**NOT FOR PUBLICATION**

FILED

OCT 20 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| INSTITUTE FOR FREE SPEECH, a Virginia non-profit corporation,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>FRED JARRETT, in his official and personal capacities as Chair of the Washington Public Disclosure Commission; et al.,<br><br>Defendants-Appellees. | No. 22-35112<br><br>D.C. No. 3:21-cv-05546-BJR<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted October 7, 2022
Seattle, Washington

Before: MURGUIA, Chief Judge, and W. FLETCHER and BENNETT, Circuit Judges.

Plaintiff-Appellant Institute for Free Speech sued the Washington State Attorney General and the commissioners of the Washington Public Disclosure Commission—the agency charged with enforcing the state's campaign-finance

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

laws—alleging First Amendment violations. The Institute alleged that it did so because it feared that representing political operative Tim Eyman pro bono in a state-court appeal of a campaign-finance-enforcement action would subject it to certain disclosure requirements under Washington's Fair Campaign Practices Act. On the Institute's petition, the Commission issued a binding declaratory order stating that the Institute would not be subject to any such requirements for representing Eyman in that appeal.

Upon crossmotions for summary judgment, the district court found that the Institute lacked Article III standing and granted judgment in the Defendants-Appellees' favor. We have jurisdiction under 28 U.S.C. § 1291 and review summary-judgment orders de novo. *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 790 (9th Cir. 2006). We affirm.

Federal courts are courts of limited jurisdiction, possessing "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under Article III, we may hear only "actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (cleaned up); *see* U.S. Const. art. III, § 2, cl. 1. The case-or-controversy requirement demands that, "[i]n every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control*

*Components, Inc.*, 572 U.S. 118 (2014). The "irreducible constitutional minimum" of Article III standing requires showing, among other things, "an injury in fact that is concrete, particularized, and actual or imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

To escape the chilling effect of sweeping restrictions on speech, a plaintiff in a pre-enforcement First Amendment challenge "may establish an injury in fact without first suffering a direct injury from the challenge[d] restriction." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (explaining that litigants are not required to speak and face the consequences before filing suit). Although we apply a more relaxed standing standard in the First Amendment context, the requirement is not waived—the plaintiff must still demonstrate that it faces "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," otherwise "the alleged injury is too imaginary or speculative to support jurisdiction." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (cleaned up).

We consider three interrelated factors to determine if the Institute, a pre-enforcement plaintiff, has "failed to show that [it] face[s] a credible threat of adverse state action sufficient to establish standing": (1) whether there is "a reasonable likelihood that the government will enforce the challenged law against" the Institute, (2) whether the Institute has established a concrete "inten[t] to violate the challenged

law," and (3) whether "the challenged law is inapplicable to" the Institute, "either by its terms or as interpreted by the government." *Lopez*, 630 F.3d at 786. The Institute's fear of enforcement must be "actual[,] well-founded," "*plausible*[,] and *reasonable*," such that it "adequate[ly] substitute[s] for a claim of . . . a threat of specific future harm." *Wolfson v. Brammer*, 616 F.3d 1045, 1062 (9th Cir. 2010); *Lopez*, 630 F.3d at 787 (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14). And the Institute "can have no well-founded fear" of prosecution if the Act does not "unambiguously reach [its] proposed conduct." *Wolfson*, 616 F.3d at 1063.

1. There is not a reasonable likelihood of enforcement, because as interpreted by the Commission, the Act is inapplicable to the Institute. The Commission's declaratory order explicitly provides that the Institute will not be subject to any of the Act's requirements:

> *Pro bono* legal services provided prospectively by [the Institute] to . . . Eyman individually . . . for the limited purpose of pursuing an appeal of the court order and judgment against . . . Eyman in [the state trial court] *does not require* [the Institute] to register or report the identity of its donors, the value of its services, its cost of providing services, or any other information to [the Commission] under the [Act] for those legal services.

This declaration gives the Institute exactly what it wanted and asked for in its petition to the Commission. There is no reasonable likelihood that the State will enforce the campaign-finance law against the Institute because the Institute's proposed plan of action *does not require registration under* the Act. Accordingly, the declaratory

order alone establishes that the Institute cannot show an injury in fact sufficient to provide it standing.

2. Because Eyman is not a candidate, a ballot proposition, or an election campaign, the Institute cannot establish a concrete intent to violate the law. Even absent the declaratory order, representing Eyman on his appeal would not place the Institute within the Act's ambit. The Act's disclosure requirements would only be triggered if the Institute were a "political committee" or an "incidental committee." Wash. Rev. Code §§ 42.17A.205, 42.17A.207, 42.17A.235. The Institute is neither kind of committee because it has no expectation of making either "expenditures in support of, or opposition to, any candidate or any ballot proposition," or "contributions or an expenditure . . . directly or "through a political committee." *Id.* §§ 42.17A.005(28), (41); *see also* Wash. Admin. Code §§ 390-16-013(1), (5)(a). So under the Act's terms, the Institute's fear of prosecution is not actual, well-founded, plausible, or reasonable. The Act does not arguably—let alone unambiguously—reach the Institute's proposed conduct here. Consequently, the district court correctly concluded that the Institute lacks standing. The summary-judgment order is

**AFFIRMED.**[1]

[1] The Institute's motion to take judicial notice (Docket Entry No. 17) is granted.