UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

WISCONSIN FAMILY ACTION,

Plaintiff,

Civil Action No. 1:21-cv-01373______

vs.

FEDERAL ELECTIONS COMMISSION,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION BY WISCONSIN FAMILY ACTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Wisconsin Family Action ("WFA") wishes to engage in political speech supporting candidates for federal office whom it believes most closely align with its mission of advancing Judeo-Christian principles and values in Wisconsin. WFA is a small, nonpartisan, nonprofit organization with limited resources, and any such activity will necessarily be on a modest scale. However, because Congress and the Federal Election Commission (the "FEC") have failed to clarify the meaning of a campaign finance provision, 52 U.S.C. § 30104(c), WFA faces expansive disclosure requirements that are chilling the exercise of constitutionally-protected rights by its donors and which thus pose an existential threat to the organization. But for the real potential for enforcement of the statute against it by the FEC (or through third-parties) and for hateful attacks on WFA and its donors, WFA would now be preparing to make independent expenditures in the upcoming federal election cycle. With the cycle fast approaching, preliminary injunctive relief is needed promptly so that WFA and its donors can freely exercise their First Amendment rights.

As recently interpreted by the FEC, Section 30104(c) would force WFA to publicly disclose all donors giving as little as $200 in one year if the organization makes even a single political expenditure, independent of any candidate, campaign or political party, of as little as $250 in the same year. This would require the disclosure of donors who give to WFA for reasons that have nothing to do with any candidate or, for that matter, campaigns generally. The FEC's interpretation does not survive heightened judicial scrutiny under the First Amendment because it

reaches far beyond what is needed to further any significant governmental interest and, in addition, would expose WFA's donors to intimidation tactics and personal attack by those who may disagree with WFA's mission. Thus, WFA seeks a declaration that Section 30104(c) does not require reporting contributions beyond those earmarked for specific independent expenditures, as well as injunctive relief against enforcement by the FEC inconsistent with that declaration.

This past July's landmark decision, *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) ("*AFPF*"), confirms that WFA is entitled to injunctive relief. Rejecting California's attempt to force nonprofits to turn over their donors' names, *AFPF* reaffirmed resoundingly that privacy is foundational to the right of association, and that unjustified compelled disclosure – such as would occur through the FEC's overbroad interpretation of Section 30104(c) -- violates that right. *See AFPF*, 141 S. Ct. at 2382 ("it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action") (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). This Court should similarly reject the FEC's efforts to compel disclosure by WFA of its donors' identities.

FACTUAL BACKGROUND

Wisconsin Family Action

WFA is a nonprofit, nonstock corporation organized under Wis. Stat. Ch. 181 and exempt from federal income taxation under I.R.C. § 501(c)(4). *Declaration of*

Julaine Appling ("*Appling Decl.*"), ¶ 2. Its mission is to advance Judeo-Christian principles and values in Wisconsin by strengthening, preserving, and promoting marriage, family, life, and religious liberty. *Id.* ¶ 4.

Founded in 2006, WFA is a relatively small organization, with only six employees. Since its inception, WFA's annual budget exceeded $1 million once. *Id.* ¶¶ 2, 4, 8. WFA is not a political action committee ("PAC") or an "independent expenditure committee" (that is, a "super PAC") registered with the FEC. *Id.* ¶ 2.

Consistent with its mission, WFA focuses on state level policies, and its activities include lobbying and voter education. *Appling Decl.* ¶¶ 4-6, 10. It has never before made independent expenditures in a federal election, and any spending by it in such elections would be modest. *Id.* ¶¶ 6, 7, 11. WFA has always spent contributions it received itself, and has never simply passed them on to a super PAC or other organization; WFA has no intention of changing this practice in the future. *Id.* ¶ 10. Similarly, WFA has never conducted its activities in coordination with any candidate, campaign, or political party, and also has no intention of ever changing this practice. *Id.* ¶ 12.

FECA and Its Relevant Provisions and Regulations

The Federal Election Campaign Act ("FECA"), 52 U.S.C. §§ 30101-30146, regulates, *inter alia*, federal campaign activities of entities other than political action committees, including entities like WFA that are organized under Section 501(c) of the Internal Revenue Code and have major purposes other than political advocacy. The courts and the FEC have referred to such entities as "nonpolitical" or

"not-political committees," *see, e.g., Declaration of Donald A. Daugherty, Jr.* ("*Daugherty Decl.*"), ¶ 3 & Exh. B, at 4; *Citizens for Responsibility and Ethics in Washington v. FEC,* 316 F. Supp. 3d 349, 379-81 (D.D.C. 2018) ("*CREW I*"), and their obligations under FECA include disclosure of information about certain contributions made to them, *see* 52 U.S.C. § 30104(c).

Specifically, under Section 30104, "[e]very person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement" that identifies "each . . . person . . . who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), . . . together with the date and amount of any such contribution."[1] 52 U.S.C. § 30104(b)(3)(A) and (c)(1). In addition, "[s]tatements required to be filed by this subsection . . . shall include . . . the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C).

FECA defines "contribution" to mean "anything of value made by any person for

[1] FECA defines "independent expenditures" as expenditures "expressly advocating the election or defeat of a clearly identified candidate" that are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.'" 52 U.S.C. § 30101(17).

the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a) (adopting statutory definition). The Supreme Court has construed the phrase "for the purpose of influencing" an election to mean, in the independent expenditure context, money spent to expressly advocate specific electoral outcomes. *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (per curiam). To avoid infringing on speech that was not "advocacy of a political result," the Court allowed broad disclosure obligations only for candidates and political committees, whose expenditures "are, by definition, campaign related." *Id.* at 79. For nonpolitical committees and all others, the Court stated that 2 U.S.C. § 434(e)[2], the predecessor to Section 30104(c), "imposes independent reporting requirements . . . only . . . when they make contributions earmarked for political purposes." 424 U.S. at 80.

In light of *Buckley*, the FEC promulgated in 1980 a regulation that required independent expenditure reporting only of contributions from donors of $200 or more (in a calendar year) when "made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(vi) (the "Regulation"). The

[2] Section 434(e) provided, "Reports by other than political committees. Every person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year shall file with the Commission a statement containing the information required by this section. Statements required by this subsection shall be filed on the dates on which reports by political committees are filed but need not be cumulative." 2 U.S.C. § 434(e) (2007).

Regulation acted as a "safe harbor" for nonpolitical committees and their donors, giving assurance that disclosure was only required for contributions earmarked for a particular independent expenditure.

The CREW Decisions and the FEC's Subsequent Failure to Give Guidance

In 2018, the District of Columbia District Court vacated the Regulation, stating that it impermissibly narrowed Section 30104(c) by 1) requiring under Subsection (c)(2)(C) that speakers disclose only those donors who earmarked their contributions for a particular communication, rather than all donors who earmarked their contributions to support or oppose a particular candidate, regardless of the specific communication; and 2) failing to treat Subsection (c)(1) as a reporting requirement separate from the particular requirements at Subsection (c)(2)(C). *See CREW I*, 316 F. Supp. 3d at 388-89, 422-23.

The district court stayed vacatur of the Regulation for 45 days to allow the FEC to issue interim regulations that "comport with the statutory disclosure requirement of 52 U.S.C. § 30104(c), consistent with this Memorandum Opinion." *Id.* at 423. However, the FEC did not issue interim regulations in that 45-day period, nor has it done so since.

On or about August 27, 2018, the Institute for Free Speech (which is also counsel for WFA in this action) petitioned the FEC to conduct a rulemaking to amend the regulatory definition of "Contribution" at Section 100.52 in light of *CREW I* (the "August 2018 Petition"). *See Daugherty Decl.*, ¶ 3 & Exh. A. The August 2018

Petition indicated that the district court's decision had "adopted a broad reading of the contributions that must be reported pursuant to 52 U.S.C. 30101(c)," and that the requested rulemaking was needed "to clarify which donations are 'contributions' as a general matter." *Id.* at 1. Thus, the August 2018 Petition stated that "in revising its definition of 'Contribution,' the [FEC] should determine that only donations **affirmatively** given for purposes of express advocacy are contributions for purposes of non-political committee reporting." *Id.* at 4-5 (emphasis original). To date, the FEC has not acted on the August 2018 Petition.

On October 4, 2018, the FEC issued a press release entitled "Federal Election Commission, Guidance following U.S. District Court decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018)" (the "October 2018 Guidance Document"). *See Daugherty Decl.*, ¶ 3 & Exh. B. The October 2018 Guidance Document stated that Section 30104(c)(1) "require[d] disclosure of donors of over $200 annually making contributions 'earmarked for political purposes,'" while Section 30104(c)(2) more narrowly required disclosure of "donors of over $200 who contribute 'for the purpose of furthering **an** independent expenditure.'" *Id.* at 4 (emphasis original).

The D.C. Circuit subsequently affirmed *CREW I*. It agreed that the Regulation conflicted with "the plain terms of the statute's broader disclosure requirements," and held that "FECA (c)(1) unambiguously requires an entity making over $250 in [independent expenditures] to disclose the name of any contributor whose contributions during the relevant reporting period total $200." *Citizens for Responsibility & Ethics in Washington v. FEC*, 971 F.3d 340, 343, 354 (D.C. Cir.

2020) ("*CREW II*"). Further, the court held that the contributions that must be disclosed under Section 30104(c)(2)(C) were a subset of those covered by Subsection (c)(1); that is, Subsection (c)(2)(C) required disclosure of whether a contribution "was intended to support" independent expenditures, while Subsection (c)(1) more broadly covered contributions used by the recipient for any of its election-related communications and activities, regardless of the intention of the contributor. *Id.* at 356.

In an August 21, 2020 press release, Citizens for Responsibility & Ethics in Washington ("CREW"), the organization which had brought the *CREW* cases, described the appellate decision as expansively requiring that "groups that make a key type of political ad known as independent expenditures must report every contributor who gave at least $200 in the past year, as well as those who give to finance independent expenditures generally." *Daugherty Decl.*, ¶ 3 & Exh. C, at 1. The press release concluded, "It will be much harder for donors to anonymously contribute to groups that advertise in elections." *Id.*

The FEC's current instruction on how to make quarterly reports (the "Reporting Instruction") states that nonpolitical committees must disclose "[e]ach contributor who makes a contribution during the reporting period aggregating in excess of $200 during the calendar year . . ., including their identification information, contribution date and amount."[3] *Daugherty Decl.*, ¶ 3 & Exh. D, at 3. In addition, the instruction

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[3] In addition to quarterly reports, nonpolitical committees must also file

requires that the report state whether "the contribution was given for the purpose of furthering independent expenditures," *id.*, which begs the question why contributions **not** given for such purpose must be disclosed. The FEC publishes quarterly reports, as well as 24- and 48-hour reports, on its website. *See* 52 U.S.C. § 30104(c)(3); 11 C.F.R. § 109.10(e); https://www.fec.gov/data/browse-data/; https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/reporting-independent-expenditures-form-5/.

Harassment, Threats, and Other Efforts
To Intimidate WFA and Its Supporters

As has become all too common, some opponents of WFA's mission have never been content with civil, public debate over the issues advocated by WFA. Instead, since its inception in 2006, WFA and individuals associated with it have been regularly subjected to ugly incidents of threatened physical violence, harassment, and destruction of property. *Appling Decl.* ¶¶ 13-14. For example, the lives and personal safety of WFA employees have been threatened, their cars vandalized, and menacing messages directed at them in phone calls and on social media. *Id.*

These intimidation tactics directly affect WFA's fundraising, which is presumably a goal of opponents who engage in them. *Id.* ¶¶ 15-17. For example, donors have told WFA that if their names are ever disclosed, they cannot continue to contribute because their families and businesses will be targeted by WFA's

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independent expenditure reports within 24 to 48 hours of a regulated communication. *See* 52 U.S.C. § 30104(g).

opponents. *Id.* ¶ 15. Similarly, potential donors have stated that they want to contribute to WFA, but have to decline because they fear their identities might be made public and then retribution taken against their businesses and them. *Id.* ¶ 16.

SUMMARY OF ARGUMENT

A request to enjoin preliminarily the violation of First Amendment rights turns largely on the movant's showing of a likelihood of success on the merits. *Wisconsin Right to Life PAC v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) ("*Barland II*"). WFA satisfies the low threshold for such a showing because the broad disclosure of donors that would be required under Section 30104(c), at least as interpreted by the FEC post-*CREW*, does not survive heightened constitutional scrutiny.

Most notably, the reach of Section 30104(c), as articulated in *CREW II* and subsequently by the FEC, goes beyond any legitimate governmental interest. This interpretation will, for example, put into a public database the names of small money donors who may not support one or more of the candidates supported by independent expenditures made by WFA. In addition, the interpretation revives a fatal constitutional ambiguity in the statute that *Buckley* and the Regulation had cured.[4]

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[4] The *CREW II* court disclaimed any constitutional dimension to its analysis of Section 30104(c), apparently believing that only issues of administrative law and statutory interpretation were before it. *CREW II*, 971 F.3d at 354 ("we have no occasion to decide any constitutional requirement concerning (c)(1)"). As shown from the cases cited herein, this is a dubious proposition, as First Amendment considerations can never be divorced from governmental restrictions on political speech or association.

If nothing else, the *CREW* decisions and the FEC's failure to promulgate a replacement for the Regulation together have left things hopelessly muddled. The *CREW II* court stated that it did not need "to delineate the precise scope of [Section 30104(c)'s] requirement to disclose all donations 'made . . . for the purpose of influencing any election for Federal office.'" *CREW II*, 971 F.3d at 354 (quoting FECA's definition of "contribution" in 52 U.S.C. § 30101(8)(A)). However, with *CREW II* having struck down the Regulation, there remains the critical issue of precisely which donors to a nonpolitical organization making independent expenditures must now be reported under Section 30104(c). For small, nonpolitical organizations like WFA, such delineation is in fact essential, and the need for it is urgent.

The real risk that disclosure poses to WFA's donors further supports the likelihood of success on its claim. The *CREW* courts lacked the benefit of *AFPF*, which reaffirmed that "'implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others.'" *AFPF*, 141 S. Ct. at 2382 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Further, *AFPF* recognized that compelled disclosure violates the right of association where it gives rise to the probability that individual contributors will experience harassment, threats, or other harm if their identities are disclosed. *See AFPF*, 141 S. Ct. at 2388. In support of its motion, WFA submits evidence demonstrating that risk is real here. *See Appling Decl.*, ¶¶ 13-17.

Consistent with *AFPF*, this Circuit has recognized specifically that the

government's invasion of donor privacy can result in suppression of political speech. *See, e.g., Barland II*, 751 F.3d at 840 (facing compelled disclosure of their donors, "some groups might conclude that their 'contemplated political activity [is] simply not worth it' and opt not to speak at all") (quoting *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 255 (1986)); *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (disclosure statutes "have their real bite when flushing small groups, political clubs, or solitary speakers into the limelight, or reducing them to silence") (Easterbrook, J., dubitante).

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARDS IN FIRST AMENDMENT CASES.

A party seeking a preliminary injunction must demonstrate "that (1) without preliminary relief, it will suffer irreparable harm before final resolution of its claims; (2) legal remedies are inadequate; and (3) its claim has some likelihood of success on the merits." *Proft v. Raoul*, 944 F.3d 686, 693 (7th Cir. 2019) (citing *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018) (citation omitted)). If the movant satisfies these factors, the court proceeds to "'a balancing phase,' where it 'must then consider [4] the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and [5] the public interest, meaning the consequences of granting or denying the injunction to non-parties.'" *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021) (citations omitted).

In First Amendment cases, the likelihood of success on the merits is usually decisive in determining whether to award a preliminary injunction. *Higher Society of Indiana v. Tippecanoe Cnty.*, 858 F.3d 1113, 1116 (7th Cir. 2017); *Barland II*, 751 F.3d at 830. "[T]he loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury,'" and "'injunctions protecting First Amendment freedoms are always in the public interest.'" *Barland II*, 751 F.3d at 830 (quoting *ACLU v. Alvarez*, 679 F.3d 583, 589, 590 (7th Cir. 2012) (internal quotation marks omitted)). Thus, the preliminary injunction analysis usually "begins and ends with the likelihood of success on the merits of the [First Amendment] claim.'" *Higher Society*, 858 F.3d at 1116 (citations omitted).

II. WFA IS REASONABLY LIKELY TO SUCCEED ON ITS CLAIM THAT 52 U.S.C. § 30104(C), AS INTERPRETED BY THE FEC POST-CREW, FAILS EXACTING SCRUTINY UNDER THE FIRST AMENDMENT.

In determining the likelihood of success on the merits, "'the burdens at the preliminary injunction stage track the burdens at trial.'" *Barland II*, 751 F.3d at 830 (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006)). A movant must show that "'his chances to succeed on his claims are better than negligible,'" *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2017) (citation omitted), and "the threshold for establishing likelihood of success is low," *Michigan v. United States Army Corps of Eng'rs*, 667 F.3d 765, 782 (7th Cir. 2011); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-CV-943, 2016 U.S. Dist. LEXIS 129678, at *10 (E.D. Wis. Sept. 22, 2016) (same). At the same time, the government "bears the burden of justifying the regulatory scheme."

Barland II, 751 F.3d at 830 (citation omitted).

Here, the FEC must justify Section 30104(c) under the "exacting scrutiny" standard, which "'requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.'" *Doe v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010)); *see also Davis v. FEC*, 554 U.S. 724, 744 (2008) (exacting scrutiny requires "relevant correlation" between stated governmental objective and means used to achieve it) (citing *Buckley*, 424 U.S. at 64). Although less rigorous than strict scrutiny, exacting scrutiny nonetheless demands close judicial examination. *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014); *see also Barland II*, 751 F.3d at 840 (exacting scrutiny "is not a loose form of judicial review").

Exacting scrutiny requires narrow-tailoring; that is, the disclosure requirement must not infringe on First Amendment rights in a large number of situations where compelling disclosure does not serve the "important" interest asserted by the government. *AFPF,* 141 S. Ct. at 2385-86.

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."

Barland II, 751 F.3d at 840-41 (7th 2011) (quoting *McCutcheon*, 572 U.S. at 218 (citations omitted)). Moreover, "'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Davis*, 554

U.S. at 744 (citation omitted). "[I]f a law that restricts political speech does not 'avoid unnecessary abridgment' of First Amendment rights, . . . it cannot survive [this] 'rigorous' review." *McCutcheon*, 572 U.S. at 199 (quoting *Buckley*, 424 U.S. at 25).

A. No Sufficiently Important Government Interest Supports Enforcement of Section 30104(c), as Interpreted by the FEC Post-*CREW*, Against WFA.

For restrictions on campaign finance activity, preventing quid pro quo corruption (or its appearance) is the linchpin governmental interest. *See McCutcheon*, 572 U.S. at 206-07. However, no threat of such corruption arises where, as with WFA, political expenditures are made independently of any candidate or campaign. *Wisconsin Right to Life PAC v. Barland*, 664 F.3d 139, 153 (7th 2011) ("*Barland I*") (citing *Citizens United,* 558 U.S. at 360); *see also SpeechNow.org v. FEC*, 599 F.3d 686, 692-94 (D.C. Cir. 2010) (contributions to independent groups cannot lead to corruption or its appearance). Thus, Section 30104(c) cannot promote that interest.

Disclosure requirements like Section 30104(c) may serve the additional governmental interest of providing the public with information about the sponsorship and sources of funding for campaign-related ads. *Citizens United*, 558 U.S. at 369 ("[T]he public has an interest in knowing who is speaking about a candidate shortly before an election."). With regard to independent groups like WFA, however, the information disclosed must be "unambiguously campaign related," *Buckley*, 424 U.S. at 81; the FEC's understanding of Section 30104(c) would encompass contributions that are **unambiguously *un*related** to any

campaign. Thus, as shown below, a substantial mismatch exists between any informational interest and the means the FEC has selected to achieve it. *Barland II*, 751 F.3d at 841 (citing *McCutcheon*, 572 U.S. at 199).

B. Because Section 30104(c), as Interpreted by the FEC Post-*CREW*, Is Not Narrowly Tailored, a Substantial Mismatch Exists Between the Disclosure Required by It and Any Informational Interest.

The FEC's post-*CREW* interpretation of Section 30104(c), as reflected in the October 2018 Guidance Document and the Reporting Instruction, is muddled and overbroad. It requires disclosure of, for example, general donations given for purposes of issue advocacy, which are not subject to disclosure under Section 30104(c), properly construed. At best, with the elimination of the Regulation's safe harbor and the failure of the FEC to promulgate a regulation to replace it, WFA and its donors lack adequate assurance as to which contributions WFA must report under Section 30104(c). At worst, Section 30104(c), as now interpreted by the FEC, is no longer narrowly tailored to any informational interest. Either way, the FEC's interpretation is chilling the constitutionally-protected rights of WFA and its donors.

After *CREW II*, Section 30104(c)(1) now requires "an entity making over $250 in [independent expenditures] to disclose the name of any contributor whose contributions during the relevant reporting total $200, along with the date and amount of each contribution." *CREW II*, 971 F.3d at 354. However, the statute can only require disclosure of certain "contributions" as that term is defined by FECA,

see 52 U.S.C. § 30101(8)(A)(i) ("contribution" means "anything of value made by any person for the purpose of influencing any election for Federal office"); *see also* 11 C.F.R. § 100.52(a) (adopting statutory definition of "contribution"); otherwise, the FEC would have no jurisdiction in the first place.

Although this interpretation is unextraordinary and, presumably, the FEC does not take issue with it[5], the interpretation leads to a thornier matter of statutory construction that *CREW II* left unfinished. Many things can "influence" an election and, as noted in *Buckley*, "the ambiguity of this phrase [i.e., 'for the purpose of influencing any election'] poses constitutional problems" in the context of independent expenditures. 424 U.S. at 76, 78-80.

To resolve the ambiguity, *Buckley* held that the disclosure statute, "as construed, imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes . . . and (2) when they make expenditures for communications that expressly advocate the election or defeat or a clearly identified candidate." 424 U.S. at 80 (construing predecessor statute to Section 30104(c)); *see also Van Hollen v. FEC*, 811 F.3d 486, 489 (D.C. Cir. 2016)).

In 1980, the FEC promulgated the Regulation, which required independent

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[5] At the same time, CREW's August 2020 press release does not acknowledge that *CREW II*'s holding can only apply to "contributions" as statutorily defined by FECA. *See Daugherty Decl.*, ¶ 3 & Exh. C.

expenditure reporting of contributions from donors of $200 or more (in a calendar year) only when "made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(vi). With no further guidance from Congress after *Buckley*, the FEC and regulated parties proceeded under the Regulation's link of "contributions" with "expenditures;" that is, "contributions" that had to be reported under Section 30104(c) were limited to those that funded particular "expenditures," i.e., express advocacy for specific electoral outcomes.

Until the *CREW* decisions nearly forty years later, the narrow understanding offered in *Buckley* and the Regulation had cured the ambiguity in the definition of "contribution," and also provided a safe harbor so that organizations like WFA knew with certainty the scope of disclosure required by Section 30104(c). With the Regulation now gone, an interpretation consistent with *Buckley*, as well as certainty as to the statute's scope, is needed.

The FEC's Reporting Instruction does not limit disclosure to contributions made "for the purpose of furthering independent expenditures," as that is merely the Subsection (c)(2) subset of contributions, according to *CREW II*, *see* 971 F.3d at 356; the Reporting Instruction reaches out further to also include "[e]ach contributor" of more than $200, regardless of their purpose for contributing, *see Daugherty Decl.*, ¶ 3 & Exh. D, at 3. Again, however, this flies in the face of *Buckley*, which cabined disclosure by independent groups to contributions that were "unambiguously campaign related." 424 U.S. at 81.

For WFA (and likely other, similar organizations), the disclosure required by the

October 2018 Guidance Document would go far beyond providing the public with information about who is supporting a candidate, given that few (if any) donors give to WFA for that reason; instead, the vast majority of WFA's donors contribute because they support its mission generally, not to help elect a specific candidate. *Appling Decl.*, ¶¶ 5, 6, 9. In fact, the broad disclosure envisioned by the FEC may result in individuals being **mis-designated** as supporting a candidate because donors may not favor every (or any) candidate supported by WFA's independent expenditures. Such "junk" disclosure serves no legitimate interest.

Similarly, the October 2018 Guidance Document goes beyond contributions "furthering an independent expenditure" to include more broadly those "'earmarked for political purposes,'" *Daugherty Decl.*, ¶ 3 & Exh. B, at 4, which might include identifying donors who did not intend for their contributions to pay for independent expenditures and/or merely gave to support WFA's mission generally. At the least, "earmarked for political purposes" is as poorly tailored as "for the purpose of influencing an election."[6]

Although the phrase "earmarked for political purposes" comes from *Buckley*, *see* 424 U.S. at 80, it is vague, overbroad, and offers little clarity for those against whom the FEC will enforce Section 30104(c). Fortunately, guidance comes from *FEC v. Survival Education Fund*, which gave "content to the phrase 'earmarked for

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[6] The August 2018 Petition raised this same issue, *see Daugherty Decl.*, ¶ 3 & Exh. A at 4-5, but the FEC still has not acted on it.

political purposes" because it was "not explained in *Buckley*." 65 F.3d 285, 294 (2d Cir. 1995).

Survival involved a claim by the FEC that issue advocacy groups had violated a FECA provision that required disclosing who financed a public mailing soliciting funds and advocating election or defeat of a candidate. *Id*. at 293-98. *Buckley's* lack of explanation posed a problem because "these groups in some sense use all contributions 'for political purposes,'" and thus, they were "at a loss to know when a solicitation triggers FECA disclosure requirements and subjects them to potential civil penalties." *Id*. at 294. To avoid the "hazards of uncertainty" inherent in the phrase "political purposes," the *Survival* court adopted another "limiting principle" derived from *Buckley*. *Id*. at 295. Addressing the "definition of contributions . . . as applied to groups acting independently of any candidate . . . and which are not 'political committees,'" *Survival* held that disclosure could only be required for "contributions that are earmarked for activities or 'communications that expressly advocate the election or defeat of a clearly identified candidate.'" *Id*. at 295 (quoting *Buckley*, 424 U.S. at 80 (footnote omitted)).

By similarly limiting the additional disclosure required by WFA under Subsection (c)(1) with this express advocacy principle from *Survival* (and *Buckley*), this Court can construe Section 30104(c) in a way that will not infringe the First Amendment rights of WFA and its donors, and will provide clear guidance regarding the scope of disclosure required from WFA.

Additional evidence of the substantial mismatch between Section 30104(c)'s

scope, as construed by the FEC post-*CREW*, and the informational interest is the absence in this case of a primary driver for the *CREW* decisions.[7] Both the district and appellate courts expressed concern that certain nonprofits could act as "pass-through entities" that “contribute millions to political committees, such as super PACs, in order to further those committees’ political activities” but “that need not identify [their] own underlying donors.” *CREW II,* 971 F.3d at 344-45; *see also* *CREW I,* 316 F. Supp. 3d at 380 (“super PACs set up only to make independent expenditures, may receive unlimited contributions from donors, including not-political committees, to fund their independent expenditure activity”).

As an initial matter, this concern is misplaced because no super PAC was before the *CREW* courts, nor is one before this Court. Moreover, unlike Crossroads GPS, WFA itself spends the contributions it receives and does not simply forward money on to any super PAC or other organization. *Appling Decl.*, ¶ 10.

Although both WFA and Crossroads GPS are Section 501(c)(4) organizations, they are nothing alike otherwise. In its short existence, Crossroads GPS had made independent expenditures of well over $100 million and, in addition, contributed over $75 million to other entities that make their own independent expenditures.

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[7] The *CREW* cases grew out of efforts by CREW to learn the identities of donors to Crossroads GPS, a widely-known organization led by a former presidential advisor and nationally-recognized political consultant. *CREW II*, 971 F.3d at 342-45. After CREW failed to obtain the information through filing an administrative complaint with the FEC in 2012, it brought the action in federal district court in 2016. *CREW II*, 971 F.3d at 346; *CREW I*, 316 F. Supp. 3d at 363-64.

CREW II, 971 F.3d at 345. In 2012 alone, Crossroads GPS reported making over $17 million in independent expenditures. *CREW I*, 316 F. Supp. 3d at 359. This level of independent expenditure dwarfs WFA's entire annual budget.[8] And also unlike WFA, Crossroads GPS focuses nationally on campaigns and elections to federal office.

Although there may be some informational interest in the public knowing which candidates a political behemoth like Crossroads GPS supports, the same is not true for small, local organizations like WFA, whose major purpose is decidedly nonpolitical. While political whales like Crossroads GPS may be the FEC's target after *CREW II*, its interpretation of Section 30104(c) will end up netting schools of issued-oriented minnows like WFA.

Finally, the low thresholds for disclosure under Section 30104(c) further ensure that, as enforced by the FEC, the provision casts an overly broad net. Again, although there may be some informational interest served by identifying truly major donors to a political campaign, those who donate $200 do not qualify as "major." *See Colorado Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1153 (9th Cir. 2007) (rejecting as "not substantial" $200 threshold to qualify as "political committee" under state statute). The informational interest is especially weak when

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[8] Relatedly, WFA could not survive protracted litigation like that which began when CREW filed its administrative complaint against Crossroads GPS eight years before the *CREW II* decision.

disclosure will subject such relatively small donors to harassment, intimidation, or worse, as set forth below.

C. Regardless of Whether It Is Narrowly-Tailored, There Is a Reasonable Probability that the Disclosure Requirement Will Result in Harassment, Threats, or Violence Directed at WFA Donors.

Even if narrowly-tailored, a disclosure requirement may still be unconstitutional where there is a reasonable probability that donors will be exposed to threats, harassment, or retaliation if their identities are made public. *See AFPF*, 141 S. Ct. at 2389; *Citizens United*, 558 U.S. at 367; *Alabama ex rel. Patterson*, 357 U.S. at 461.

In *AFPF*, the Supreme Court held that the First Amendment did not allow California to compel nonprofit organizations to disclose the names of their donors to the state Attorney General as a precondition to fundraising in the state. 141 S. Ct. at 2389. The Court cited evidence submitted by the nonprofits of threats, protests, stalking and physical violence. *Id.* at 2381, 2388.

WFA presents evidence comparable to that presented in *AFPF*.[9] WFA and its supporters have experienced ugly, hateful harassment, threats to their lives, and property damage. *Appling Decl.*, ¶¶ 13-14. WFA donors have expressed fears of such treatment by WFA opponents if their identities are made public, and others have simply declined to give to WFA out of such fears. *Id.* ¶¶ 15-16. And while California

[9] There is no indication in the *CREW* decisions that any evidence was presented of actual or potential harassment or other attacks on Crossroads GPS or its donors.

assured everyone that it would keep donor information confidential (an assurance that was rejected, *see AFPF*, 141 S. Ct. at 2381), information about WFA's donors would be published on the FEC's website.

Although *McCutcheon* observed that "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information," 572 U.S. at 224, experience in the nearly eight years since shows that such technology also makes it easier to use the information to harass those with different beliefs, *see AFPF*, 141 S. Ct. at 2388 ("Such risks are heightened in the 21st century and seem to grow with each passing year . . . "). WFA welcomes robust, civil, public debate with its fellow Wisconsin residents over the issues. However, what neither WFA nor its donors should be subjected to are the personal attacks and menacing threats that expansive disclosure under Section 30104(c) will surely facilitate.

III. WFA WILL BE IRREPARABLY HARMED IF AN INJUNCTION IS NOT GRANTED.

The First Amendment violations that result from the FEC's interpretation of Section 30104(c) inherently cause irreparable harm warranting an injunction. Indeed, when a "deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d. ed.); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

IV. THE PUBLIC INTEREST AND BALANCE OF HARMS WEIGH HEAVILY IN FAVOR OF AN INJUNCTION.

A preliminary injunction will serve the public interest. *See Higher Society*, 858 F.3d at 1116. WFA seeks simply to vindicate the constitutional rights of its donors and it to engage in political speech and maintain privacy in their associations. This is surely in the public interest. *See Whole Women's Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019).

Also, a preliminary injunction will not cause any harm. With respect to the FEC, the government suffers no harm from an injunction which merely ensures that constitutional standards are maintained. *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004).

V. THE FED. R. CIV. P. 65(C) BOND REQUIREMENT SHOULD BE WAIVED BECAUSE WFA SEEKS ONLY PRE-ENFORCEMENT INJUNCTIVE RELIEF TO PROTECT ITS CONSTITUTIONAL RIGHTS AND NO MONEY DAMAGES.

"'Under appropriate circumstances bond may be excused, notwithstanding the literal language of Rule 65(c).'" *Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp.3d 931, 955 (W.D. Wis. 2018) (quoting *Wayne Chem. Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (citations omitted)). Such circumstances include, like here, "when the suit is about constitutional principles rather than commercial transactions." *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019). Further, it is not clear how the FEC would incur monetary damages due to an erroneous award of the preliminary relief requested by WFA. Thus, because the FEC will not incur any such damages and

withholding a preliminary injunction would harm the constitutional rights of WFA and its donors, as well as WFA's high probability of succeeding on the merits, this Court should exercise its discretion to waive the bond requirement.

CONCLUSION

WFA respectfully requests that this Court grant its motion for a preliminary injunction. Specifically, the Court should enjoin the FEC from forcing WFA to disclose under Section 30104(c) any contributions other than those that are earmarked for specific independent expenditures expressly advocating the election or defeat of an identified candidate for Federal office.

Dated this 2nd day of December, 2021

Respectfully submitted,

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