

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 HUMAN LIFE OF WASHINGTON, INC.,

9 Plaintiff,

10 v.

11 CHAIR BILL BRUMSICKLE, VICE CHAIR  
12 KEN SCHELLBERG, SECRETARY DAVE  
13 SEABROOK, JANE NOLAND, AND JIM  
14 CLEMENTS, in their official capacities as officers  
and members of the Washington State Public  
15 Disclosure Commission, ROB MCKENNA, in his  
official capacity as Washington Attorney General,  
and DAN SATTERBERG, in his official capacity  
as King County Prosecuting Attorney,

16 Defendants.  
17

CASE NO. C08-0590-JCC

ORDER

18  
19 This matter comes before the Court on Plaintiff’s Motion for Preliminary Injunction (Dkt. Nos. 8  
20 & 32), the State Defendants’ Response in opposition (Dkt. No. 44), and Plaintiff’s Reply (Dkt. No. 55).  
21 Having considered the parties’ briefing and supporting documentation, and determining that oral  
22 argument is unnecessary, the Court hereby finds and rules as follows.

23 **I. BACKGROUND**

24 Plaintiff Human Life of Washington (“HLW”) is a nonprofit organization, incorporated under  
25 Washington law, that seeks to engage in what it calls “constitutionally-protected ‘issue advocacy’ on the  
26 issue of physician-assisted suicide.” (V. Compl. ¶ 1 (Dkt. No. 1).) The State Defendants in this matter are

1 officers and commissioners of the Washington State Public Disclosure Commission (“PDC”), who along  
2 with the Defendant State Attorney General, have enforcement authority over violations of Washington’s  
3 election laws. (*Id.* ¶¶ 14–15.)

4 The issues implicated in this case arise from Washington Initiative 1000 (“I-1000”), which is in  
5 the process of being qualified for the November 2008 ballot and would permit certain terminally ill  
6 patients to request and self-administer lethal medication prescribed by a physician. (*Id.* ¶ 20.) According  
7 to Plaintiff, I-1000 makes 2008 a particularly important time to debate end-of-life issues, and therefore it  
8 intends to solicit funds for radio advertisements with a fund raising letter and phone script, and then  
9 broadcast the ads, activities that Plaintiff maintains will not expressly urge a position for or against  
10 I-1000. (Pl.’s Mot. 2 (Dkt. No. 32).)

11 Out of concern that their solicitation of funds and broadcast of advertisements might trigger  
12 public disclosure requirements under state law, and believing that such requirements are illegal, Plaintiff  
13 filed this action on April 16, 2008, challenging the constitutionality of certain provisions of Washington’s  
14 election laws. (V. Compl. ¶¶ 41–66 (Dkt. No. 1).) Specifically, Plaintiff takes issue with Washington’s  
15 definition of a “political committee” (Count 1), *see* WASH. REV. CODE § 42.17.020(39), its definition of  
16 “independent expenditure” (Count 2), *see* WASH. REV. CODE § 42.17.100, its definition of “political  
17 advertising” (Count 3), *see* WASH. REV. CODE § 42.17.020(37), and its reporting requirement for  
18 communications containing “a rating, evaluation, endorsement, or recommendation for or against a  
19 candidate or ballot measure” (Count 4), *see* WASH. ADMIN. CODE § 390–16–206. With the instant  
20 motion, Plaintiff requests a preliminary injunction against enforcement of the challenged provisions until  
21 the merits can be decided.

## 22 **II. DISCUSSION**

### 23 **A. Legal Standard**

24 To obtain a preliminary injunction, the moving party must satisfy either the “traditional” or  
25 “alternative” test. Under the traditional test, a court must find that: (1) the moving party will suffer  
26

1 irreparable injury if the relief is denied, (2) the moving party will probably prevail on the merits, (3) the  
2 balance of potential harm favors the moving party, and (4) the public interest favors granting relief.  
3 *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). The alternative test requires a court to find: (1) a  
4 combination of probable success and the possibility of irreparable injury; or (2) that serious questions are  
5 raised and the balance of hardships tips sharply in its favor. *Id.* Under this last part of the alternative test,  
6 “even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an  
7 irreducible minimum that there is a fair chance of success on the merits.” *Johnson v. Cal. St. Bd. of*  
8 *Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995). The two prongs of the alternative test are not separate  
9 inquiries, but rather “extremes of a single continuum.” *Clear Channel Outdoor, Inc. v. City of Los*  
10 *Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). “[T]he less certain the district court is of the likelihood of  
11 success on the merits, the more plaintiffs must convince the district court that the public interest and  
12 balance of hardships tip in their favor.” *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d  
13 914, 918 (9th Cir. 2003).

#### 14 **B. Justiciability**

15 Defendants’ threshold argument is that this matter is not justiciable, since Plaintiff’s proposed  
16 activities are uncertain and speculative, and have not been subject to enforcement. (Defs.’ Resp. 8 (Dkt.  
17 No. 44).) It is also Defendants’ position that Plaintiff’s failure to exhaust administrative remedies by  
18 seeking guidance from the PDC renders this action non-justiciable. (*Id.* at 9.) Plaintiff responds by citing  
19 the unique standing and ripeness doctrines in the First Amendment arena, asserting that pre-enforcement  
20 challenges of this kind are justiciable when the exercise of First Amendment rights might be impermissibly  
21 chilled. (Pl.’s Reply 2–3 (Dkt. No. 55).) As for the exhaustion of remedies, Plaintiff cites authority for the  
22 proposition that this obligation is excused in § 1983 actions. (*Id.* at 3–4.)

23 The “case or controversy” requirement has a unique application when First Amendment speech is  
24 implicated:

25 Particularly in the First Amendment-protected speech context, the Supreme Court has  
26 dispensed with rigid standing requirements. “In an effort to avoid the chilling effect of

1 sweeping restrictions, the Supreme Court has endorsed what might be called a ‘hold your  
2 tongue and challenge now’ approach rather than requiring litigants to speak first and take  
their chances with the consequences.”

3 *California Pro-Life Council, Inc. v. Getman* (“*CPLC I*”), 328 F.3d 1088, 1094 (9th Cir. 2003) (citation  
4 omitted) (quoting *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir.  
5 2003). According to *CPLC I*, whether there is a justiciable “case or controversy” in a pre-enforcement  
6 action depends on whether the challenged regulation “arguably covers” a plaintiff’s intended conduct.  
7 *CPLC I*, 328 F.3d at 1095. If it does, the plaintiff may bring a challenge even if there has been no threat  
8 of enforcement. *Id.*

9 For the purposes of standing, the instant case appears to be virtually indistinguishable from *CPLC*  
10 *I*. Plaintiff maintains that but for Washington’s public disclosure requirements, it would solicit funds for  
11 broadcast advertisements concerning physician-assisted death. No enforcement action has been brought  
12 or threatened. Nonetheless, on a plain reading of the challenged provisions, this Court cannot say that  
13 they do not “arguably cover[]” Plaintiff’s intended conduct. Regarding Count 1, the definition of  
14 “political committee” includes “any person (except a candidate or an individual dealing with his or her  
15 own funds or property) having the expectation of receiving contributions or making expenditures in  
16 support of, or opposition to, any candidate or any ballot proposition.” WASH. REV. CODE §  
17 42.17.020(38). Without wading into the contested distinction between “issue advocacy” and “express  
18 advocacy,” it is enough to say that Plaintiff’s proposed solicitations and advertisements at least  
19 “arguably” place them within Washington’s definition of a “political committee.” The definition of  
20 “independent expenditure” challenged in Count 2 yields the same conclusion, as “the term ‘independent  
21 expenditure’ means any expenditure that is made in support of or in opposition to any candidate or ballot  
22 proposition and is not otherwise required to be reported . . .” WASH. REV. CODE § 42.17.100(1).  
23 Furthermore, that Plaintiff’s activities could “arguably” be deemed “political advertising” is apparent from  
24 the definition of that term in RCW § 42.17.020(37), which includes any means of mass communication  
25 “used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or  
26

1 opposition in any election campaign.” Finally, the requirement that “[a]ny person making a measurable  
2 expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against  
3 a candidate or ballot proposition shall report such expenditure,” WASH. ADMIN. CODE § 390-16-206, at  
4 least arguably applies to Plaintiff’s activities.

5 This analysis is to be distinguished from one actually applying the challenged provisions to  
6 Plaintiff’s proposed activities; the Court does not purport to decide those questions here. For the purpose  
7 of standing it is enough to say that the matter is reasonably arguable. Accordingly, under the unique  
8 justiciability doctrine for challenges regarding First Amendment speech, there is a sufficient “case or  
9 controversy” here to confer standing upon the Plaintiff.<sup>1</sup>

10 Furthermore, that Plaintiff has not exhausted its administrative remedies by seeking guidance with  
11 the PDC does not render the matter non-justiciable. While it would have been helpful to have the input of  
12 those charged with interpreting and enforcing Washington’s election laws, “the Supreme Court has  
13 explicitly held that exhaustion is not required for claims brought under 42 U.S.C. § 1983.” *Truth v. Kent*  
14 *School Dist.*, 524 F.3d 957, 966 (9th Cir. 2008). Thus, under Plaintiff’s theory of the case, this matter  
15 may be heard in federal court without first recourse with the PDC.

### 16 C. Probable Success on the Merits

17 Since Plaintiff’s claims are justiciable, the Court proceeds to the question of whether a  
18 preliminary injunction should issue. With this case being in a relatively early stage, and because the Court  
19 must judge the constitutionality of Washington law without the guidance of those charged with its  
20 enforcement, the Court denied Plaintiff’s motion to consolidate hearing of the motion for preliminary  
21 injunction and consideration of the merits. (*See* Order 4–5 (Dkt. No. 38).) The rationale was to ensure  
22

---

23 <sup>1</sup> It is worth noting that this analysis applies even though I–1000 has yet to officially qualify for  
24 the November 2008 ballot. This is because the term “ballot proposition,” as used in the challenged  
25 provisions, includes initiatives “from and after the time when the proposition has been initially filed with  
26 the appropriate election officer of that constituency prior to its circulation for signatures.” WASH. REV.  
CODE § 42.17.020(4). To the Court’s knowledge, I–1000 is already a “ballot proposition” by this  
standard.

1 that the relevant issues are fully developed and briefed prior to a dispositive ruling. As the parties are well  
2 aware, however, both the traditional and alternative tests for a preliminary injunction depend largely on  
3 whether the moving party enjoys probable success on the merits, and therefore some appraisal of the  
4 underlying claims is necessary.

5 On this point, Plaintiff offers an extended discussion of campaign finance law since the Supreme  
6 Court's seminal opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), arguing that as a facial matter, the  
7 challenged provisions are vague and overbroad, and that as applied to Plaintiff's intended activities, they  
8 would impose burdens that contravene First Amendment protection for organizations like HLW that seek  
9 to engage in "issue advocacy." (Pl.'s Mot. 3–23 (Dkt. No. 32).) Specifically, Plaintiff argues that under  
10 *California Pro-Life Council, Inc. v. Randolph* ("CPLC *II*"), 507 F.3d 1172 (9th Cir. 2007), an  
11 organization such as HLW, whose "major purpose" is not campaign advocacy, cannot be regulated as a  
12 "political committee." (Pl.'s Mot. 3–5 (Dkt. No. 32).) Plaintiff also asserts that Washington law purports  
13 to regulate pure issue advocacy, which it cannot do under *Buckley* and *FEC v. Wisconsin Right to Life,*  
14 *Inc.* ("WRTL *II*"), 127 S. Ct. 2652 (2007). (Pl.'s Mot. 5–10 (Dkt. No. 32).) Applying these principles,  
15 Plaintiff argues that Washington's definition of "political committee," "independent expenditure,"  
16 "political advertising," and its requirements for a "rating, evaluation, endorsement or recommendation"  
17 are all unconstitutional. (*Id.* at 10–23.) Furthermore, Plaintiff contends that to the extent these provisions  
18 do not violate the Constitution *per se*, they do not withstand strict scrutiny, which Plaintiff maintains is  
19 the applicable standard of review. (Pl.'s Reply 7–8 (Dkt. No. 55).)

20 Without engaging in an extended consideration of the merits that would preclude further  
21 development of the relevant issues, the Court concludes that Plaintiff has not shown probability of  
22 success on the merits. Plaintiff cites a patchwork of major Supreme Court cases that set forth the  
23 distinctions upon which Plaintiff bases its claims, such as "express advocacy" versus "issue advocacy,"  
24 and the "major purpose" test for organizations subject to campaign finance regulation. However, it is  
25  
26

1 neither clear that the analyses cited are the same with respect to public disclosure requirements,<sup>2</sup> nor that  
2 Plaintiff's desired activities themselves should be characterized as Plaintiff claims. As for the few cases in  
3 this Circuit that have dealt squarely with the issues presented in this case, they offer a far less conclusive  
4 picture than Plaintiff suggests.

5 For example, Plaintiff relies heavily upon the companion cases *CPLC I* and *CPLC II*, which  
6 involved a similar challenge to California public disclosure laws. The Ninth Circuit in *CPLC I* relied upon  
7 a state court construction of the statute in question to decide that California's definition of "independent  
8 expenditure" was not unconstitutionally vague; the court then upheld the state's right to regulate express  
9 ballot advocacy, provided that the regulation survive strict scrutiny. *CPLC I*, 328 F.3d at 1098–1104. In  
10 *CPLC II*, decided after *McConnell v. FEC*, 540 U.S. 93 (2003) cast doubt over the distinction between  
11 "express advocacy" and "issue advocacy," the Ninth Circuit applied the strict scrutiny analysis based on  
12 the "law of the case" doctrine, without deciding whether it was the proper standard. *CPLC II*, 507 F.3d  
13 at 1177 n.5. Furthermore, while the *CPLC II* court concluded that California's imposition of PAC-like  
14 requirements was not narrowly tailored, it also made clear that "irrespective of the major purpose of an  
15 organization, disclosure requirements may be imposed." *Id.* at 1180 n.11 (citing *Alaska Right to Life*  
16 *Committee v. Miles*, 441 F.3d 773, 786 (9th Cir. 2006)). Thus, contrary to Plaintiff's claim that "Ninth  
17 Circuit and Supreme Court precedents forbid Washington from imposing PAC status on groups like  
18 HLW, whose major purpose is issue advocacy," (Pl.'s Mot. 5 (Dkt. No. 32)), it appears that no such  
19 categorical rule governs, and in fact, the "major purpose" test in this context is something of a red  
20 herring.

21 For the purpose of applying authoritative Ninth Circuit case law to public disclosure requirements  
22

---

23 <sup>2</sup> The Court offers this observation not to indicate that cases such as *WRTL II* are entirely  
24 inapposite to the instant matter, but rather to express caution with importing their rationale wholesale,  
25 without reference to the particular type of regulation at issue. Plaintiff evinces a similar caution with  
26 respect to the holding in *McConnell*, which Plaintiff claims "is meaningless [for this case] because [it]  
does not involve contribution limits." (Pl.'s Reply 8 (Dkt. No. 55).) Of course, *WRTL II* did not involve  
public disclosure requirements, and thus one might fairly question how broadly its holding extends.

1 in harmony with the major Supreme Court decisions in *Buckley*, *McConnell*, and *WRTL II*, the Court  
2 considers *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006) to be particularly  
3 instructive. That case featured substantially similar facial and as-applied challenges to public disclosure  
4 requirements under Alaska law that bear a strong resemblance to those at issue here. Observing that the  
5 level of scrutiny required in the public disclosure context was unclear from governing precedent, the  
6 Ninth Circuit in *Miles* assumed without deciding that strict scrutiny would apply. *Id.* at 788. It then  
7 concluded that the challenged provisions of Alaska law all survived strict scrutiny as they advanced a  
8 “compelling state interest” while being “narrowly tailored” to their objectives. *Id.* at 791.

9       These are precisely the issues presented in the instant matter, and what *Miles* demonstrates is that  
10 even if Plaintiff were to prevail on its theory of the proper legal standard to be applied in this case, the  
11 state regulatory framework could very well pass constitutional muster. Whether Washington’s public  
12 disclosure provisions should be treated as Alaska’s were is still an open question, however in light of the  
13 Ninth Circuit’s exhaustive analyses in *Miles* and *CPLC I & II* this Court cannot say with any assurance  
14 that Plaintiff’s ability to prevail on the merits is probable.

#### 15       **D. Irreparable Injury**

16       Plaintiff argues that it would suffer “irreparable injury” without injunctive relief, premising this  
17 claim largely upon the inherent value of First Amendment freedoms forgone. (Pl.’s Mot. 23 (Dkt. No.  
18 32).) While the Court acknowledges the magnitude of Plaintiff’s alleged harm, under either the traditional  
19 or alternative test for a preliminary injunction, this factor alone cannot compensate for the lack of  
20 probable success on the merits discussed above.

#### 21       **E. Balance of Potential Harm and The Public Interest**

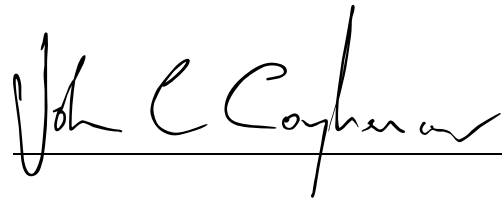
22       With respect to these factors, the Court concludes that although the exercise of First Amendment  
23 freedoms is among the most cherished in our constitutional jurisprudence, the state interest here is  
24 substantial in its own right. Through their duly elected representatives, Washington voters have enacted a  
25 series of public disclosure requirements intended to promote transparency in the election process by  
26

1 revealing the sources of funding during elections so that voters may be informed as to the nature of the  
2 information they receive. While these estimable goals must yield to the Constitution if the two are indeed  
3 in conflict, it cannot be said that the state would not suffer a substantial hardship if a regulatory  
4 framework in place for over 35 years were to suddenly be upturned in an election year. Finally, Plaintiff is  
5 quite right to observe that “[t]he public has an interest in its representatives enacting and enforcing  
6 constitutional laws.” (Pl.’s Mot. 24 (Dkt. No. 32).) However, this simply begs the question posed by this  
7 case. Thus, it is also true that if the challenged provisions are constitutional, the public has a strong  
8 interest in their continued enforcement, for the very reasons they were adopted in the first place. Simply  
9 put, without deciding the underlying merits of the action, the balance of potential harm and the public  
10 interest do not decisively favor the Plaintiff.

11 **III. CONCLUSION**

12 For the foregoing reasons, Plaintiff’s Motion for a Preliminary Injunction (Dkt. Nos. 8 & 32) is  
13 DENIED.

14 SO ORDERED this 9th day of July, 2008.

15  
16  
17 

18 John C. Coughenour  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26