No. 22-35112

In the United States Court of Appeals for the Ninth Circuit

INSTITUTE FOR FREE SPEECH,

Plaintiff-Appellant,

v.

FRED JARRETT, ET AL.,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Western District of Washington, The Hon. Barbara J. Rothstein
(Dist. Ct. No. 3:21-cv-05546-BJR)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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I. IFS HAS STANDING TO CHALLENGE THE FCPA

A. The government's claim of express disavowal is contradicted by the record

Retroactive continuity or "retcon" is "a literary device in which the form or content of a previously established narrative is changed." Merrian-Webster, A Short History of 'Retcon.' https://www.merriam-webster.com/words-at-play/retcon-history-and-meaning (last visited June 19, 2022). "[A] retcon allows an author to have his or her cake and eat it too[.]" *Id.*

Washington state deploys a similar device to promote the fiction that it disavowed the FCPA's enforcement against IFS's exercise of core First Amendment activity. First, it pretends that the declaratory order reached issues it did not. Second, it ignores veiled enforcement threats made by the PDC's general counsel. Third, it now conveniently suggests that Eyman is not a committee for purposes of legal representation, a position at odds with both its position before the state court and the PDC's order.

Contrary to the state's serial protestations, the PDC's declaratory order plainly declined to reach the issue of Eyman's status as an ongoing political committee. It left the door open to enforcement and this is even more apparent when one considers the general counsel's statements during the hearing.

Paragraph #2 of the PDC's order acknowledges that the state court "has designated Mr. Eyman as an ongoing political committee," and then declares that whether "[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 jurisdiction of the Superior Court." ER-86 (emphasis added); ER-85 ("Legal services provided for the purpose of assisting any continuing political committee…are not contemplated by this Declaratory Order[.]").[1]

Thus, it was inaccurate for the district court to hold that the PDC's declaratory order "unequivocally stated" that representing Eyman in the appeal would not require reporting under the FCPA. ER-14. On the contrary, the PDC expressly avoided reaching that issue.

B. The general counsel specifically hinted that IFS might qualify as an incidental committee under the FCPA

During the hearing, the PDC's general counsel admitted that IFS might qualify as either a "political committee" or an "incidental committee" under the FCPA, but that "the highest percentage is an incidental committee." Official PDC Meeting Video, https://bit.ly/3wXu82k at 5:57; 6:00; 6:02:20. The state does not deny

[1] The government's disavowal narrative is inconsistent. At one point, it acknowledges that perhaps the declaratory order "declines to take a position" on enforcement. Dkt. #15 at 53. If so, the order does not disavow enforcement.

that these statements were made, although it now seeks to characterize them as unimportant musings about hypotheticals.

But the state does not explain why IFS should ignore those warnings. It is entirely appropriate for IFS to interpret the general counsel's statements as relevant and intended to convey a message. Only the foolhardy would ignore these statements from the state enforcement agency's chief legal advisor.

Upon examining the PDC's official guidance, it becomes apparent why the general counsel stated that IFS could plausibly qualify as an incidental committee. Incidental committees are non-profit entities that spend $25,000 or more in a calendar year on "political committees," receive "$10,000 or more from a single source," and must file a C-8 Incidental Committee Payments and Political Expenditure Report. PDC, *Incidental Committees,* https://pdc.wa.gov/registration-reporting/incidental-committees (last visited June 20, 2022). C-8 reports include the top 10 sources (donors) of payments the entity received in the current calendar year and any expenditure of more than $50 on a political committee. *Id.;* PDC, *C-8 Form,* https://pdc.wa.gov/sites/default/files/2021-11/C8_2020_0.pdf (last visited June 24, 2022).

It is undisputed that Washington state sought, and obtained, the designation of Tim Eyman as an ongoing political committee in the enforcement action. Even if the state has overreached, Mr. Eyman is

legally a political committee at this time. Thus, any non-profit expending more than $25,000 on Tim Eyman in a calendar year might plausibly have to file a C-8 report disclosing its services and top ten donors. *See id.* Given the cost of legal services, IFS would easily provide more than $25,000 in legal services per year if it represented Eyman. ER-168.

This explains why the PDC's general counsel responded "potentially yes" when asked whether Eyman's status as an ongoing political committee mattered. The state seeks to waive away those statements and focus on his status as an individual at the outset of the enforcement action. If Eyman is still just an individual today, then the PDC declaratory order should have said so. It was the state, after all, that had asked the state court to designate him a committee for all time. ER-34. The state did not start calling him an individual again until it became legally convenient for it to do so, in this litigation. SER-58.

Indeed, judicial estoppel should apply here. *See Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 782-83 (9th Cir. 2001). In state court, the state insisted successfully that Eyman was an ongoing political committee, but now the state asserts the opposite in federal court, thereby seeking to gain a litigation advantage in a different forum. Neither the PDC nor any of the state's legal representatives (including two litigation counsel in the state-court action, the PDC's general counsel, and at least two Assistant Attorney Generals present

at the hearing) offered any helpful clarification on this point *before* IFS sued the state.

The state's positions are shifting and obviously inconsistent. This Court should not reward such gamesmanship.

C. IFS has standing because the government is giving it the run-around

Despite the state's protestations to the contrary, it is apparent that it does not want IFS to represent Tim Eyman on his appeal. Absent an express disavowal of enforcement, IFS has a plausible risk of becoming an "incidental committee" that must file C-8 disclosure reports if it provides legal services at below-market value to a political committee.

When IFS first consulted the AGO's litigation counsel in the state-court enforcement action, Eric Newman, passed the buck to the PDC. ER-110. Neither Newman, nor Assistant Attorney General Todd Sipe (who was copied on the email and is a counsel of record on this appeal), suggested in any way that the civil case was directed only against Eyman as a person.

Next IFS sought guidance from the PDC. ER-149–160. Again, no one from the PDC or the AGO opined that IFS would only be representing Eyman as a person. In fact, the opposite occurred: the general counsel opined that it might matter that Eyman is now also an ongoing committee. The PDC's order declined to reach the issue, although it acknowledged that he was also a committee. ER-86.

Now the government claims simultaneously that the PDC's order was clear, but also suggests that it was IFS's responsibility to seek clarification from the state court about the scope of the order it granted at the government's request. Dkt. #15 at 5; SER 38.

Then-Commissioner Lehman similarly opined that IFS should seek clarification from the state court in an area that was "clearly unclear," although the state now seeks to disavow his admission. ER-75; Dkt. #15 at 25-26. On the contrary, the PDC's declaratory order enshrined the confusion Lehman accurately noted and passed the buck again.

Only after it was sued in federal court, the state claimed, for the first time, that IFS's representation would only be of an individual because Eyman was sued as an individual when the state first initiated its case. SER-58. Notably, the state requested that Eyman be designated a committee *after* filing its case, and he is still saddled with that status. ER-34, ER-117. This belated assertion serves to retroactively make the state appear more reasonable.

The state's positions change depending on what is most beneficial to its officials. For example, while the state points to its initial complaint against Eyman for the proposition that Eyman is only a person, the state's Answering Brief also asserts that "it is the Commission's declaratory order that matters," and that individual government attorneys may not speak for the commission. Dkt. #15 at 21.

But the state now seeks to use Todd Sipe's declaration to edit the narrative about Eyman's capacity for purposes of legal representation. *See* SER-38 (Sipe Decl. authenticating state-court complaint); SER-4 (state-court complaint caption); SER-58 (Brief citing Sipe Decl. to claim, for first time, that "IFS's proposed representation of Mr. Eyman in his appeal would necessarily be representation of Mr. Eyman in his individual capacity"). If the state's claim in its Answering Brief is correct, that neither Eric Newman, nor his co-counsel Todd Sipe, could provide binding guidance to IFS before this litigation, then Todd Sipe cannot do so during this litigation either. The retcon attempt fails.

Moreover, the state's retcon doesn't amend the PDC's declaratory order. A third-party FCPA complainant could simply point to the order for the proposition that IFS was representing a committee and therefore became an incidental committee that needed to report. In fact, that would be a plausible reading of the order. IFS has no certainty that the PDC would screen out such a complaint, since the order left that issue open.

If Washington state's officials believed Tim Eyman was just a person all along, they should have just said so. It is now up to this Court to put an end to the narrative-shifting and buck-passing.

D. Thomas is inapposite

The government resorts to several arguments in attempting to avoid standing. First, it argues that the declaratory order is clear and so

seeks to avoid engaging with IFS's concrete plan to represent Eyman. Next, it argues that IFS's plan to represent others is insufficiently concrete. It relies heavily on *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) for this proposition, citing that case eight times. Dkt. #15.

IFS's concrete plan to represent Eyman is undisputed. Both the district court and the state mistakenly rely on the fiction that the PDC's order was unequivocal as to representing Eyman. It was not and, at a minimum, IFS should enjoy standing to challenge the FCPA as-applied to its proposed representation of Eyman.

Moreover, the *Thomas* plaintiffs had a thinner record on standing. That case involved religious landlords who did not want to rent to non-married couples, in potential violation of a municipal ordinance. The *Thomas* plaintiffs could identify no tenants who had been turned away. *Thomas,* 220 F.3d at 1140. "There has been no specific threat *or even hint* of future enforcement or prosecution." *Id.*

IFS has at least one prospective client standing by. And unlike *Thomas,* in this case, the PDC's general counsel openly hinted that IFS might qualify as an incidental committee and advised the commission not to reach a conclusion on that issue—advice the commission followed. Official PDC Video Hearing Record, https://bit.ly/3wXu82k at 4:55 to 4:55:52 and 6:03:06 to 6:05:38; ER-75–76. Moreover, the PDC has an undisputed history of aggressively enforcing the FCPA against pro bono

legal service providers. ER-113–115; *State v. Evergreen Freedom Found.,* 192 Wn.2d 782, 786 (2019).

The free speech claim in *Thomas* was also thread-bare, because the landlords had neither advertised a marital preference in the past, nor had "they expressed any intent to do so in the future." *Thomas,* 220 F.3d at 1140 n.5.

Conversely, IFS has an (1) established record of providing pro bono services to others, (2) has asserted an undisputed intent to represent Eyman, and (3) also an intent to represent similarly situated parties in the future. ER-168–169; ER-20. Unlike the *Thomas* plaintiffs, IFS's claims unquestionably implicate First Amendment rights to associate and speak by way of pro bono litigation against the government.

Thomas is also arguably the nadir of this circuit's holdings on pre-enforcement standing and other cases have eroded its significance, especially in the free-speech context. *See, e.g., Wolfson v. Brammer,* 616 F.3d 1045, 1059 (9th Cir. 2010); *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (analyzing cases on free speech standing); *Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1095 (9th Cir. 2003).

This case is more like *Wolfson*, 616 F.3d at 1059, where the plaintiff "expressed an intention to run for office in the future, and a desire to engage in two kinds of campaign-related conduct that is likely to be prohibited by the Code." This Court held that standing existed there, even though the plaintiff had not identified a specific election cycle, and

no one had ever enforced or threatened to enforce the code against him. *Id*. And while that plaintiff unsuccessfully asserted that the advisory opinions in that case heightened the chilling effect of the code, unlike IFS, he failed to "state *why* the advisory opinions increased the chilling effect of the pledges and promises clauses." *Id.* at 1063 (emphasis in original). IFS, in contrast, has been emphatic about the run around it received.

Similarly, *Lopez* is instructive here. In that case, this Court almost found standing for a Christian student who ran afoul of a community college professor who aggressively objected to the student's views on homosexuality and same-sex marriage, expressed during a speech class. *Lopez,* 630 F.3d at 794 ("Lopez's arguments come to the very edge of showing injury in fact"). It was significant that the student's "past and proposed future speech" did not appear to violate the plain language of the college's sexual harassment policy. *Id.* at 790-91. Also significant was that the college's administration had specifically repudiated the professor's aggressive behavior, disciplined the professor, and committed to protecting students' rights to free expression. *Id.* at 791.

In contrast, IFS's proposed services to Eyman (and potentially others) would plausibly be a contribution or expenditure under a plain reading of the FCPA and its implementing regulation, WAC 390-17-405. Moreover, unlike the college in *Lopez,* the state refused to squarely address IFS's concerns, hinted at enforcement, and gave it the run-

around. It would be as if the college president had told the student, "Well I can see why you are concerned, but we can't address hypothetical situations and we'll just have to wait-and-see."

The First Amendment does not require IFS to risk disclosing its donors' identities based on mixed messages. Bringing a pre-enforcement challenge is the safest way to protect IFS's rights and this Court should not eschew its duty to adjudicate the issues on the substantive merits.

E. IFS's has standing to challenge a subset of FCPA applications on an as-applied basis

The government asserts that IFS's intent to represent others is too speculative to support standing. But, as noted *infra,* it is no more speculative than in *Wolfson,* 616 F.3d at 1059, where the plaintiff indicated an intent to run for an unspecified judicial office again at some unknown time in the future. The government also fails to tell us why things should be any different for another defendant who wants pro bono help. If it is true as-applied to legal services rendered to Tim Eyman, then it should also be true as-applied to any similarly situated person.

This Court has previously recognized that a "paradigmatic as-applied attack challenges only one of the rules in a statute, *a subset of the statute's applications,* or the application of the statute to a specific factual circumstance[.]" *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) (citing Richard H. Fallon, Jr., *As-Applied and Facial*

Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1334 (2000)) (emphasis added). Neither IFS, nor any other putative pro bono legal service provider, should have to litigate every time it wishes to represent a defendant against Washington's campaign-finance apparatus. Standing exists, and this Court should definitively put this case or controversy to rest.

II. THE DISTRICT COURT IMPROPERLY LIMITED IFS TO ARGUMENTS MADE IN ITS INITIAL ADMINISTRATIVE PETITION

Even if the district court did not expressly invoke administrative exhaustion, the court's opinion inappropriately labeled IFS's argument for relief on behalf of similarly situated persons as "disingenuous." ER-13. "The petition, itself, clearly limited the issue to IFS's representation of Mr. Eyman on the appeal." *Id.*

But the PDC's own enabling regulations allowed IFS to present new "argument" at any time prior to issuance of the order. WAC 390-12-250. Oddly, the government's Answering Brief inaccurately describes that regulation as allowing for "additional material and evidence" but not additional "issues." Dkt. #15 at 19, n.6.

The regulation is not limited to additional material or evidence, and it makes no mention of issues at all. It explicitly allows for new "*argument* at any time prior to the issuance of the declaratory order." WAC 390-12-250 (emphasis added). As a result, IFS was free to argue that one solution to the problem was for the PDC to impose a limiting

construction on the FCPA's definitions of "contribution" or "expenditure."

Of course, other solutions existed. The PDC could also have declared that it would consider any representation of Eyman in the appeal to be a representation of him as a person, and not a committee; but such language is absent from the order.

Even more important, IFS was making an as-applied challenge to a state law and regulation in federal court—and thus was not limited to arguments it made in the administrative proceeding before the PDC. *See* SER-76–79 (as-applied claims as to Eyman and similarly situated persons). Even if the PDC was disinclined to grant relief beyond a representation of Eyman,[2] IFS has a right to challenge application of the FCPA's definitions and WAC to the broader sub-set of cases involving the representation of defendants in campaign-finance enforcement actions. *Hoye,* 653 F.3d. at 857; *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010) ("An as-applied First Amendment challenge contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity."); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033-34 (9th Cir. 2006) (as-applied challenge occurs where "a plaintiff argues that the law is unconstitutional as

[2] In fact, the PDC did not grant relief as to Eyman as a dual-status entity.

applied to his own speech or expressive conduct."); *see also Perera v. Jennings,* No. 21-cv-04136-BLF, 2022 U.S. Dist. LEXIS 69947, at *14-15 (N.D. Cal. Apr. 15, 2022) (citing *Hoye* for proposition that as-applied can be directed to "a subset of the statute's application"); *Nielsen v. Shinn*, No. CV 20-01182-PHX-DLR (JZB), 2022 U.S. Dist. LEXIS 38871, at *23 (D. Ariz. Jan. 28, 2022) (same).

IFS didn't have to seek any input from the PDC to bring this suit. *Pakdel v. City & Cty. of S.F.,* 141 S. Ct. 226, 2230-31 (2021). The issue of whether the FCPA is unconstitutional as-applied to the *subset of situations* involving the provision of pro bono legal services to persons similarly situated to Eyman was properly before the district court.

III. APPLICATION OF THE FCPA TO PRO BONO LEGAL SERVICES PROVIDED IN A DEFENSE POSTURE IS UNCONSTITUTIONAL

A. IFS need not show that the FCPA definitions are unconstitutional in every application

The state improperly seeks to raise the bar for IFS by mischaracterizing its challenge as facial. Dkt. #15 at 37. It asserts that IFS must prove that the FCPA's definitions of "contribution" and "expenditure" are unconstitutional in "every conceivable application."

But that is a misreading of IFS's complaint. IFS is not seeking to invalidate *all* of Washington's campaign finance apparatus. In fact, IFS's claims have nothing to do with political campaigns. IFS seeks only

to invalidate the FCPA's application to defensive pro bono litigation, not its application to campaigning.

The state also oversimplifies the differences between facial and as-applied relief. Classifying a challenge as facial or as-applied affects the breadth of the remedy, "but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127-28 (2019); *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (quoting Fallon, 113 Harv. L. Rev. at 1327-28: "[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"); *see also* Fallon, 113 Harv. L. Rev. at 1324 ("[T]here is no single distinctive category of facial, as opposed to as-applied litigation").

The state's approach invites "pleading games." *Bucklew,* 139 S. Ct. at 1128. To hold "that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels." *Id.* The state is doing just that because it knows that it cannot legally justify applying the FCPA to pro bono defense work.

Likewise, seeking relief on behalf of oneself, and others in similar situations, does not automatically convert a pre-enforcement challenge into a facial challenge. As discussed *infra,* this Circuit has long recognized that as-applied challenges may seek to invalidate "a subset of the statute's applications." *Hoye,* 653 F.3d at 857. Facial and as-applied challenges differ in the extent to which the invalidity of a

statute need be demonstrated, but the substantive legal test remains "invariant." *Legal Aid Servs.,* 608 F.3d at 1096; *Hoye,* 653 F.3d at 857; *Isaacson v. Horne*, 716 F.3d 1213, 1230 (9th Cir. 2013), *overruled on other grounds, Dobbs v. Jackson Women's Health Org.,* No. 19-1392, 2022 U.S. LEXIS 3057, at *96 (June 24, 2022) (central question is whether statute deprives women of constitutional right).

As this Court explained in *Isaacson*: that a statute may violate a constitutional right in all cases, or in only some cases, "may affect the breadth of the relief to which plaintiffs are entitled, but not our jurisdiction to entertain the suit or the constitutional standard we apply." *Id.*

The government's cramped approach would make it more difficult to challenge the constitutionality of state laws, relegating plaintiffs to either challenging only idiosyncratic applications of the law, or broadly seeking to invalidate a whole statute, with no room in between. Constitutional rights need not be enforced in such a binary manner. Courts have long applied a spectrum of relief, adjusting it to fit the practical needs of a case.

Finally, it bears noting that when the government burdens speech rights, it is the government's burden to show that its law is constitutional, not the other way around. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000); *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1197 (9th Cir. 2016). Labeling IFS's claim

as facial is a sleight-of-hand designed to shift this burden away from the state and onto IFS.

B. Narrow-tailoring is a required component of exacting scrutiny

The state defends the general constitutionality of the FCPA's disclosure regime under exacting scrutiny based on voters' informational interest. But this is not a campaign-finance case. Eyman is defending himself in court against the government, not campaigning. This is obviously not a situation where Washington's voters will gain valuable information to be used at the ballot box.

Even if exacting scrutiny applies, the Supreme Court recently clarified that such scrutiny requires not just a substantial relation between the disclosure requirement and a sufficiently important government interest, but also narrow tailoring. *Ams. for Prosperity Found. v. Bonta,* 141 S. Ct. 2373, 2384-85 (2021) (*"AFPF"*). That case represents an important course correction, because earlier exacting scrutiny cases often omitted the narrow tailoring component. *Compare id., with Nat'l Ass'n for Gun Rights, Inc. v. Mangan,* 933 F.3d 1102, 1112 (9th Cir. 2019). It is concerning that the state does not cite *AFPF* once in its Answering Brief, even though it is binding and recent precedent on exacting scrutiny.

The FCPA definitions and WAC fail exacting scrutiny because Washington state does not have an important government interest in

forcing disclosure about pro bono legal services provided to entities defending against the state. Indeed, the state appears to concede that point because it never attempts to justify disclosure in such circumstances anywhere in its brief. *See also* Dkt. #15 at 25 ("Mr. Eyman is neither a candidate nor a ballot proposition"). Instead, it tries to change the subject to campaign-finance in general.[3]

The FCPA should fail an exacting scrutiny inquiry at the outset, but even if one presumes some sufficient governmental interest, the FCPA's application here is not narrowly tailored because plausible, less-burdensome alternatives exist. For example, the PDC could have imposed a limiting construction or the PDC could have opined that any representation of Eyman on appeal would be a representation of him as a person only, and not a political committee. It did neither.

C. The campaign-finance disclosure exception to content-based regulations does not apply when there is no campaign

This is a disclosure case in search of a campaign. And for that reason, this court should apply the strict scrutiny that is required for content-based regulations. The baseline presumption is that strict

[3] The state's reliance on *Evergreen Freedom Found.*, 192 Wn.2d at 786-87, is also misplaced. That case involved non-profit lawyers bringing free lawsuits seeking a judicial directive that cities put measures on the local ballot. Thus, even though the state aggressively applied the FCPA, it had some limited nexus to voter interests. But voters will have no say on Eyman's appeal.

scrutiny applies, unless the government can articulate an exception. *See Wash. Post v. McManus,* 355 F. Supp. 3d 272, 288 (D. Md. 2019), *affirmed,* 944 F.3d 506 (4th Cir. 2019) (explaining baseline and exceptions in the context of state social media regulations for political advertising). Here Washington's government—like the state of Maryland in *McManus*—is asserting that the campaign-finance exception applies, lowering the burden from strict to exacting scrutiny. *Id.;* Dkt. #15 at 38. But there can be no campaign-finance exception where there is no campaign.

Indeed, the state's position is self-contradictory: it cannot simultaneously concede that Eyman is not campaigning while also arguing for application of the campaign-finance exception and relying on voter-informational-interest rationales. These positions are mutually exclusive.

Moreover, even if we were to assume some sort of a state interest in regulating political speech outside of a campaign context, the exception makes sense only for disclosure exacted from "direct participants in the political process." *McManus,* 944 F.2d at 516. Thus, in *McManus,* the Fourth Circuit found the state's interest in regulating elections too attenuated when it attempted to impose disclosure and disclaimer requirements on third-party social media platforms that hosted political speech. *Id*. The court was particularly concerned that the additional burdens would discourage the platforms from hosting such speech

altogether. *Id.* at 516. "Faced with this headache, there is good reason to suspect many platforms would simply conclude: Why bother?" *Id.*

So too with respect to pro bono legal services offered to defendants like Eyman. Lawyers may not bother taking on a potentially unpopular unpaid representation that comes with additional disclosure burdens (to their litigation opponent no less) and risk that their employer might have to disclose its top donors, jeopardizing future fundraising.

Moreover, this case is really about the exercise of a time-honored right: to associate and speak for the purposes of pro bono litigation against the government. *NAACP v. Button*, 371 U.S. 415, 431 (1963). The Supreme Court recognized this right almost sixty years and yet the state neither mentions *Button,* nor its progeny, anywhere in its Answering Brief.

Furthermore, although *Button* predated the Supreme Court's more recent scrutiny framework, it utilized some of the language of strict scrutiny: "only a *compelling state interest* in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *Id.* at 438; *see also Reed v. Town of Gilbert,* 576 U.S. 155, 167-68 (2015) (citing *Button* when applying strict scrutiny to a content-based sign regulation). The state seems to concede that it lacks any compelling interest in this context because it doesn't argue otherwise.

Nor does the invocation of *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022) rescue the state here. That case involved an on-/off-premises sign distinction, one that had by history and tradition been long-recognized in many jurisdictions. *Id.* at 1469. It is factually distinguishable and history and tradition do not favor the government's position. Further, *Austin* recognized that regulations that discriminate based on "the topic discussed or the idea or message expressed" are still to be analyzed as content-based. *Id.* at 1474 (quoting *Reed,* 576 U.S. at 171).

Under that test, the FCPA definitions and their implementing regulation are content-based as-applied in this context, because pro bono legal advocacy on behalf of political committees is treated differently than advocacy on behalf of candidates, political parties, or caucus political committees. *See* WAC 390-17-405(2).

The state seeks to evade this obvious conclusion by re-labeling it as "recipient-based discrimination," but it is concerning to maintain that some Americans have second-class rights to legal representation when they are sued, and driven into bankruptcy, by state officials. The state's path leads to some unsavory places.

Moreover, this Court has its own well-established history of identifying and striking down content-based regulations, including ones that single out disfavored speakers. *See, e.g., Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer,* 961 F.3d 1062, 1072 (9th Cir. 2020) (laws

favoring some speakers over others are subject to strict scrutiny); *Hoye,* 653 F.3d at 851-52 ("The City's policy of distinguishing between speech that facilitates access to clinics and speech that discourages access is not content-neutral."); *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) ("[Rule] specifically restricts street performers from communicating a particular set of messages -- requests for donations, such as 'I'd like you to give me some money if you enjoyed my performance.'").

Washington's campaign-finance apparatus simply has no business regulating the provision of pro bono legal services to any person defending against the state in court. Nor should this Court allow Washington state to grant special rights to defendants who are candidates or political parties, while granting lesser rights to state-designated one-man political committees.

IV. DEFENDANTS JARRETT, DOWNING, AND LEHMAN ARE NOT ENTITLED TO IMMUNITY

A. Quasi-judicial immunity does not apply when officials act in an enforcement capacity

Commissioners Jarrett, Lehman, and Downing claim quasi-judicial immunity for the personal capacity claims against them. Dkt. #15 at 47. Such immunity would insulate them from nominal damages only and would not cover the official-capacity claims. *Pulliam v. Allen,* 466 U.S. 522, 541-42 (1984); *see also VanHorn v. Oelschlager,* 502 F.3d 775, 778-

79 (8th Cir. 2007). But such immunity does not fit where the PDC is providing compliance guidance in a combined function as the maker and enforcer of regulations.

This Court has held that immunity analysis "begins with a central tenet of American jurisprudence – no one is above the law[.]" *Buckles v. King County*, 191 F.3d 1127, 1133 (9th Cir. 1999). Accordingly, Downing, Lehman, and Jarrett bear the burden of showing that quasi-judicial immunity applies here. *Id.* The question is whether, in acting as agency officials in this matter, they performed functions sufficiently analogous to those performed by judges. *Id.* The "touchstone" for the doctrine's applicability has been "performance of the function of resolving disputes *between parties,* or of authoritatively adjudicating private rights." *Id.* (citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993)) (emphasis added). To be sure, there are other factors, as noted in *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985),[4] but the absence of an adversarial process is significant and, IFS submits, determinative in this instance.

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

The government admits that the PDC's petition process was non-adversarial. Dkt. #15 at 49. Indeed, that process stands in contrast to the PDC's adjudicatory proceedings involving allegations of FCPA violations, which are subject to specific requirements under the state's Administrative Procedure Act, including the separation of functions and limits on *ex parte* communications between staff and the commission. RCW 34.05.455, 34.05.458; WAC 390-37-100 (Enforcement procedures—Conduct of hearings (adjudicative proceedings)).

The case for quasi-judicial immunity would be stronger in an adversarial adjudicatory proceeding, but those important procedural safeguards were absent from the PDC's petition process. For example, a document obtained through public disclosure request shows that Executive Director Lavallee communicated with at least two commissioners about the state court's orders in the Eyman lawsuit before hearing IFS's petition. ER-22.

Furthermore, in considering IFS's petition, defendants Jarrett, Lehman, and Downing were providing enforcement-related guidance. This made their role more like the commissioners of the Oregon Land Conservation and Development Commission (LCDC) in *Zamsky v. Hansell*, 933 F.2d 677, 678 (9th Cir. 1991). The LCDC had two primary functions: (1) adopting goals which become mandatory state-wide planning standards with which all local land-use plans must comply; and (2) review local land-use plans for conformity with the commission's

goals. *Id.* The plaintiff sued the commission for singling out his property and demanding that the local legislature amend its plan, impairing his property value. *Id.* at 679.

In declining to find quasi-judicial immunity, this Court reasoned that (1) the commission's proceedings are often non-adversarial; (2) that the commissioners don't just approve plans, but advise on bringing plans into compliance; and (3) are not insulated from the agency that promulgates the rules to be applied. *Id.* "Instead, they are the same individuals who promulgate the 'goals' in the first place; they combine the functions of lawmaker and monitor of compliance[,]" functions that are inconsistent with the judicial role and immunity. *Id.*

The same lack of insulation and combining of functions is present here. First, nothing barred *ex parte* contact between commission staff and the commissioners during IFS's petition process. Second, the PDC commissioners are themselves responsible for developing and enforcing the regulations implementing the FCPA. RCW 42.17A.105(8) ("The commission shall…[e]nforce this chapter according to the powers granted it by law…"); RCW 42.17A.110 ("In addition to the duties in RCW 42.17A.105, the commission may…[a]dopt, amend, and rescind suitable administrative rules to carry out the policies and purposes of this chapter…"); PDC, *How to Participate in the Rule Making Process*, https://www.pdc.wa.gov/engage/rule-making (last visited June 24, 2022).

Moreover, the declaratory order process is explicitly related to agency enforcement functions. RCW 34.05.240 provides that any "person may petition an agency for a declaratory order with respect to the *applicability* to specified circumstances of a rule, order, or statute *enforceable* by the agency" (emphasis added). Commissioner Downing similarly stated that a declaratory order "is appropriate when there is uncertainty under the law and the person is trying to decide how to comport themselves in order to remain in compliance. Helpful guidance is provided in that way." ER-76–77 (verbal fillers omitted). These statements are describing a compliance-advising function like *Zamsky*.

Thus, the declaratory order process is an executive-enforcement function rather than an adversarial adjudicative process where commissioners weigh argument and evidence presented in an trial-like format. Official acts committed in executive capacities may sometimes be subject to qualified immunity, but not absolute quasi-judicial immunity. *See Mesquite Grove Chapel v. Pima Cty. Bd. of Adjustment, Dist. 4,* No. 4:10-cv-00769-JR, 2013 U.S. Dist. LEXIS 190329, at *14-18 (D. Ariz. June 19, 2013) (distinguishing between executive and judicial capacity and listing Ninth Circuit cases where quasi-judicial immunity was absent); *Guru Nanak Sikh Soc'y v. Cty. of Sutter*, 326 F. Supp. 2d 1128, 1136 (E.D. Cal. 2003) (following *Zamsky* due to Board of Supervisors' combined functions as maker and enforcer of laws).

The commissioners also claim that they should not have to do their jobs under the threat of a federal civil rights claim. Dkt. #15 at 48. But many executive officials face that prospect, and adjudicating such claims is one of the central purposes of federal courts.[5]

While the PDC has been in existence since 1972, IFS's petition is designated as only the 18th in nearly 50 years. ER-79; PDC, *About the PDC,* https://www.pdc.wa.gov/about-pdc-0 (last visited June 24, 2022). The commissioners are unlikely to be paralyzed with fear if this Court enjoins their violation of civil rights and imposes nominal damages. Petitions are infrequent. And state officials should be mindful of federal constitutional rights when they enforce state laws.

Finally, it is notable that Commissioner Isserlis voted against the staff-proposed declaratory order, yet her no vote was not recorded in the order and no dissenting opinion or other explanation was provided. *Compare* PDC Minutes for May 27, 2021 Regular Meeting, https://bit.ly/3OzeWSu, at 5 (last visited June 26, 2022) ("The motion passed 3 - 1. Commissioner Isserlis voted No"), *with* ER-87. The omission of a dissenting opinion illustrates how different the PDC's process was from most multi-judge panels in contemporary American

[5] *See* 28 U.S.C. § 1331 and § 1343.

courts.[6] That's because the commissioners were acting as executive-agency law enforcers, not judges.

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

B. Qualified immunity does not apply because the right to associate for the purpose of pro bono litigation against the government has been clearly established for almost six decades

Even if quasi-judicial immunity is unavailable, the defendant commissioners assert that they should enjoy qualified immunity, which may be accorded to executive branch officials. Dkt. #15 at 50. Analyzing qualified immunity involves a two-step process: (1) whether the plaintiff has alleged or shown a violation of a constitutional right; and (2) whether that right was clearly established at the time of the official's misconduct. *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir.

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

2019) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). This Court may analyze either prong first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Almost six decades of precedent, stretching back to the twilight of the Jim Crow era, establish that state officials may not interfere with the right of non-profit legal service providers to associate with parties for the purposes of public interest litigation against the government. *See, e.g., Button,* 371 U.S. at 438–39; *In re Primus,* 436 U.S. 412, 427-28 (1978). Just a few years ago, the district court in Seattle again recognized those rights in *Nw. Immigrant Rts. Project v. Sessions*, No. C17-716 RAJ, 2017 U.S. Dist. LEXIS 118058, at *8-9 (W.D. Wash. July 27, 2017) (citing *Button,* 371 U.S. at 437). By 2021, this right was as clearly established as any, but as is often the case, constitutional rights are not self-executing. Each new generation needs to re-assert them against state actors who overstep their limits.

Moreover, even if Eyman's dual status was unusual, owing to the government's own tactics, officials can still be on notice that their conduct violates established law in novel circumstances. *Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009). The mere application of settled law to a new factual permutation does not give officials a free pass. *Id.* Nor should the ferocity of the state's prosecution tactics against Eyman be used as an excuse to overlook IFS's rights to provide him with a pro bono defense on appeal.

Tim Eyman is now saddled with debt and shackled by an injunction that was written by the AGO and signed by a state court judge. IFS has simply requested to exercise a time-honored right to represent a person, free of charge, against the government, without being subject to additional burdens of regulation or disclosure or of fending off an FCPA complaint. This case fits squarely within the precedent of *Button* and its progeny.

CONCLUSION

This Court should reverse the district court on standing and direct it to grant IFS's cross-motion for summary judgment on the substantive merits.

Dated: June 29, 2022

Respectfully submitted,

s/Endel Kolde

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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