UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

WISCONSIN FAMILY ACTION,

Plaintiff,

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

vs.

FEDERAL ELECTION COMMISSION,

Defendant.

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

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INTRODUCTION

FEC[1] regulations have long assured organizations like WFA which disclosures were necessary to avoid liability under federal campaign finance law. But recent D.C. Circuit decisions have undone this safe harbor, introducing imprecision and vagueness into the disclosure regime. WFA and its donors thus require this Court's relief to secure their First Amendment rights.

WFA does not contest its obligations to disclose information about its own expenditures, as the FEC states on the first page of its brief. Nor does WFA challenge the FEC's assertion there that 52 U.S.C. § 30104(c)'s requirement that contributions intended to pay for independent expenditures be disclosed if so earmarked — a proposition which the FEC's current guidance, and brief in this case, leave unclear. But the FEC errs in asserting at page one that Section 30104(c) may compel WFA to disclose donors whose contributions are earmarked merely for a "political purpose." The First Amendment bars that overreaching result.

For nearly a half century, it has been black letter law that the statutory phrase "for the purpose of influencing" is unconstitutionally vague unless interpreted to reach express advocacy (or its functional equivalent) only, and nothing more. *See Buckley v. Valeo*, 424 U.S. 1, 76-81 (1976) (per curiam). Contrary to the FEC's assertion, *Buckley*'s passing reference to "political purpose" does not create an

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[1] Unless indicated otherwise, defined terms in this brief have the same meaning as in WFA's Memorandum In Support Of Motion For Preliminary Injunction.

exception to the express advocacy limitation that swallows the rule, which is not supported by any compelling governmental interest, let alone tailored to one. Considering the harm caused by the FEC's revisionism, and the public interest at stake, the Court should restore the status quo ante by granting this motion.

ARGUMENT

I. WFA WILL LIKELY SUCCEED ON THE MERITS OF ITS CLAIM.

A. No important governmental interest supports disclosure under Section 30104(c), as interpreted by the FEC post-CREW.

Recognizing, with WFA, that disclosure under Section 30104(c) is unrelated to deterring quid pro quo corruption, the FEC cites an interest in providing information to the public about the sponsorship of third-party campaign ads and other independent expenditures. FEC Mem. at 10–12. Although this informational interest may justify disclosure in certain situations, *see Citizens United v. FEC*, 558 U.S. 310, 369 (2010) ("the public has an interest in knowing who is speaking about a candidate shortly before an election"), it does not here.

WFA's contributors are not speaking about any candidate shortly before an election or otherwise, *see Buckley,* 424 U.S. at 21 (the "transformation of contributions into political debate involves speech by someone other than the contributor"); the speaker is WFA, and WFA does not quarrel with disclosures it must make about its own expenditures. At issue here is whether the identities of individuals who support WFA generally but do not themselves want to speak about particular candidates or issues, or have their general support for WFA publicly

disclosed, must be revealed on the worldwide web.

Where the speaker is "a private citizen who is not known to the recipient [of the political speech], the name and address of the [speaker] add little, if anything, to the [recipient's] ability to evaluate the . . . message." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995) (striking down state prohibition on distribution of anonymous campaign literature); *see also Hatchett v. Barland*, 816 F. Supp. 2d 583, 599 (E.D. Wis. 2011). Any interest pales further when the speaker is known and only the names of some of its supporters are kept private.

Nearly all contributors to WFA reside in Wisconsin, and the rest are snowbirds or other former residents. *Supplemental Declaration of Julaine Appling*, ¶ 2. Naming someone living peacefully in Crandon on the FEC's website for giving WFA $201 in general support sheds little-to-no light on a candidate for the Seventh Congressional District. *See Buckley*, 424 U.S. at 67 (disclosures must help voters evaluate candidates or "facilitate predictions of [their] future performance in office"). The informational interest is narrow and centered on helping voters "define . . . [a] candidate['s] constituencies," *id.* at 81; that is, "the interests to which a candidate is most likely to be responsive," *id.* at 67. Mere public curiosity about WFA's membership, or inquiry based on a desire to attack WFA's donors and disrupt or discourage their association, does not advance that interest.

The FEC also cites its need to "gather[] the data necessary to enforce more substantive electioneering restrictions." FEC Mem. at 10. But while *Buckley* recognized that disclosure may be needed "to detect violations of [FECA's]

contribution limitations," 424 U.S. at 68, there are no contribution limits on what one may give to WFA, and no specific dollar limits on what it may spend.[2] Further, even if the FEC itself needs to review contributor information to detect violations of "more substantive" statutes, that neither necessitates nor warrants publishing the information on the internet. *See McIntyre*, 514 U.S. 351-53 (finding that enforcement interest did not support broad disclosure required by state statute).

B. Compelling disclosure of contributions given "to influence elections" or "for a political purpose" is not narrow tailoring.

Ambiguous, vague or overbroad language like "to influence elections" or "for a political purpose" leads to ill-fitting tailoring, which not only violates the constitutional rights of individuals, but leads in turn to junk disclosure that actually frustrates any legitimate informational interests. By relying on such phrases, the FEC's interpretation undermines the narrow construction required by *Buckley* to preserve FECA's constitutionality.

Citing *Buckley*, this Circuit has recognized that both "influencing an election" and "for a political purpose" are unconstitutionally vague, absent an adequate limiting construction. *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 832-34 (7th Cir. 2014) (discussing definition in state statute of "political purpose," which referred to acts done "for the purpose of influencing" an election); *see also FEC v. Survival Educ. Fund*, 65 F.3d 285, 294-95 (2d Cir. 1995). Thus, to uphold a state

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[2] WFA is, of course, limited in what it can spend as a percentage of its revenue — independent expenditures may not become its principal purpose without triggering a host of requirements under FECA.

campaign finance statute covering "political speakers other than candidates, their committees, and political parties," *Barland II* held that the terms must be "limited to express advocacy and its functional equivalent, as . . . [they were] explained in *Buckley* and *Wisconsin Right to Life II*." 751 F.3d at 834.

The FEC states, "Congress enacted the comprehensive disclosure provisions of FECA as part of an effort to establish a system of 'total disclosure' of the financing of campaigns for federal elective office." FEC Mem. at 2. Although this may accurately describe the original intent, this is precisely the intent that *Buckley* confirmed must bow to constitutional considerations. 424 U.S. at 76-77. *Buckley* found that the disclosure provision, "if narrowly construed, . . . is within constitutional bounds," *id.* at 61, and proceeded to so construe it, as did subsequent cases. Constitutional precedent, not overreaching legislative intent, controls here.

To avoid unconstitutional vagueness, the Supreme Court construed the phrase "for the purpose of influencing," to cover express advocacy only, not discussion of policy issues, other political activity unrelated to any election, or even more general discussion of candidates. *Id.* at 77-80; *see also id.* at 41-44 (similarly construing "relative to a" candidate, as used in FECA).

"For a political purpose" is even more problematic than "for the purpose of influencing an election" because it fails to tie the contribution to any federal election at all. Campaign speech and other election-related activity is merely a subset of all political activity that occurs in this country at the federal level. Much speech with "a political purpose" has nothing to do with elections and is directed at proposed

legislation, judicial and executive branch nominations, and general efforts to shape public opinion. Contributions that support such activity are beyond the scope of Section 30104(c), and indeed beyond FECA's reach generally.

Although the phrase "political purpose" can be found in *Buckley*, *see id.* at 78, 80, the FEC exaggerates its significance. It would make little sense for the Court to have gone through the long discussion, culminating in substantially narrowing "influencing an election" to mean only "express advocacy," but then, with the isolated use of a single phrase in a sentence summing up what it had just done, to require disclosure of financial support for general discussions with any "political purpose." In context, it is clear that "political purpose" meant "express advocacy." *See Survival Educ.*, 65 F.3d at 295 ("The only contributions 'earmarked for political purposes' with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA."). Indeed, in *Buckley*'s very next sentence, the Court reaffirmed that "contributions" must "have a sufficiently close relationship to the goals of the Act," and must be "connected with a candidate or his campaign." *Buckley*, 424 U.S. at 78. As elephants are not hidden in statutory mouseholes, *see Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020), so too a phrase used off-handedly in a 144-page opinion should not open a loophole that would allow restrictions on rights even broader than those struck down in the same decision, like the standard now proposed by the FEC.

Buckley recognized that clever operatives might try to get around campaign finance restrictions. *See Buckley*, 424 U.S. at 45, 76. Nonetheless, the Court had to

weigh that risk against the infringement on First Amendment rights by measures taken to mitigate it. Those "'freedoms need breathing space to survive,'" *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)), and the FEC's interpretation would chill their exercise. Fears about what other entities may be doing do not justify infringing the free speech rights of organizations like WFA and their donors.

The FEC fails to distinguish *Survival Education* which, like *Barland II,* recognized the ambiguity of "political purpose" and did so in the context of federal campaign law. Contrary to the FEC's assertion, FEC Mem. at 21-22, it is irrelevant whether the provision at issue in *Survival Education* is characterized as a disclosure or disclaimer requirement because both are subject to exacting scrutiny, *see Citizens United*, 558 U.S. at 366, which is the level that applies to Section 30104(c). Moreover, like the provision in *Survival Education*, the FEC's interpretation of Section 30104(c) — requiring disclosure of contributions "to influence federal elections and . . . earmarked for a political purpose," FEC Mem. at 1 — reaches beyond express advocacy.

Given the difficulties presented by "political purpose," it is not surprising that even *CREW II* stayed away from the term, only using it twice. *CREW v. FEC*, 971 F.3d 340, 353 (D.C. Cir. 2020) (citing the phrase as used in *Buckley* and by Crossroads GPS). Nonetheless, the FEC now seeks to inject it into Section 30104(c)'s requirements post-*CREW*, eviscerating *Buckley*'s core holding that where an organization lacks the major purpose of nominating or electing candidates, only

express advocacy triggers disclosure obligations.

C. "Furthering an independent expenditure" must be established by an earmark.

If contributions "for the purpose of furthering an independent expenditure" are to be disclosed, FEC Mem. at 4, earmarking is necessary to pass constitutional muster. Otherwise, "the relation of the information sought [through disclosure] to the purposes of the Act may be too remote," *Buckley*, 424 U.S. at 79-80; that is, contributions unrelated to or unintended for any independent expenditure could be covered simply because the nonpolitical committee receiving them separately makes an independent expenditure of more than $250. This would undermine *Buckley*'s holding that unlike political committees, entities like WFA need not disclose all their donors. *See also Barland II*, 751 F.3d at 841-42.

An earmarking prerequisite would establish a relationship between the disclosure and a valid information interest. Earmarking helps both to avoid "mislead[ing] voters as to who really supports . . . communications" and to ensure that disclosure requirements "address . . . concerns regarding individual donor privacy." *Van Hollen v. FEC*, 811 F.3d 486, 497, 499 (D.C. Cir. 2016). Thus, courts have found an earmarking requirement "important" for determining if disclosure is properly tailored. *See, e.g., Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016).

D. The disclosure demanded by the FEC fits poorly for other reasons.

Even under the FEC's overbroad notion of a proper "information" interest, no

substantial relation exists between the FEC's disclosure requirements under Section 30104(c) and the relevant public's "interest in knowing who is speaking . . . shortly before an election." *Citizens United*, 558 U.S. at 369. First of all, the FEC's rule is not limited in any way to speech "shortly before an election."

Second, identifying WFA contributors who personally support a candidate depicted unfavorably in a WFA-sponsored ad does not further any informational interest and, rather, would be misleading. Consider, for example, a staunchly Democratic businesswoman who provides financial support to her business's trade association, which then runs ads supporting a Republican candidate. Her name would appear on the FEC website as supporting that Republican candidate, which would not be true. And the more that the FEC's database of contributor information contains names of people who give for reasons other than a specific candidate supported by the nonpolitical committee, the less reliable the database will be. Even when donors are accurately listed as favoring a specific candidate, someone viewing the website will not know if that is correct or a false positive, like the example of the Democratic businesswoman. The information interest is only valid if voters can depend on the information as accurate, yet the FEC's rule encourages inaccuracy.

A practical problem that did not exist when *Buckley* was decided arises under Section 30104(c). As the FEC observes, 2 U.S.C. § 434(e) (1974) required that "contributors to persons other than a political committee were required to report their own contributions to the FEC, whereas FECA now requires that information to come from the person making sufficient independent expenditures." FEC Mem. at

11 (citing *CREW v. FEC*, 316 F. Supp. 3d 349, 374 (D.D.C. 2018)). Thus, at the time of *Buckley*, the persons required to report knew the purpose of a contribution because they themselves made it; today, disclosure of a contribution by its recipient heightens the need under Section 30104(c) for earmarking to establish donor intent and ensure accurate disclosure.

The FEC asserts that donors who wish to keep their identities confidential can opt out of having their contributions used for independent expenditures.[3] FEC Mem. at 15. This position reflects the FEC's indifference to the burdens it would place on WFA and its supporters, the vast majority of whom do not earmark their contributions for any purpose, *see Appling Decl.*, ¶ 9. *See AFPF,* 141 S. Ct. at 2387 (disclosure requirement did not "remotely 'reflect the seriousness of the actual burden' that the demand for [donor identities] imposes on donors' association rights") (quoting *Doe v. Reed*, 573 U.S. 186, 196 (2010)). That individuals can avoid a burden on their constitutional rights by doing something they don't want to do does not make the burden constitutional. *See FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 477, n.9 (2007).

The FEC's position presumes that unless a donor affirmatively demonstrates otherwise, his or her contributions to WFA are for some "political purpose" or to influence elections. Although it is reasonable to presume that contributions to

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[3] The FEC quotes *Gaspee Project v. Mederos*, 13 F.4th 79, 89 (1st Cir. 2021) for this proposition, but that case involved a Rhode Island disclosure statute, not FECA.

political committees are an effort to elect or defeat a candidate, the presumption cannot logically apply to nonpolitical committees like WFA, especially in light of the constitutional mandate to avoid burdening First Amendment rights.

A related issue is what an organization like WFA must do when there is no clear indication of donor intent. The obligation to reach back out to donors for clarification would additionally burden WFA's free speech rights. *See Barland II*, 751 F.3d at 840 ("heavy administrative burdens[] creat[e] disincentives to participation in election-related speech.").

After *CREW II*, nonpolitical committees can now only look to the FEC's conflicting and nonbinding representations in the October 2018 Guidance Document and the Reporting Instruction (and, perhaps, its brief here). *CREW I* left the Regulation in place for forty-five days to give the FEC time to issue interim regulations, *see* 316 F. Supp. 3d at 423, but the FEC did nothing. Now the FEC contends that the 2018 Petition for rulemaking to clarify matters does not merit action by it. FEC Mem. at 22-23. The FEC's dismissive attitude towards the uncertainty faced by WFA and its supporters, as well as by all similarly-situated organizations and their supporters, should alarm this Court.

Finally, the low dollar thresholds for disclosure under Section 30104(c) — which have not been adjusted since 1979 — also ensure that it casts its net too widely. Although only Congress can increase the statutory thresholds, this Court should not ignore the real world effect of congressional inaction. Low thresholds signal overbroad tailoring. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 248-62 (2006) (low

limit in Vermont law for out-of-state contributions shows lack of narrow tailoring); *Barland II*, 751 F.3d at 837 (Wisconsin statute requiring registration as a "political committee" was overbroad based on, inter alia, "the low $300 statutory spending threshold"); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1278 (10th Cir. 2016) ("But at a $3,500 contribution level, we cannot . . . characterize the disclosure interest [by an issue advocacy group] as substantial."). "As a matter of common sense, the value of [disclosure of] financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level," *Canyon Ferry Rd. Baptist Church, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009), and thresholds of $250 and $200 are negligible.

E. General concerns about political spending are irrelevant to the merits.

Throughout its brief, the FEC decries spending in politics. However, efforts to influence or obtain access to federal representatives are not covered by campaign finance restrictions, nor are they inherently bad as a constitutional matter. *See Citizens United*, 558 U.S. at 359-60.

The FEC cites the D.C. Circuit Court's observation that independent expenditures "exploded" after *Citizens United* was decided in 2010, "and that spending is 'dominated' by 501(c)(4) organizations, like WFA, and independent-expenditure-only political committees (so called super PACs)." FEC Mem. at 16 (citing *CREW II*, 971 F.3d at 344). However, the FEC already regulates conduit activity, *see* 11 C.F.R. § 110.6; 52 U.S.C. § 30226(a)(8), and in any event, complaints about increased independent expenditures nationally have little relevance to WFA.

If anything, increased spending on political speech results in more political speech, which as a constitutional matter is presumptively good, not bad. And in light of federal spending exceeding $6 trillion annually, it is not surprising or unreasonable that Americans would spend a lot of money trying to influence who decides how their government spends a lot more money.

The FEC's argument that minor political parties and independent candidates are subject to broad disclosure requirements, *see* FEC Mem. at 18, does not support imposing them on WFA. Unlike a minor political party or independent candidate, electoral politics are not WFA's "major purpose," and it does not participate in them on a full-time basis. WFA's supporters are even further removed from the electoral arena and many of them wish to influence who represents them without experiencing that arena themselves. *See Appling Decl.*, ¶¶ 13, 15.

The FEC's assertion that modest spending by a small organization like WFA in Wisconsin congressional races "may have an outsized impact," FEC Mem. at 18 is conjecture, as well as irrelevant to which contributors must be disclosed under Section 30104(c). And, again, efforts to impact an election are constitutionally protected. The FEC flatters with claims that WFA plays "a prominent role in Wisconsin state politics and has backed many winning candidates in state elections." FEC Mem. at 27. But the fact remains that WFA is not a political committee and it does not play in the same league as the political behemoths that troubled the *CREW* courts, nor does it plan to. *See Appling Decl.* ¶¶ 4, 8, 10, 12.

II. THE RECORD ESTABLISHES THAT DISCLOSURE WILL TRIGGER THREATS AND REPRISALS, HARMING WFA AND ITS DONORS IRREPARABLY.

WFA's donors should not be needlessly put to the choice of either supporting organizations like WFA and exposing themselves to retribution, or foregoing their constitutional rights in order to protect themselves, their families, and their businesses. CREW's amicus brief in this case only deepens the concerns of WFA and its supporters, who view the tenacious pursuit of expansive disclosure as an ominous sign.

The evidence presented by WFA,[4] *see Appling Decl.*, ¶¶ 13-14, is similar to the *AFPF* plaintiffs' "evidence that they and their supporters have been subjected to bomb threats, protests, stalking and physical violence." *AFPF*, 141 S. Ct. at 2388; *see also id.* at 2381. The "gravity of the privacy concerns [of the *AFPF* plaintiffs was] further underscored" by the support for their position from hundreds of amici, many if not most of which were likely Section 501(c) organizations, "span[ning] the ideological spectrum, and indeed the full range of human endeavors." *Id.* at 2388. Similarly, the "deterrent effect feared by . . . [WFA] is real and pervasive" here. *Id.*

Once an individual's associational privacy is gone, the right to it is gone. Thus, the briefest loss of First Amendment rights inflicts irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Even absent WFA's evidence, irreparable harm

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[4] Although it questions WFA's evidence of harassment, FEC Mem. at 23-24, the FEC could have asked for a deposition or other expedited discovery. It chose not to, and the declaration stands unrebutted.

would be all but presumed.

That harm is also immediate and ongoing. Wisconsin's August 9 primary, about which WFA wants to speak, is a short six months away. Similarly-situated organizations have already been waiting since the 2018 Petition for the FEC to act as *CREW I* directed it to do. With the 2022 election cycle imminent, WFA can wait no longer.

III. ENFORCING THE CONSTITUTION ADVANCES THE PUBLIC INTEREST.

The government established by the Constitution cannot be harmed by enforcement of the Constitution, and enforcement of the First Amendment undisputedly advances the public good. FEC's appeals to the "status quo" are irrelevant; there is no

> particular magic in the phrase "status quo.". . . If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . . The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Praefke Auto Elec. & Battery Co. v. Tecumseh Prods. Co., 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000) (citation omitted). The current status quo that has resulted from the FEC's failure to act is not tolerable under the First Amendment.

Dated this 4th day of February, 2022

Respectfully submitted,

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