

November 15, 2021

Kevin J. Hamilton  
KHamilton@perkinscoie.com  
D. +1.206.359.8741  
F. +1.206.359.9741

***Via Email Only***

Washington Public Disclosure Commission  
711 Capitol Way, Room 206  
P.O. Box 40908  
Olympia, WA 98504  
[pdcc@pdcc.wa.gov](mailto:pdcc@pdcc.wa.gov)

**Re: Request for Expedited Declaratory Order**

Dear Commissioners:

I represent a registered Washington recall committee, A Better Seattle (the “Committee”). On behalf of the Committee, I hereby petition the Commission for an expedited Declaratory Order under the provisions of WAC 390-12-255 suspending contribution limits under RCW 42.17A.405(3), 42.17A.125, and WAC 390.05.400, for the Committee in connection with the December 7, 2021 election.

As a recall committee, A Better Seattle does not have the potential for corruption, or the appearance of corruption, required for the PDC to enforce the contribution limits without violating the First Amendment. As I’m sure you are aware, in these circumstances the Ninth Circuit invalidated the contribution limitation as applied to a similar recall committee. In light of that decision, the Commission has previously issued guidance to a similarly-situated recall committee in Declaratory Order No. 17. A Better Washington seeks -- on identical facts -- a similar Declaratory Order.

**Regulatory Framework**

Pursuant to RCW 34.05.240(1), the Committee may petition the Commission for a Declaratory Order when: (a) uncertainty necessitating resolution exists; (b) there is an actual controversy arising from the uncertainty such that the declaratory order will not be merely an advisory opinion; (c) the uncertainty adversely affects the petitioner; (d) the adverse effect of the uncertainty on the petitioner outweighs the adverse effects on others or on the general public that may likely arise from the order requested; and (e) the petition complies with the requirements of the applicable rules and statutes..

As you know, Washington campaign finance law prohibits individuals from making contributions over \$1,000 to “a political committee having the expectation of making expenditures in support of the recall of [a] city official.” RCW 42.17A.405(3); WAC 390-05-

400. This law currently remains in place despite a Ninth Circuit opinion declaring this statute unconstitutional as applied to a particular recall campaign. *Farris v. Ranade*, 584 Fed. App'x 887, 889 (9th Cir. 2014) (*Farris II*).

The Ninth Circuit in *Farris* likened recall committees to political action committees making independent expenditures in that both types of committee lack the “sort of close relationship with candidates that supports a threat of actual or apparent corruption.” *Farris v. Seabrook*, 677 F.3d 858, 867 (9th Cir. 2012) (*Farris I*). In the absence of a need to prevent corruption, such a restriction is an unconstitutional violation of the First Amendment. *Id.* at 865; see *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 694 (9th Cir. 2010). The court emphasized the lack of a contact between that recall committee and any potential candidates for the position or those who would have control over appointing a replacement. *Farris I*, 677 F.3d at 867 (“There is no evidence that the Recall Committee would have any influence on the Council’s appointment decision upon a successful recall.”).

I have attached copies of both *Farris I* and *Farris II* to this correspondence for the Commission’s convenience.

### **Declaratory Order No. 17**

Against this background, the Commission in its Declaratory Order No. 17, agreed that it would not enforce contribution limitations against the Recall Mark Lindquist Committee, a similarly-situated recall committee.

In doing so, the Commission emphasized that “the *Farris* decisions anticipated an evaluation of the individual and specific facts of each committee and its campaign activities” before the contribution limits could be suspended. Decl. Order No. 17 at 8. The committee in that case informed the PDC that not only would it refrain from coordination with a candidate for the relevant office as well as any councilmembers with appointment authority, but also it would not “solicit or accept contributions from such a candidate or his or her campaign committee” and would not “solicit any donations in support of or opposition to such a candidate.” *Id.* at 7.<sup>1</sup>

A Better Seattle will stipulate to the same restrictions, specifically;

1. It will refrain from any coordination with any candidate for the relevant office (Seattle City Council District No. 3);

---

<sup>1</sup> The Commission, similarly, acknowledged that the contribution limitations would not be enforceable against the Committee to Recall Sherriff Adam Fortney at its December 3, 2020, meeting. I have attached a copy of the Commission Meeting Minutes reflecting that acknowledgement.

November 15, 2021

Page 3

2. It will refrain from any coordination with any councilmembers with appointment authority for any vacancies in the office of Seattle City Council;
3. It will not “solicit or accept contributions from such a candidate or his or her campaign committee” and would not “solicit any donations in support of or opposition to such a candidate.”

These are precisely the same stipulations proffered by the Recall Lindquist Committee and accepted by the Commission in its Declaratory Order No. 17. As the Commission recognized there, these stipulations ensure that there is no corruption or appearance of corruption.

Consistent with Declaratory Order 17, and in light of the applicable constitutional principles recognized *Farris I* and *Farris II*, as applied to identical facts, the Committee respectfully requests -- on an expedited basis -- a declaratory order acknowledging the inapplicability of, or suspending the application of, contribution limits for the Committee in connection with the December 7, 2021 election.

I would be happy to respond to questions or provide whatever additional information the Commission might find helpful in addressing this petition.

Sincerely,



Kevin J. Hamilton

KJH:kjh

Enclosures

677 F.3d 858

United States Court of Appeals,  
Ninth Circuit.

Robin FARRIS; Recall Dale Washam, a Washington political committee; Oldfield & Helsdon, PLLC, a Washington **professional limited** liability company, Plaintiffs–Appellees,  
v.

Dave SEABROOK, Chair; Barry Sehlin, Vice Chair; Jennifer Joly; Jim Clements, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; Doug Ellis, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission, Defendants–Appellants.

No. 11–35620.

|  
Argued and Submitted Nov. 16, 2011.

|  
Filed Jan. 19, 2012.

|  
Amended April 11, 2012.

**Synopsis**

**Background:** Proponents for the recall of county assessor-treasurer brought action challenging the constitutionality of statutory provision prohibiting contributions of more than \$800 to a political committee making expenditures in a recall campaign. The United States District Court for the Western District of Washington, [Robert J. Bryan, J.](#), granted the recall proponents' motion for a preliminary injunction enjoining the State from enforcing the contribution limit against them. State defendants appealed.

**Holdings:** On denial of rehearing and rehearing en banc, the Court of Appeals, [Fisher](#), Circuit Judge, held that:

[1] appeal of district court order was not rendered moot because controversy was capable of repetition, yet evading review;

[2] recall proponents had substantial likelihood of success on the merits of their claim;

[3] district court did not abuse its discretion in concluding that recall proponents would suffer irreparable harm in absence of injunction; and

[4] it was within district court's discretion to conclude that public interest outweighed continued enforcement of the contribution limit.

Affirmed.

Opinion, 667 F.3d 1051, amended and superseded.

**Procedural Posture(s):** On Appeal; Motion for Preliminary Injunction.

West Headnotes (15)

[1] **Federal Courts**  Inception and duration of dispute; recurrence; “capable of repetition yet evading review”

170B Federal Courts

170BIII Case or Controversy Requirement

170BIII(A) In General

170Bk2108 Mootness

170Bk2113 Inception and duration of dispute; recurrence; “capable of repetition yet evading review”

(Formerly 170Bk12.1)

The exception to mootness for disputes that are capable of repetition, yet evading review, applies when (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

1 Cases that cite this headnote

[2] **Federal Courts**  Elections, voting, and political rights

170B Federal Courts

170BIII Case or Controversy Requirement

170BIII(B) Particular Cases, Contexts, and Questions

170Bk2158 Elections, voting, and political rights

(Formerly 170Bk13.20)

The exception to mootness for disputes that are capable of repetition, yet evading review,

frequently arises in election cases because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits.

[2 Cases that cite this headnote](#)

**[3] Constitutional Law** 🔑 Mootness

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k977 Mootness

Appeal of district court order preliminarily enjoining State from enforcing against recall proponents statutory \$800 contribution limit to political committees making expenditures in a recall campaign, based on recall proponents' argument that the contribution limit violated the First Amendment's guarantee of freedom of speech, was not rendered moot by recall proponents' subsequent failure to obtain enough signatures to qualify for the ballot because the controversy was capable of repetition, yet evading review; given its limited scope, the injunction was fully and irrevocably carried out when the recall proponents failed to obtain enough signatures to qualify for the ballot, but the parties could not have practically obtained appellate review of the district court order within that time, and, furthermore, if the recall proponents attempted another recall, they would have been subject to the same \$800 contribution limit. U.S.C.A. Const.Amend. 1; West's RCWA 42.17A.405(3).

[2 Cases that cite this headnote](#)

**[4] Federal Courts** 🔑 Preliminary injunction; temporary restraining order

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3612 Remedial Matters

170Bk3616 Injunction

170Bk3616(2) Preliminary injunction; temporary restraining order

(Formerly 170Bk815)

A Court of Appeals reviews an order granting a preliminary injunction for an abuse of discretion; under this standard, as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.

[3 Cases that cite this headnote](#)

**[5] Federal Courts** 🔑 Preliminary injunction; temporary restraining order

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3612 Remedial Matters

170Bk3616 Injunction

170Bk3616(2) Preliminary injunction; temporary restraining order

(Formerly 170Bk815)

A Court of Appeals' review of a district court order granting a preliminary injunction for abuse of discretion is limited and deferential, and it does not extend to the underlying merits of the case.

[6 Cases that cite this headnote](#)

**[6] Federal Courts** 🔑 Abuse of discretion in general

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3563 Discretion of Lower Court in General

170Bk3565 Abuse of discretion in general

(Formerly 170Bk812)

A district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact.

[5 Cases that cite this headnote](#)

**[7] Federal Courts** 🔑 Questions of Law in General

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3566 Questions of Law in General

170Bk3567 In general

(Formerly 170Bk776)

When the district court bases its decision on an erroneous legal standard, a Court of Appeals reviews the underlying issues of law de novo.

5 Cases that cite this headnote

[8] **Injunction** 🔑 Likelihood of success on merits

212 Injunction

212II Preliminary, Temporary, and Interlocutory Injunctions in General

212II(B) Factors Considered in General

212k1094 Entitlement to Relief

212k1096 Likelihood of success on merits

A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest.

92 Cases that cite this headnote

[9] **Injunction** 🔑 Grounds in general; multiple factors

212 Injunction

212II Preliminary, Temporary, and Interlocutory Injunctions in General

212II(B) Factors Considered in General

212k1092 Grounds in general; multiple factors

Serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.

88 Cases that cite this headnote

[10] **Constitutional Law** 🔑 Campaign finance, contributions, and expenditures

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1469 Campaign finance, contributions, and expenditures

Under the First Amendment, contribution limitations are permissible as long as the

government demonstrates that the limits are closely drawn to match a sufficiently important interest. *U.S.C.A. Const.Amend. 1.*

1 Cases that cite this headnote

[11] **Constitutional Law** 🔑 Campaign finance, contributions, and expenditures

**Election Law** 🔑 Limitations on amount of contributions

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1469 Campaign finance, contributions, and expenditures

142T Election Law

142TV Contributions and Expenditures; Campaign Finance

142Tk186 Limitations on amount of contributions (Formerly 144k311 Elections)

States have an important governmental interest, for purposes of supporting the imposition of contribution limitations under the First Amendment, in preventing the actuality or appearance of quid pro quo corruption; this anticorruption interest justifies limits on contributions to political committees operated by candidates themselves, as well as limits on contributions to committees that, although formally separated from the candidate, are sufficiently close to the candidate to present a risk of actual or apparent corruption. *U.S.C.A. Const.Amend. 1.*

3 Cases that cite this headnote

[12] **Injunction** 🔑 Contributions and expenditures

212 Injunction

212IV Particular Subjects of Relief

212IV(J) Elections, Voting, and Political Rights

212k1349 Contributions and expenditures

Proponents for the recall of county assessor-treasurer, seeking preliminary injunction enjoining the State from enforcing against them statutory \$800 contribution limit to political committees making expenditures in a recall campaign, had substantial likelihood of success on merits of claim that the contribution limit violated the First Amendment's guarantee of freedom of speech; despite the State's contention

that the contribution limit was closely drawn to match an important interest in the prevention of corruption or the appearance of corruption, given that recall committees did not coordinate or prearrange their independent expenditures with candidates, and did not take direction from candidates on how their dollars would be spent, they did not have the sort of close relationship with candidates that supported a threat of actual or apparent corruption. *U.S.C.A. Const.Amend. 1*; *West's RCWA 42.17A.405(3)*.

[7 Cases that cite this headnote](#)

**[13] Civil Rights** 🔑 Preliminary Injunction

**Injunction** 🔑 Elections, Voting, and Political Rights

78 Civil Rights  
 78III Federal Remedies in General  
 78k1449 Injunction  
 78k1457 Preliminary Injunction  
 78k1457(1) In general  
 212 Injunction  
 212IV Particular Subjects of Relief  
 212IV(J) Elections, Voting, and Political Rights  
 212k1341 In general

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury in the preliminary injunction context and that harm is particularly irreparable where a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable. *U.S.C.A. Const.Amend. 1*.

[12 Cases that cite this headnote](#)

**[14] Injunction** 🔑 Contributions and expenditures

212 Injunction  
 212IV Particular Subjects of Relief  
 212IV(J) Elections, Voting, and Political Rights  
 212k1349 Contributions and expenditures

District court's conclusion that recall proponents would suffer irreparable harm, in absence of preliminary injunction enjoining State from enforcing against them statutory \$800 contribution limit to political committees making expenditures in a recall campaign, due to the limited time the recall proponents had to gather

signatures required to qualify for the ballot, was not an abuse of discretion.

[2 Cases that cite this headnote](#)

**[15] Injunction** 🔑 Contributions and expenditures

212 Injunction  
 212IV Particular Subjects of Relief  
 212IV(J) Elections, Voting, and Political Rights  
 212k1349 Contributions and expenditures

It was within the district court's discretion, in issuing preliminary injunction enjoining State from enforcing against recall proponents statutory \$800 contribution limit to political committees making expenditures in a recall campaign, to conclude that the public interest in upholding free speech and association rights outweighed the interest in continued enforcement of the campaign finance provisions after weighing the relevant considerations. *U.S.C.A. Const.Amend. 1*; *West's RCWA 42.17A.405(3)*.

[2 Cases that cite this headnote](#)

**West Codenotes**

**Validity Called into Doubt**

*West's RCWA 42.17A.405(3)*

**Attorneys and Law Firms**

\***861** Robert M. McKenna, Attorney General; Linda A. Dalton, Senior Assistant Attorney General (argued), Olympia, WA, for the appellants.

Jeffrey P. Helsdon, Oldfield & Helsdon, PLLC, Fircrest, WA; William Maurer (argued) and Jeanette Petersen, Institute for Justice, Seattle, WA; Paul Avelar, Tempe, AZ, for the appellees.

Theodore J. Angelis and Taki V. Flevaris (argued), K & L Gates, Seattle, WA, for amici curiae Wisconsin Democracy Campaign and Washington Public Campaigns.

Allen Dickerson, Alexandria, VA, for amicus curiae Center for Competitive Politics.

Appeal from the United States District Court for the Western District of Washington, Robert J. Bryan, District Judge, Presiding. D.C. No. 3:11-cv-05431-RJB.

Before: RAYMOND C. FISHER, RICHARD A. PAEZ and RICHARD R. CLIFTON, Circuit Judges.

## ORDER

The opinion filed January 19, 2012, and appearing at 667 F.3d 1051 (9th Cir.2012), is **AMENDED**. An amended opinion will be filed concurrently with this order.

With this action, the panel has voted to deny the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *Fed. R.App. P. 35*.

The petition for panel rehearing and rehearing en banc, filed February 9, 2012, is **DENIED**.

No further petitions for rehearing will be accepted.

## OPINION

FISHER, Circuit Judge:

The district court granted a preliminary injunction prohibiting the State of Washington from enforcing its limitation on contributions to political committees supporting the recall of a state or county official. We conclude that the plaintiffs satisfied their burden under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), to demonstrate that the contribution limit is likely an unconstitutional and harmful burden on the plaintiffs' rights of free speech under the First Amendment. Accordingly, the district court did not err in granting the injunction, and we affirm.

### I. Background

#### A. Washington's Recall Procedure

Washington provides its electorate with an elaborate procedure for recalling elected officials. According to

Washington's constitution, elected officials may be recalled for malfeasance, misfeasance or a violation of their oaths of office. *See Wash. Const. art. I, §§ 33, 34*. A voter who wishes to recall an elected official must prepare a typewritten charge naming the official and providing a detailed description of the grounds for recall. *See Wash. Rev.Code § 29A.56.110*. Recall charges are filed with the county auditor, and the county's prosecuting attorney then prepares a ballot synopsis, which sets forth the name of the person charged, the title of the office and the elements of the charge. *See id.* §§ 29A.56.120, 29A.56.130. Within 15 days thereafter, the superior court conducts a hearing to decide “(1) whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed [i.e., the sufficiency \*862 of the charges], and (2) the adequacy of the ballot synopsis.” *Id.* § 29A.56.140. The person demanding recall and the person subject to the recall may appear before the court with counsel and may appeal an adverse decision to the Washington Supreme Court. *See id.*

If the charges are held to be sufficient, the recall proponents begin to collect signatures from registered voters who support the petition. To recall a county official whose county has a population of 40,000 or more, proponents must collect a number of signatures “equal to twenty-five percent of the total number of votes cast for all candidates for the office to which the officer whose recall is demanded was elected at the preceding election.” *Id.* § 29A.56.180(1). They have 180 days to collect these signatures following court approval of the ballot synopsis. *See id.* § 29A.56.150(2). If proponents collect the required number of signatures, the auditor must “fix a date for a special election to determine whether or not the officer charged shall be recalled and discharged from office.” *Id.* § 29A.56.210. The election must be held “not less than forty-five nor more than sixty days” from the time that the signatures are verified. *Id.* If the recall is successful, the recalled official must vacate his or her office and the appropriate state legislative body will appoint a successor to fill the position until the next general election. *See id.* §§ 29A.56.260, 36.16.110.

The statutory provision challenged here prohibits contributions of more than \$800 to a political committee making expenditures in a recall campaign. *See id.* § 42.17A.405(3).<sup>1, 2</sup> This limit applies to monetary and in-kind contributions alike. *See id.* § 42.17A.005(15)(c) (“Contributions other than money or its equivalent are deemed to have a monetary value equivalent to the fair market value of the contribution ... and count [ ] towards any applicable contribution limit of the provider.”).<sup>3</sup>

1 Formerly codified as [Washington Revised Code § 42.17.640\(3\)](#).

2 Section 42.17A.405(3) states:

No person, other than a bona fide political party or a caucus political committee, may make contributions to a state official, a county official, a city official, or a public official in a special purpose district against whom recall charges have been filed, or to a political committee having the expectation of making expenditures in support of the recall of the state official, county official, city official, or public official in a special purpose district during a recall campaign that in the aggregate exceed eight hundred dollars if for a legislative office, county office, or city office, or one thousand six hundred dollars if for a special purpose district office or a state office other than a legislative office.

[Wash. Rev.Code § 42.17A.405\(3\)](#).

3 Formerly codified as [Washington Revised Code § 42.17.020\(15\)\(c\)](#).

#### B. Plaintiffs' Efforts to Recall Dale Washam

Plaintiff Robin Farris began an effort to recall Pierce County Assessor–Treasurer Dale Washam in 2010, after becoming aware of allegations that Washam had engaged in malfeasance while in office. Farris formed a political committee, Recall Dale Washam (“the Recall Committee”), which she registered with the Washington Public Disclosure Commission (PDC), and filed charges against Washam under [§ 29A.56.110](#).

After proceedings in the superior court and an appeal, the Washington Supreme Court found several of Farris' charges sufficient and approved a ballot synopsis. *See In re Recall of Washam*, 171 Wash.2d 503, 257 P.3d 513 (2011). The recall proponents then had until August 31, 2011 to \*863 collect signatures from 65,495 registered Pierce County voters to qualify the approved synopsis for the November ballot.

Meanwhile, shortly before the Washington Supreme Court issued its decision, the PDC issued the Recall Committee a “Notice of Administrative Charges,” alleging that the committee violated [Washington Revised Code § 42.17A.405](#) by accepting more than \$800 in in-kind contributions from Oldfield & Helsdon, a law firm that had represented the committee in the state superior court and supreme court

proceedings on a pro bono basis. The PDC ultimately withdrew the charges, but stated:

The fact that PDC staff does not intend to allege a violation of [[§ 42.17A.405](#)] should not be construed to mean that the contribution limits of [[§ 42.17A.405](#)] are not applicable to the recall election. The statute, as written, is to be followed during the recall campaign.

#### C. Proceedings Before the District Court

In June 2011, Farris, the Recall Committee and Oldfield & Helsdon filed a complaint challenging the constitutionality of [§ 42.17A.405\(3\)](#)'s \$800 contribution limit. Two weeks later, the plaintiffs moved for a preliminary injunction enjoining the State from enforcing the contribution limit, arguing that the limit violated their First Amendment rights. In July 2011, the district court granted the motion, preliminarily enjoining the State from enforcing [§ 42.17A.405\(3\)](#) against the plaintiffs during the 2011 recall campaign.

## II. Jurisdiction

We have jurisdiction to review a district court's order granting a preliminary injunction under 28 U.S.C. [§ 1292\(a\)\(1\)](#). Before we can exercise our jurisdiction under [§ 1292\(a\)\(1\)](#), however, we must ensure that this appeal continues to present a live controversy.

While this appeal was pending, the plaintiffs' August 31, 2011 deadline to collect signatures passed. The plaintiffs did not collect the required number of signatures to qualify the recall question for the November 2011 ballot. Because the district court's injunction applied only to the plaintiffs' campaign for the November 2011 ballot, we must consider whether this appeal is now moot. We hold that it is not moot, because this situation is capable of repetition, yet evading review.

[1] [2] This exception to mootness applies when “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Enyart v. Nat'l*

*Conference of Bar Exam'rs*, 630 F.3d 1153, 1159 (9th Cir.2011) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007)) (internal quotation marks omitted). “[T]he exception frequently arises in election cases ‘because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits.’” *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1002 (9th Cir.2010) (quoting *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir.2003)).

[3] Both elements are present here. The district court issued the injunction on July 15, 2011. Given its limited scope, the injunction was “fully and irrevocably carried out” as of August 31, 2011, when the plaintiffs failed to obtain enough signatures to qualify for the November ballot. *Enyart*, 630 F.3d at 1160. The parties “could not practically obtain appellate review of the district court order[ ]” within this time. *Id.* Furthermore, if the plaintiffs attempt another recall, they will be \*864 subject to the same \$800 contribution limit. See *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650 (9th Cir.2007) (holding that a challenge to a contribution limit applicable to the signature-gathering phase of a recall election was not rendered moot by the recall effort's failure to obtain sufficient signatures to place the recall question on the ballot because the controversy was capable of repetition, yet evading review); *Enyart*, 630 F.3d at 1159–60 (holding that the appeal of a “fully and irrevocably carried out” preliminary injunction was not moot because there was a reasonable expectation that the defendant would be subject to a preliminary injunction again in the future).<sup>4, 5</sup>

<sup>4</sup> The recall effort incurred debt that remains outstanding. We acknowledge the possibility that plaintiffs' ability to retire that debt may be hampered if the injunction is lifted and the \$800 contribution limit imposed by the challenged statute is applied to plaintiffs. This is another reason why the appeal is not moot.

<sup>5</sup> Considering the matter sua sponte, we are also satisfied that the plaintiffs' suit is ripe. See *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir.2010) (describing the standard for determining whether a pre-enforcement challenge is ripe).

### III. Discussion

#### A. Standard of Review

[4] [5] [6] [7] We review an order granting a preliminary injunction for an abuse of discretion. See *Katie A. ex rel. Ludin v. L.A. Cnty.*, 481 F.3d 1150, 1155 (9th Cir.2007). “Under this standard, [a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.” *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir.2011) (alteration in original) (quoting *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir.2010)) (internal quotation marks omitted). “This review is limited and deferential, and it does not extend to the underlying merits of the case.” *Id.* (quoting *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir.2009)) (internal quotation marks omitted). “The district court, however, necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact.” *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 994 (9th Cir.2011) (per curiam) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir.2003)) (internal quotation marks omitted). When the district court bases its decision on an erroneous legal standard, we review the underlying issues of law de novo. See *id.*

#### B. Analysis

[8] [9] A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest. See *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). We have also articulated an alternate formulation of the *Winter* test, under which “ ‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir.2011).

Here, the district court determined that preliminary injunctive relief was appropriate by applying the first *Cottrell* factor (serious questions going to the merits) and \*865 the last three *Winter* factors (irreparable harm, the balance of equities and the public interest). The court did not find that the balance of hardships tipped sharply in the plaintiffs' favor, as the *Cottrell* test requires, or a likelihood of success on the merits, as the *Winter* test requires. The district court's analysis was therefore incomplete. As we explain below, however, the

district court's error was harmless because plaintiffs' showing satisfies all four prongs of the *Winter* standard. Because the district court did not apply the first *Winter* factor (likelihood of success on the merits), we review that factor de novo. Given that the district court applied the final three *Winter* factors, we review the court's evaluation of those factors for an abuse of discretion.

### 1. Likelihood of Success on the Merits

The plaintiffs contend the \$800 limit on contributions to recall committees violates the First Amendment's guarantee of freedom of speech.

[10] Under the First Amendment, “contribution limitations are permissible as long as the Government demonstrates that the limits are ‘closely drawn’ to match a ‘sufficiently important interest.’ ” *Randall v. Sorrell*, 548 U.S. 230, 247, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)); see also *Citizens for Clean Gov't*, 474 F.3d at 652 (applying this level of scrutiny to a contribution limit imposed during the signature phase of a recall effort).<sup>6</sup> The State contends the \$800 contribution limit passes muster because it is closely drawn to match an important interest in the prevention of corruption or the appearance of corruption.

<sup>6</sup> We speculated in *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 691–92 n. 4 (9th Cir.2010), that after *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 898, 175 L.Ed.2d 753 (2010), all campaign funding restrictions may be subject to strict scrutiny. The Supreme Court has since reaffirmed, however, that “closely drawn” scrutiny applies to contribution limits. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, — U.S. —, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664 (2011).

[11] The State is certainly correct that states have an important governmental interest in preventing the actuality or appearance of quid pro quo corruption. See *Thalheimer*, 645 F.3d at 1118 (“The Supreme Court has concluded that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.” (quoting *Long Beach Area Chamber of Commerce v. City of Long Beach* (“*Long Beach*”), 603 F.3d 684, 694 (9th Cir.2010)

(internal quotation marks omitted)); *id.* at 1119 (“[T]he *Citizens United* decision ... narrowed the scope of the anti-corruption rationale to cover quid pro quo corruption only, as opposed to money spent to obtain influence over or access to elected officials.” (quoting *Long Beach*, 603 F.3d at 694 n. 5) (internal quotation marks omitted)).

This anticorruption interest justifies limits on contributions to political committees operated by candidates themselves. See, e.g., *Buckley*, 424 U.S. at 26–27, 96 S.Ct. 612 (holding that the governmental interest in preventing the actuality and appearance of corruption was sufficient justification for a federal law limiting candidate contributions to \$1,000). It also justifies limits on contributions to committees that, although formally separate from the candidate, are sufficiently close to the candidate to present a risk of actual or apparent corruption. Thus, the Supreme Court has \*866 sustained contribution limits as applied to political parties, because “the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, ... have made all large soft-money contributions to national parties suspect.” *McConnell v. FEC*, 540 U.S. 93, 154–55, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), overruled on other grounds by *Citizens United*, 130 S.Ct. 876. The Court similarly sustained contribution limits as applied to “multicandidate political committees.” See *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197–98, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981). The Court upheld these limits because multicandidate political committees “by definition ... contribute directly to five or more candidates for federal office,” and “this direct donor relationship presented a risk of actual or apparent quid pro quo corruption.” *Thalheimer*, 645 F.3d at 1120 (citing *Cal. Med. Ass'n*, 453 U.S. at 185 n. 1, 197, 101 S.Ct. 2712); see also *Cal. Med. Ass'n*, 453 U.S. at 203, 101 S.Ct. 2712 (Blackmun, J., concurring) (“Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption.”).

On the other hand, both this court and the Supreme Court have rejected contribution limits as applied to committees having only a tenuous connection to political candidates. In *Citizens United*, the Court held that a federal law restricting corporate and union spending on electioneering communications that support or oppose a political candidate could not be sustained by the anticorruption interest. The Court reasoned that the “absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the

candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” 130 S.Ct. at 908 (quoting *Buckley*, 424 U.S. at 47, 96 S.Ct. 612) (internal quotation marks omitted).

Similarly, in *Long Beach*, we invalidated contribution limits as applied to political action committees making independent expenditures to support or oppose candidates for office. We explained that:

the strength of the state's interest in preventing corruption is highly correlated to the nature of the contribution's recipient. Thus, the state's interest in the prevention of corruption—and, therefore, its power to impose contribution limits—is strongest when the state limits contributions made directly to political candidates.... As one moves away from the case in which a donor gives money directly to a candidate, however, the state's interest in preventing corruption necessarily decreases.

*Long Beach*, 603 F.3d at 696 (quoting *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291 (4th Cir.2008)). We observed that “[t]he Supreme Court has upheld limitations on contributions to entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance thereof.” *Id.* Because the political action committees made independent expenditures and were “several significant steps removed from ‘the case in which a donor gives money directly to a candidate,’ ” we held that the state's anticorruption interest was insufficient to uphold the contribution limits. *Id.* at 696–99 (quoting *Leake*, 525 F.3d at 291).

[12] Like independent expenditure committees, recall committees in Washington have at most a tenuous relationship with candidates. The contribution limit here is thus materially indistinguishable from the limit we invalidated in *Long Beach*. Under Washington's recall system, \*867 political committees seeking to recall officials do not coordinate their spending with candidates for office. In the event a recall is successful, the successor to office is appointed by a governmental entity designated by state law—in this case, the Pierce County Council. See Wash. Rev.Code §

36.16.110; Pierce County, Wash., Charter art. 4, § 4.70. Thus, as Washington law is structured, expenditures by recall committees are similar to independent expenditures. See *Citizens United*, 130 S.Ct. at 910 (defining independent expenditures as “political speech presented to the electorate that is not coordinated with a candidate”). Given that recall committees “do not coordinate or prearrange their independent expenditures with candidates, and they do not take direction from candidates on how their dollars will be spent,” they do not have the sort of close relationship with candidates that supports a threat of actual or apparent corruption. *Long Beach*, 603 F.3d at 696.

Neither the State nor amici, moreover, has presented any evidence showing that contributions to recall committees in Washington raise the specter of corruption, and certainly not in this case. The Wisconsin Democracy Campaign and Washington Public Campaigns, as amici curiae, attempt to bolster the State's anticorruption rationale with several newspaper articles that describe alleged corruption in connection with recall efforts in states other than Washington. Most of the out-of-state recall efforts involve systems different from Washington's, in which a recall campaign is accompanied by an election to select the successor—a structure that does not exist in Washington. None of the articles describes a circumstance where, in a recall system like Washington's, in which successors are appointed, a recall committee or its members had a relationship with the state entity charged with appointing a successor that would raise the specter of corruption.<sup>7</sup> The only evidence of an interaction between the Recall Committee and the Pierce County Council, the appointing body, is the State's allegation that one Council member posted on the Recall Committee's Facebook page a description of the procedures that would take place if the recall campaign were successful. There is no evidence that the Recall Committee would have any influence on the Council's appointment decision upon a successful recall. For this reason, “[o]n this record, ... an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.” *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985).

<sup>7</sup> The State contends the district court abused its discretion by ruling on the plaintiffs' motion for summary judgment without giving the State a greater opportunity to conduct discovery and develop the record, relying on *Citizens for Clean Government*. This argument is without merit.

*Citizens for Clean Government* does not limit a district court's authority to rule on a preliminary injunction, a decision that is necessarily based on an incomplete record. Here, the State never filed a request for specific, expedited discovery and, therefore, we cannot conclude that the district court abused its discretion by ruling on the injunction based on the evidence that was before it.

In sum, the State did not identify a sufficiently important interest to justify the \$800 limit on contributions to recall committees. The first *Winter* factor—likelihood of success on the merits—thus supports issuance of the preliminary injunction.<sup>8, 9</sup>

<sup>8</sup> Plaintiffs' likelihood of success might be different if recall elections in Washington were accompanied by an election for the successor, as is the case in many states, and a recall committee coordinated its expenditures with one of the candidates for office. That circumstance would be similar to cases in which contribution limits have been upheld. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981).

Furthermore, as our analysis implies, the outcome might be different if there were evidence that contributions were being made with a “wink and a nod” from Council members indicating that a particular candidate would be appointed. *Long Beach*, 603 F.3d at 697 n. 7.

<sup>9</sup> In a petition for rehearing, the State argues that allowing it to limit contributions to incumbent political officials opposing a recall, but prohibiting it from enforcing contribution limits against recall committees supporting the recall would lead to disproportionate influence by recall committees. The possibility that independent committees will make expenditures disproportionate to political candidates or incumbents, however, is simply a consequence of *Citizens United* that is now a feature of all political campaigns. See *Citizens United*, 130 S.Ct. at 910 (“Reliance on a ‘generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.’” (quoting *McConnell*, 540 U.S. at 296, 124 S.Ct. 619)). The State has not provided any

evidence that Washington's recall elections present a special circumstance in which “[t]he appearance of influence or access” would “cause the electorate to lose faith in our democracy.” *Id.*

\*868 In so concluding, we recognize that the State has a strong interest in “help[ing] citizens make informed choices in the political marketplace.” *Citizens United*, 130 S.Ct. at 914 (quoting *McConnell*, 540 U.S. at 197, 124 S.Ct. 619) (internal quotation marks omitted). One important method of doing so is requiring disclosure of *who* is financing a ballot campaign. See *Family PAC v. McKenna*, Nos. 10–35832, 10–35893, 2011 WL 6826338, at \*5–6 (9th Cir. Dec. 29, 2011). Disclosure enables the electorate to “give proper weight to different speakers and messages.” *Citizens United*, 130 S.Ct. at 916. In the context of a recall initiative, therefore, the State's additional, specific interest in preventing corruption can at least in part be addressed through disclosure requirements.

## 2. Irreparable Harm, Balance of the Equities and the Public Interest

The district court properly exercised its discretion in concluding that the remaining *Winter* factors also support issuance of the injunction.

[13] [14] With respect to the second factor, irreparable harm, the district court correctly noted that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury” and that “harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and [a] delay of even a day or two may be intolerable.” *Thalheimer*, 645 F.3d at 1128 (alterations in original) (quoting *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir.2009)) (internal quotation marks omitted). The district court's conclusion that the plaintiffs would suffer irreparable harm from the contribution limit due to the limited time they had to gather signatures thus was not an abuse of discretion.

[15] Nor did the court err in concluding that the balance of equities and public interest favor an injunction. It was within the district court's discretion to conclude that the “public interest in upholding free speech and association rights out-weighed the interest in continued enforcement of these campaign finance provisions” after weighing the relevant considerations. *Id.* at 1128–29.

**IV. Conclusion**

The district court properly granted the preliminary injunction prohibiting enforcement \*869 of the \$800 contribution limit against the plaintiffs.<sup>10</sup>

<sup>10</sup> We note that the district court issued a narrow injunction, which prohibits the enforcement of

Wash. Rev.Code § 42.17A.405(3) only as to the plaintiffs in this proceeding. Nothing in our opinion should be construed as expanding the scope of that injunction.

**AFFIRMED.**

**All Citations**

677 F.3d 858, 2012 Daily Journal D.A.R. 4554

---

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

584 Fed.Appx. 887

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

Robin FARRIS; Recall Dale Washam, a Washington political committee; Oldfield & Helsdon, PLLC, a Washington **professional limited liability** company, Plaintiffs–Appellants,  
v.  
Amit D. RANADE, **Chair**; Grant S. Degginger, Attorney, Vice Chair; Kathy Turner; Katrina Asay, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; Andrea McNamara Doyle, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission, Defendants–Appellees.  
Robin Farris; Recall Dale Washam, a Washington political committee; Oldfield & Helsdon, PLLC, a Washington **professional limited liability** company, Plaintiffs–Appellants,  
v.

Amit D. Ranade, **Chair**; Grant S. Degginger, Attorney, Vice Chair; Kathy Turner; Katrina Asay, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission; Andrea McNamara Doyle, in His Official Capacity as Interim Executive Director of the Washington State Public Disclosure Commission, Defendants–Appellees.

Nos. 12–35949, 13–35040.

Argued and Submitted Feb. 6, 2014.

Filed Oct. 2, 2014.

**Synopsis**

**Background:** Proponents of recalling elected county official brought action challenging Washington statutory provision

prohibiting contributions of more than \$800 to political committee making expenditures in recall campaign. After grant of preliminary injunction was affirmed, [677 F.3d 858](#), the United States District Court for the Western District of Washington, [Robert J. Bryan](#), Senior District Judge, [2012 WL 5410072](#), granted summary judgment in favor of defendants, and denied plaintiffs' motion for attorneys' fees. Plaintiffs appealed.

**Holdings:** The Court of Appeals held that:

[1] court appropriately declined to consider facial challenge to provision, but

[2] remand was required for consideration of factors on excusable neglect with respect to attorneys' fees motion.

Affirmed in part and reversed and remanded in part.

Opinion, [2014 WL 3378566](#), amended and superseded on denial of rehearing en banc.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (2)

[1] **Constitutional Law**  **Necessity of Determination**

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k975 In general

Remand was required for district court to consider all four factors for evaluating potential excusable neglect in proponents' filing of motion for attorneys' fees, in suit arising from proponents' efforts to recall elected county official, and specifically challenging Washington statutory provision prohibiting contributions of more than \$800 to political committee making expenditures in recall campaign; in evaluating excusable neglect issue, and ultimately declining to extend 14-day deadline and denying motion

as untimely, district court listed all four factors, but only addressed two of them in its analysis. [Fed.Rules Civ.Proc.Rules 6\(b\)\(1\), 54\(d\)\(2\)\(B\), 28 U.S.C.A.](#); [West's RCWA 42.17A.405\(3\)](#).

1 Cases that cite this headnote

[2] **Constitutional Law** 🔑 Necessity of Determination

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k975 In general

After ruling that Washington campaign contributions statute, in prohibiting contributions of more than \$800 to political committee making expenditures in recall campaign, was unconstitutional as applied, the district court appropriately declined to consider recall proponents' broader facial challenge to that statute. [West's RCWA 42.17A.405\(3\)](#).

**Attorneys and Law Firms**

\*888 [Paul Vincent Avelar](#), Tempe, AZ, [Jeffrey Paul Helsdon](#), Oldfield & Helsdon, PLLC, Fircrest, WA, [William Randolph Maurer](#), Bellevue, WA, [William Randolph Maurer](#), Seattle, WA, for Plaintiffs–Appellants.

[Callie A. Castillo](#), Esquire, Assistant Attorney General, Attorney General's Office, [Linda Anne Dalton](#), Esquire, AGWA–Office of the Washington Attorney General, Olympia, WA, for Defendants–Appellees.

Appeal from the United States District Court for the Western District of Washington, [Robert J. Bryan](#), Senior District Judge, Presiding. D.C. No. 3:11–cv–05431–RJB.

Before: [FISHER](#), [GOULD](#) and [CHRISTEN](#), Circuit Judges.

ORDER AMENDING MEMORANDUM  
DISPOSITION AND DENYING  
PETITION FOR REHEARING EN BANC

The memorandum disposition, filed July 11, 2014, is **AMENDED**.

An amended memorandum disposition is filed concurrently with this order. Judges Gould and Christen have voted to deny Appellants' petition for rehearing en banc, and Judge Fisher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. [Fed. R.App. P. 35](#). Appellants' petition for rehearing en banc, filed July 25, 2014, is **DENIED**.

No further petitions for rehearing will be accepted.

AMENDED MEMORANDUM \*

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

The plaintiffs appeal the district court's summary judgment order, insofar as it \*889 declined to address the plaintiffs' facial challenge to [Washington Revised Code § 42.17A.405\(3\)](#). They also appeal the district court's ruling that their motion for attorney's fees was untimely and that they did not demonstrate excusable neglect warranting an extension of the deadline. We have jurisdiction under [28 U.S.C. § 1291](#). We affirm the summary judgment order but vacate and remand on the attorney's fees issue.

1. In *Farris v. Seabrook (Farris I)*, 677 F.3d 858, 867 (9th Cir.2012), we affirmed the district court's preliminary injunction order, concluding that “the State did not identify a sufficiently important interest to justify [[§ 42.17A.405\(3\)](#)]’s \$800 limit on contributions to recall committees.”<sup>1</sup> Most of the underlying facts relevant to the current appeal are fully set forth in *Farris I* and need not be repeated. Of particular relevance here, we acknowledged the State’s interest in preventing the actuality or appearance of quid pro quo corruption in recall elections, but likened Washington recall committees to political action committees making independent expenditures to support or oppose candidates, for which contribution limits had been invalidated because of tenuous connections or no connection to the candidates themselves. *See id.* at 865–67. We explained that “[n]either the State nor amici ... presented any evidence showing that contributions to recall committees in Washington raise the

specter of corruption, and certainly not in this case,” but noted that “the outcome might be different if there were evidence that contributions were being made with a ‘wink and a nod’ from Council members indicating that a particular candidate would be appointed.” See *id.* at 867 & n. 8.

<sup>1</sup> The limit has since been raised to \$950. See *Wash. Admin. Code* § 390–05–400.

On remand, the district court's summary judgment order applied *Farris I* to the evidence presented and entered a permanent injunction, stating that the court would “grant summary judgment for Plaintiffs and hold RCW § 42.17A.405(3) unconstitutional as applied to Plaintiffs.” The court found that “[t]here is no evidence of coordination of expenditures or ‘a wink and a nod’ to justify the State's anti-corruption interest. The Government has presented no evidence demonstrating an issue of material fact regarding the appearance of or actual corruption.” The district court also determined that “[b]ecause this Court should provide Plaintiffs' requested relief and hold that RCW § 42.17A.405(3) is unconstitutional as applied to Plaintiffs, the Court need not address whether RCW § 42.17A.405(3) is unconstitutional on its face.”

[1] We agree with the district court's decision not to address the plaintiffs' broader facial challenge. Given the record in this case, the plaintiffs have received all the relief to which they are entitled. The district court's order was somewhat ambiguous as to the scope of its injunctive relief, insofar as its application beyond the immediate case. The court stated that § 42.17A.405(3) was unconstitutional as applied to the plaintiffs, but also that the defendants were enjoined from enforcing § 42.17A.405(3) “against Plaintiffs *in this case only*” (emphasis added). We construe the district court's order and corresponding injunction as precluding enforcement of § 42.17A.405(3) against the plaintiffs in all similar circumstances, where there is no evidence or appearance of corruption. The defendants themselves have acknowledged that “the [Washington Public Disclosure] Commission read the order in the broadest manner \*890 possible, *i.e.*, that it is enjoined from ever enforcing Wash. Rev.Code § 42.17A.405(3)'s contribution limits against the Recall Proponents.”<sup>2</sup> Even if there may be non-parties to this litigation who generally may enforce § 42.17A.405(3) and who theoretically might not be bound by the district court's injunction, see *Fed.R.Civ.P.* 65(d)(2), *Farris I* and the district court's order clearly preclude enforcement of § 42.17A.405(3) against the plaintiffs when there is no evidence or appearance

of corruption, because the provision is unconstitutional in such instances. Accordingly, the plaintiffs have received all the relief to which they are entitled.

<sup>2</sup> The defendants also said that “until a court directs that the Commission may interpret the order more narrowly, the Commission remains permanently enjoined from enforcing the contribution limits against the Recall Proponents.” We conclude that the Commission is enjoined from enforcing § 42.17A.405(3) against the plaintiffs in the future, but, consistent with *Farris I* and as we have emphasized, only in cases where there is no evidence or appearance of corruption.

This interpretation comports with the general notion that courts should favor narrow constitutional rulings over broad ones.<sup>3</sup> See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (“Facial challenges are disfavored for several reasons.”); *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (“This Court ... is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” (internal quotation marks omitted)); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1144–45, 1155–56 (10th Cir.2007) (holding that an as-applied ruling on part of a campaign finance reform amendment was sufficient and that the court did not need to reach a facial challenge, as “the nature of judicial review constrains a federal court to consider only the case that is actually before it”).

<sup>3</sup> Plaintiffs argue that *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), requires invalidating Wash. Rev.Code § 42.17A.405(3) on its face. *Citizens United*, however, does not require facial invalidation when a narrower remedy is sufficient. See *id.* at 333, 130 S.Ct. 876 (invalidating statute only after rejecting narrower remedies as insufficient).

Finally, even if the district court abused its discretion in striking declarations concerning standing that the plaintiffs filed with their reply brief, the additional recall campaign Jeffrey Helsdon described in his declaration did not include evidence or the appearance of corruption. Accordingly, *Farris*

*I* and the district court's order extend to this second recall campaign, so the plaintiffs' challenge to this portion of the court's order is moot.

[2] 2. The district court correctly ruled that the plaintiffs' motion for attorney's fees was filed after the applicable 14-day deadline. See Fed.R.Civ.P. 54(d)(2)(B) (“Unless a statute or a court order provides otherwise, the motion [for attorney's fees] must: (i) be filed no later than 14 days after the entry of judgment ....”). On the other hand, the court erred in analyzing whether the plaintiffs' error was the result of excusable neglect and they were entitled to an extension of the deadline. See Fed.R.Civ.P. 6(b)(1) (“When an act may or must be done within a specified time, the court may, for good cause, extend the time: ... (B) on motion made after the time has expired if the party failed to act because of excusable neglect.”).

\*891 The court relied primarily on *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir.1994), and the three judge panel opinion in *Pincay v. Andrews (Pincay I)*, 351 F.3d 947 (9th Cir.2003), in evaluating possible excusable neglect. But we reversed *Pincay I* in our en banc decision in the same case, see *Pincay v. Andrews (Pincay II)*, 389 F.3d 853, 860 (9th Cir.2004) (en banc), and *Pincay II* cited *Kyle* as part of “[o]ur circuit's confusion” on excusable neglect, *id.* at 857. Moreover, the district court listed all four factors from *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), but did not address the first and fourth in its analysis. See *Pioneer*, 507 U.S. at 395, 113 S.Ct. 1489 (A court typically considers four factors in determining whether

a moving party engaged in excusable neglect: (1) “the danger of prejudice” to the opposing party; (2) “the length of the delay and its potential impact on judicial proceedings”; (3) “the reason for the delay, including whether it was within the reasonable control of the movant”; and (4) “whether the movant acted in good faith.”); see also *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261–62 (9th Cir.2010) (“[T]he district court here neither cited nor applied the *Pioneer* [ ] test, but instead based its decision solely on whether the reason for the delay—the third *Pioneer* [ ] factor—could establish excusable neglect. By ignoring the other three factors, the district court abused its discretion.”); *Lemoge v. United States*, 587 F.3d 1188, 1194 (9th Cir.2009) (“[W]e conclude that it will always be a better practice for the district court to touch upon and analyze at least all four of the explicit *Pioneer* [ ] factors.”).

On remand, the district court should reevaluate the excusable neglect issue by addressing all four factors of the *Pioneer* test under our current law.

Costs on appeal awarded to the plaintiffs.

The panel will retain jurisdiction of these cases.

**AFFIRMED IN PART; VACATED AND REMANDED IN PART.**

**All Citations**

584 Fed.Appx. 887

**State of Washington**  
**PUBLIC DISCLOSURE COMMISSION**  
**711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908**  
**(360) 753-1111 • FAX (360) 753-1112**  
**Toll Free 1-877-601-2828 • E-mail: [pdcc@pdcc.wa.gov](mailto:pdcc@pdcc.wa.gov) • Website: [www.pdcc.wa.gov](http://www.pdcc.wa.gov)**

**MINUTES – Regular Meeting**

9:30 a.m. | December 3, 2020

711 Capitol Way S. #206

Olympia, Washington

**Commission Members Present (Participated via Microsoft Teams Online)**

David Ammons, Chair; Fred Jarrett, Vice Chair; Bill Downing, member; Russell Lehman, member; Nancy Isserlis, member.

**Staff Present (Participated via Microsoft Teams Online)**

Peter Frey Lavalley, Executive Director; BG Sandahl, Deputy Director; Kim Bradford, Communications and Outreach Director; Sean Flynn, General Counsel; James Gutholm, Chief Information Officer; Jana Greer, Administrative Officer; Kurt Young, Compliance Officer; Erick Agina, Compliance Officer; Chad Johnson, Senior Financial Consultant, Department of Enterprise Services (DES); John Meader, Assistant Attorney General representing the Commission; and Chad Standifer, Assistant Attorney General representing PDC staff.

The regular meeting of the Public Disclosure Commission (PDC) was called to order by Commission Chair David Ammons at 9:33 a.m.

**[PDC Meeting Video](#)**

COVID 19 update: The December 3, 2020 Public Disclosure Commission Meeting was streamed live at <https://www.youtube.com/user/WASTPDC/live>.

The December commission meeting was held remotely pursuant to the Governor’s Emergency Proclamation [20-28](#) regarding Covid-19, waiving in-person meeting and access requirements.

**Public Comment | [PDC Meeting Video](#) or [PDC Meeting Video](#)**

As was noticed and announced, a conference call line was provided for public comment during this time.

No person(s) provided public comment at the December 3, 2020, Regular Meeting.

**Chair Farewell Comments | [PDC Meeting Video](#)**

Chair Ammons, in parting remarks at his last meeting as a commissioner, reflected on his time with the agency and the progress, sterling reputation and great staff of the Public Disclosure Commission. He thanked current and past commissioners, PDC staff, Assistant Attorneys General and PDC counsel, Governor Inslee, budget leaders, legislators including Senator Hunt, Representative Gregerson, and the public.

Executive Director Frey Lavalley presented a letter from the Governor addressed to Chair Ammons and a plaque of appreciation.

Fellow commissioners and PDC staff expressed gratitude toward Chair Ammons for his service and dedication to the agency.

**Election of Chair and Vice Chair 2021-2022 | [PDC Meeting Video](#)**

**MOTION 20-084** Moved by Commissioner Downing and seconded by Commissioner Lehman that:

**The Commission elect Commissioner Fred Jarrett as the Chair of the Washington State Public Disclosure Commission for the remainder of the current 2020 - 2021 term – 2022 with the expectation to extend to a full year’s term beginning in June 2021.**

The motion passed 5 – 0.

**MOTION 20-085** Moved by Commissioner Downing and seconded by Commissioner Lehman that:

**The Commission elect Commissioner Nancy Isserlis as the Vice Chair of the Washington State Public Disclosure Commission for 2021 – 2022 with the expectation to extend to a full year’s term beginning in June 2021.**

The motion passed 5 – 0.

**Consideration and Possible Approval of Meeting Minutes | [PDC Meeting Video](#)**

Meeting minutes were presented to the Commission for consideration and possible approval:

- October 15, 2020, Special Meeting
- October 22, 2020, Regular Meeting

**MOTION 20-086** Moved by Commissioner Isserlis and seconded by Commissioner Jarrett that:

**The Commission approve the meeting minutes for the October 15, 2020, special meeting as presented.**

The motion passed 4 – 0, Commissioners Ammons, Jarrett, Downing, and Isserlis voted to approve. Commissioner Lehman abstained.

**MOTION 20-087** Moved by Commissioner Isserlis and seconded by Commissioner Jarrett that:

**The Commission approve the meeting minutes for the October 22, 2020, regular meeting as presented.**

The motion passed 5 - 0.

**2021 Commission Meeting Dates | [PDC Meeting Video](#)**

The Commission reviewed the 2021 schedule for regular meetings of the Public Disclosure Commission to be submitted to the Code Reviser.

**MOTION 20-088** Moved by Commissioner Downing and seconded by Commissioner Jarrett that:

**The Commission approve the 2021 Commission meeting dates as presented for submission to the Code Reviser.**

The motion passed 5 - 0.

**Public Hearing | Rulemaking | [PDC Meeting Video](#)**

Sean Flynn, General Counsel, recommended that the commission not move forward at this time regarding the amendment of the proposed permanent rules of [SSB 6152](#). The agency received a substantial number of comments that will require more time to adequately review. Staff is proposing to come back to the Commission in January 2021 with the intent to proceed with rulemaking. General Counsel Flynn summarized the highlights of the comments that have been received.

[Dimitri Iglitzin](#) provided public comment regarding his thoughts on the burden of the need to obtain certification repeatedly for the same donor organizations as per the requirements set forth in [SSB 6152](#).

**Management Team Updates | [PDC Meeting Video](#)**

[Peter Frey Lavallee](#), Executive Director, presented updates to the Commission.

- COVID-19 Guidance and Remote Work Update.
- Congratulations to Chair Elect Jarrett and Vice Chair Elect Isserlis.
- Farewell to Chair Ammons.
- Senate Committee Meeting Update.
- Anticipated Reintroduction of the “Faux Mailers Issue” Bill by Representative Thai.

[BG Sandahl](#), Deputy Director, presented updates to the Commission.

- Audit Program Update.
- Process Improvement for Complaint to Enforcement Process.
- Active Enforcement Case Update.
- Group Enforcement Update.

[James Gutholm](#), Chief Information Officer, provided an update on PDC IT activity.

- Campaign Finance Data Migration Update.
- Post Deployment Support for Data Migration.
- Real-time Data Updates.
- Financial Affairs System Usability Study.

[Kim Bradford](#), Communications and Outreach Director, provided Customer Service and Filer Assistance updates to the Commission.

- Annual Report Update.
- Strategic Goals – Training Program Expansion.
- Legal Discovery Requests.
- Electronic Filing Hardship Exemption Update.

**Budget Update | [PDC Meeting Video](#)**

Executive Director Frey Lavallee said he has provided information to the Governor’s Office regarding the PDC, the progress it’s made over recent years and the adverse effect that potential cuts in staffing could have on the agency.

Chad Johnson, Senior Financial Consultant, Department of Enterprise Services (DES), updated the Commission on the budget requests submitted by the agency. He discussed the meeting he had with the Office of Financial Management to clarify some budget questions. Mr. Johnson is now awaiting the Governor's proposed budget, expected to be released by December 20, 2020. Mr. Johnson noted that the next revenue forecast is expected in February 2021.

**F-1 filers who partially reported due to COVID-19** | [PDC Meeting Video](#)

Outreach and Communications Director Kim Bradford provided an update on the COVID-19 reporting option that was made available to financial affairs (F-1) filers in March 2020. The option allowed for 2020 filers to file partial financial affairs statements because of limited access to records due to the pandemic. Those filers made a commitment to complete their reports no later than 30 days after the State of Emergency had lifted.

Given that most institutions have reopened in some fashion, PDC staff believes most filers should now be able to complete their reports. The agency will be performing outreach to the 303 filers who claimed the partial reporting option to notify them of the need to amend their reports or provide a written explanation of the inability to file complete reports. The COVID-19 reporting option will not be available for the 2021 filing season.

**Enforcement Updates** | [PDC Meeting Video](#)

Kurt Young, Compliance Officer, provided the enforcement update report for the period October 14, 2020, to November 23, 2020:

As of November 23, 2020, 53 Active Cases Open.

14 Under Investigation with Initial Hearings

39 Cases Under Assessment

153 Group Enforcement Cases

43 Cases Closed during the Period

- 6 Cases found with No Evidence of Violations
- 22 Cases Closed with Reminder
- 5 Cases Closed with Formal Written Warning
- 4 Cases Closed as Unfounded
- 5 Cases Resolved through Statement of Understanding
- 1 Case Violation Found by the Commission

**Break/Executive Session /Closed Session** | [PDC Meeting Video](#)

The Commission went into Executive Session at 11:45 a.m. to discuss matters allowed in Executive Session pursuant to [RCW 42.30.110](#), including but not limited to discussion of enforcement matters, pending and potential litigation with legal counsel, and personnel matters.

Returned to public meeting at 1:08 p.m.

**Enforcement (Possible Stipulation)** | [PDC Meeting Video](#)

Chad Standifer, Assistant Attorney General, presented the proposed Stipulation for [PDC Case 75003](#), [Committee to Recall Snohomish County Sheriff Adam Fortney](#), involving alleged violations of [RCW 42.17A.235](#) and [RCW 42.17A.240](#) for failure to timely and accurately report contributions.

Colin McMahon, Chair of the Committee to Recall Snohomish County Sherriff Adam Fortney, participated by phone via Microsoft Teams.

**MOTION 20-089** Moved by Commissioner Downing and seconded by Commissioner Jarrett that:

**The Commission approve the stipulation as to Facts, Violations and Penalty with the following amendments: The inclusion of 30 days payment or referral to collections language, the duration of the deferred enforcement remaining until dissolution of the Committee, and the acknowledgment that all other requirements of 42.17A are applicable and to be adhered to with the exception of the campaign contribution limitation.**

The motion passed 5 - 0.

PDC staff and Mr. McMahon, on behalf of the Committee, concurred in the amendments.

**Consideration of Petition for Declaratory Order by Committee to Recall Sherriff Adam Fortney and Possible Commission Action** | [PDC Meeting Video](#)

Colin McMahon, Chair of the Committee to Recall Sherriff Adam Fortney, agreed the topic could be withdrawn from discussion due to the conclusion of the previous agenda item.

Meeting adjourned at 1:48 p.m.

Approved January 28, 2021.