No. 09-A_____

In the Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, AND PROTECT MARRIAGE WASHINGTON,
Appellants

v.

REED et al., *Appellees and Intervenor-Appellees*,

Appeal from No. 09-35818 and consolidated cases in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 3:09-CV-05456-BHS in the
U.S. District Court for the Western District of Washington

Application of John Doe #1, John Doe #2, and Protect Marriage Washington to Vacate the Ninth Circuit's Stay of the District Court's Preliminary Injunction

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To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

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Table of Contents

Table of Authorities

Cases

Statutes and Rules

Other Authorities

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To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit:

This Application is a request to vacate a stay issued by the Ninth Circuit, which stays a preliminary injunction issued in the Western District of Washington. The events leading to the District Court's issuance of the preliminary injunction began in May 2009, when Washington's governor signed a bill into law which expands the rights, responsibilities, and obligations of individuals entering into domestic partnerships in Washington.

Shortly after this bill was signed into law, Applicant Protect Marriage Washington began circulating a referendum petition, designated Referendum 71. Upon gathering the requisite number of signatures, Referendum 71 would delay the effective date of the bill, until the citizens of Washington could vote upon its passage. In July 2009, the Referendum 71 petition, which included over 138,500 signatures, was submitted to the Secretary of State. Upon a review of all the signatures, the Secretary of State determined that Referendum 71 had qualified for the November 2009 ballot.

Washington statutes contemplate that the signatures on the referendum petitions will not be publicly disclosed; for instance, during the signature review process, observers of the process are prohibited from making any record of the

information regarding the individuals who signed the petitions. Moreover, since the 1930s, all formal opinions of the Attorney General have maintained that these signatures are not public records subject to disclosure under Washington's public record disclosure laws. Even after Washington's current public records act went into effect, the Secretary of State maintained that "petitions are not public records" and that "the release of these signatures [has] no legal value, but could have deep political ramifications to those signing." A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973 (*see* Appendix). However, despite these statutes and Washington's long history of preventing the release of referendum petitions under its public records act, the State now maintains that the referendum petitions are public records, subject to disclosure.

That Washington suddenly considers referendum petitions public records that are subject to disclosure is particularly troubling in the context of Referendum 71. Two groups who have asked for the referendum petitions, KnowThyNeighbor.org and WhoSigned.org, have publicly stated that they will be placing the names of the petition signers on the internet in a searchable database, so that individuals can have "personal" and "uncomfortable" conversations with the citizens who signed the referendum petition. Not only does the State support the release of the names to these groups, but throughout the case, the State has maintained that its facilitation of such "conversations"

through public disclosure is acceptable and normal part of the political process.

The State also facilitates these "conversations" in light of a growing amount of evidence that these are not "conversations" at all, but "confrontations." The Applicants submitted numerous declarations from Washington, California, and across the country in the District Court illustrating the sort of confrontations that have already occurred to those whose names are publicly associated with Referendum 71 or other similar ballot measures. For instance, Larry Stickney, the campaign manager for Applicants, has received an email death threats telling him to avoid areas of Washington, and another email threatening to hurt his family. Mr. Stickney has taken these threats seriously, going so far as making his family sleep in an interior living room to ensure their safety, as well as reporting the threats to the sheriff.

That the process of signing a petition is political speech is of little doubt; the Supreme Court has previously stated, "Initiative petition circulation 'of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.'" *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, (1999) ("*Buckley II*") (quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988)). Without Washington's public disclosure laws, the names of the referendum signers, who are engaging in political speech, would not be considered public records subject to disclosure. However, without any compelling government interest for releasing them,

Washington considers the referendum petitions "public records" that can be disclosed to the public, including to those who seek to use the names solely to harass, intimidate and threaten the petition signers.

On September 10, 2009, the Western District of Washington, recognizing the irreparable injury that Applicants would suffer if the names of the referendum signers were released to the public, issued a well-reasoned preliminary injunction Order preventing the release of the names of the petition signers. However, on October 15, 2009, the Ninth Circuit issued a short, half-page Order issuing a stay of the District Court's preliminary injunction. The Ninth Circuit's Order is immediately effective, and provides no reasoning or basis for its decision.[1]

The problem currently facing Applicants is the immediacy of the Ninth Circuit's Order. At any time, the Secretary of State could release the names of the more than 138,500 individuals who signed the Referendum 71 petition, subjecting those individuals to the irreparable harm of public disclosure of their protected political speech. Because the Order of the Ninth Circuit fails to give any reasons for its decision, Applicants are unable to seek any review, because the Order provides no basis on which review could be sought.

Therefore, Applicants respectfully request that the stay be vacated until

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[1] Both the Order of the District Court and the Order of the Ninth Circuit are included in the Appendix attached hereto.

such time as the decision on the preliminary injunction is issued, and Applicants can seek a writ of certiorari on the issues . This request would preserve the issues for appeal, as well as the First Amendment rights to engage in political speech exercised by the signers of Referendum 71.

Standard for Vacating a Stay Granted by an Appellate Court

The decision to vacate a stay of the Ninth Circuit is considered, on appeal to a Circuit Judge, under the same standards as the Circuit Judge would consider a stay application. *See Western Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1310 (1987) (applying stay standards to a motion to vacate a stay issued by the Court of Appeals); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-1313 (1973) (same). On a motion to vacate a stay, "The conditions that must be shown to be satisfied before a Circuit Justice may grant such an application are familiar: a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309, 1310 (1994).

As to a Circuit Judge's ability to act in this situation, "[t]he power of a Circuit Justice to dissolve a stay is well settled." *New York v. Kleppe*, 429 U.S. 1307, 97 S. Ct. 4, 5 (1976). Further, when asking for relief prior to a final decision of the Court of Appeals, "[p]erhaps the most compelling justification for

a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *Kleppe*, 429 U.S. 1307, 97 S. Ct. at 6 (1976). Moreover, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

Facts

Because the Ninth Circuit has not issued any opinion in this case, Applicants will set out the pertinent facts before the District Court, as well as those facts pertinent to the case's current posture, and which provide both a background as to how this case arose and context for the Applicants' later discussion as to why the District Court was correct to issue a preliminary injunction.

On May 18, 2009, Washington Governor Christine Gregoire signed

Engrossed Second Substitute Senate Bill 5688.[2] The bill expands the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses. The bill is often referred to simply as the "everything but marriage" domestic partnership bill.

In May 2009, Protect Marriage Washington, one of the Applicants, began circulating a referendum petition on Senate Bill 5688, designated Referendum 71. Pursuant to the Washington Constitution, upon gathering the requisite number of signatures on a referendum petition, a bill signed into law must be put to a vote of the citizens of Washington as to its ultimate passage. Wash. Const. art. II, § 1(b). On Saturday, July 25, 2009, Applicant Protect Marriage Washington submitted a petition containing over 138,500 signatures to the Secretary of State. John Doe #1 and John Doe #2 are two of the 138,500 citizens who signed the petition. The Secretary of State subsequently conducted an extensive canvass and verification of the petitions and has determined that Referendum 71 received a sufficient number of signatures and that it has qualified for the election to be held on November 3, 2009.[3]

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[2] The facts of this case pertinent to the underlying appeal are set forth in great detail by the District Court in its Opinion, which Applicants have attached in the Appendix. Applicants now restate the basic facts as well as those pertinent to this Application for the Justice's convenience.

[3] The signature verification process has been the subject of several lawsuits during the pendency of this action. However, none of the state court actions involve the issue presented to on this appeal.

Proponents and opponents of a referendum are permitted to have observers present as the Secretary of State conducts the signature verification process. However, Washington law explicitly prohibits the observers from making any record of the names, addresses, or other information contained on the petitions. Revised Code of Wash. ("RCW") § 29A.72.230.

Several groups are now attempting to make an end run around this provision and have requested copies of the Referendum 71 petitions submitted to the Secretary of State pursuant to Washington's Public Records Act. RCW § 42.56.001 *et seq*. The State has taken the position that referendum petitions are "public records" within the meaning of RCW § 42.56.10(2) and are subject to public disclosure pursuant to RCW § 42.56.070.[4] If the preliminary injunction is stayed pending appeal, the petitions will be released to the groups that have submitted public records requests for the petitions.

Although the State now takes the position that the referendum petitions are "public records," this has not always been the case. Attorney general opinions from 1938 and 1956 state that referendum petitions are not public records subject to public disclosure. Wash. Op. Att'y Gen. 378 (1938); Wash. Op. Att'y Gen. 55-57 No. 274 (1956). Even after the Public Records Act was enacted, the Secretary of State maintained that the names of petition signers were not

[4] Although the Public Records Act does contain exemptions from disclosure, the parties appear to agree that the Public Records Act does not contain a specific exemption for referendum petitions.

subject to release. *See* A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973; *see also* A. Ludlow Kramer, Official Statement, July 13, 1973.

Further , while the Secretary of State is granted the authority to canvass and verify the signatures, the elections code specifically prohibits any observer of the verification process from making any record of the names and addresses of petition signers.[5] RCW § 29A.72.230 (observers of the signature verification process may "make no record of the names, addresses, or other information on the petitions . . . .") The names of those who sign a petition in Washington are divulged to a limited number of people, for a very limited purpose—to verify that a referendum petition is properly on the ballot. Within this limited disclosure, the State has taken affirmative steps through the election code to keep the names of the petition signers confidential.

Among the individuals and groups that have requested copies of the petitions are two groups that have publicly stated that they intend to place the names and addresses of those who signed Referendum 71 on the internet. Their

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[5] Further, from its language, it appears that if any Washington citizen is dissatisfied with the verification process, he or she need not see the signatures to have the verification process appealed to the Court system; he or she must only express his or her dissatisfaction and the appeal is taken. RCW § 29A.72.240 ("Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may . . . apply to the superior court of Thurston County for a citation requiring the secretary of state to submit the petition to said court for examination . . . .")

stated intent is to make the names searchable, with the goal of encouraging individuals to have "uncomfortable" conversations with any individual that signed the petition. The news media has widely reported that KnowThyNeighbor.org and WhoSigned.org intend to publish the names of petition signers on the internet.[6]

As set forth above, on September 10, 2009, the District Court, after extensive briefing by the parties and intervenors, and a preliminary injunction hearing, issued a preliminary injunction preventing the release of the names of the petition signers. On September 11, 2009, the State, followed in later days by the two intervenors, appealed to the Ninth Circuit. Specifically, the State asked the Ninth Circuit for a motion to stay the preliminary injunction pending appeal, and to overturn the preliminary injunction, and asked that the case be expedited in light of the November 3, 2009 election. The Ninth Circuit expedited the appeal, and after an accelerated briefing schedule, held oral argument on

[6] In the District Court, Applicants also brought a claim that alleges that the release of the names of the petition signers for this particular referendum petition would also result in a reasonable probability that those petition signers whose names were revealed would be subject to threats, harassment, and reprisals under the reasonable-probability test established by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), and subsequent cases. However, the District Court did not consider this claim in its Order of September 10, 2009, and Applicants do not know whether the Ninth Circuit addressed it in its decision, because of the failure of the Ninth Circuit to provide any reasoning behind their Order.

October 14, 2009.[7] On October 15, 2009, the Ninth Circuit issued an Order staying the preliminary injunction, effective immediately. Because of its immediate effectiveness, the State could, at any time, release the names of the petition signers to the public, causing irreparable harm to the First Amendment political speech rights of the petition signers.

The Ninth Circuit's Order provided no reasoning for its decision.[8] Though the Ninth Circuit has stated that an opinion "shall be issued expeditiously and in due course," the immediacy of the Ninth Circuit's Order means that Applicants and the petition signers will suffer irreparable injury to their First Amendment rights before they can so much as appeal.

Argument

Applicants will first address the inherent problems in the Ninth Circuit's Order, and the related rules that prevent Applicants from asking for a rehearing or rehearing *en banc* at this time. Then, in the context of the three aspects of a Circuit Judge's review of the Ninth Circuit's Order set forth above, further flaws of the stay pending appeal granted by the Ninth Circuit will be discussed. Additionally, when determining the third aspect—whether Applicants are likely

[7] Intervenor Washington Families Standing Together did not file a separate brief at the Ninth Circuit. The only Intervenor who filed a brief at the Ninth Circuit was Washington Coalition for Open Government.

[8] The closest the Ninth Circuit came to any reasoning was its statement that the District Court "relies on an incorrect legal standard."

to ultimately prevail on the merits—Applicants will present, in abbreviated form, the reasoning of the District Court, which is necessary because of the failure of the Ninth Circuit to issue any reasoning behind any portion of their Order staying the preliminary injunction.

1. The Ninth Circuit's Order staying the preliminary injunction without a written opinion effectively precludes the Applicant's from seeking any meaningful review before the Ninth Circuit.

In a one sentence order, the Ninth Circuit panel stayed a preliminary injunction granted by the district court in a carefully crafted seventeen page opinion. In failing to set forth the grounds for their decision to stay the preliminary injunction, the Circuit Court has precluded the Applicants from exercising their right to a petition for rehearing or rehearing *en banc*.

Under Federal Rule of Appellate Procedure 8, a court of appeals may stay an order of the district court pending an appeal when: "(1) the applicant has made a *strong showing* that he is likely to succeed on the merits; (2) the applicant will be irreparably injured absent a stay; (3) a stay will not substantially injure the other parties interested in the proceedings; and (4) a stay is in the public interest." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (emphasis added). Just last term, the Supreme Court noted that a stay must be awarded only upon a clear showing that the movant is entitled to such relief. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (relying heavily on the Court's own analysis in *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008), an

opinion criticizing the Ninth Circuit for allowing a far too lenient preliminary injunction standard). The Court's opinion in *Nken* suggests that the circuit courts should be far less willing to disturb a preliminary injunction assuming the district court applied the correct preliminary injunction standard.

It goes without saying that the Ninth Circuit's one sentence order staying the preliminary injunction fails to adequately address the stay factors. In stating that the district court based its award of a preliminary injunction upon "an incorrect legal standard," the Circuit Court arguably addressed the first factor. However, the statement provides little insight into what standard the district court incorrectly applied. The Applicant's are prohibited from seeking a rehearing *en banc* because the Federal Rules of Appellate Procedure require the petitioner to "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed. R. App. P. 40. It is impossible for Applicants to prepare such a petition because the Circuit Court has failed to provide any justification for its conclusion that the district court applied "an incorrect legal standard."

With respect to the second stay factor, the Circuit Court fails to explain how the State would suffer irreparable injury if the preliminary injunction were left intact pending a final resolution of the appeal. In less than three months, the parties obtained a hearing before the Ninth Circuit.[9] Given the willingness of

[9] The complaint was filed on July 28, 2009.

both the district and circuit courts to expedite this matter, there is no indication that the appeal would not have been concluded before the November 3, 2009, election. Presumably, so long as the appeal was concluded before the election with sufficient time to release the petitions, the State would suffer little meaningful harm. Yet the Circuit Court failed to make any finding as to the irreparable harm that the State would suffer if the preliminary injunction was left in tact while the appeal ran its course.

The Circuit Court order also fails to give any consideration to the third and fourth factors. In this case, the Applicants will most certainly face immediate and irreparable injury if the names of the petition signers are released. "The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Once the proverbial "cat is out of the bag," a decision concluding that the Public Records Act violates the Applicants' First Amendment rights will provide little comfort to the 138,500 Washington citizens compelled to publicly disclose their position on an extremely emotional and divisive issue. With respect to the final stay factor, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Michigan Liquor Control. Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Because the Circuit Court failed to issue any findings with its Order immediately staying the preliminary injunction, Applicants are deprived of any

ability to pursue a petition for rehearing, a petition for rehearing *en banc*, or a petition for a writ of certiorari to the Supreme Court. Allowing the Circuit Court to stay a preliminary injunction, issued in a carefully crafted seventeen page opinion, by way of a one-sentence order stating that the district court's order was premised upon an "incorrect legal standard" is ripe for abuse. Even if the Circuit Court's order is guided by a clearly erroneous legal standard, Applicants will be deprived of a meaningful opportunity to seek review before they suffer immediate and irreparable injury in the form of the public release of the referendum signatures.[10]

The actions of the Ninth Circuit have placed Applicants squarely between the proverbial rock and hard place—either Applicants wait for a decision from the Ninth Circuit before filing for a rehearing and suffer the irreparable harm of the release of the names of the petition signers, or Applicants file for rehearing without having reasons for the filing, and their petition is summarily dismissed,

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[10] It is the understanding of Applicants that the Secretary of State will not release the names of the petition signers until after a similar case commenced in Washington state court is resolved. The state court action was commenced days before the Ninth Circuit arguments in this case, and is premised in large part upon the district court's award of a preliminary injunction. The news media has reported that decision in the state court could come as early as Monday, October 18, 2009. No parties in this case have yet raised any issue regarding abstention or other reasons why this case should not proceed, and it appears that the Secretary of State is not releasing the names out of prudent caution. The Secretary of State has publicly stated that the petitions have been electronically imaged and will be immediately available for public release when all restraining orders have been removed.

even if it is on the right side of the law.

2. Assuming the correctness of Applicant's argument, the Applicants will suffer immediate and irreparable injury if the stay is not vacated.

As discussed above, "[t]he loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Elrod*, 427 U.S. at 373. Assuming that the Applicants are correct that referendum signatures are political speech deserving of the First Amendment's protections, and that the Public Records Act is not narrowly tailored to serve a compelling government interest, the Applicants will suffer such irreparable injury.[11]

Moreover, the immediate nature of the stay means that, even if this case proceeds to rehearing or the Supreme Court, and the stay is found to have been incorrectly issued, the case will not be fully preserved for appeal, because the names of the petition signers will have already been released and the harm will have already been suffered.

3. There is a reasonable probability that the Court will grant certiorari.

As set forth above, Applicants do not know the reasons for the Ninth Circuit's decision, and are therefore at a disadvantage in demonstrating whether, on the specific issues the Court's Order is based upon, there is a reasonable probability that the Court will grant certiorari. However, numerous

[11] The standard and the government's interest will be discussed in greater detail at Part 4, *infra*.

cases on similar political speech issues indicate that there is a reasonable probability that the Court will grant certiorari.

Since *Buckley*, a broad challenge to campaign disclosure laws, the Supreme Court has entertained cases dealing with the compelled disclosure of political speech. 424 U.S. 1; *Brown v. Socialist Workers*, 459 U.S. 87 (compelled disclosure of members of a minor political party). The Supreme Court has also dealt with numerous issues specifically with respect to compelled disclosure in the context of ballot measures. *See Buckley II*, 525 U.S. 182 (numerous challenges to disclosure of petition circulator information); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (compelled disclosure of author of pamphlets regarding a ballot measure). The specific issues dealt with by the District Court add a new layer to compelled disclosure that has not yet been addressed by the Supreme Court. Though the Court has dealt with the issue of political speech in the context of those who circulate petitions, *Buckley II*, 525 U.S. at 186, it has not dealt with the issue of political speech in the context of those who sign a petition, nor even stated that a person who signs a petition is engaging in political speech. Indeed, the issue of compelled disclosure of those who sign ballot measure petitions is an issue that is arising with great frequency across the country, as various groups are obtaining the names of petition signers through public disclosure laws, to post those names online solely for the purpose of encouraging harassment of those individuals. *See generally*

KnowThyNeighbor.org, http://knowthyneighbor.org/ (Searchable databases available for petition signers on marriage issues in Arkansas, Florida, Massachusetts, and Oregon).

Furthermore, the Supreme Court took special interest just last term in reviewing cases involving the standard for issuing a preliminary injunction under Federal Rule of Civil Procedure 65, *Winter*, 129 S. Ct. 365, and the standards regarding the issuance of a stay pending appeal. *Nken*, 129 S. Ct. 1749. Thus, there is a reasonable probability that the Court will grant certiorari.

4. There is a fair probability that Applicants will ultimately prevail on the merits.

A. Referendum signatures are a form of expression protected by the First Amendment.

When, as here, a litigant alleges that a statute burdens the freedoms of speech and association protected by the First Amendment, the first question must always be: Does the statute burden expression and association that the First Amendment was meant to protect? *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). The district court correctly concluded that referendum signatures are political speech deserving of the First Amendment's protections.

The Supreme Court has, on several occasions, been called upon to decide whether a particular law infringing upon a litigant's ability to participate in the

referenda process implicates First Amendment expression.[12] *See generally Buckley II*, 525 U.S. at 182; *Bellotti*, 435 U.S. at 765; *McIntyre*, 514 U.S. at 345-46; *Meyer v. Grant*, 486 U.S. at 422, 425; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) ("*CARC*"). In each case, the Court has determined that the challenged law implicated expression protected by the First Amendment. *See Buckley II*, 525 U.S. at 186-87 (stating that "petition circulation is 'core political speech'); *McIntyre*, 514 U.S. at 345-46 (stating that challenged provisions do not control the mechanics of the election, they are a "direct regulation of the content of speech"); *Meyer v. Grant*, 486 U.S. at 421 (noting "the circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change"); *CARC*, 454 U.S. at 294-95 ("We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."); *Bellotti*, 435 U.S. at 785-86 (recognizing a corporation's right to engage in political speech with respect to an initiative).[13] *See also Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir.

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[12] The Constitution of the United States of America does not guarantee citizens the right to the referenda process. However, when the people reserve the right to an initiative or referenda, "the exercise of that power is protected by the First Amendment applied to the States through the Fourteenth Amendment." *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999), *cert. denied* 528 U.S. 870 (1999).

[13] In *Bellotti*, one of the major errors committed by the Supreme Judicial Court of Massachusetts was a failure to subject to the challenged provision to the

1985) (holding that the circulation of a petition is protected speech); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1030-31 (9th Cir. 2009) (treating compelled disclosure statute as protected speech in the context of a ballot initiative election); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003) (same) ("*CPLC I*"); *Hegarty v. Tortolano*, No. Civ.A. 04-11668-RWZ, 2006 WL 721543, *2 (D. Mass. Mar. 17, 2006) (holding that "signing a petition . . . constitutes speech requiring further First Amendment analysis.").

That referendum petitions represent political speech deserving of the First Amendment's protections is also supported by nearly a century of precedent in the State of Washington. Under the Washington elections code, individuals allowed to observe the Secretary of State's signature verification process are absolutely prohibited from making *any* records of the names and addresses of the petition signers. RCW § 29A.72.230 (stating that observers of the signature verification process may "make no record of the names, addresses, or other information on the petitions. . . ."). The entire election code contemplates limited governmental disclosure to ensure that a referendum petition contains a sufficient number of valid signatures to warrant the placement of the referendum on the ballot.

Moreover, Washington has a long history of treating referendum

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scrutiny required by the First Amendment. *Bellotti*, 435 U.S. at 786-87.

signatures as confidential; equating privacy as necessary to ensure that ballot measure are properly put to a vote. "It is the public policy of this state that we uphold the secret ballot in every particular, and these petitions are, more or less, in effect a vote of those who sign the petitions requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not public records and your office should refuse to permit them to be inspected and copied." Wash. Op. Att'y Gen. 378 (1938). *See also* Wash. Op. Att'y Gen. 55-57 No. 274 (1956) (aff'g prior statement that referendum signatures should not be publicly released). The Washington Secretary of State restated its policy of treated referendum signatures as confidential even after Washington citizens expressed a strong preference for governmental transparency in 1972 through the enactment of the Public Records Act. *See* A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973; *see also* A. Ludlow Kramer, Official Statement, July 13, 1973 ("I consider the signing of an initiative or referendum petition a form of voting by the people. Furthermore, the release of these signatures [has] no legal value, but could have deep political ramifications to those signing. I will not violate the public trust.").

The District Court correctly considered Supreme Court and Ninth Circuit precedent, the expressed confidentiality of the elections code, and the other evidence submitted by Applicants, and concluded that referendum signatures are political speech deserving of the First Amendment's protections.

B. The District Court correctly concluded that the Public Records Act is subject to strict scrutiny.

Having correctly determined that referendum signatures are protected political speech, the District Court correctly turned to the question as to the appropriate level of review applicable to the Public Records Act because it compels protected political speech.[14] *Buckley II*, 525 U.S. at 206-09 (Thomas, J., concurring) (discussing the standards of review that the courts apply after concluding that a statute burdens political speech protected by the First Amendment). The District Court correctly concluded that the Public Records Act infringes upon political speech and is subject to strict scrutiny.

In discussing the level of scrutiny applicable to the Public Records Act, the District Court began by recognizing that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Buckley II*, 525 U.S. at 187 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). However, the District Court correctly noted that "the government may infringe on an individual's rights to

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[14] There was some confusion in the District Court as to how the Public Records Act compels political speech. Applicants did not argue that the Public Records Act requires an individual to sign a referendum petition, but instead, that the Act compels a petition signer to *publicly* disclose that he or she has signed a petition after exercising his or her right to sign the petition. The argument is identical to the legion of campaign finance cases analyzed under the First Amendment where the issue is not whether the state compels any individual to make a contribution, but instead, that the state compels the individual to publicly disclose that fact that he or she has made a contribution after exercising the right to make that contribution.

free speech but only to the extent that such infringement is narrowly tailored to serve a compelling government interest. @@ ORDER @ 12? (citing *McIntyre*, 514 U.S. at 346-47).

The District Court's reasoning is consistent with that of the Supreme Court, which has held that when a law restricts "core political speech" or "imposes 'severe burdens' on speech or association," the law must be narrowly tailored to serve a compelling government interest (*i.e.*, the law is subject to exacting/strict scrutiny). *See Buckley II*, 525 U.S. at 206-09 (Thomas, J., concurring) (laws implicating "core political speech" or that impose substantial burdens on First Amendment rights are always subject to strict scrutiny); *Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure cannot be justified by a mere showing of some legitimate government interest. . . . [It] must survive exacting scrutiny. . . . [T]here must be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed.").

A potentially problematic issue here involving the proper level of scrutiny was deftly handled by the District Court. Courts have used two terms ("exacting scrutiny" and "strict scrutiny") to label the level of scrutiny to be applied here. "Exacting scrutiny," as used in *Buckley*, is "strict scrutiny." *Buckley* required "exacting scrutiny" of compelled disclosure provisions, *id.* at 64, which it referred to as the "strict test," *id.* at 66, and by which it meant "strict scrutiny." *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, n.7 (2007) (*Buckley*'s use of

"exacting scrutiny," 424 U.S. at 44, was "strict scrutiny")("*WRTL II*"); *see also McIntyre*, 514 U.S. at 347 (*citing Bellotti*, 435 U.S. at 786) (equating "exacting" scrutiny with "strict" scrutiny).[15] The District Court recognized that courts have used two terms for the level of scrutiny applied in this situation, but determined that the two levels of scrutiny were equivalent before proceeding to apply strict scrutiny. (District Court Order at 12, n. 6.)

Under strict scrutiny, Washington "bears the burden of proving that the [Public Records Act] provisions at issue are '(1) narrowly tailored, to serve (2) a compelling state interest.'" *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (*citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) ("*CPLC II*"). The District Court found that the State failed to meet its burden to demonstrate that the Public Records Act is narrowly tailored to serve a compelling government interest.

Accordingly, the District Court correctly determined that the release of the

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[15] In *Canyon Ferry*, the Ninth Circuit declined to clarify whether strict scrutiny applies in the context of ballot measure disclosure. 556 F.3d at 1031 (striking Montana's disclosure statute under any standard of review). *See also Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (applying strict scrutiny); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 787-88 (9th Cir. 2006) (assuming without deciding that strict scrutiny applies); and *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004) (applying strict scrutiny).

However, regardless of whether this Court accepts that "exacting scrutiny" is always the same as "strict scrutiny," strict scrutiny must apply to the Public Record Act's disclosure provisions because compelled disclosure provisions constitute substantial First Amendment burdens. *Davis v. FEC*, ___ U.S. ___, 128 S. Ct. 2759, 2774-75 (2008).

names of the petition signers pursuant to the Public Records Act is likely unconstitutional, because the State did not show that the Act is narrowly tailored to serve a compelling government interest.

C. The Public Records Act is not narrowly tailored to serve a compelling government interest.

To survive strict scrutiny analysis, a law or regulation must be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). The State bears the burden of proving that any interest is presents is compelling, and then proving that the public disclosure of referendum petitions is narrowly tailored to serve that interest. *See CPLC II*, 507 F.3d at 1178. A law can fail to be narrowly tailored in one of several ways. It may be over-inclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). The regulation may also be under-inclusive if it fails to restrict speech that does implicate the government's interest. *See*, *e.g.*, *Republican Party of Minn.*, 536 U.S. at 779-80. Finally, a regulation is not narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

1) The interests presented by the State and the intervenors are not the sort of "compelling government interests" previously identified as sufficient to justify infringing on First Amendment rights.

In *Buckley*, the Supreme Court stated that "disclosure requirements, as a general matter, directly serve [three] substantial governmental interests." 424 U.S. at 68. "First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office [("Informational Interest")]. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity [("Corruption Interest")]. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits [("Enforcement Interest")]." *Id.* at 66-68.

Subsequent courts have clarified that the Corruption and Enforcement Interests are unique to candidate elections, and therefore cannot be relied upon to justify compelled referendum disclosure. *See Bellotti*, 435 U.S. at 789-90; *CPLC I,* 328 F.3d at 1105 n.23; *see also Canyon Ferry*, 556 F.3d at 1031-32.

The Ninth Circuit recently clarified that the Informational Interest carries with it a significant limitation—it is limited to identifying those "persons *financially* supporting or opposing a . . . ballot measure." *Canyon Ferry*, 556 F.3d at 1032 (emphasis in original). Importantly, the Ninth Circuit added, "the disclosure requirements are not designed to advise the public generally what groups may be in favor of, or opposed to, a particular candidate or ballot issue;

they are designed to inform the public what groups have demonstrated an interest in the passage or defeat of a candidate or ballot issue by their *contributions* or *expenditures* directed to that result." *Id.* at 1032-33 (emphasis in original). The Ninth Circuit went on to hold that this limited informational interest is not absolute. *Id.* at 1033-34 (striking a *de minimis* reporting requirement because the marginal informational gain that resulted did not justify the substantial burden resulting from compelled public disclosure). The District Court correctly noted that "the Court nor the parties have the ability to identify whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public." (District Court Order at 15.) In other words, an individual's signature on a referendum petition simply does not serve the "informational interest" defined by the Ninth Circuit.

In *Buckley II*, the Supreme Court also considered and rejected administrative efficiency and fraud detection as potential state interests justifying compelled public disclosure. *Buckley II*, 525 U.S. at 192. Even if fraud detection were a legitimate interest, it is not compelling with respect to referendum petitions. First, the Supreme Court has recognized that fraud is much less of a concern at the petition process stage. *Meyer*, 486 U.S. at 427-28. This flows from the very justification of the petition process: ensuring that there

is a sufficient level of public support to warrant the expenditure of public and private funds to place the referendum on the ballot. The question is not whether Referendum 71 should or should not be enacted, but merely whether Washington citizens as a whole should have the opportunity to voice their opinion on Referendum 71.

Second, in *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000), the Ninth Circuit noted that fraud prosecutions in Washington during the petition process have been sparse (twice in seven years) and that the fraud was detected by traditional methods of detecting and prosecuting forgeries (i.e., signature comparison). *See also id.* at 1138 (noting that it is "precisely the risk that people will refrain from advocating controversial positions that makes a disclosure scheme of this kind especially pernicious"). Thus, the State's interest is in government disclosure (i.e., disclosure to the government) to prevent fraud in the petition process, rather than in *public* disclosure.[16] Public

[16] An important distinction needs to be drawn in this case between disclosure of donor information and *public* disclosure of donor information. There is no dispute that compelled disclosure represents a burden on First Amendment rights. *See Davis*, 128 S. Ct. at 2774-75; *Buckley*, 424 U.S. at 64. However, in prior cases discussing compelled disclosure provisions, there has been a failure—or lack of need—to address the difference between compelled "private" disclosure (i.e., disclosure made only to the government) and compelled "public" disclosure (i.e., disclosure made available to the public).

Strict scrutiny requires that each application of a statute restricting speech must be supported by a compelling government interest. *WRTL II*, 127 S. Ct. at 2672. *See also Heller*, 378 F.3d at 991 ("[I]t is not just *that* a speaker's identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech.") (emphasis in

disclosure of a petition is not narrowly tailored to advance the fraud interest and is therefore unconstitutional under the First Amendment.

2) The Washington Public Records Act is not narrowly tailored to serve the interests presented by the State and the intervenors.

At the District Court, the State only presented two potential compelling interests—first, that the state has a compelling government interest in preserving the integrity of the election process, and second, that the electorate is entitled to know who is lobbying for their vote. The District Court extensively discussed both of these interests, and determined that "it is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process" and that "the identity of the person who supports the referral of a referendum is irrelevant to the voter as the voting public must consider the content of the referendum and be entitled to a process by which it can ensure that the petitions are free from fraud." (District Court Order at 15.)

On appeal to the Ninth Circuit, the State reiterated its interests in "determining whether there is sufficient support for a referendum measure to

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original) Thus, in applying strict scrutiny to the provisions of the PRA challenged herein, the Court should be cognizant of the fact that private and public reporting provisions impact First Amendment rights in slightly different ways. A compelled disclosure system that requires only private reporting may be constitutional in a situation where public reporting may not, and, to that end, PMW only challenges Washington's statutes insofar as they require the public disclosure of the names of the petition signers.

qualify it to the ballot" by "protecting the authority of its citizens to oversee government decision-making with respect to qualification of referendums on the ballot," (i.e., a fraud interest), and "affording citizens the opportunity to know who supports sending referendum measures to the ballot." (State's Brief at 24-26.) The District Court examined and dispatched with each of these arguments. One intervenor also argued to the Ninth Circuit that the State has an interest in preventing fraud, but expanded that interest with a new argument that the revelation of the names of the signatures helps the citizens of Washington to determine the special interest groups and citizens who are interested in the petition.[17]

a. To the extent it exists, the fraud interest of the State is served by a more narrowly tailored means.

The State's fraud interest is adequately served through a less restrictive means—limited government disclosure to allow for signature verification. Moreover, to the extent it exists, the State's concerns about fraud appear to be overblown. *See Washington Initiatives Now*, 213 F.3d at 1139 (noting that fraud

[17] Solely at the Ninth Circuit, an intervenor also argued that there is an informational interest in requiring those who expressly advocate the defeat or passage of a ballot measure to disclose their expenditures and contributions. However, the intervenor failed to note the Ninth Circuit's recent decision in *Canyon Ferry*, which stated that any informational interest that might exist here would only be a financial interest, and that it does not apply when that financial expenditure or contribution is *de minimis* in nature. 556 F.3d at 1034. That a petition signature is not a financial interest makes the informational interest cited by the intervenor inapplicable here.

prosecutions during the petition process have been sparse). Furthermore, the Supreme Court has recognized that fraud is much less of a concern during the petition process. *See Meyer*, 486 U.S. at 427-28. However, even if the State could present evidence that its interest in combating fraud is compelling, the public disclosure of referendum petitions is not narrowly tailored to serve that interest.

Pursuant to Washington law, the Secretary of State, and only the Secretary, is granted the authority to verify and canvass the names of the legal voters on the petition.[18] RCW § 29A.72.230. Given the State's interest in ensuring that a sufficient number of legal voters support the referendum, this is an example of a narrowly tailored statute designed to serve a compelling state interest.

In a vacuum, the State's argument that they need the citizens to aid in fraud detection sounds plausible. However, the facts suggest that the public does not have an interest in assisting the State in the signature verification process.

First, only the Secretary of State is given the power to conduct the signature verification process and the election code provides for no specific mechanism allowing individual citizens to challenge individual signatures on

[18] This verification is subject to review by the Court, although, as set forth at Note 5, *supra*, this judicial review does not require nor contemplate that the signatures will be viewed by the general public.

the referendum petition.[19] RCW § 29A.72.230. Absent procedures to allow for individuals to bring forth challenges to signatures and appropriate deadlines, the assertion that individuals will be providing a check on fraud rings hollow. The integrity of the election process is protected by the Secretary of State, who is responsible for verifying the signatures, and by the observers permitted to be present during the verification process, who can ensure that the Secretary of State is observing proper procedures in the signature verification process, as well as subsequent judicial review.

Second, the fact that the disclosure occurs through the Public Records Act and not through a provision of the elections code itself is illustrative of the rather tenuous argument raised by the State. If the goal is to allow for public assistance in the signature verification process, one would expect the disclosure provision to be mandatory, contained within the elections code itself, and provide for procedures to submit contested names.

Third, while this appears to be the first case involving a request for public disclosure of a referendum petition, Washington stated that they have released initiative petitions in recent election cycles.[20] Despite this fact, the State has

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[19] Washington does provide a general mechanism for challenging elections. *See* RCW § 29A.68.011 *et seq*.

[20]As set forth above, although the State's long-standing policy had been not to release ballot petitions because they were not considered "public records," it appears that sometime within the last decade, this policy has changed, and the State now considers ballot measures "public records" that are subject to public disclosure. The

failed to cite a single instance where the public disclosure of the initiative petition resulted in the detection of a single fraudulent signature.[21] The State has failed to carry its burden of offering evidence that the statute is supported by a compelling government interest, and that its chosen remedy, the public disclosure of referendum petitions, is narrowly tailored to address that interest in a direct and material way.

b. The interest of voters in knowing who signed a petition is not a compelling government interest.

As to the interest of voters in knowing who has signed a petition, the Ninth Circuit has specifically rejected this interest as viable in a recent decision where it ruled that, in the context of ballot measure campaigns, a state cannot compel the disclosure of the names of those people who have made *de minimis* contributions to a campaign. *See Canyon Ferry*, 556 F.3d at 1034. Signatories to a petition are like *de minimis* contributors and the state cannot compel their disclosure under the First Amendment. *Id.*; *see also id.* at 1036 (Noonan, J.,

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State has yet to provide any reason, legal or otherwise, for this sudden change in policy.

[21] The State's fraud interest cannot be in detecting and prosecuting instances of fraud, which is an example of the "prophylaxis-upon-prophylaxis approach" rejected in *WRTL II*, 551 U.S. at 478-79. In order for the proffered fraud interest to be compelling, it must result in widespread detection of fraudulent signatures. However, even if the State had a public fraud detection program in place, the detection of a few bad signatures, unlikely to effect whether the referendum qualifies, is insufficient to overcome the burdens on the First Amendment rights that occur when the names of 138,500 petition signers are released to the general public.

concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). Likewise, one could ask, "How do the names of petition signers affect anyone else's vote? Does any voter exclaim, 'Hank Jones signed the petition. I must be against it!'" Moreover, the State's position requires the illogical conclusion that Washington citizens are more interested in knowing who merely signs a petition than they are in knowing those citizens who make financial contributions to a campaign.[22] An intervenor's concern with special interest

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[22] Similarly, solely at the Ninth Circuit, one intervenor argued that the release of the names of the petition signers will help citizens "understand who the backers of the petition are, whether they are State officials or influential citizens in the State of Washington, and where generally the support for the referendum is coming from." (WCOG Brief at 32.) In addition to being unrecognized as an interest by any court in analyzing compelled disclosure provisions subject to strict scrutiny, the Ninth Circuit's *Canyon Ferry* decision holding that there isn't even sufficient interest to compel the release of those who financially support a measure at a *de minimis* level prevents this from being a compelling governmental interest. 556 F.3d at 1034.

Such a requirement would also be underinclusive, because it does not compel those who oppose an initiative petition to identify themselves. If the goal is really an informed electorate, identifying those opposing initiative petitions is just as important as identifying those who support them. This principal was recognized by the Ninth Circuit when it noted, "Knowing which interested parties back or oppose a ballot measure is critical ...." *CPLC I*, 328 F.3d at 1106 (emphasis added); *see also Canyon Ferry*, 556 F.3d at 1032 ("[B]y knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.") (quoting *Getman*, 328 F.3d at 1106). Yet, the intervenor would not require those who oppose initiative petitions to identify themselves to the masses, even when that opposition—as sometimes happens—circulates literature urging the electorate to refuse to sign the initiative petition. Only proponents are forced to identify themselves. When a regulation is underinclusive in this way, it makes belief that it is designed to serve the proffered interest "a challenge to the credulous." *Republican Party of Minnesota*, 536 U.S. at 780. *See also City of LaDue*

groups is similarly problematic in light of *Canyon Ferry*—unless the special interest group is making financial expenditures or contributions, it cannot be divulged under the Ninth Circuit's precedent.

Finally, though the public may have an interest in the names of the petition signers, and, more generally, in governmental openness and disclosure, that interest must bow to the concerns of the Constitution and the rights of citizens to engage in free speech. As the Supreme Court stated, "[i]t is irrelevant that the voters rather than a legislative body enacted [the statute], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control*, 454 U.S. at 295.

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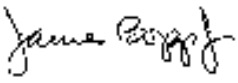
v. Gilleo, 512 U.S. 43, 52 (1994) (noting that such underinclusiveness diminishes "the credibility of the government's rationale for restricting speech in the first place."). This argument also refutes WCOG's argument that the citizens act as legislators in this context; if they did, the public would have an equal interest in ascertaining those who *don't* support the measure, but the statute does not provide such a mechanism. Moreover, if one accepts WCOG's argument that those signing the petition are acting as legislators and the public should know of their support for thee measure, it follows that the act of signing a petition is *not* a vote for or against the petition, but merely a statement that the citizen-legislator believes that the petition's subject should be proposed to the electorate-legislature as a whole. It is then the full electorate-legislature—i.e., the voting citizens of Washington—who are truly acting as citizen-legislators and voting on the subject of the referendum petition. If that is the case, the intervenor's logical position must be that the votes of the entire electorate-legislature should be part of the public record and subject to review. However, the intervenor, nor anyone else, has never suggested that the votes at the general election should also be public, as would be necessary to their argument that citizens act as legislators when signing referendum petitions.

Conclusion

Applicants have met their burden of proving that they will suffer immediate and irreparable harm because of the Ninth Circuit's unreasoned Order, that—even without a full opinion from the Ninth Circuit—it is likely the Supreme Court would grant certiorari, and that the Applicants will prevail on the merits. In light of the Ninth Circuit's Order that would prevent Applicants from taking any appeal, in addition to causing the harms shown above, Applicants' requested relief of vacating the stay of the Ninth Circuit should be granted, pending an opportunity for Applicants to review the Ninth Circuit's reasoning, and to petition in the Ninth Circuit for rehearing, for rehearing *en banc*, or petition this Court for a writ of certiorari.

Respectfully Submitted this 16th day of October, 2009,



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No. 09-A_____

In the Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, AND PROTECT MARRIAGE WASHINGTON, ***Appellants***

v.

REED et al., ***Appellees and Intervenor-Appellees*****,**

Appeal from No. 09-35818 and consolidated cases in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 3:09-CV-05456-BHS in the
U.S. District Court for the Western District of Washington

Certificate of Service for Application of John Doe #1, John Doe #2, and Protect Marriage Washington to Vacate the Ninth Circuit's Stay of the District Court's Preliminary Injunction

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To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

James Bopp, Jr., *Counsel of Record*
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October 16, 2009

I, James Bopp, Jr., a member of the bar of this court, certify that on October 16, 2009, I served a copy of the *Application of John Doe #1, John Doe #2, and Protect Marriage Washington to Vacate the Ninth Circuit's Stay of the District Court's Preliminary Injunction* with the following individuals at the addresses listed below by placing a copy for delivery by Federal Express, and served a courtesy copy of the same via email upon the following persons:

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I also certify that on October 16, 2009, I served a copy of the *Application of John*

Doe #1, John Doe #2, and Protect Marriage Washington to Vacate the Ninth Circuit's Stay of the District Court's Preliminary Injunction with the following individuals at the addresses listed below by placing a copy for delivery with Federal Express:

Nancy Lynn Talner
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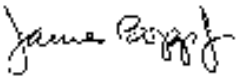
October 16, 2009



James Bopp, Jr.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual; JOHN DOE #2, an individual; and PROTECT MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as Secretary of State of Washington; and DEBRA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants.

CASE NO. C09-5456BHS

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on the Plaintiffs' motion for preliminary injunction (Dkt. 3). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file, and hereby grants the motion for the reasons stated herein.

I. BACKGROUND

A. PROCEDURAL BACKGROUND

On July 28, 2009, Plaintiffs filed a complaint and motion for temporary restraining order and preliminary injunction, seeking to enjoin the Secretary of State of Washington ("Secretary of State") from any public release of documents showing the names and contact information of those individuals who signed petitions in support of Referendum

Measure No. 71 ("R-71"). Dkts. 2 (Plaintiffs' Complaint) and 3 (Motion for Temporary Restraining Order and Preliminary Injunction).

In Count I of the complaint, Plaintiffs allege that the Washington Public Records Act, RCW 42.56.001, violates the First Amendment as applied to referendum petitions because the act is not narrowly tailored to serve a compelling governmental interest. Dkt. 2 at 10. In Count II, Plaintiffs allege that the Public Records Act is unconstitutional as applied to R-71 because "there is a reasonable probability that the signatories of the R-71 petition will be subjected to threats, harassment, and reprisals." *Id*.

On July 29, 2009, the Court granted Plaintiffs' motion for temporary restraining order, scheduled a preliminary injunction hearing for September 3, 2009, and set a briefing schedule. Dkt. 9. On August 14, 2009, Defendants filed a response. Dkt. 25. On August 21, 2009, Plaintiffs filed a reply. Dkt. 31. The Court held a preliminary injunction hearing on September 3, 2009. Dkt. 62.

At the hearing, the Court entered the following rulings: (a) Pursuant to Federal Rule of Civil Procedure 24(b) (permissive intervention), the Court granted the motions to intervene filed by Washington Families Standing Together ("WFST") and Washington Coalition for Open Government ("WCOG"); (b) the Court denied the motion to intervene filed by Mr. Arthur West because no motion was on the docket; and (c) the Court denied Plaintiffs' motion to consolidate the preliminary injunction hearing with a trial on the merits. Dkt. 62.

B. WASHINGTON'S REFERENDUM PROCESS

In Washington, while legislative authority is vested in the state legislature, the people reserve to themselves the power to reject any bill or law through the referendum process. Wash. Const., art. II, § 1 and 1(b).[1] A referendum petition against any bill passed by the legislature must be filed with the Secretary of State within 90 days after

[1] The state constitution provides some exceptions to the people's power to reject laws passed by the legislature that do not apply in this case.

adjournment of the legislative session at which the bill was enacted. *Id*., § 1(d); RCW 29A.72.160; *see also* WAC 434-379-005 (filing of proposed referendum with Secretary of State).

In order to initiate the referendum process, the state constitution requires the filing of petitions with the Secretary of State that contain the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the Secretary of State. Wash. Const., art II, § 1(b); *see also* RCW 29A.72.150. Referendum petition sheets must include a place for each signer to sign and print his or her name, and the address, city, and county at which he or she is registered to vote. RCW 29A.72.130.

Once the referendum petition has been filed, the Secretary of State verifies and canvasses the names of the legal voters on the petition. RCW 29A.72.230. The signature on a petition sheet must be matched to the signature on file in state voter registration records. WAC 434-379-020. In order to determine whether a petition is valid, the Secretary of State may employ statistical sampling techniques. RCW 29A.72.230; WAC 434-379-010. In addition, under state statute,

> [t]he verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county. The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides.

Id.

Upon completion of this verification and canvassing process, the Secretary of State must issue a determination as to whether a referendum petition does or does not contain the requisite number of valid signatures. *See* RCW 29A.72.240. Any citizen dissatisfied with the Secretary of State's determination may file an action in state superior court for a citation requiring the Secretary of State to submit the petition to the state court "for

examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be." *Id*. Within five days of the state superior court's decision, the party may seek review by the Washington Supreme Court. *Id*.

If it is ultimately determined that a petition contains the requisite number of valid signatures, the referendum is submitted for vote at the next general election. Wash. Const., art. II, § 1(d).

C. WASHINGTON'S PUBLIC RECORDS ACT

Washington's Public Records Act generally makes all public records available for public inspection and copying. RCW 42.56.070.[2] The term "public record" is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency." RCW 42.56.010(2). The Public Records Act provides that "[i]n the event of conflict between the provisions of [the Public Records Act] and any other act, the provisions of [the Public Records Act] shall govern." RCW 42.56.030. Exemptions to the Public Records Act must either be included in the act itself, or clearly expressed in another statute. RCW 42.56.070(1).

The Public Records Act also contains the following language:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030.

[2] While the Public Records Act exempts specific categories of records from public disclosure, the parties appear to agree that no exemption applies in this case.

D. OTHER RELEVANT STATE LAW

Under RCW 29A.08.720(2), "poll books, precinct lists, and current lists of registered voters are public records and must be made available for public inspection and copying under such reasonable rules and regulations as the county auditor or secretary of state may prescribe."[3] State law provides certain "fundamental rights" for voters, including "the right of absolute secrecy of the vote." RCW 29A.04.206(2). In addition, "no voter may be required to disclose political faith or adherence in order to vote." *Id*.

The parties have not identified any Washington State law that specifically addresses whether personally identifying information provided by the signers of referendum petitions may be publicly disclosed.

E. REFERENDUM MEASURE NO. 71

On May 18, 2009, the Washington Governor signed Engrossed Second Substitute Senate Bill 5688 ("SB 5688"). This bill expands the rights, responsibilities, and obligations accorded state-registered domestic partners to be equivalent to those of married spouses.

On or about May 4, 2009, Larry Stickney, the Campaign Manager for Protect Marriage Washington ("Protect Marriage"), filed notice with the Secretary of State of his intent to circulate a referendum petition on SB 5688. Dkt. 2 at 4 (Verified Complaint). The proposed referendum was assigned the title R-71 by the Secretary of State. If referred to the next general election ballot, R-71 would ask voters to either accept or reject SB 5688.

On May 13, 2009, Protect Marriage was organized as a state political action committee pursuant to RCW 42.17.040. *Id.* According to Plaintiffs' complaint, Protect Marriage's major purpose is to collect the requisite number of signatures necessary to place R-71 on the ballot and to encourage Washington voters to reject SB 5688. *Id*.

On July 25, 2009, Protect Marriage submitted a petition containing over 138,500

[3]It is unclear whether records of voter signatures are available to the public.

signatures to the Secretary of State for verification and canvassing. *Id*. at 7. According to Nick Handy, Director of Elections for the Secretary of State, the petition sheets were delivered in an "open, public forum," with R-71 supporters and opponents in attendance. Dkt. 26 at 2 (Declaration of Nick Handy). The Elections Division began the process of counting and verifying individual signatures shortly after the petition sheets were filed. *Id*. at 3.

The petition appears to conform with Washington state's formatting requirements set out in RCW 29A.72.130 and contains the following language:

To the Honorable Sam Reed, Secretary of State of the State of Washington:

> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. 71 . . . shall be referred to the people for their approval or rejection at the regular . . . election to be held on the 3rd day of November, 2009; and each of us for himself or herself says: I have personally received this petition, I am a legal voter for the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

Dkt. 27 at 2 (Declaration of Catherine S. Blinn); *id*., 3-12 (Exhibit A) (R-71 petition).

In addition, as required by RCW 29A.72.140, the petition contains a warning that: "Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by a fine or imprisonment or both." *Id*.

The petition included a table, which requested the following information: (1) the printed name of the registered voter, (2) the signature of the voter, (3) the voter's home address, (4) the voter's city and county, and (5) the voter's email address. Dkt. 27 at 4. The petition indicated that inclusion of the voter's email address was "optional." *Id*.

As of August 20, 2009, the Secretary of State has received public record requests of the Referendum 71 petition from the following individuals or entities: (1) Brian Murphy of WhoSigned.org (Dkt. 23 at 10); (2) Toby Nixon, President of the Washington Coalition for Open Government (*id*. at 12); (3) Arthur West (*id*. at 14); (4) Brian Spencer,

on behalf of Desire Enterprises (Dkt. 30 at 9); and (5) Anne Levinson, on behalf of Washington Families Standing Together (*id*. at 11).[4]

On or about June 9, 2009, the groups Whosigned.org and KnowThyNeighbor.org issued a joint press release, stating that the groups intended to publish the names on the internet of every individual signing the Referendum 71 petition. Dkt. 2 at 6; *see* Dkt. 4-5 (Exhibit 4). Plaintiffs maintain that some of the public record requesters have publicly stated that they intend to publish the names of the petition signers on the internet and make the names searchable. *Id*. Plaintiffs also claim that the purpose of placing the names on the internet is to "encourage individuals to contact" and to have a "personal and uncomfortable conversation" with any person who signed the petition. *Id*.; Dkt. 3 at 9.

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

As a threshold matter, the following opinion addresses only an individual's right to participate in a political process and the government's authority to intrude on that right. Once narrowed to these two issues, the Court finds it unnecessary to address the content of SB 5688 or the content of R-71.

Here, pursuant to the Washington Public Records Act, Defendants requested that the Secretary of State disclose the contents of petitions filed to refer R-71 as a measure for the next ballot, a proposed measure to undo SB 5688. Plaintiffs argue that such disclosure would be unconstitutional, as it would violate their fundamental right to free speech. The issue before the Court is limited to whether Plaintiffs have such an individual right and, if so, whether the government is entitled to intrude on that right in this instance.

[4] Ms. Levinson's request excluded "any and all information subject to [this Court's July 29, 2009] temporary restraining order" (Dkt. 30-11) which restrained Defendants from releasing "the names, addresses, or other contact information of those individuals who signed the Referendum 71 petition" (Dkt. 9 at 4).

A. PRELIMINARY INJUNCTION STANDARD

The basic function of injunctive relief is to preserve the status quo pending a determination of the action on the merits. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that a balance of the equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). Traditionally, injunctive relief was also appropriate under an alternative "sliding scale" test. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). However, the Ninth Circuit overruled this standard in keeping with the Supreme Court's decision in *Winter*. *American Trucking Ass'ns Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (holding that "[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable").

1. Likelihood of Success

Plaintiffs contend that it is unconstitutional for Defendants, acting under authority of the Public Records Act, to comply with public record requests for referendum petitions that contain identifying information of those who support referral of a referendum to the next ensuing general election. Dkt. 3 at 9. Plaintiffs argue that releasing these petitions and the information contained therein would violate the signers' fundamental, First Amendment right to freedom of speech. *Id*. at 9-10. To succeed on this motion for preliminary relief, Plaintiffs must first establish that it is likely that supporting the referral of a referendum should be considered protected political speech.

a. Individual Right

Plaintiffs assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. *Id*.

The type of free speech in question is anonymous political speech. As the Honorable Thomas S. Zilly, United States District Judge, has previously stated:

> The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. *See generally* [*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-342, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995)]. Anonymous speech is a great tradition that is woven into the fabric of this nation's history.
>
> When speech touches on matters of public political life, such as debate over the qualifications of candidates, discussion of governmental or political affairs, discussion of political campaigns, and advocacy of controversial points of view, such speech has been described as the "core" or "essence" of the First Amendment. *See McIntyre*, 514 U.S. at 346-47.

Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001).

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. amend. I.[5] The Supreme Court has consistently held that a component of the First Amendment is the right to anonymously participate in a political process. *See e.g.*, *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (invalidating, on First Amendment Grounds, a Colorado statute that required initiative petition circulators to wear identification badges); *McIntyre*, 514 U.S. at 357 (overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature, holding that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority."); *Talley v. California*, 326 U.S. 60, 65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (invalidating a California statute prohibiting the distribution of "any handbill in any place under any circumstances" that did not contain the name and address of the

[5] The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. People of the State of California*, 283 U.S. 359, 368, 51 S. Ct. 532 (1931).

person who prepared it, holding that identification and fear of reprisal might deter "perfectly peaceful discussions of public matters of importance").

In this case, the Court must determine whether it is likely that referendum petitions that were submitted to the Secretary of State should be considered protected political speech. Defendants argue that petition signers waived any First Amendment protections because the signers supported the referral of the referendum in an open and public forum. Dkt. 25 at 7-10. But Defendants have neither cited nor submitted any authority in support of this proposition. Moreover, the Court is unaware of any authority, including the Washington Constitution or RCW Chapter 29A.72, which stands for the proposition that signatures in support of a referral must be obtained in a public forum. Therefore, at this time, the Court is not persuaded that waiver of one's fundamental right to anonymous political speech is a prerequisite for participation in Washington's referendum process.

Defendants do assert that Washington's Constitution requires public disclosure of the personally identifying information provided when a person signs a referendum petition. Dkt. 25 at 8. But Washington's Constitution states only that "all such petitions shall be filed with the secretary of state," and it does not state that the information contained on the petition must also be considered public information. *See* Wash. Const., art. II, § 1(d). In fact, both the Supreme Court and the Washington Supreme Court have previously held that an initiative process falls within the protections of political speech. *Meyer v. Grant*, 486 U.S. 414, 421, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); *Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 239 ("It is undisputed that gathering initiative signatures in some manner, at some place, is a constitutionally guaranteed practice. It is at the core of both the First Amendment and Const. art. 1, s 5.").

Defendants also argue that participation should not be considered protected political speech because the petition signers act as quasi-legislators. Dkt. 25 at 10-11. Defendants reason that because the referendum and initiative processes are reserved powers by the people to legislate, the petition signer acts like a legislator with such action

being inherently public. *Id*. To support this argument, Defendants rely on *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999), and *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000). Dkt. 25 at 10. But both of these cases are distinguishable. First, the *Heavey* court addressed the question of whether a writ of mandamus should issue against a state officer when the officer defended the constitutionality of a referendum. 138 Wn.2d at 803-804. While the *Heavey* court did state that referendum and initiative measures involve the people in their legislative capacity, it was only to note that such legislation "remain[s] subject to the mandates of the Constitution." *Id*. at 808. The court did not hold that a "quasi-legislative" action requires waiver of a fundamental right to anonymous political speech.

Second, in *Amalgamated Transit Union Local 587*, the court addressed a challenge to the constitutionality of a statute enacted through the initiative process. 142 Wn.2d at 193-199. The court did not address the issue of the political nature of the initiative process itself. Therefore, the Court is not persuaded by Defendants' "quasi-legislative" arguments.

In this case, it is important to note that the Court is unaware of any authority that is directly on point for the question before the Court. The weight of authority, however, counsels toward the finding that supporting the referral of a referendum is likely protected political speech. For example, in *Meyer*, the Court noted that, of necessity, "the circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421. In fact, the Court explicitly stated that the "record in this case demonstrates that the circulation of appellees' petition involved political speech." *Id.*, n.4. Moreover, in *Buckley*, the Court held that petition circulation is "core political speech," because it involves "*interactive* communication concerning political change." 525 U.S. at 187 (quoting *Meyer*, 486 U.S. at 422) (emphasis added). The *Buckley* Court also noted that "First Amendment protection for such *interaction* . . . is at its zenith." *Id*. at 187 (internal quotations omitted) (emphasis added). It would seem that if the circulator is protected by

the First Amendment and the process is at the core of the First Amendment, then the people singing the petition in support of referral of the referendum would also be entitled to the protections of the First Amendment. In fact, the *Buckley* Court touched upon the protection of the "interaction" in the circulation process, which involved a "political conversation" and the "exchange of ideas." *Id*. at 192. By necessity, an interaction involves the circulator as well as one who may support the referral of a referendum. Based on these authorities, the Court finds that it is likely that an individual who supports the referral of a referendum is entitled to protection under the First Amendment.

Therefore, the Court finds that Plaintiffs have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously. The next step in the Court's analysis is based on the fact that the right to freedom of speech is not absolute.

The Supreme Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id*. at 187 (quoting *Storer v. Brown*, 415 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)). In other words, the government is not without an interest in the integrity of the referendum process. As such, the government may infringe on an individual's right to free speech but only to the extent that such infringement is narrowly tailored to achieve a compelling governmental interest. *See McIntyre*, 514 U.S. at 346-47 (holding that governmental restrictions on core political speech are entitled to "exacting" scrutiny, and upheld only where they are narrowly tailored to serve an overriding state interest.").[6]

[6] Some of the relevant cases discuss a level of review called "exacting" scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (a compelled disclosure case). But "exacting" scrutiny is "strict" scrutiny. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (citing *First Nat'l Bank of Boston v. Bellotti*, 436 U.S. 765, 786 (1978) (equating "exacting" scrutiny with "strict" scrutiny). *See also Fed. Elec. Comm'n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (reiterating *McIntyre's* holding that "exacting" scrutiny is applied to determine whether the law is narrowly tailored to serve an overriding state interest and applying "strict" scrutiny to a federal campaign statute).

b. Governmental Interest

Under a strict scrutiny analysis, the Court must first identify the asserted compelling governmental interest. In this case, Defendants argue that "[a] state indisputably has a compelling interest in preserving the integrity of its election process." Dkt. 25 at 17 (citing *Eu v. San Francisco Cy. Democratic Cent. Comm.*, 489 U.S. 214, 231, 109 S. Ct. 1013, 1024, 103 L. Ed. 2d 271 (1989) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761, 93 S. Ct. 1245, 1251-52, 36 L. Ed. 2d 1 (1973))). The Court agrees with Defendants on this point as it is undisputed that the State must employ some measures to prevent fraud in the referendum process. What is disputed, however, is the extent of the government intrusion on the individual's right to anonymously participate in a political activity, i.e., whether the Public Records Act is narrowly tailored to accomplish the interest of preserving the integrity of the referendum process.

It is important to reiterate two points: (1) for the purposes of preliminary relief, the Court must determine only whether Plaintiffs are likely to succeed on the merits of their claim (*see Winter, supra*); and (2) Plaintiffs are only challenging the Public Records Act that requires disclosure of public documents and are not challenging the requirement of RCW 29A.72.130 that those who sign in support of referral of the referendum disclose identifying information. Based on the record before the Court, the Court finds that Plaintiffs have established a likelihood of success on the claim that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process.

In *Buckley*, the Court addressed a challenge to several statutes that were enacted by Colorado's Legislature that regulated the state's initiative and referendum petition process. *Id*. at 187-189. One particular statute, of relevance to the present matter, required initiative-petition circulators to wear a badge identifying their name. *Id*. at 187. The Court stated that:

> We have several times said no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made. But the

> First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. We therefore . . . are satisfied that . . . the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.

Id. (internal citations and quotations omitted). The Court held that the law violated the petition circulators' First Amendment free speech guarantee. *Id*. at 205. In reaching this conclusion, the Court separated what it considered necessary or proper ballot-access controls from restrictions that unjustifiably inhibit the circulation of ballot initiative petitions. *Id*. at 192-93. The Court noted that evidence was presented that "demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process." *Id*. at 197-98 (internal citations omitted).

In this case, the State argues that its "interest in the public availability of the Plaintiffs' names outweighs any alleged First Amendment interest . . . ." Dkt. 25 at 16. The State further argues as follows:

> Absent access to the names of persons who signed referendum petitions, the public would not be able to independently examine whether the State acted properly in determining whether a referendum measure qualified for the ballot. Without access to the names of signers, the public would not be able to even verify the gross number of signatures submitted, whether the State accepted duplicate signatures, or whether the State accepted signatures from persons disqualified from voting. Public access to the signature petitions thus provides an important check on the integrity of the referendum election process.

Dkt. 25 at 17. The State's argument would be more persuasive if there was not a more narrowly tailored signature verification procedure. *See* RCW 29A.72.230

Under RCW 29A.72.230, the Secretary of State must "verify and canvass the names of the legal voters on the petition." The statute also provides for public access to that verification process:

> The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process.

Id. Moreover, the Washington Supreme Court has held that statutory referendum provisions "evidence an intent on the part of the Legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, in the exercise of this constitutional right by the people . . . ." *State v. Superior Court of Thurston County*, 81 Wn. 623, 647, 143 P. 461 (1914).

In light of the State's own verification process and the State's own case law, at this time the Court is not persuaded that full public disclosure of referendum petitions is necessary as "an important check on the integrity of the referendum election process."

In the alternative, Defendants assert that there exists a second "compelling" interest in favor of disclosure. Dkt. 25 at 17. Defendants argue that the electorate is entitled to know "who is essentially lobbying for their vote, and thus, who likely will benefit from the measure." *Id.* (citing *California Pro-Life Council v. Getman*, 328 F. 3d 1088, 1105-07) (9th Cir. 2003). But this argument is unavailing because neither the Court nor the parties have the ability to identify whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public. In other words, the identity of the person who supports the referral of a referendum is irrelevant to the voter as the voting public must consider the content of the referendum and be entitled to a process by which it can ensure that the petitions are free from fraud.

Therefore, the Court finds that Plaintiffs have established that it is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process.

c. Conclusion - Likelihood of Success

The Court finds that Plaintiffs have established that it is likely that supporting the referral of a referendum is protected political speech. The Court also finds that Plaintiffs have established that it is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the

referendum process. Therefore, the Court concludes that Plaintiffs have established that they are likely to succeed on the merits of their claim that the Public Records Act is unconstitutional as applied to the disclosure of referendum petitions. At this time, the Court need not reach the merits of Plaintiffs' second claim for relief.

2. Likelihood of Irreparable Harm in the Absence of Preliminary Relief

Plaintiffs contend that the denial of their request for a preliminary injunction will cause them irreparable harm. Their claim is premised on the argument that their First Amendment right to free speech will be violated, irreparably, if the State complies with the public record request. *See* Dkt. 3 at 29.

"Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment Freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 547 (1976); *See also Brown v. Cal. Dept. of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that a risk of irreparable injury may be presumed when a plaintiff states a colorable First Amendment claim; *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."). Because this court finds that referendum petitions are likely to be protected under the First Amendment, Plaintiffs are entitled to the presumption that they will be irreparably harmed absent preliminary relief. Defendants have failed to overcome this presumption.

Therefore, the Court finds that Plaintiffs have established that they are likely to suffer irreparable harm in the absence of preliminary relief.

3. Balance of the Equities

In determining whether to grant or deny a motion for preliminary injunction, the court must balance the equities of the respective parties' interests. *Winter, supra*. Where a case raises serious First Amendment questions, a court is compelled to find the potential

for irreparable harm, "or that at the very least the balance of hardships tips sharply in [the moving party's] favor" *Summartano v. First Judicial District Court, in and for County of Carson City*, 303 F. 3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). Because this Court finds that Plaintiffs have established that this case likely raises serious First Amendment questions in regard to protected speech and this Court thereby presumes irreparable injury, under *Summartano,* this court also finds that the equities tip in favor of the Plaintiffs. *See id*.

4. Public Interest

Plaintiffs argue that granting the preliminary injunction is in the public's interest. In *Sammartano,* the Ninth Circuit Court of Appeals held "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 974. The *Sammartano* court went on to state that the public's interest in protecting First Amendment rights may sometimes be overcome where there is "a strong showing of other competing public interests."

In this case, Defendants have failed to make a strong showing of other competing public interests. Therefore, the Court finds that granting the preliminary injunction is in the public's interest to prevent the likely violation of Plaintiffs' First Amendment rights.

III. ORDER

Therefore, it is hereby

ORDERED that Plaintiffs' motion for preliminary injunction (Dkt. 3) is **GRANTED**.

DATED this 10th day of September, 2009.

BENJAMIN H. SETTLE
United States District Judge

FILED

OCT 15 2009

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual; JOHN DOE #2, an individual; PROTECT MARRIAGE WASHINGTON,

Plaintiffs - Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington; BRENDA GALARZA, in her official capacity as Public records Officer for the Secretary of State of Washington,

Defendants - Appellants.

No. 09-35818

DC No. 3:09-CV-05456 BHS
W.D. Wash.

O R D E R

JOHN DOE #1, an individual; JOHN DOE #2, an individual; PROTECT MARRIAGE WASHINGTON,

Plaintiffs - Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington; BRENDA GALARZA, in her official capacity as Public records Officer for the Secretary of State of Washington,

No. 09-35826

DC No. 3:09-CV-05456 BHS
W.D.Wash.

Defendants,

and

WASHINGTON COALITION FOR OPEN GOVERNMENT,

Defendant-intervenor - Appellant.

JOHN DOE #1, an individual; JOHN DOE #2, an individual; PROTECT MARRIAGE WASHINGTON,

Plaintiffs - Appellees,

v.

WASHINGTON FAMILIES STANDING TOGETHER,

Intervenor - Appellant,

SAM REED, in his official capacity as Secretary of State of Washington; BRENDA GALARZA, in her official capacity as Public records Officer for the Secretary of State of Washington,

Defendants.

No. 09-35863

DC No. 3:09-CV-05456 BHS
W.D. Wash.

Before: PREGERSON, TASHIMA, and N.R. SMITH, Circuit Judges.

The court, after consideration of the record and briefs of the parties, and oral argument, has determined that the district court's Order Granting Plaintiffs' Motion for Preliminary Injunction (the "Preliminary Injunction Order"), filed September 10, 2009, relies on an incorrect legal standard and, therefore, must be reversed.

It is therefore **ordered**:

1. Appellants' motion for a stay pending appeal is granted and the Preliminary Injunction Order is hereby stayed, effective immediately, pending final resolution of these appeals.

2. An opinion setting forth the reasons for the court's reversal of the Preliminary Injunction Order shall be issued expeditiously and in due course.

NOs. 09-35818, 09-35826, 09-35863

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,

Plaintiffs/Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants/Appellants

and

WASHINGTON COALITION FOR OPEN GOVERNMENT, and WASHINGTON FAMILIES STANDING TOGETHER

Intervenors/Appellants.

On Appeal from the United States District Court
District of Washington, at Tacoma
No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

Appellees' Emergency Motion to Panel for Reconsideration

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Appellees John Doe #1, John Doe #2, and Protect Marriage Washington (collectively "PMW") respectfully request that this Court reconsider its Order of October 15, 2009 ("Order"). Specifically, PMW requests that this Court reconsider its decision to immediately stay the District Court's preliminary injunction pending final resolution of these appeals.

PMW intends to seek review of this Court's Order by the Circuit Judge of the Supreme Court assigned to the U.S. Court of Appeals for the Ninth Circuit.[1] Because the Order granting the stay is immediate in nature, the harms alleged by PMW (namely, the release of the names of the petition signers), may occur at any time under the Order. The immediate nature of the Order thus denies PMW the ability to seek review of the decision without the harms alleged in their filings from coming to fruition.

[1]PMW plans to file its Application to the Circuit Judge by Monday, October 19, 2009.

Therefore, PMW respectfully requests that this Court temporarily delay the effectiveness of the stay pending appeal, until such time as the Circuit Judge for the Ninth Circuit has had an opportunity to review Appellees' request for review.

Respectfully submitted this 15th day of October, 2009.

s/ Sarah E. Troupis

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* Application for Admission Pending

STATE OF WASHINGTON

Twenty-Fourth Biennial Report

OF THE

ATTORNEY GENERAL

G. W. HAMILTON
Attorney General

1937-1938

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STATE PRINTING PLANT
1938

You state that so far as you have been able to determine there is nothing in the law which would make such a provision as above quoted against the public policy of the state.

Doubtless you are correct so far as the statute law is concerned, but it cannot be the law that contracts in restraint of marriage are to be upheld. It has long been the law that the public policy of the state is such as will tend to foster and perpetuate the institution of marriage rather than to uphold contracts in restraint of marriage. The law books lay down this principle and it would seem that public officials should not be the first ones to violate the unwritten law of our state.

The provisions of a teacher's contract are prescribed by the department of education of the state and we are of the opinion that the addition of such a provision as the directors in this district have attempted to add thereto comes very close to the line, if it does not cross the line, of being in restraint of marriage.

Inasmuch as the teacher doubtless plans to bring an action if the board attempts to cancel the contract, we will not go further into the matter in this opinion.

13 C. J., section 404 on contracts, cites many authorities upon the question and if you will examine them you will find that quite possibly the court might sustain the teacher's contention.

G. W. HAMILTON, *Attorney General,*
By W. A. TONER, *Asst. Attorney General.*

Initiative and Referendum—Petitions—Inspection by Interested Persons

Olympia, Wash., August 25, 1938.

Honorable Belle Reeves, Secretary of State, Olympia, Washington.

Dear Mrs. Reeves: I am addressing a letter to you upon an oral request of your employee, Mr. Rosenberg, who informs me that you desire to know whether or not the letter written to your office on June 7th is an official ruling of this office.

I wish to inform you that it was only an unofficial letter which did not express the opinion of this office, and the ruling

made in that letter is hereby overruled. A copy of an opinion of this office under date of March 14, 1938, to The Honorable Cliff Yelle, state auditor, is enclosed which discusses the matter more thoroughly as to what constitutes public records in any office.

We find that the letter of June 7th was not thoroughly considered as to whether or not initiatory petitions by the people, when filed in your office, are actually public records.

Since making a thorough investigation and examination of the question, it is very doubtful as to whether such petitions ever become public records.

It is the public policy of this state that we uphold the secret ballot in every particular and these petitions are, more or less, in effect a vote of those who sign the petitions requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied.

This being a new question, it should be finally settled by our supreme court and parties desiring to inspect and copy these records can bring an action in the supreme court securing an order for such purpose. The question is very doubtful in my mind and there is no better opportunity than now to have the matter settled by the supreme court.

We would advise that you refuse to allow the petitions to be inspected or copied.

G. W. HAMILTON, *Attorney General.*

Social Security—Unemployment Compensation—What Constitutes Compensation of Employees—Tips Not Included

Olympia, Wash., September 1, 1938.

Mr. Jack E. Bates, Supervisor Unemployment Compensation Division, Olympia, Washington.

Dear Sir: Please be referred to our opinion No. 19 dated September 15, 1937, in answer to the following question:

"Do the terms 'wages' and 'remuneration' as used in the Unemployment Compensation act, chapter 162 of the Laws of 1937, include tips or gratui-

SECRETARY OF STATE STATE OF WASHINGTON

A. LUDLOW KRAMER OLYMPIA 98501

SAM SUMNER REED
ASSISTANT SECRETARY OF STATE

July 13, 1973

The Honorable Hubert F. Donohue
Washington State Senator
Route 2 Box 13
Dayton, Washington 99328

Dear Senator Donohue:

I regret that I must refuse to honor your request for copies of those signature petitions supporting Initiative Measure 282 of Thurston County residents.

I wish to make it clear that during the progress of checking signatures, official proponents or opponents are allowed to be present and this courtesy, of course, would be extended to you. However, once the determination has been made as to whether signatures are sufficient or insufficient, then any names revealed to individuals could not, in my judgment, have any legal value.

As you well know, you are entitled to seek an attorney general's opinion if you so wish, but my position will remain unchanged unless so directed by either the attorney general, the Legislature or the courts.

Sincerely,

A. Ludlow Kramer

ALK/jmw

SECRETARY OF STATE STATE OF WASHINGTON

A. LUDLOW KRAMER OLYMPIA 98504

Secretary of State Lud Kramer denied today a request by State Senator Hubert Donohue (9th district) to release to him the signature of Thurston County residents signing initiative measure 282.

Secretary Kramer's statement reads as follows:

It has been my policy not to release the names of citizens signing initiative or referendum petitions. As far as I am concerned petitions are not public records and are being held in trust by this office.

I consider the signing of an initiative or referendum petition a form of voting by the people. Furthermore, the release of these signatures have no legal value, but could have deep political ramifications to those signing. I will not violate public trust.

Encl: Senator Donohue's letter
reply: Secretary of State Lud Kramer

STATE OF WASHINGTON

DON EASTVOLD
ATTORNEY GENERAL
OLYMPIA

INITIATIVE PETITION SIGNATURES -- PUBLIC NATURE OF

Signatures on initiative and referendum petitions are not public records. The secretary of state should only permit inspection of such petitions by persons authorized to attend the canvass of the names and prosecuting attorneys contemplating criminal prosecutions.

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May 28, 1956

Honorable Herb Hanson
State Representative, 39th District
1005 Alice
Snohomish, Washington

Cite as:
AGO 55-57 No. 274

Dear Sir:

In your letter of April 30, 1956, you requested our opinion on the following question:

After the secretary of state has counted the signatures on an initiative petition and found it to be sufficient, are the bound volumes of such signatures public records which should be available for public inspection?

In our opinion to regard such signatures as public records would be contrary to public policy.

ANALYSIS

If the secretary of state refuses to file an initiative or referendum and no successful appeal is taken from such refusal, the secretary of state is required by law to destroy the petition. RCW 29.79.180.

Each voter is required to sign in triplicate a registration card containing his full name and address and listing the precinct in which he is registered. RCW 29.07.090. The third copy of registration cards is filed with the secretary of state

> " * * * for the sole purpose of, checking initiative and referendum petitions and mailing pamphlets required for constitutional amendments and by the initiative and referendum procedure. They shall not be open to public inspection or be used for any other purpose. "(RCW 29.07.130)

Under RCW 29.79.220 the count of signatures on initiative and referendum petitions is made in the same manner as the count of signatures on petitions to the legislature but within sixty days after filing.

RCW 29.79.200 provides in part:

> " Upon filing the volumes of an initiative petition proposing a measure for submission to the legislature at its next regular session, the secretary of state shall forthwith in the presence of at least one person representing the advocates and one person representing the opponents of the proposed measure, should either desire to be present, proceed to canvass and count the names of the registered voters thereon. * * * "

During the count of the signatures representatives of the public are entitled to be present. We are convinced that this provision in the law is designed to satisfy interested persons that there is an accurate canvass of the names appearing on the petitions.

While there is no specific statute on the precise question presented, the above statutes demonstrate, in our view, a tendency on the part of the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege.

RCW 29.79.240 provides as follows:

> " The secretary of state shall, while making the canvass, keep a record of all names appearing on an initiative or referendum petition which are not registered voters and of all names appearing thereon more than once, and shall report the same to the prosecuting attorneys of the respective counties where the names were signed to the end that prosecutions may be had for such violations of this chapter. "

Willful violations of statutes pertaining to signing of initiative petitions carry penalties ranging from gross misdemeanor to felony. RCW 29.79.440 -- .470. To permit public access to signatures on initiative petitions would tend to hamper the preservation of evidence essential to secure convictions under these sections.

On August 25, 1938, this office advised the secretary of state as follows (OAG 1938, 377):

> " We are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied. "

With the exception of representatives of the public entitled to be present during the canvass of the signatures, we reaffirm our previous opinion. We conclude that to regard the names appearing on such petitions as public records for any purpose other than to assure an accurate canvass and to permit prosecuting attorneys to prosecute violations is contrary to public policy.

We hope the foregoing analysis will prove helpful.

Very truly yours,

DON EASTVOLD
Attorney General

Andy G. Engebretsen

ANDY G. ENGEBRETSEN
Assistant Attorney General

AGO 55-57 No. 274