the existence of a prior case involving very similar facts. *Id*. By contrast, in this case, IFS does not identify any case involving remotely similar facts that would have made it "'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The cases cited by IFS state principles at far too high a "'level of generality'" to overcome qualified immunity. *Kisela v. Hughes*, 138 S. Ct. 1148,

1152 (2018) (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015)).

5. IFS's personal capacity claims lack merit

IFS's personal-capacity claims fail on the merits because the personal-capacity defendants did not deprive IFS of any federal right. Deprivation of a federal right is an essential element of 42 U.S.C. § 1983. *E.g.*, *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119–20 (2005). IFS appears to base its personal-capacity claims against the three then-commissioners of the PDC on the fact that they voted in favor of the declaratory order. SER-68 (¶¶ 5, 7, 8). But, far from violating IFS's constitutional rights, the declaratory order *vindicated* IFS's First Amendment right, confirming that IFS's representation of Mr. Eyman would *not* trigger registration or disclosure requirements.

Even if, *arguendo*, the declaratory order *were* unclear, it still would not have violated IFS's rights. IFS claims that, before seeking a declaratory order, it read the FCPA to require that it report its representation of Mr. Eyman. Opening Br. at 5. The declaratory order, IFS contends, did not sufficiently disavow enforcement of a state statute. Opening Br. at 24. But IFS identifies no federal right to have an administrative agency disavow enforcement of a state statute. It is well-established that even "'general threat[s] by officials to enforce

those laws which they are charged to administer' do not" constitute an injury. *Lopez*, 630 F.3d at 787 (alteration in original) (quoting *United Pub. Workers of Am.*, 330 U.S. at 88). The declaratory order does not even do that; at most, it declines to take a position. Any harm to IFS, therefore, is traceable to the statute, and not to the individual commissioners' votes on the declaratory order. But this all is hypothetical.

The declaratory order is clear. IFS will not be required to register or make disclosures to the PDC based on its proposed representation of Mr. Eyman. The declaratory order vindicates—not violates—IFS's constitutional rights.

IX. CONCLUSION

This case does not present a case or controversy. IFS seeks to represent Mr. Eyman without any requirement that it register or make disclosures to the Commission. The Commissioner's binding declaratory order and state law make clear that IFS may do so.

Even if this Court were to reach the merits, it should affirm on additional grounds supported by the record. Washington's campaign finance registration and disclosure requirement for providers of donated legal services readily satisfy exacting scrutiny and are not vague. Further, the personal-capacity defendants are entitled to quasi-judicial immunity and/or qualified immunity.

RESPECTFULLY SUBMITTED this 8th day of June, 2022.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Defendants-Appellees State of Washington, by and through its undersigned counsel, hereby states that there are no cases related to the instant appeal that are currently pending in this Court.

s/ Karl D. Smith
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Deputy Solicitor General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

Table of Contents

Except for the following, all applicable statutes and regulations are contained in the addendum of Plaintiff-Appellant's previously filed opening brief.

Wash. Rev. Code § 34.05.542 – Time for filing petition for review.

Subject to other requirements of this chapter or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.

(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

Wash. Rev. Code § 42.17A.100 – Public disclosure commission—Established—Commissioners—Prohibited activities—Compensation, travel expenses.

(1) The public disclosure commission is established. The commission shall be composed of five commissioners appointed by the governor, with the consent of the senate. The commission shall have the authority and duties as set forth in this chapter. All appointees shall be persons of the highest integrity and qualifications. No more than three commissioners shall have an identification with the same political party.

(2) The term of each commissioner shall be five years, which may continue until a successor is appointed, but may not exceed an additional twelve months. No commissioner is eligible for appointment to more than one full term. Any commissioner may be removed by the governor, but only upon grounds of neglect of duty or misconduct in office.

(3)(a) During a commissioner's tenure, the commissioner is prohibited from engaging in any of the following activities, either within or outside the state of Washington:

(i) Holding or campaigning for elective office;

(ii) Serving as an officer of any political party or political committee;

(iii) Permitting the commissioner's name to be used in support of or in opposition to a candidate or proposition;

(iv) Soliciting or making contributions to a candidate or in support of or in opposition to any candidate or proposition;

(v) Participating in any way in any election campaign; or

(vi) Lobbying, employing, or assisting a lobbyist, except that a commissioner or the staff of the commission may lobby to the limited extent permitted by RCW 42.17A.635 on matters directly affecting this chapter.

(b) This subsection is not intended to prohibit a commissioner from participating in or supporting nonprofit or other organizations, in the commissioner's private capacity, to the extent such participation is not prohibited under (a) of this subsection.

(c) The provisions of this subsection do not relieve a commissioner of any applicable disqualification and recusal requirements.

(4) A vacancy on the commission shall be filled within thirty days of the vacancy by the governor, with the consent of the senate, and the appointee shall serve for the remaining term of the appointee's predecessor. A vacancy shall not impair the powers of the remaining commissioners to exercise all of the powers of the commission.

(5) Three commissioners shall constitute a quorum. The commission shall elect its own chair and adopt its own rules of procedure in the manner provided in chapter 34.05 RCW.

(6) Commissioners shall be compensated in accordance with RCW 43.03.250 and shall be reimbursed for travel expenses incurred while engaged in the business of the commission as provided in RCW 43.03.050 and 43.03.060. The compensation provided pursuant to this section shall not be considered salary for purposes of the provisions of any retirement system created under the laws of this state.

Wash. Rev. Code § 42.17A.200 – Application of chapter—Exceptions.

The provisions of this chapter relating to the financing of election campaigns shall apply in all election campaigns other than (1) for precinct committee officer; (2) for a federal elective office; and (3) for an office of a political subdivision of the state that does not encompass a whole county and that contains fewer than five thousand registered voters as of the date of the most recent general election in the subdivision, unless required by RCW 42.17A.135 (2) through (5) and (7).

Wash. Rev. Code § 42.17A.205 – Statement of organization by political committees.

(1) Every political committee shall file a statement of organization with the commission. The statement must be filed within two weeks after organization or within two weeks after the date the committee first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier. A political committee organized within the last three weeks before an election and having the expectation of receiving contributions or making expenditures during and for that election campaign shall file a statement of organization within three business days after its organization or when it first has the expectation of receiving contributions or making expenditures in the election campaign.

(2) The statement of organization shall include but not be limited to:

(a) The name, address, and electronic contact information of the committee;

(b) The names, addresses, and electronic contact information of all related or affiliated committees or other persons, and the nature of the relationship or affiliation;

(c) The names, addresses, and titles of its officers; or if it has no officers, the names, addresses, and titles of its responsible leaders;

(d) The name, address, and electronic contact information of its treasurer and depository;

(e) A statement whether the committee is a continuing one;

(f) The name, office sought, and party affiliation of each candidate whom the committee is supporting or opposing, and, if the committee is supporting the entire ticket of any party, the name of the party;

(g) The ballot proposition concerned, if any, and whether the committee is in favor of or opposed to such proposition;

(h) What distribution of surplus funds will be made, in accordance with RCW 42.17A.430, in the event of dissolution;

(i) Such other information as the commission may by rule prescribe, in keeping with the policies and purposes of this chapter;

(j) The name, address, and title of any person who authorizes expenditures or makes decisions on behalf of the candidate or committee; and

(k) The name, address, and title of any person who is paid by or is a volunteer for a candidate or political committee to perform ministerial

functions and who performs ministerial functions on behalf of two or more candidates or committees.

(3) No two political committees may have the same name.

(4) Any material change in information previously submitted in a statement of organization shall be reported to the commission within the ten days following the change.

(5) As used in this section, the "name" of a sponsored committee must include the name of the person who is the sponsor of the committee. If more than one person meets the definition of sponsor, the name of the committee must include the name of at least one sponsor, but may include the names of other sponsors. A person may sponsor only one political committee for the same elected office or same ballot proposition per election cycle.

Wash. Rev. Code § 42.17A.207 – Statement of organization by incidental committees.

(1)(a) An incidental committee must file a statement of organization with the commission within two weeks after the date the committee first:

(i) Has the expectation of making any expenditures aggregating at least twenty-five thousand dollars in a calendar year in any election campaign, or to a political committee; and

(ii) Is required to disclose a payment received under RCW 42.17A.240(2)(d).

(b) If an incidental committee first meets the criteria requiring filing a statement of organization as specified in (a) of this subsection in the last three weeks before an election, then it must file the statement of organization within three business days.

(2) The statement of organization must include but is not limited to:

(a) The name, address, and electronic contact information of the committee;

(b) The names and addresses of all related or affiliated political or incidental committees or other persons, and the nature of the relationship or affiliation;

(c) The names, addresses, and titles of its officers; or if it has no officers, the names, addresses, and titles of its responsible leaders and the name of the person designated as the treasurer of the incidental committee;

(d) The name, office sought, and party affiliation of each candidate whom the committee is supporting or opposing if the committee contributes directly to a candidate and, if donating to a political committee, the name and address of that political committee;

(e) The ballot proposition concerned, if any, and whether the committee is in favor of or opposed to such proposition; and

(f) Such other information as the commission may by rule prescribe, in keeping with the policies and purposes of this chapter.

(3) Any material change in information previously submitted in a statement of organization must be reported to the commission within the ten days following the change.

Wash. Rev. Code § 42.17A.235 – Reporting of contributions and expenditures—Public inspection of accounts.

(1)(a) In addition to the information required under RCW 42.17A.205 and 42.17A.210, each candidate or political committee must file with the commission a report of all contributions received and expenditures made as a political committee on the next reporting date pursuant to the timeline established in this section.

(b) In addition to the information required under RCW 42.17A.207 and 42.17A.210, on the day an incidental committee files a statement of organization with the commission, each incidental committee must file with the commission a report of any election campaign expenditures under *RCW 42.17A.240(6), as well as the source of the ten largest cumulative payments of ten thousand dollars or greater it received in the current calendar year from a single person, including any persons tied as the tenth largest source of payments it received, if any.

(2) Each treasurer of a candidate or political committee, or an incidental committee, required to file a statement of organization under this chapter, shall file with the commission a report, for each election in which a candidate, political committee, or incidental committee is participating, containing the information required by RCW 42.17A.240 at the following intervals:

(a) On the twenty-first day and the seventh day immediately preceding the date on which the election is held; and

(b) On the tenth day of the first full month after the election.

(3)(a) Each treasurer of a candidate or political committee shall file with the commission a report on the tenth day of each month during which the candidate or political committee is not participating in an election campaign, only if the committee has received a contribution or made an expenditure in the preceding calendar month and either the total contributions received or total expenditures made since the last such report exceed two hundred dollars.

(b) Each incidental committee shall file with the commission a report on the tenth day of each month during which the incidental committee is not otherwise required to report under this section only if the committee has:

(i) Received a payment that would change the information required under RCW 42.17A.240(2)(d) as included in its last report; or

(ii) Made any election campaign expenditure reportable under *RCW 42.17A.240(6) since its last report, and the total election campaign expenditures made since the last report exceed two hundred dollars.

(4) The report filed twenty-one days before the election shall report all contributions received and expenditures made as of the end of one business day before the date of the report. The report filed seven days before the election shall report all contributions received and expenditures made as of the end of one business day before the date of the report. Reports filed on the tenth day of the month shall report all contributions received and expenditures made from the closing date of the last report filed through the last day of the month preceding the date of the current report.

(5) For the period beginning the first day of the fourth month preceding the date of the special election, or for the period beginning the first day of the fifth month before the date of the general election, and ending on the date of that special or general election, each Monday the treasurer for a candidate or a political committee shall file with the commission a report of each bank deposit made during the previous seven calendar days. The report shall contain the name of each person contributing the funds and the amount contributed by each person. However, persons who contribute no more than twenty-five dollars in the aggregate are not required to be identified in the report. A copy of the report shall be retained by the treasurer for the treasurer's records. In the event of deposits made by candidates, political committee members, or paid staff other than the treasurer, the copy shall be immediately provided to the treasurer for the treasurer's records. Each report shall be certified as correct by the treasurer.

(6)(a) The treasurer for a candidate or a political committee shall maintain books of account accurately reflecting all contributions and expenditures on a current basis within five business days of receipt or expenditure. During the ten calendar days immediately preceding the date of the election the books of account shall be kept current within one business day. As specified in the political committee's statement of organization filed under RCW 42.17A.205, the books of account must be open for public inspection by appointment at a place agreed upon by both the treasurer and the requestor, for

inspections between 9:00 a.m. and 5:00 p.m. on any day from the tenth calendar day immediately before the election through the day immediately before the election, other than Saturday, Sunday, or a legal holiday. It is a violation of this chapter for a candidate or political committee to refuse to allow and keep an appointment for an inspection to be conducted during these authorized times and days. The appointment must be allowed at an authorized time and day for such inspections that is within forty-eight hours of the time and day that is requested for the inspection. The treasurer may provide digital access or copies of the books of account in lieu of scheduling an appointment at a designated place for inspection. If the treasurer and requestor are unable to agree on a location and the treasurer has not provided digital access to the books of account, the default location for an appointment shall be a place of public accommodation selected by the treasurer within a reasonable distance from the treasurer's office.

(b) At the time of making the appointment, a person wishing to inspect the books of account must provide the treasurer the name and telephone number of the person wishing to inspect the books of account. The person inspecting the books of account must show photo identification before the inspection begins.

(c) A treasurer may refuse to show the books of account to any person who does not make an appointment or provide the required identification. The commission may issue limited rules to modify the requirements set forth in this section in consideration of other technology and best practices.

(7) Copies of all reports filed pursuant to this section shall be readily available for public inspection by appointment, pursuant to subsection (6) of this section.

(8) The treasurer or candidate shall preserve books of account, bills, receipts, and all other financial records of the campaign or political committee for not less than five calendar years following the year during which the transaction occurred or for any longer period as otherwise required by law.

(9) All reports filed pursuant to subsection (1) or (2) of this section shall be certified as correct by the candidate and the treasurer.

(10) Where there is not a pending complaint concerning a report, it is not evidence of a violation of this section to submit an amended report within twenty-one days of filing an initial report if:

(a) The report is accurately amended;

(b) The amended report is filed more than thirty days before an election;

(c) The total aggregate dollar amount of the adjustment for the amended report is within three times the contribution limit per election or two hundred dollars, whichever is greater; and

(d) The committee reported all information that was available to it at the time of filing, or made a good faith effort to do so, or if a refund of a contribution or expenditure is being reported.

(11)(a) When there is no outstanding debt or obligation, the campaign fund is closed, the campaign is concluded in all respects, and the political committee has ceased to function and intends to dissolve, the treasurer shall file a final report. Upon submitting a final report, the political committee so intending to dissolve must file notice of intent to dissolve with the commission and the commission must post the notice on its website.

(b) Any political committee may dissolve sixty days after it files its notice to dissolve, only if:

(i) The political committee does not make any expenditures other than those related to the dissolution process or engage in any political activity or any other activities that generate additional reporting requirements under this chapter after filing such notice;

(ii) No complaint or court action under this chapter is pending against the political committee; and

(iii) All penalties assessed by the commission or court order have been paid by the political committee.

(c) The political committee must continue to report regularly as required under this chapter until all the conditions under (b) of this subsection are resolved.

(d) Upon dissolution, the commission must issue an acknowledgment of dissolution, the duties of the treasurer shall cease, and there shall be no further obligations under this chapter. Dissolution does not absolve the

candidate or board of the committee from responsibility for any future obligations resulting from the finding after dissolution of a violation committed prior to dissolution.

(12) The commission must adopt rules for the dissolution of incidental committees.

Wash. Rev. Code § 42.17A.240 – Contents of report.

Each report required under RCW 42.17A.235 (1) through (4) must be certified as correct by the treasurer and the candidate and shall disclose the following, except an incidental committee only must disclose and certify as correct the information required under subsections (2)(d) and (7) of this section:

(1) The funds on hand at the beginning of the period;

(2) The name and address of each person who has made one or more contributions during the period, together with the money value and date of each contribution and the aggregate value of all contributions received from each person during the campaign, or in the case of a continuing political committee, the current calendar year, with the following exceptions:

(a) Pledges in the aggregate of less than one hundred dollars from any one person need not be reported;

(b) Income that results from a fund-raising activity conducted in accordance with RCW 42.17A.230 may be reported as one lump sum, with the exception of that portion received from persons whose names and addresses are required to be included in the report required by RCW 42.17A.230;

(c) Contributions of no more than twenty-five dollars in the aggregate from any one person during the election campaign may be reported as one lump sum if the treasurer maintains a separate and private list of the name, address, and amount of each such contributor;

(d) Payments received by an incidental committee from any one person need not be reported unless the person is one of the committee's ten largest sources of payments received, including any persons tied as the tenth largest source of payments received, during the current calendar year, and the value of the cumulative payments received from that person during the current calendar year is ten thousand dollars or greater. For payments to incidental committees from multiple persons received in aggregated form, any payment of more than ten thousand dollars from any single person must be reported, but the aggregated payment itself may not be reported. The commission may suspend or modify reporting requirements for payments received by an incidental committee in cases of manifestly unreasonable hardship under this chapter;

(e) Payments from private foundations organized under section 501(c)(3) of the internal revenue code to an incidental committee do not have to be reported if:

(i) The private foundation is contracting with the incidental committee for a specific purpose other than election campaign purposes;

(ii) Use of the funds for election campaign purposes is explicitly prohibited by contract; and

(iii) Funding from the private foundation represents less than twenty-five percent of the incidental committee's total budget;

(f) Commentary or analysis on a ballot proposition by an incidental committee is not considered a contribution if it does not advocate specifically to vote for or against the ballot proposition; and

(g) The money value of contributions of postage is the face value of the postage;

(3) Each loan, promissory note, or security instrument to be used by or for the benefit of the candidate or political committee made by any person, including the names and addresses of the lender and each person liable directly, indirectly or contingently and the date and amount of each such loan, promissory note, or security instrument;

(4) All other contributions not otherwise listed or exempted;

(5) A statement that the candidate or political committee has received a certification from any partnership, association, corporation, organization, or other combination of persons making a contribution to the candidate or political committee that:

(a) The contribution is not financed in any part by a foreign national; and

(b) Foreign nationals are not involved in making decisions regarding the contribution in any way;

(6) The name and address of each candidate or political committee to which any transfer of funds was made, including the amounts and dates of the transfers;

(7) The name and address of each person to whom an expenditure was made in the aggregate amount of more than fifty dollars during the period covered by this report, the amount, date, and purpose of each expenditure, and

the total sum of all expenditures. An incidental committee only must report on expenditures, made and reportable as contributions as defined in RCW 42.17A.005, to election campaigns. For purposes of this subsection, commentary or analysis on a ballot proposition by an incidental committee is not considered an expenditure if it does not advocate specifically to vote for or against the ballot proposition;

(8) The name, address, and electronic contact information of each person to whom an expenditure was made for soliciting or procuring signatures on an initiative or referendum petition, the amount of the compensation to each person, and the total expenditures made for this purpose. Such expenditures shall be reported under this subsection in addition to what is required to be reported under subsection (7) of this section;

(9)(a) The name and address of any person and the amount owed for any debt with a value of more than seven hundred fifty dollars that has not been paid for any invoices submitted, goods received, or services performed, within five business days during the period within thirty days before an election, or within ten business days during any other period.

(b) For purposes of this subsection, debt does not include regularly recurring expenditures of the same amount that have already been reported at least once and that are not late or outstanding;

(10) The surplus or deficit of contributions over expenditures;

(11) The disposition made in accordance with RCW 42.17A.430 of any surplus funds; and

(12) Any other information required by the commission by rule in conformance with the policies and purposes of this chapter.

Wash. Rev. Code § 42.17A.255 – Special reports—Independent expenditures.

(1) For the purposes of this section the term "independent expenditure" means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17A.225, 42.17A.235, and 42.17A.240. "Independent expenditure" does not include: An internal political communication primarily limited to the contributors to a political party organization or political action committee, or the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person.

(2) Within five days after the date of making an independent expenditure that by itself or when added to all other such independent expenditures made during the same election campaign by the same person equals one hundred dollars or more, or within five days after the date of making an independent expenditure for which no reasonable estimate of monetary value is practicable, whichever occurs first, the person who made the independent expenditure shall file with the commission an initial report of all independent expenditures made during the campaign prior to and including such date.

(3) At the following intervals each person who is required to file an initial report pursuant to subsection (2) of this section shall file with the commission a further report of the independent expenditures made since the date of the last report:

(a) On the twenty-first day and the seventh day preceding the date on which the election is held; and

(b) On the tenth day of the first month after the election; and

(c) On the tenth day of each month in which no other reports are required to be filed pursuant to this section. However, the further reports required by this subsection (3) shall only be filed if the reporting person has

made an independent expenditure since the date of the last previous report filed.

The report filed pursuant to (a) of this subsection (3) shall be the final report, and upon submitting such final report the duties of the reporting person shall cease, and there shall be no obligation to make any further reports.

(4) All reports filed pursuant to this section shall be certified as correct by the reporting person.

(5) Each report required by subsections (2) and (3) of this section shall disclose for the period beginning at the end of the period for the last previous report filed or, in the case of an initial report, beginning at the time of the first independent expenditure, and ending not more than one business day before the date the report is due:

(a) The name, address, and electronic contact information of the person filing the report;

(b) The name and address of each person to whom an independent expenditure was made in the aggregate amount of more than fifty dollars, and the amount, date, and purpose of each such expenditure. If no reasonable estimate of the monetary value of a particular independent expenditure is practicable, it is sufficient to report instead a precise description of services, property, or rights furnished through the expenditure and where appropriate to attach a copy of the item produced or distributed by the expenditure;

(c) The total sum of all independent expenditures made during the campaign to date;

(d) A statement from the person making an independent expenditure that:

(i) The expenditure is not financed in any part by a foreign national; and

(ii) Foreign nationals are not involved in making decisions regarding the expenditure in any way; and

(e) Such other information as shall be required by the commission by rule in conformance with the policies and purposes of this chapter.

Wash. Rev. Code § 42.17A.405 – Limits specified—Exemptions.

(1) The contribution limits in this section apply to:
(a) Candidates for legislative office;
(b) Candidates for state office other than legislative office;
(c) Candidates for county office;
(d) Candidates for port district office;
(e) Candidates for city council office;
(f) Candidates for mayoral office;
(g) Candidates for school board office;
(h) Candidates for public hospital district board of commissioners in districts with a population over one hundred fifty thousand;
(i) Persons holding an office in (a) through (h) of this subsection against whom recall charges have been filed or to a political committee having the expectation of making expenditures in support of the recall of a person holding the office;
(j) Caucus political committees;
(k) Bona fide political parties.

(2) No person, other than a bona fide political party or a caucus political committee, may make contributions to a candidate for a legislative office, county office, city council office, mayoral office, school board office, or public hospital district board of commissioners that in the aggregate exceed *eight hundred dollars or to a candidate for a public office in a port district or a state office other than a legislative office that in the aggregate exceed *one thousand six hundred dollars for each election in which the candidate is on the ballot or appears as a write-in candidate. Contributions to candidates subject to the limits in this section made with respect to a primary may not be made after the date of the primary. However, contributions to a candidate or a candidate's authorized committee may be made with respect to a primary until thirty days after the primary, subject to the following limitations: (a) The candidate lost the primary; (b) the candidate's authorized committee has insufficient funds to pay debts outstanding as of the date of the primary; and (c) the contributions may only be raised and spent to satisfy the outstanding debt. Contributions to candidates subject to the limits in this section made with respect to a general election may not be made after the final day of the applicable election cycle.

(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 port 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 port 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 port district office or a state office other than a legislative office.

(4)(a) Notwithstanding subsection (2) of this section, no bona fide political party or caucus political committee may make contributions to a candidate during an election cycle that in the aggregate exceed (i) eighty cents multiplied by the number of eligible registered voters in the jurisdiction from which the candidate is elected if the contributor is a caucus political committee or the governing body of a state organization, or (ii) forty cents multiplied by the number of registered voters in the jurisdiction from which the candidate is elected if the contributor is a county central committee or a legislative district committee.

(b) No candidate may accept contributions from a county central committee or a legislative district committee during an election cycle that when combined with contributions from other county central committees or legislative district committees would in the aggregate exceed forty cents times the number of registered voters in the jurisdiction from which the candidate is elected.

(5)(a) Notwithstanding subsection (3) of this section, no bona fide political party or caucus political committee may make contributions to a state official, county official, city official, school board member, public hospital district commissioner, or a public official in a port district against whom recall charges have been filed, or to a political committee having the expectation of making expenditures in support of the state official, county official, city official, school board member, public hospital district commissioner, or a public official in a port district during a recall campaign that in the aggregate exceed (i) eighty cents multiplied by the number of eligible registered voters in

the jurisdiction entitled to recall the state official if the contributor is a caucus political committee or the governing body of a state organization, or (ii) forty cents multiplied by the number of registered voters in the jurisdiction from which the candidate is elected if the contributor is a county central committee or a legislative district committee.

(b) No official holding an office specified in subsection (1) of this section against whom recall charges have been filed, no authorized committee of the official, and no political committee having the expectation of making expenditures in support of the recall of the official may accept contributions from a county central committee or a legislative district committee during an election cycle that when combined with contributions from other county central committees or legislative district committees would in the aggregate exceed forty cents multiplied by the number of registered voters in the jurisdiction from which the candidate is elected.

(6) For purposes of determining contribution limits under subsections (4) and (5) of this section, the number of eligible registered voters in a jurisdiction is the number at the time of the most recent general election in the jurisdiction.

(7) Notwithstanding subsections (2) through (5) of this section, no person other than an individual, bona fide political party, or caucus political committee may make contributions reportable under this chapter to a caucus political committee that in the aggregate exceed *eight hundred dollars in a calendar year or to a bona fide political party that in the aggregate exceed *four thousand dollars in a calendar year. This subsection does not apply to loans made in the ordinary course of business.

(8) For the purposes of RCW 42.17A.125, 42.17A.405 through 42.17A.415, 42.17A.450 through 42.17A.495, 42.17A.500, 42.17A.560, and 42.17A.565, a contribution to the authorized political committee of a candidate or of an official specified in subsection (1) of this section against whom recall charges have been filed is considered to be a contribution to the candidate or official.

(9) A contribution received within the twelve-month period after a recall election concerning an office specified in subsection (1) of this section is considered to be a contribution during that recall campaign if the contribution

is used to pay a debt or obligation incurred to influence the outcome of that recall campaign.

(10) The contributions allowed by subsection (3) of this section are in addition to those allowed by subsection (2) of this section, and the contributions allowed by subsection (5) of this section are in addition to those allowed by subsection (4) of this section.

(11) RCW 42.17A.125, 42.17A.405 through 42.17A.415, 42.17A.450 through 42.17A.495, 42.17A.500, 42.17A.560, and 42.17A.565 apply to a special election conducted to fill a vacancy in an office specified in subsection (1) of this section. However, the contributions made to a candidate or received by a candidate for a primary or special election conducted to fill such a vacancy shall not be counted toward any of the limitations that apply to the candidate or to contributions made to the candidate for any other primary or election.

(12) Notwithstanding the other subsections of this section, no corporation or business entity not doing business in Washington state, no labor union with fewer than ten members who reside in Washington state, and no political committee that has not received contributions of *ten dollars or more from at least ten persons registered to vote in Washington state during the preceding one hundred eighty days may make contributions reportable under this chapter to a state office candidate, to a state 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 official. This subsection does not apply to loans made in the ordinary course of business.

(13) Notwithstanding the other subsections of this section, no county central committee or legislative district committee may make contributions reportable under this chapter to a candidate specified in subsection (1) of this section, or an official specified in subsection (1) of this section against whom recall charges have been filed, or political committee having the expectation of making expenditures in support of the recall of an official specified in subsection (1) of this section if the county central committee or legislative district committee is outside of the jurisdiction entitled to elect the candidate or recall the official.

(14) No person may accept contributions that exceed the contribution limitations provided in this section.

(15) The following contributions are exempt from the contribution limits of this section:

(a) An expenditure or contribution earmarked for voter registration, for absentee ballot information, for precinct caucuses, for get-out-the-vote campaigns, for precinct judges or inspectors, for sample ballots, or for ballot counting, all without promotion of or political advertising for individual candidates;

(b) An expenditure by a political committee for its own internal organization or fund-raising without direct association with individual candidates; or

(c) An expenditure or contribution for independent expenditures as defined in RCW 42.17A.005 or electioneering communications as defined in RCW 42.17A.005.

Wash. Rev. Code § 42.17A.410 – Candidates for judicial office—Special elections to fill vacancies—Contribution limits—Adjustments.

(1) No person may make contributions to a candidate for judicial office that in the aggregate exceed *one thousand six hundred dollars for each election in which the candidate is on the ballot or appears as a write-in candidate. Contributions made with respect to a primary may not be made after the date of the primary. However, contributions to a candidate or a candidate's authorized committee may be made with respect to a primary until thirty days after the primary, subject to the following limitations: (a) The candidate lost the primary; (b) the candidate's authorized committee has insufficient funds to pay debts outstanding as of the date of the primary; and (c) the contributions may only be raised and spent to satisfy the outstanding debt. Contributions made with respect to a general election may not be made after the final day of the applicable election cycle.

(2) This section through RCW 42.17A.490 apply to a special election conducted to fill a vacancy in an office. However, the contributions made to a candidate or received by a candidate for a primary or special election conducted to fill such a vacancy will not be counted toward any of the limitations that apply to the candidate or to contributions made to the candidate for any other primary or election.

(3) No person may accept contributions that exceed the contribution limitations provided in this section.

(4) The dollar limits in this section must be adjusted according to RCW 42.17A.125.

Wash. Rev. Code § 42.17A.417

(1) A foreign national may not make a contribution to any candidate or political committee, make an expenditure in support of or in opposition to any candidate or ballot measure, or sponsor political advertising or an electioneering communication.

(2) A person may not make a contribution to any candidate or political committee, make an expenditure in support of or in opposition to any candidate or ballot measure, or sponsor political advertising or an electioneering communication, if:

(a) The contribution, expenditure, political advertising, or electioneering communication is financed in any part by a foreign national; or

(b) Foreign nationals are involved in making decisions regarding the contribution, expenditure, political advertising, or electioneering communication in any way.

Wash. Admin. Code § 390-05-400 – Changes in dollar amounts.

Pursuant to the authority in RCW 42.17A.125 that the commission may revise the monetary contribution limits and reporting thresholds and code values of the act to reflect changes in economic conditions, the previous and current amounts are:

Code Section	Subject Matter	Previous	Current
.005	Reporting threshold for "Independent Expenditure" for political advertising	$950	$1,000
.255	Reporting threshold for "Independent Expenditure" not otherwise reported	$100	$100
.445(3)	Reimbursement of candidate for loan to own campaign	$5,500	$6,000
.630(1)	Report—		
	Applicability of provisions to persons who made contributions	$19,000	$20,000
	Persons who made independent expenditures	$950	$1,000
.405(2)	Contribution Limits—		
	Candidates for state leg. office	$950	$1,000
	Candidates for county office	$950	$1,000
	Candidates for other state office	$1,900	$2,000
	Candidates for special purpose districts	$1,900	$2,000
	Candidates for city council office	$950	$1,000
	Candidates for mayoral office	$950	$1,000
	Candidates for school board office	$950	$1,000
	Candidates for hospital district	$950	$1,000
.405(3)	Contribution Limits—		
	State official up for recall or pol comm. supporting recall—		
	State Legislative Office	$950	$1,000
	Other State Office	$1,900	$2,000
.405(4)	Contribution Limits—		
	Contributions made by political parties and caucus committees		
	State parties and caucus committees	.95 per voter	$1.00 per registered voter

	County and leg. district parties	.50 per voter	.50 per registered voter
	Limit for all county and leg. district parties to a candidate	.50 per voter	.50 per registered voter
.405(5)	Contribution Limits—		
	Contributions made by pol. parties and caucus committees to state official up for recall or committee supporting recall		
	State parties and caucuses	.95 per voter	$1.00 per registered voter
	County and leg. district parties	.50 per voter	.50 per registered voter
	Limit for all county and leg. district parties to state official up for recall or pol. comm. supporting recall	.50 per voter	.50 per registered voter
.405(7)	Limits on contributions to political parties and caucus committees		
	To caucus committee	$950	$1,000
	To political party	$5,000	$5,500
.410(1)	Candidates for judicial office	$1,900	$2,000
.475	Contribution must be made by written instrument	$95	$100
.710	Code values for statement of personal financial affairs - See WAC **390-24-301**		

Wash. Admin. Code § 390-16-013 – Incidental committees—Registration and reporting requirements and method for reporting.

(1) Chapter 42.17A RCW requires the disclosure of monetary and in-kind contributions and expenditures by nonprofit organizations that participate significantly in candidate and ballot proposition campaigns in Washington state. Nonprofit organizations that make contributions or expenditures in Washington elections above specified thresholds, and are not otherwise defined under the law as political committees, must file organizational statements with the PDC and disclose certain contributors, regardless of the organization's primary purpose. These are referred to in the law as "incidental committees." To be an incidental committee, triggering the requirements to file a statement of organization with the PDC and then file the required disclosure reports, an organization must expect to make contributions or expenditures of at least twenty-five thousand dollars in a calendar year for an election campaign and receive a payment of at least ten thousand dollars from a single source.

(2) The official form for providing the statement of organization by incidental committees as required by RCW 42.17A.207 is designated the incidental committee registration report, or "C-1-IC."

(3) The official form for reporting top ten payments and expenditures by incidental committees as required under RCW 42.17A.240 is designated the incidental committee payments and political expenditures report, or "C-8."

(4) These reporting forms must be filed electronically when the PDC has provided an electronic method to do so. Until an electronic method is provided, the reporting forms should be downloaded from the PDC's website, www.pdc.wa.gov, or obtained at the PDC office, in Olympia, Washington, and submitted by postal mail or hand delivery. The executive director may make exceptions on a case-by-case basis for an incidental committee that lacks the technological ability to file reports electronically.

(5) For purposes of determining whether a nonprofit organization has the expectation of making contributions or expenditures aggregating at least twenty-five thousand dollars in a calendar year that then triggers the reporting requirements:

(a) Contributions include any monetary or in-kind contributions made to a political committee, including a political committee that the nonprofit organization sponsors; and

(b) Contributions do not include contributions made to an out-of-state political committee, unless the contribution is earmarked or otherwise designated specifically for any in-state election campaign or political committee.

(6) The sources of the top ten largest cumulative payments of ten thousand dollars or greater, as required to be reported on the C-8 report, must include:

(a) The top ten sources of payments within the current calendar year through the applicable reporting period, including any changes to the top ten sources from the previous reporting period; and

(b) The total cumulative payment value, within the current calendar year through the applicable reporting period, made from a person who is reported on the current report as a source of a top ten payment.

(7) For purposes of reporting the sources of the top ten largest cumulative payments of ten thousand dollars or greater, for payments received from multiple persons in an aggregated form, only a payment of more than ten thousand dollars from any single person must be reported, but not the aggregated payment to the nonprofit organization itself or through any intermediary aggregated payment.

(8) An incidental committee may request a modification or suspension of reporting requirements in cases of manifestly unreasonable hardship pursuant to RCW 42.17A.120, as set forth in chapter 390-28 WAC.

(9) Each incidental committee is automatically dissolved at the end of the calendar year in which it was registered, or upon completion of all reporting requirements for that year, whichever is later. Dissolution does not absolve the nonprofit organization that registered as an incidental committee from responsibility for any obligations resulting from a finding before or after dissolution of a violation committed prior to dissolution. Dissolution in this context refers only to the termination of an incidental committee created to fulfill the nonprofit's reporting responsibilities under chapter 42.17A RCW, and is not intended to affect the legal status of the nonprofit organization itself.