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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

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

Plaintiffs,

vs.

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

Defendants.

No. _____

**Plaintiffs' Notice of Motion and Motion for
Temporary Restraining Order and
Preliminary Injunction, and Memorandum
in Support of Motion for Temporary
Restraining Order and Preliminary
Injunction**

NOTE ON MOTION CALENDAR: [DATE]

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1 TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

2 YOU ARE HEREBY GIVEN NOTICE THAT on A DATE TO BE DETERMINED BY
3 COURT ORDER, before a JUDGE TO BE DETERMINED in Courtroom TO BE
4 DETERMINED BY COURT ORDER of the United States District Court for the Western
5 District of Washington, Seattle Division, located at 700 Stewart Street, Seattle, Washington
6 98101, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington, will and hereby
7 do move for a temporary restraining order and preliminary injunction against Defendants.

8 This motion for temporary restraining order and preliminary injunction is made pursuant to
9 Fed. R. Civ. P. 65, and on the grounds specified in this Notice of Motion and Motion, and
10 Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary
11 Injunction, the documents filed in support thereof, the Verified Complaint, and such other and
12 further evidence as may be presented to the Court at the time of the hearing.

13 Pursuant to this notice, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage
14 Washington do hereby move for a preliminary injunction to:

- 15 (1) Enjoin Defendants from making referendum petitions available to the public pursuant to
16 the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise;
17 (2) Enjoin Defendants from making the Referendum 71 petition or any petition related to
18 the definition of marriage or the rights and responsibilities that should be accorded to
19 same-sex couples, available to the public pursuant to the Public Records Act, Wash.
20 Rev. Code § 42.56.001 *et seq.*, or otherwise.

21 In support thereof, Plaintiffs present the following Memorandum in Support of Motion for
22 Temporary Restraining Order and Preliminary Injunction.

23 **I. INTRODUCTION**

24 Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington seek a temporary
25 restraining order and preliminary injunction to prevent Defendant Sam Reed, Secretary of State
26 for the State of Washington, and Defendant Debra Galarza, the Public Records Officer for the
27 Secretary of State of Washington, from releasing copies of the Referendum 71 petition pursuant
28 to the Washington Public Records Act, Wash. Rev. Code § 42.56.001, or otherwise.

1 Upon information and belief, Plaintiffs fear that copies of the Petition will be made public
2 pursuant to the Public Records Act as early as Wednesday, July 29, 2009. This fear is premised
3 upon a statement by Defendant Galarza that referendum petitions are “public records” within the
4 meaning of the Public Records Act and well-documented reports that two groups intend to seek
5 their disclosure pursuant to that act. These groups, KnowThyNeighbor.org and WhoSigned.org,
6 have stated that they intend to make the names of the 138,500 petition signers available and
7 searchable on the internet in an attempt to encourage Washington citizens to have a personal and
8 uncomfortable conversation with any individual that has signed the petition. Ironically, the
9 creators of WhoSigned.org have exercised their First Amendment right to remain anonymous, a
10 choice the petition signers cannot make because of the Public Records Act.¹ (Decl. of Scott F.
11 Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 14.)

12 A temporary restraining order and preliminary injunction are necessary to protect Plaintiffs
13 from suffering immediate and irreparable deprivations of their First Amendment liberties that
14 will occur if Defendants release copies of the petition pursuant to the Public Records Act. As
15 shall be set forth below and in Plaintiffs’ Verified Complaint, individuals whose names are
16 already connected with Referendum 71 have been subjected to threats, harassment, and reprisals
17 simply for exercising their First Amendment freedoms of speech and association. If a temporary
18 restraining order and preliminary injunction are not issued, each of the 138,500 Washington
19 residents who signed the Petition will suffer similar deprivations of their First Amendment
20 liberties.

21 Furthermore, if a temporary restraining order and preliminary injunction do not issue, the
22 campaign surrounding Referendum 71 will be irreparably prejudiced by the release of the petition
23 signers before this Court has an adequate opportunity to consider the merits of Plaintiffs’ claims.

24
25
26 ¹ Any individual seeking to learn the identity of the creators of WhoSigned.org would find that the task is
27 extremely difficult given the sensitive First Amendment concerns. *See, e.g., Indep. Newspapers, Inc. v. Brodie*, 966
28 A.2d 432, 456 (Md. 2009). By citing this case, Plaintiffs do not mean to suggest that the creators of WhoSigned.org
are entitled to any less protection by the First Amendment than should be afforded Plaintiffs. Instead, it is cited to
demonstrate just how zealous the courts are and should be in protecting First Amendment rights.

1 **II. STATEMENT OF FACTS**

2 On January 28, 2009, Washington State Senator Ed Murray introduced Senate Bill 5688
3 (“SB 5688”), a bill designed to expand the rights, responsibilities, and obligations accorded state-
4 registered same-sex and senior domestic partners to be equivalent to those of married spouses.
5 The bill is often referred to simply as the “everything but marriage” domestic partnership bill.
6 After various amendments, the bill was passed by the Washington Senate as Second Substitute
7 Senate Bill 5688 on March 10, 2009, and subsequently passed by the Washington House of
8 Representatives on April 15, 2009. On May 18, 2009, Washington Governor Christine Gregoire
9 signed Engrossed Second Substitute Senate Bill 5688.

10 On or about May 4, 2009, Larry Stickney, the Campaign Manager for Protect Marriage
11 Washington, filed notice with the Secretary of State of his intent to circulate a referendum
12 petition on SB 5688. (Verified Complaint, ¶ 21.)The proposed referendum was assigned the title
13 Referendum 71 by the Secretary of State. On May 13, 2009, Protect Marriage Washington was
14 organized as a State Political Committee pursuant to Wash. Rev. Code § 42.17.040. (Verified
15 Compl., ¶ 22.) Protect Marriage Washington’s major purpose is to collect the requisite number of
16 signatures necessary to place Referendum 71 on the ballot pursuant to Wash. Const. art. II, § 1(b)
17 and to encourage Washington citizens to reject SB 5688. (Verified Compl., ¶ 23.)

18 On Saturday, July 25, 2009, Protect Marriage Washington submitted a petition containing
19 over 138,500 signatures to Defendant Reed, exceeding the number of signatures necessary to
20 place Referendum 71 on the ballot. (Verified Compl., ¶ 40.) By filing the petition, Plaintiffs have
21 delayed the effective date of SB 5688. If the Secretary of State determines that the petition
22 contains a sufficient number of valid signatures, SB 5688 will become law only if a majority of
23 Washington residents vote to “approve” the bill at the next general election.

24 Defendant Reed is responsible for verifying and canvassing the signatures on the
25 Referendum 71 petition and proponents and opponents are permitted to have representatives
26 present during the process. The statute prohibits proponents and opponents observing the
27 verification and canvas process from making any records of the names, addresses, or other
28 information contained on the petitions. Wash. Rev. Code § 29A.72.230.

1 Upon information and belief, Plaintiffs believe that two organizations,
2 KnowThyNeighbor.org and WhoSigned.org, intend to make an end run around this provision of
3 the Washington Code, by requesting copies of the petitions submitted pursuant to Washington’s
4 Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.* (See Verified Complaint at ¶¶ 33-39.)
5 Defendant Galarza has stated that referendum petitions are “public records” within the meaning
6 of Wash. Rev. Code § 42.56.10(2) and are subject to public disclosure pursuant to Wash. Rev.
7 Code § 42.56.070.

8 KnowThyNeighbor.org and WhoSigned.org have publicly stated that they intend to publish
9 the names of petition signers on the internet and to make the names searchable, with the purpose
10 of encouraging individuals to contact any person signing the petition. *See* (Decl. of Scott F.
11 Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., ¶ 6.) The news media has widely reported
12 that KnowThyNeighbor.org and WhoSigned.org intend to publish the names of any individual
13 who signs the petition on the internet. (*See id.* at ¶¶ 6-13.)

14 Larry Stickney, the Campaign Manager for Protect Marriage Washington, has received a
15 large number of emails from people who disagree with his position on marriage. (Verified
16 Compl., Ex. 1.) Some of these emails have been threatening and/or harassing. For example, one
17 threatening email states: “You better stay off the olympic peninsula. . it’s a very dangerous place
18 filled with people who hate racists, gay bashers and anyone who doesn’t believe in equality. Fair
19 is fair.” (*Id.* at p. 10.) Another email threatened the signers of the Referendum 71 petition with
20 boycotts: “We shall boycott the businesses of EVERYONE who signs your odious, bigoted
21 petition.” (*Id.* at p. 21.) Other emails are offensive and harassing: “Dear God fearing hate
22 mongerers - . . . Maybe you just want to feel a cock in your ass and hate yourself for it. Whatever.
23 Praise Jeebus you retarded fuckholes!” (*Id.* at p. 20.)

24 These threats were not confined to email; Mr. Stickney received indirect threats to his safety
25 through blog posts: “If Larry Stickney can do ‘legal’ things that harm OUR family, why can’t we
26 go to Arlington, WA to harm his family?” (Verified Compl., Ex. 2.) Mr. Stickney reported this
27 particular threat to his local Sheriff. (Verified Compl., ¶ 29.)

28 Mr. Stickney has also been harassed through more traditional forms of media. For example,

1 “The Stranger,” an alternative Seattle newspaper, published details of his divorce that occurred
2 fifteen years ago. (Verified Compl., Ex. 3.)

3 This harassment and threatening behavior extends to Mr. Stickney’s home. In late June, an
4 individual was seen taking pictures of Mr. Stickney’s house while his daughter played outside.
5 (Verified Compl., ¶ 28.) Shortly after Referendum 71 was presented to the Secretary of State on
6 May 4, 2009, Mr. Stickney received a phone call at 2:00 a.m. from a woman who sounded frantic
7 and deranged, and who said various obscene and vile things to him. (Verified Compl., ¶ 30.)

8 These threats to himself and his family have been taken extremely seriously by Mr. Stickney.
9 For example, early in the campaign to circulate the Petition, Mr. Stickney made his children sleep
10 in an interior living room because he feared for their safety if they slept in their own bedrooms.
11 (Verified Compl., ¶ 27.)

12 Anyone who follows the debate over the definition of marriage would not be surprised by
13 the harassment and threats that have been leveled at Mr. Stickney. Past supporters of traditional
14 marriage have been subject to similar—and worse—threats, harassment, and reprisals for their
15 support. (*See generally*, Decl. of Scott F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj.,
16 Ex. 12 & Ex. 13) (consisting of approximately sixty declarations from California each recounting
17 at least one instance of threats, harassment, and reprisals directed at supporters of Proposition 8,
18 a ballot proposition that added a definition of marriage as between one man and one woman to
19 the California Constitution.)

20 The threatened publication of the names on the Referendum 71 petition has created an
21 environment that discourages Washington citizens from exercising their First Amendment rights
22 to participate in the referendum process. Plaintiffs and their supporters will suffer immediate and
23 irreparable harm if the requested relief is not granted.

24 **III. ARGUMENT**

25 **A. Standards for Issuance of a Temporary Restraining Order and Preliminary Injunction**

26 In determining whether to grant injunctive relief prior to trial, the Court must consider four
27 factors: (1) the plaintiff’s likelihood of success in the underlying dispute between the parties; (2)
28 whether the plaintiff will suffer irreparable injury if the injunction is not issued; (3) the injury to

1 the defendant if the injunction is issued; and (4) the public interest. *Winter v. Natural Res. Def.*
2 *Council, Inc.*, 129 S.Ct. 365, 374 (2008) (rejecting the Ninth Circuit’s “possibility” standard).

3 “Ex parte temporary restraining orders are no doubt necessary in certain circumstances, . . .
4 but under federal law they should be restricted to serving their underlying purpose of preserving
5 the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and
6 no longer.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local*
7 *No. 70 of Alameda County*, 415 U.S. 423, 439 (1974) (citation omitted); 11A Charles Alan
8 Wright, Arthur R. Miller, & Mary Kay Kane (“Wright & Miller”), *Federal Practice and*
9 *Procedure* § 2951 (2d ed. 2009) (“The issuance of an ex parte temporary restraining order is an
10 emergency procedure and is appropriate only when the appellant is in need of immediate relief”).
11 “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties
12 until a trial on the merits can be held. Given this limited purpose, and given the haste that is often
13 necessary if those positions are to be preserved, a preliminary injunction is customarily granted
14 on the basis of procedures that are less formal and evidence that is less complete than in a trial on
15 the merits.” *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

16 Where free speech is involved, preliminary injunction standards must be speech-protective.
17 First, preliminary injunction standards involving expressive association must reflect our
18 constitutional principles that “[i]n a republic . . . the people are sovereign,” *Buckley v. Valeo*, 424
19 U.S. 1, 14 (1976), and there is a “profound national commitment to the principle that debate on
20 public issues should be uninhibited, robust, and wide-open,” *id.* (citation omitted). *FEC v.*
21 *Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (“*WRTL IP*”) (opinion of Roberts, CJ, stating
22 holding), requires that we recall that we deal with the First Amendment, which mandated that
23 “Congress shall make no law . . . abridging the freedom of speech,” *id.* at 2674. So “no law,”
24 i.e., “freedom of speech” and expressive association, is the constitutional *default* and must be the
25 overriding *presumption* where expressive association is at issue.

26 Second, the “freedom of speech” presumption means that First Amendment protections must
27 be incorporated into the preliminary injunction standards, not limited to merits consideration. So
28 if exacting or strict scrutiny applies, as here, the preliminary injunction burden shifts to the state

1 to prove the elements of strict scrutiny, just as the state has the burden on the merits:

2 The Government argues that, although it would bear the burden of demonstrating a
3 compelling interest as part of its affirmative defense at trial on the merits, the [plaintiff]
4 should have borne the burden of disproving the asserted compelling interests at the hearing
5 on the preliminary injunction. This argument is foreclosed by our recent decision in
6 *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004). In *Ashcroft*, we affirmed
7 the grant of a preliminary injunction in a case where the Government had failed to show a
8 likelihood of success under the compelling interest test. We reasoned that “[a]s the
9 Government bears the burden of proof on the ultimate question of [the challenged Act’s]
10 constitutionality, respondents [the movants] must be deemed likely to prevail unless the
11 Government has shown that respondents’ proposed less restrictive alternatives are less
12 effective than [enforcing the Act].” *Id.*, at 666. That logic extends to this case; here the
13 Government failed on the first prong of the compelling interest test, and did not reach the
14 least restrictive means prong, but that can make no difference. The point remains that the
15 burdens at the preliminary injunction stage track the burdens at trial.

16 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).²

17 Third, because exacting or strict scrutiny is the antithesis of deference or a presumption of
18 constitutionality, no deference or favorable presumption must be afforded the regulation of
19 speech in preliminary injunction balancing. This is required by the “freedom of speech”
20 presumption and because “the *Government* must prove that applying [the challenged provision to
21 the communication at issue] furthers a compelling interest and is narrowly tailored to achieve
22 that interest.” *WRTL II*, 127 S. Ct at 2664 (emphasis in original).

23 Fourth, the necessary incorporation of First Amendment protections into preliminary
24 injunction standards requires that in determining the balance of harms and the public interest,
25 courts must apply *WRTL II*’s requirement that “[w]here the First Amendment is implicated, the
26 tie goes to the speaker, not the censor.” *Center for Individual Freedom v. Ireland*, No. 08-190,
27 slip. op. at *51 (S.D. W. Va. Oct. 17, 2008) (mem. op. granting prelim. inj.) (*quoting WRTL II*,
28 127 S. Ct. at 2669) (applying principle to consideration of public harm).

Fifth, the “freedom of speech” presumption means that state officials have no per se interest
in regulating expressive association. Their first loyalty should be to the First Amendment.

² See also *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1060, 1072-73 (10th Cir. 2001) (placing the burden on the government to justify its speech restrictions in a preliminary injunction hearing); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005) (in First Amendment challenge, government bears burden of establishing that content-based restriction will “more likely than not” survive strict scrutiny); *Ass’ns and Comty. Orgs. v. Browning*, No. 08-445, slip. op. at 11 (N.D. Fla. Oct. 29, 2008) (preliminary injunction burden tracks trial burden).

1 Beyond that, their only interest is in enforcing the laws *as they exist*, with any interest in the
2 particular *content* of those laws being beyond their interest in the preliminary injunction
3 balancing of harms: “It is difficult to fathom any harm to Defendants [enforcement officials] as it
4 is simply their responsibility to enforce the law, whatever it says.” *Id.*

5 Sixth, where First Amendment rights are involved, the government “must do more than
6 simply posit the existence of the disease sought to be cured. It must demonstrate that the recited
7 harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in
8 a direct and material way.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal
9 citation omitted).³ Against this need for proof of real harm if a law of questionable
10 constitutionality is preliminarily enjoined is the paramount fact that “the protection of First
11 Amendment rights is very much in the public’s interest.” *Center for Individual Freedom v.*
12 *Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *27.

13 Under these principles, preliminary injunctive relief is not only possible but has been granted
14 in disclosure exemption cases such as this. In *Brown v. Socialist Workers ’74 Campaign*
15 *Committee*, 459 U.S. 87 (1981), the northern Ohio district court “entered a temporary restraining
16 order barring enforcement of the disclosure requirements pending a determination of the merits,”
17 which temporary restraining order was renewed by the southern Ohio district court on transfer.
18 *Id.* at 90. In *Averill v. City of Seattle*, 325 F. Supp. 2d 1173 (W.D. Wash. 2004), a federal district
19 court in the Ninth Circuit issued a preliminary injunction until the case could be resolved on
20 summary judgment, noting that a candidate and campaign committee had submitted evidence that
21 those with similar views (though not plaintiffs themselves) had “been subjected to threats and
22 harassment.” *Id.* at 1174. *Averill* provides much helpful guidance on how the reasonable-
23 probability test is to be interpreted and applied, and it was decided after *McConnell v. FEC*, 540
24 U.S. 93 (2003), clarified the proper reasonable-probability test and application, which will be

25
26 ³ See also *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n. 22 (1984) (“[This Court]
27 may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its
28 abridgement of expressive activity.”). *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (same); see also *id.* at 192
(FEC may not *speculate* that NRA received more because it did not record contributions of under \$500, citing
Turner, 512 U.S. at 664).

1 discussed at Section B.1.b.2, *infra*. Under *Averill*'s analysis, Plaintiffs should also receive a
2 preliminary injunction.

3 In this case, an emergency temporary restraining order and a preliminary injunction are both
4 necessary and appropriate because Plaintiffs have a strong likelihood of success and would suffer
5 immediate and irreparable harm if such interim relief is denied. Defendants, by contrast, will not
6 be meaningfully harmed by the issuance of the requested temporary restraining order and a
7 preliminary injunction, and the requested relief will best serve the public interest and the
8 principles embodied in the First Amendment to the Constitution of the United States.

9 **B. The Standards for Issuance of a Temporary Restraining Order and a Preliminary
10 Injunction Are Satisfied Here.**

11 The standards for granting interim injunctive relief are satisfied in this case.

12 **1. Plaintiffs are likely to succeed on the merits.**

13 For the reasons set for below, Plaintiffs have a substantial likelihood of proving that the
14 Public Records Act is unconstitutional as applied to referendum petitions because disclosure of
15 the names of those who signed a referendum petition violates the First Amendment to the United
16 States Constitution, in that Washington lacks a compelling government interest sufficient to
17 warrant public disclosure, and because there is a reasonable probability of threats, harassment,
18 and reprisals if the Referendum 71 petition is made public.

19 **a. The Public Records Act is unconstitutional as applied to referendum petitions.**

20 As set forth below, the Public Records Act is unconstitutional as applied to referendum
21 petitions because the Washington lacks a compelling interest sufficient to warrant the public
22 disclosure of referendum petitions.

23 **1) Compelled disclosure provisions are subject to strict scrutiny.**

24 The First Amendment to the United States Constitution states, "Congress shall make no law
25 . . . abridging the freedom of speech." U.S. Const. amend. I.⁴ The freedoms of speech and
26 association protected by the First Amendment have their "fullest and most urgent application

27 ⁴ The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. People of*
28 *the State of California*, 283 U.S. 359, 368 (1931).

1 precisely to the conduct of campaigns for political office,” *Buckley*, 424 U.S. at 15 (citation
2 omitted), and the protections undoubtedly apply in the context of both candidate and ballot
3 measure elections. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981) (citation
4 omitted).

5 In the context of a ballot measure, the First Amendment is especially important because it
6 ensures that a collection of individuals “can make their views known, when, individually, their
7 voices would be faint or lost.” *Id.* at 294; *see also* Center for Governmental Studies, *Democracy*
8 *by Initiative: Shaping California’s Fourth Branch of Government*, 282 (2d ed. 2008) (discussing
9 the tremendous amount of resources it takes to circulate a petition and campaign for a ballot
10 measure).

11 Compelled disclosure provisions, such as the compelled disclosure of the Referendum 71
12 petition signers pursuant to the Public Records Act, impinge upon the core freedoms protected by
13 the First Amendment.⁵ *Davis v. FEC*, ___ U.S. ___, 128 S. Ct. 2759, 2774-75 (2008). “[C]ompelled
14 disclosure cannot be justified by a mere showing of some legitimate government interest. . . . [It]
15 must survive exacting scrutiny. . . . [T]here must be a ‘relevant correlation’ or ‘substantial
16 relation’ between the governmental interest and the information required to be disclosed.”
17 *Buckley*, 424 U.S. at 64.

18 Furthermore, exacting scrutiny is required “even if any deterrent effect on the exercise of
19 First Amendment rights arises, not through direct government action, but indirectly as an
20 unintended but inevitable result of the government’s conduct in requiring disclosure.” *Id.* at 65
21 (*citing NAACP v. Alabama*, 357 U.S. 449, 463 (1958)).⁶

23 ⁵ Although the cases cited by Plaintiffs deal with the disclosure of donor information, the situation of the
24 Petition signers is analogous to that of individuals who have chosen to contribute to a ballot measure campaign. In
25 both situations, the State is compelling the disclosure of the names those individuals who support a particular ballot
26 measure. In the case of a contribution to a ballot measure campaign, this is the disclosure of those who have
27 contributed above a certain, specified threshold. Similarly, in the context of the signing of a petition, through a
28 request under the Public Records Act, the State would be compelling the disclosure of all of those who signed the
petition.

⁶ Washington is not required to take direct action to restrict the First Amendment rights of Plaintiffs for the
provisions challenged herein to be found unconstitutional. *NAACP v. Alabama*, 357 U.S. at 463. “In the domain of
these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that

1 “Exacting scrutiny,” as used in *Buckley*, is “strict scrutiny.” *Buckley* required “exacting
2 scrutiny” of FECA’s compelled disclosure provisions, *id.* at 64, which it referred to as the “strict
3 test,” *id.* at 66, and by which it meant “strict scrutiny.” *See WRTL II*, 127 S.Ct. at n.7 (*Buckley*’s
4 use of “exacting scrutiny,” 424 U.S. at 44, was “strict scrutiny”); *see also McIntyre v. Ohio*
5 *Elections Comm’n*, 514 U.S. 334, 347 (1995) (*citing First Nat’l Bank of Boston v. Bellotti*, 435
6 U.S. 765, 786 (1978)) (equating “exacting” scrutiny with “strict” scrutiny).⁷

7 Under strict scrutiny, the State bears the burden of proving that the application of the Public
8 Records Act is “(1) narrowly tailored, to serve (2) a compelling state interest.” *Cal. Pro-Life*
9 *Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (*citing Republican Party of*
10 *Minnesota v. White*, 536 U.S. 765, 774-75 (2002)) (“*CPLC II*”).

11 **2) Research demonstrates that compelled disclosure has a significant chilling**
12 **effect on speech.**

13 While the burden is on the State to demonstrate that the release of referendum petitions
14 pursuant to the Public Records Act is narrowly tailored to serve a compelling government
15 interest, Plaintiffs wish to highlight differences between public perception regarding compelled
16 disclosure provisions and personal sentiments regarding disclosure.

17 abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental
18 action.” *Id.* at 461. “The crucial factor is the interplay of governmental and private action, for it is only after the
19 initial exertion of state power represented by the production order that private action takes hold.” *Id.* at 463.

20 ⁷ In *Canyon Ferry*, the Ninth Circuit again declined to clarify whether strict scrutiny applies in the context of
21 ballot measure disclosure. *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021,
22 1031 (9th Cir. 2009) (striking Montana’s disclosure statute under any standard of review). *See also Cal. Council*
Pro-Life, 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).

23 Other cases have indicated that the “the strength of the governmental interest must reflect the seriousness of the
24 actual burden on First Amendment rights.” *Davis*, 128 S. Ct. at 2775. Severe burdens on First Amendment rights
25 must be narrowly tailored to serve a compelling government interest. *Buckley v. Am. Constitutional Law Found.,*
26 *Inc.*, 525 U.S. 182, 206-07 (1999) (Thomas, J., concurring). Regulations that “entail only a marginal restriction upon
27 [First Amendment rights]” are subject to “closely drawn scrutiny.” *See McConnell*, 540 U.S. at 137 (2003)
28 (discussing contribution limits and how such limits still permit individuals to exercise their First Amendment speech
and associational rights). Such regulations need only be “closely drawn” to a “sufficiently important interest.” *Id.* at
136.

However, regardless of whether this Court accepts that “exacting scrutiny” is always the same as “strict
scrutiny,” or whether it first examines the extent of the burden on First Amendment rights, strict scrutiny must apply
to the provisions because compelled disclosure provisions constitute substantial First Amendment burdens. *Davis*,
128 S. Ct. at 2774-75.

1 Public disclosure statutes are often trumpeted on the grounds that “sunlight is the best
2 disinfectant” and as enjoying wide public support. *See Buckley*, 424 U.S. at 67; *CPLC II*, 507
3 F.3d at 1179; *see also* David Ammons, *Who Signs R-71? Foes May Post it Online*, Washington
4 Secretary of State Blogs, June 2, 2009 (available at
5 [http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/06/who-signs-r-71-foes-may-post-it](http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/06/who-signs-r-71-foes-may-post-it-online/)
6 [-online/](http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/06/who-signs-r-71-foes-may-post-it-online/)) (discussing Secretary of State’s commitment to “transparency”).⁸ Yet few have actually
7 studied whether campaign disclosure actually solves the problems it seeks to address, and fewer
8 still have probed voters about the specific costs associated with compelled disclosure statutes.⁹

9 In 2007, the Institute for Justice commissioned a study to examine the burdens of compelled
10 disclosure provisions on First Amendment rights. *See* Dick Carpenter, Ph.D., *Disclosure Costs:*
11 *Unintended Consequences of Campaign Finance Reform*, Institute for Justice, March 2007
12 (available at <http://www.ij.org/publications/other/disclosurecosts.html>) (“*Disclosure Costs*”).
13 Prior to this study, “no one [had] analyzed systematically the effects of campaign-finance
14 regulations on freedom of speech or association.” Jeffrey Milyo, Ph.D., *The Political Economics*
15 *of Campaign Finance*, *The Independent Review*, Vol. 3, Issue 4, 537, 537 (Spring 1999).

16 While the study involved financial disclosure provisions, its findings are illustrative of the
17 disconnect between public perception and actual evidence regarding compelled disclosure. While
18 there may be some minor difference between support indicated by a financial contribution to a
19

20 ⁸ David Ammons is the Communications Director for Defendant Reed.

21 ⁹ Evidence of the social costs associated with compelled public disclosure was part of the record in *McConnell*
22 *v. FEC*, 251 F. Supp. 2d 176, 227-229 (D.D.C. 2003) (per curiam). The evidence ranged from large numbers of
23 contributions at just below the disclosure trigger amount, to vandalism after public disclosure, to non-contribution
24 because of concerns about a group’s ability to retain confidentiality, to concerns about employers, neighbors, other
25 business entities, and others knowing of support are not popular everywhere and the results of such disclosure. *Id.*
26 *See also AFL-CIO v. FEC*, 333 F.3d 168, 176, 179 (D.C. Cir. 2003) (recognizing that releasing names of volunteers,
27 employees, and members would make it hard to recruit personnel, applying strict scrutiny, and striking down an FEC
28 rule requiring public release of all investigation materials upon conclusion of an investigation); Dick M. Carpenter
II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at
[http://www.ij.org/](http://www.ij.org/publications/other/disclosurecosts.html)
[publications/other/disclosurecosts.html](http://www.ij.org/publications/other/disclosurecosts.html)); William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of*
Political Contribution Disclosure, 6 U. Pa. J. Const. L. 1 (2003); James Bopp, Jr. & Josiah Neeley, *How Not to*
Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing, 86 Denv. U. L. Rev. 195,
218-20 (2008) (discussing the burdens of disclosure).

1 political action committee and personally signing a referendum petition, the net result is the
2 same: individual names and addresses ultimately appear on the internet and are easily accessible
3 by the public.

4 The results of the study are consistent in one respect with prior studies on campaign finance
5 disclosure—over 80% of the respondents agreed that the government should make public the
6 identities of those who contribute to ballot measures.¹⁰ *Id.* at 7. However, that is where the
7 similarities end.

8 When the issue was personalized, support for public disclosure waned significantly. Only
9 40% of respondents were comfortable with their *own* name and address being posted on a
10 government website as a result of a contribution to a ballot committee. *Id.* Even fewer
11 respondents (24%) felt that their employer’s name should be posted on the Internet because of
12 their political contribution. *Id.* Nearly 60% of respondents indicated that they would think twice
13 about donating if it meant that their name and address would be released to the public. *Id.*
14 Furthermore, after comparing general support for disclosure laws with an individual’s likelihood
15 of contributing to a campaign if their information is made public, Carpenter found that “even
16 those who strongly support forced disclosure laws will be less likely to contribute to an issue
17 campaign if their contribution and personal information will be made public.” *Id.* at 7. When
18 asked why they would think twice before donating, respondents cited a desire to remain
19 anonymous, fear of retaliation (both personal and economic), and that public disclosure would
20 take away their right to a secret ballot. *Id.* See also *McIntyre*, 514 U.S. at 343 (“The specific
21 holding in *Talley* related to advocacy of an economic boycott, but the Court’s reasoning
22 embraced a respected tradition of anonymity in the advocacy of political causes. This tradition is
23 perhaps best exemplified by the secret ballot, the hard-won right to vote one’s conscience
24 without fear of retaliation.”). As Carpenter concluded

25
26 ¹⁰ Respondents were asked to state how they felt about the following statement. “The government should
27 require that the identities of those who contribute to ballot issue campaigns should be available to the public.” This
28 finding is consistent with the findings of David Binder, relied upon by the court in *CPLC II*, where 71% of
respondents felt that it was important to know the identities of individuals that contributed to a ballot measure
committee. *CPLC II*, 507 F.3d at 1179.

1 while voters appear to like the idea of disclosure in the abstract (that is, as it applies to
2 someone else), their support weakens dramatically in the concrete (that is, when it involves
3 them). Stated succinctly, it is ‘disclosure for thee, but not for me.’ . . . But the potential
4 costs do not end there. Most respondents also reported themselves less likely to contribute
5 to an issue campaign if their personal information was disclosed . . . Thus, the cost of
6 disclosure also seems to include a chilling effect on political speech and association as it
7 relates to ballot issue campaigns. . . . The vast majority of respondents possessed no idea
8 where to access lists of contributors and never actively seek out such information before
9 they vote. At best, some learn of contributors through passive information sources, such as
10 traditional media, but even then only a minority of survey participants could identify
11 *specific* funders of campaigns related to the ballot issue foremost in their mind. . . . Such
12 results hardly point to a more informed electorate as a result of mandatory disclosure . . .

13 *Disclosure Costs* at 13. Thus, in addition to having a significant chilling effect on political
14 speech, the research also indicates that compelled disclosure provisions do little to solve the

15 ¹¹ Carpenter’s research has demonstrated just how little the information gleaned from compelled disclosure is
16 used by voters. His research demonstrates that voters, in the abstract, want public disclosure and indicate that it
17 would effect their vote. However, in the concrete, donors are reluctant to make their financial support public and
18 almost never access the public disclosure reports. Moreover, even traditional information sources relied upon by
19 voters, such as newspapers and television, tend to ignore campaign disclosure reports.

20 Campaign disclosure is typically justified on the ground that “[voters are] cognitively limited decision makers,
21 processing only a small fraction of the information to which they are exposed. Rather than engaging in a
22 comprehensive information search and then deliberating to achieve an optimal choice, the argument goes, individuals
23 tend to rely on cues to make judgments.” *Disclosure Costs* at 4.

24 Carpenter’s research indicates that nearly two-thirds of the voters rely upon traditional forms of media,
25 including newspaper, television, and radio, as sources of information on ballot measures. *Id.* at 12. Only 12%
26 indicated that they used the Internet, but the study does not indicate how the Internet was used. In other words, the
27 voter could have been visiting the websites of traditional news sources. *Id.* at 12.

28 In a later study, Carpenter analyzed how often traditional media—from which the typical voter obtains most of
his or her information—used disclosure information in their stories. Carpenter found that traditional media rarely uses
public disclosure in their stories: “Although voters enjoyed a wealth of information about ballot issues in 2006, little
of that information included data that drew on, appeared to draw on, or made reference to information related to or
resulting from campaign-finance disclosure laws. Despite the posting of disclosure information on the Colorado
Secretary of State’s website, and the alleged importance of such information to voters, only 4.8 percent of the
information sources included any discussion of disclosure-related data. Instead, more than 95 percent of the sources
in this sample focused on the content of the ballot issues, predicted effects of the issues’ passage or defeat, and
otherwise discussed the merits or demerits of the proposed initiatives without making any reference to information
resulting from disclosure.” Dick Carpenter, Ph.D., *Mandatory Disclosure for Ballot-Initiative Campaigns*, *The*
Independent Review, 578 (Spring 2009) (*available at* [http://www.independent](http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf)
[.org/pdf/tir/tir_13_04_6_carpenter.pdf](http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf)) (“*Mandatory Disclosure*”). Even as the election draws near, traditional
media sources do not increase the number of stories relying on donor disclosure. *Id.* (97% of traditional media
sources in two weeks immediately before election did not draw on, appear to draw on, or make reference to
disclosure reports).

In conclusion, Carpenter noted: “It therefore appears that it is not only citizens who do not consult disclosure
information directly, but also media, think tanks, and other ‘elites’ that, according to cue-taking literature, ordinarily
assume a ‘cue-giving’ role to the general public.” *Id.* at 578. The voters, who gain most of their information from the
news media, rely on a source that, for all practical purposes, ignores the public disclosure system in its coverage of
ballot measures. Thus, the voters are not gaining valuable information from the public disclosure of donors -
particularly in light of the First Amendment harms being caused to citizens because of this compelled public
disclosure.

1 problem that they are meant to address, namely informing the public what special interests back a
2 particular ballot measure.

3 **3) The Public Records Act is unconstitutional as applied to referendum**
4 **petitions because it is not narrowly tailored to serve a compelling**
5 **government interest.**

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

15 Subsequent courts have clarified that the Corruption and Enforcement Interests are unique to
16 candidate elections, and therefore cannot be relied upon to justify compelled referendum
17 disclosure. *See Bellotti*, 435 U.S. at 789-90 (holding that the state lacked a compelling interest in
18 combating corruption in the context of a referendum election because there is no risk of *quid pro*
19 *quo* corruption); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003)
20 (same) (“*CPLC I*”). *See also Canyon Ferry Road*, 556 F.3d at 1031-32 (noting that the
21 Enforcement Interest cannot justify ballot-measure disclosure because its necessary only to
22 enforce contribution limits—limits that are unconstitutional in the context of a ballot-measure
23 election); *CPLC I*, 328 F.3d at 1105 n.23 (same). However, these courts have suggested that the
24 Informational Interest may be sufficient to justify compelled referendum disclosure, a conclusion
25 that appears to be premised on a misreading of *Buckley* and the Informational Interest discussed
26 therein. *See, e.g., CPLC II*, 507 F.3d at 1178-80.

27 In *Buckley*, the Supreme Court stated that information regarding contributions and
28 expenditures “allows voters to place each candidate in the political spectrum” and that the
“sources of a candidate’s financial support also alert the voter to the interests to which a

1 candidate is most likely to be responsive and thus facilitate predictions of future performance.”
2 424 U.S. at 67. The need to provide this information to voters is a direct result of the realities of a
3 political campaign involving *candidates*; candidates often discuss their general policies regarding
4 education, health care, and taxes, but rarely disclose detailed policy positions about those topics.
5 Issues that escape the attention of the media are simply not discussed. Thus, information
6 regarding contributors to a candidate allows voters to better predict some of the difficult policy
7 decisions that an elected official is called to make in office, especially on those issues that are not
8 discussed publicly during a campaign.

9 By comparison, everything the voter needs to know about a referendum is contained in the
10 text of the measure itself. There is no “political spectrum” and certainly no “future performance.”
11 A referendum can be an incredibly complex piece of legislation, but the first *Buckley* interest is
12 not about simplifying the message for voters. *See Bellotti*, 435 U.S. at 792 (“But if there be any
13 danger that the people cannot evaluate the information and arguments advanced . . . it is a danger
14 contemplated by the Framers of the First Amendment.”). Information about contributors no doubt
15 may change perceptions about a referendum, but it simply does not change the nature of the
16 referendum itself. The First Amendment grants advocates the right to separate their message
17 from their identity to ensure that the message will not be prejudged simply because voters do not
18 like the proponent. *McIntyre*, 514 U.S. at 342. The identity of the speaker is no doubt helpful in
19 evaluating the message, “but the best test of truth is the power of the thought to get itself
20 accepted in the competition of the market.” *Id.* at 348 n. 11 (citations omitted). “Don’t
21 underestimate the common man. People are intelligent enough to evaluate the source of
22 anonymous writing. They can evaluate its anonymity along with its message, as long as they are
23 permitted, as they must be, to read that message. And then, once they have done so, it is for them
24 to decide what is ‘responsible’, what is valuable, and what is truth.” *Id.*

25 Because the identity of the speaker does not change the message communicated and because
26 it simply cannot alter the text of the referendum itself, Washington lacks a compelling
27 government interest sufficient to compel the public disclosure of a referendum petition. *See id.*
28 *See also Buckley II*, 525 U.S. at 203 (noting that ballot-measure expenditure reporting adds little

1 insight as to the measure), *aff'g Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092,
2 1104-05 (10th Cir. 1997) (“The first and third [*Buckley* interests] are inapplicable because [the
3 statute] addresses expenditures, not contributions.”).

4 The U.S. Court of Appeals for the Ninth Circuit recently ruled that, in the context of ballot
5 measure campaigns, a state cannot compel the disclosure of the names of those people who have
6 made *de minimis* contributions to a campaign. *See Canyon Ferry Road Baptist Church of East*
7 *Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009). Signatories to a petition are like
8 *de minimis* contributors and the state cannot compel their disclosure under the First Amendment.
9 *Id.*; *see also id.* at 1036 (Noonan, J., concurring) (“How do the names of small contributors affect
10 anyone else’s vote? Does any voter exclaim, ‘Hank Jones gave \$76 to this cause. I must be
11 against it!’”). Likewise, one could ask, “How do the names of petition signers affect anyone
12 else’s vote? Does any voter exclaim, ‘Hank Jones signed the petition. I must be against it!’”

13 In *Buckley II*, the Supreme Court also considered and rejected administrative efficiency and
14 fraud detection as potential state interests. *Buckley II*, 525 U.S. at 192. Even if fraud detection
15 were a legitimate interest, it is not compelling with respect to referendum petitions. First, the
16 Supreme Court has recognized that fraud is much less of a concern at the petition process stage.
17 *Meyer v. Grant*, 486 U.S. 414, 427-28 (1988). This flows from the very justification of the
18 petition process: ensuring that there is a sufficient level of public support to warrant the
19 expenditure of public and private funds to place the referendum on the ballot. The question is not
20 whether SB 5688 should or should not be enacted, but merely whether Washington citizens as a
21 whole should have the opportunity to voice their opinion on SB 5688.

22 Second, in *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000), the
23 Ninth Circuit noted that fraud prosecutions during the petition process have been sparse (twice in
24 seven years) and that the fraud was detected by traditional methods of detecting and prosecuting
25 forgeries (i.e., signature comparison). *See also id.* at 1138 (noting that it is “precisely the risk that
26 people will refrain from advocating controversial positions that makes a disclosure scheme of
27 this kind especially pernicious”). Thus, the State’s interest is in private disclosure (i.e., disclosure
28 to the government) to prevent fraud in the petition process. Public disclosure of a petition is not

1 narrowly tailored to advance that interest and is therefore unconstitutional under the First
2 Amendment.

3 Moreover, allowing the disclosure of the names of the petition signers would be an end run
4 around Washington’s petition statute, which specifically attempts to prevent the disclosure of the
5 names of petition signers. Under Wash. Rev. Code § 29A.72.230, the names and addresses of
6 petition signers are statutorily protected—the small and limited group of people who are allowed
7 to observe the verification and canvass of the signatures may “make no record of the names,
8 addresses, or other information on the petitions or related records during the verification process .
9 . . .” Wash. Rev. Code § 29A.72.230. The petition statute thus prevents the release of the names
10 of those who signed a petition. By releasing the names of those who signed a petition through a
11 request made under Washington’s Public Records Act, the State is allowing an unconstitutional
12 end run around the statute.

13 **b. The Public Records Act is unconstitutional as applied to Referendum 71**
14 **because there is a reasonable probability that the release of the names of the**
15 **petition signers will subject those petition signers to threats, harassment, and**
16 **reprisals.**

17 The Supreme Court has consistently held that compelled disclosure provisions impose
18 substantial burdens on the First Amendment freedoms of speech and association. *Davis*, 128 S.
19 Ct. at 2774-75 (citing *Buckley*, 424 U.S. at 64). In considering campaign donation thresholds, the
20 Supreme Court predicted that compelled disclosure provisions might chill the speech of some
21 individuals because of the risk that compelled disclosure would expose those individuals to
22 harassment and retaliation. *Buckley*, 424 U.S. at 68; *see also id.* at 237 (Burger, C.J., concurring
23 in part and dissenting in part) (discussing the social costs of public disclosure).

24 As set forth above, the Washington Public Records Act is not narrowly tailored to serve a
25 compelling government interest. However, even if this Court finds that the Public Records Act is
26 narrowly tailored to serve a compelling government interest, the release of the Referendum 71
27 petition is unconstitutional because there is a reasonable probability that its disclosure will
28 subject the petition signers to a reasonable probability of threats, harassment, and reprisals.
Under this “reasonable-probability test” articulated by the Supreme Court, when there is a

1 reasonable probability that people espousing a certain opinion—such as support for a traditional
2 definition of marriage—will be subject to threats, harassment, or reprisals, the government
3 cannot compel the release of their names. Because the reasonable-probability test is met here, the
4 Public Records Act is unconstitutional as applied and this Court should issue a temporary
5 restraining order and preliminary injunction to prevent the public release of the Referendum 71
6 petition.

7 **1) Compelled disclosure provisions are subject to strict scrutiny.**

8 As set forth in Section III.B.1.a-1, *supra*, compelled disclosure provisions, such as the
9 compelled disclosure that will occur if the Referendum 71 petition is made public, are subject to
10 strict scrutiny.

11 **2) Disclosing the names of the petition signers will subject those petition
12 signers to a reasonable probability of threats, harassment, and reprisals.**

13 In the context of compelled disclosure, Plaintiffs must meet but one test for an exemption
14 from the reporting requirements to be granted a temporary restraining order and a preliminary
15 injunction—the “reasonable-probability test.” Under this test, Plaintiffs must demonstrate a
16 reasonable probability that the compelled disclosure of the names of those who signed the
17 petition will subject those individuals to threats,¹² harassment,¹³ or reprisals.¹⁴ As set forth below,
18 Plaintiffs have demonstrated: (1) that individuals and organizations circulating the petition have
19 already been subject to threats, harassment, and reprisals; (2) that groups have already shown that
20 the release of the names of the petition signers will be used to harass those petition signers; and
21 (3) supporters of similar causes in the past have been subjected to the sort of threats, harassment,
22

23 ¹² “Threat, *n.* 1. A communicated intent to inflict harm or loss on another or on another’s property, esp. One
24 that might diminish a person’s freedom to act voluntarily or with lawful consent 2. An indication of an
25 approaching menace 3. A person or thing that might well cause harm” Black’s Law Dictionary 1489-90
(7th ed. 1999).

26 ¹³ “Harassment Words, conduct, or action (usu. repeated or persistent) that, being directed at a specific
27 person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.”
Black’s Law Dictionary 721 (7th ed. 1999).

28 ¹⁴ “Reprisal 3. Any act or instance of retaliation, as by an employer against a complaining employee.”
Black’s Law Dictionary 1305 (7th ed. 1999).

1 and reprisals prior courts have considered and found sufficient to grant a disclosure exemption.¹⁵
2 Given the existence and prevalence of the threats, harassment, and reprisals directed at people
3 already associated with Referendum 71 and similar causes, there is a reasonable probability that
4 any individual associated with Referendum 71 identified as a result of the State’s disclosure of
5 the Referendum 71 petition pursuant to the Public Records Act will be subjected to similar
6 threats, harassment, and reprisals, unless a temporary restraining order and preliminary injunction
7 are issued to prevent the release of those names.

8 **a) The standards of the reasonable-probability disclosure exemption test.**

9 In *Buckley*, the Court created the reasonable-probability test in response to, and in rejection
10 of, the argument that the proof of a chill on expressive association would be impossible. *Buckley*,
11 424 U.S. at 73. In the appellate court, a dissenting opinion argued that a blanket exemption must
12 be created for minor parties, because the “evils of chill and harassment are largely incapable of
13 formal proof.” *Id.* (citation omitted). The dissenter noted the difficulty of obtaining “witnesses
14 who are too fearful to contribute but not too fearful to testify about their fear.” *Id.* at 74. The
15 Supreme Court rejected this argument by establishing the reasonable-probability test, including
16 its mandate of “sufficient flexibility” in evidence to fit the situation where witnesses would be
17 difficult to obtain because they are chilled by fear of threats, harassment, or reprisals. *Id.* Rather
18 than create the blanket exemption urged by the appellate court’s dissent, the Supreme Court
19 recognized the inherent problem created by the threat of threats, harassment, or reprisals after
20 disclosure (or the possibility of such threats, harassment, or reprisals), and then required only a
21 minimal amount of proof—but some proof, nonetheless—for those requesting an exemption
22 from reporting.

23 Thus, *Buckley* established that the sole test Plaintiffs must meet to obtain a disclosure
24 exemption: the Court must determine whether there is a “reasonable probability that the
25 compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or
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27 ¹⁵ Plaintiffs are not required to establish a causal link between the compelled disclosure statute and the
28 instances of threats, harassment, and reprisals. *Buckley*, 424 U.S. at 74.

1 reprisals from either Government officials or private parties.” *McConnell*, 540 U.S. at 198
2 (citation omitted). If there is a such a reasonable probability, Plaintiffs must receive an
3 exemption from disclosure. There is no further test or balancing because the Supreme Court has
4 already done the balancing and established the reasonable-probability test as the sole criterion a
5 party needs to meet to gain a disclosure exemption.¹⁶ *Id.*

6 **b) The quantum and quality of evidence required to meet the**
7 **reasonable-probability test.**

8 The First Amendment context and the reasonable-probability test govern the quantum and
9 quality of evidence that must be presented to establish a reasonable probability of threats,
10 harassment, and reprisals. The Supreme Court has set forth five requirements on the quantum and
11 quality of evidence required to meet the reasonable-probability test that are applicable here.

12 **i) Plaintiffs are not required to establish a direct causal link**
13 **between disclosure and specific instances of threats, harassment,**
14 **and reprisals.**

15 First, the Supreme Court has rejected the notion that a causal link must be established
16 between the threats, harassment, and reprisals, and public disclosure. *Buckley*, 424 U.S. at 74 (“A
17 strict requirement that chill and harassment be directly attributable to the specific disclosure from
18 which the exemption is sought would make the task even more difficult.”). In the present case,
19 the critical question is whether each particular individual was subjected to threats, harassment, or
20 reprisals because of his or her support for Referendum 71 or a traditional definition of marriage.¹⁷
21 If the answer is “yes,” then the Court can assume, as a matter of law, that there is a reasonable
22 probability that any individual who is disclosed because he or she signed the Referendum 71
23 petition will likewise be subjected to threats, harassment, and reprisals. To the extent that

24 ¹⁶ Nevertheless, if the Court were to weigh Washington’s interest in disclosure against the First Amendment
25 harms, the balance tips even more in favor of Plaintiffs than it did in *Buckley* or *Brown v. Socialist Workers ‘74*
26 *Campaign Comm.*, because of the technological changes that have altered the dynamics of public disclosure, and the
27 social science research that has illuminated these harms and dispelled the notion that donor information solves the
28 problem of voter ignorance.

¹⁷ The Second Circuit provides a helpful application of the reasonable-probability test in *FEC v. Hall-Tyner*
Election Campaign Committee, 678 F.2d 416 (2d Cir. 1982), in which it, *inter alia*, makes clear that those seeking
exemption have no burden to prove “harassment will certainly follow compelled disclosure” because “breathing
space” is required in the First Amendment context. *Id.* at 421.

1 Plaintiffs can demonstrate a causal link between the support for Referendum 71 or a traditional
2 definition of marriage, it only strengthens their case and demonstrates that the assumption is
3 well-justified.

4 **ii) Plaintiffs need not demonstrate that they, or their members, have**
5 **been subjected to threats, harassment, and reprisals.**

6 Similarly, the second “sufficient flexibility” standard of the reasonable-probability test
7 allows an organization to rely not only on evidence of specific incidents of harassment directed at
8 its members or the organization itself, but also on evidence of threats, harassment, or reprisals
9 directed at other individuals and organizations holding similar views. Thus, in *Averill v. City of*
10 *Seattle*, the court granted an exemption to a specific candidate’s campaign committee primarily
11 upon evidence of threats and harassment directed at the Freedom Socialist Party and Radical
12 Women generally. 325 F. Supp. 2d 1173, 1175 (W.D. Wash. 2004). The only additional evidence
13 submitted by the committee consisted of several harassing and crank calls directed at contributors
14 to the committee. *Id.* at 1178.¹⁸ Once Plaintiffs have established evidence of threats, harassment,
15 or reprisals directed at other individuals or organizations holding similar views, there is, as a
16 matter of law, a reasonable probability of threats, harassment, and reprisals. The fact that
17 members of the Plaintiffs’ organization have been harassed only strengthens the case and
18 demonstrates that the analytical inference is well-justified.

19 **iii) The reasonable-probability test requires only that threats,**
20 **harassment, and reprisals exist, not that they be severe.**

21 The reasonable-probability test does not require threats, harassment, or reprisals to be
22 substantial or severe, only that threats, harassment, and reprisals exist. The test is one of
23 probability, making numerosity a logical criterion. However, the nature of the claim makes it

24 ¹⁸ In cases where the courts have found it inappropriate to look to evidence of harassment directed at other
25 organizations, they have done so on the grounds that it was impossible to determine the specific cause of the
26 harassment. *See, e.g., Oregon Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1259 (D. Or.
27 1977) (noting that the harassment was “at least as likely to be the product of the other political activities of the
28 affiants.”). The Verified Complaint and other evidence presented by Plaintiffs leave little doubt as to the cause of the
harassment—each individual was threatened or harassed because he or she supported a traditional definition of
marriage. Together, this evidence demonstrates that there is a reasonable probability that any individuals advocating
a traditional definition of marriage will be subjected to similar threats, harassment, and reprisals.

1 difficult to rely solely on the number of instances of threats, harassment, and reprisals that have
2 occurred. As the Court recognized in *Buckley*, plaintiffs in situations where there is a reasonable
3 probability of threats, harassment, or reprisals face a daunting task in trying to find witness who
4 are “too fearful to contribute but not too fearful to testify about their fear.” 424 U.S. at 74.

5 Accordingly, the courts must look to a variety of other factors. The severity of reprisals
6 certainly has a proper role to play in the analysis. When the incidents occurred may be relevant.¹⁹
7 So too might the geographic dispersion and publicity surrounding the incidents.²⁰ However, it is
8 inappropriate to distinguish any case on a single factor. A few severe and public threats could be
9 sufficient to warrant an exemption. Likewise, relatively minor instances of threats, harassment,
10 and reprisals may be sufficient if they are widespread. In fact, *Averill* recognized that “even small
11 threats” could be sufficient. *Averill*, 325 F. Supp. 2d at 1176.

12 Thus, in determining whether there is a reasonable probability of threats, harassment, and
13 reprisals, the courts have considered everything from boycotts to death threats to determine
14 whether there is a reasonable probability of future threats, harassment, and reprisals. *See, e.g.,*
15 *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. at 99 (threatening phone calls and
16 hate mail, the burning of organizational literature, destruction of members’ property, police
17 harassment, and shots fired into organization’s office); *Bay Area Citizens Against Lawsuit Abuse*,
18 982 S.W.2d 371 (Tex. 1998) (boycotts). Each has a proper role to play in the analysis and an

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21 ¹⁹ The evidence presented in this case suggests that the threats, harassment, and reprisals directed at individuals
22 supporting a traditional definition of marriage are not limited to the Petition on Referendum 71. For example, the
23 declarations attached to the Declaration of Scott Bieniek as Exhibits 12 and 13, recite many instances of harassment
24 directed at supporters of marriage between one man and one woman in light of California’s Proposition 8, a ballot
25 measure establishing a Constitutional definition of marriage in California. *See* (Decl. of Scott F. Bieniek in Supp. of
26 Pls. Mot. for TRO & Prelim. Inj., Ex. 12 & Ex. 13.) In late April, a national controversy erupted when Carrie
27 Prejean, First Runner-Up, Miss USA, said she did not support gay marriage when answering a question from Miss
28 USA judge Perez Hilton. *See Hilton, Miss California Take Sides on “Today”*, S.F. Chronicle, Apr. 23, 2009
(indicating that her answer may have cost her the Miss USA crown). The evidence suggests that the threats and
harassment directed at individuals supporting a traditional definition of marriage are anything but isolated incidents.

²⁰ Incidents involving harassment, threats, and reprisals against supporters of marriage between one man and
one woman are not geographically limited. *See* Decl. of Scott F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim.
Inj., Ex. 13, Page 118-35 (John Doe #30 - California); *id.* at Page 42-44 (John Doe #19 - Louisiana); *id.* at Page 69-
74 (John Doe #27 - Michigan); *id.* at Page 80-117 (John Doe #29 - New York); & *id.* at Page 142-44 (John Doe #32
- Ohio.)

1 exemption must be granted if the Court determines that there is a reasonable probability of
2 threats, harassment, and reprisals.

3 **iv) The exemption is not limited to minor political parties.**

4 While *Buckley* and *Brown* make references to “minor parties,” nothing in *NAACP v.*
5 *Alabama*—the opinion on which the exemption is premised—suggests that the exemption is so
6 limited. The “minor party” language in *Buckley* results from the parties’ argument for a “blanket
7 exemption” for minor parties from disclosure requirements without first having to demonstrate
8 the requisite level of harm under *NAACP v. Alabama*. 357 U.S. at 449; see *Buckley*, 424 U.S. at
9 68-74. As the *NAACP v. Alabama* Court put it, compelled disclosure is just as “likely to affect
10 adversely the ability of petitioner and its members to pursue their collective effort to foster
11 beliefs which they admittedly have the right to advocate, in that it may induce members to
12 withdraw from the Association and dissuade others from joining it because of fear of exposure of
13 their beliefs shown through their associations and of the consequences of this exposure.” 357
14 U.S. at 462-63. Indeed, in *McConnell v. FEC*, the Court expressly affirmed the analysis and
15 holding of the district court, which applied the reasonable-probability test to entities that were, by
16 no stretch of the imagination, minor parties. *McConnell v. FEC*, 251 F. Supp. 2d 176, 245-47
17 (D.D.C. 2003) (applying the reasonable-probability test to a Chamber of Commerce coalition, the
18 American Builders and Contractors, Associated General Contractors of America, the American
19 Civil Liberties Union, and the National Rifle Association). The exemption has also been applied
20 in non-partisan elections. *McArthur v. Smith*, 716 F. Supp. 592, 594 (S.D. Fla. 1989). Non-
21 partisan elections, like ballot measures, are about the issues, not the political party of the
22 candidate. See also *Oregon Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp.
23 1255, 1257 (D. Or. 1977) (noting that courts must be especially vigilant in cases involving minor
24 parties, but in no way limiting the exemption to minor parties).

25 Furthermore, “the First Amendment does not ‘belong’ to any definable category of persons
26 or entities: It belongs to all who exercise its freedoms.” *Bellotti*, 435 U.S. at 802 (Burger, J.,
27 concurring). As the *Buckley* court put it, age, size, and political success, are all poor factors upon
28 which to create a blanket exemption. *Buckley*, 424 U.S. at 73. The Court explained that some

1 “long-established parties are winners—some are consistent losers,” and sometimes a new party
2 “may garner a great deal of support if it can associate itself with an issue that has captured the
3 public’s imagination.” *Id.* Today’s winners might be tomorrow’s losers, and the First
4 Amendment must protect both. Tying the *Brown* exemption to minor parties fails to protect the
5 First Amendment’s goal of encouraging “uninhibited, robust, and wide-open” debate. *New York*
6 *Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). All parties, whether large or small, new or well-
7 established, winners or losers, must be free to advocate their position free from the deplorable
8 acts directed at supporters of Referendum 71 and a traditional definition of marriage.

9 **v) The test does not require any threats, harassment, or reprisals to**
10 **be directed at Plaintiffs by government officials.**

11 It is of little import that none of the threats, harassment, and reprisals introduced into
12 evidence come directly at the hands of state actors. As the Supreme Court said in *NAACP v.*
13 *Alabama*, “it is only after the initial exertion of state power represented by the production order
14 that private action takes hold.” 357 U.S. at 463. An exemption is warranted from the most well-
15 intentioned disclosure statute if there is a reasonable probability of threats, harassment, and
16 reprisals. *See id.* (noting the deterrent effect of *unintended*, but *inevitable* results flowing from
17 compelled disclosure provisions); *McArthur*, 716 F. Supp. at 594 (“The Court clearly stated that
18 the first amendment prohibits compelled disclosure of contributors or recipients’ names if the
19 revelation would subject them to harassment from *either* government officials or private parties.
20 The Court’s use of ‘either’ indicates that harassment, reprisals or threats from private persons is
21 sufficient to allow this court to enforce the plaintiff’s first amendment rights by cloaking the
22 contributors and recipients’ names in secrecy.” (emphasis in original)). Under the First
23 Amendment and the reasonable-probability test announced in *Buckley*, Washington simply
24 cannot stick its head in the sand and ignore the real and inevitable consequences that flow from
25 the Public Records Act, however well-intentioned that statute may be. In light of these burdens,
26 Washington’s interest in disclosure of those who signed the Petition must give way to greater
27 First Amendment concerns in order to protect the free and robust debate necessary to preserve
28 our form of government.

1 **3) Disclosing the names of the Petition signers is unconstitutional as applied**
2 **to Plaintiffs, because there is a reasonable probability of threats,**
3 **harassment, and reprisals.**

4 The Verified Complaint and other evidence demonstrates that compliance with the
5 compelled disclosure provisions of Washington’s interpretation of the Public Records Act will
6 expose Plaintiffs, and those who signed the Petition to a reasonable probability of threats,
7 harassment, and reprisals if their names are released to the public. The evidence demonstrates
8 that the reprisals directed at supporters of a traditional definition of marriage are not isolated
9 events perpetuated by one or two individuals, but are instead, part of a larger campaign designed
10 to silence any individual supporting Referendum 71 or a traditional definition of marriage. In
11 light of such evidence, Plaintiffs are entitled to a temporary restraining order and a preliminary
12 injunction because their right to exercise their First Amendment freedoms of expression and
13 association free from threats, harassment, and reprisals outweighs any interest Washington may
14 have in compelled disclosure.

15 As set forth in the Facts section of this Memorandum, Larry Stickney, the Campaign
16 Manager for Protect Marriage Washington, has received a large number of emails from people
17 who disagree with his position on marriage. (Verified Compl., Ex. 1.) Rather than engage Mr.
18 Stickney in a civil conversation about the marriage issue, many of these emails threaten and/or
19 harass Mr. Stickney. He has been told to avoid an entire area of Washington, has been threatened
20 with a boycott, and harassed with obscenities. (Verified Compl., Ex. 1, p. 10, 20, & 21.)

21 Mr. Stickney also received indirect threats to his safety through blog posts, which threatened
22 harm not only to him, but to his entire family as well. (Verified Compl., Ex. 2, p. 2.) Even
23 details of a divorce fifteen years ago have become the subject of a harassing newspaper article
24 about Mr. Stickney. (Verified Compl., Ex. 3, p. 1.)

25 More ominously, Mr. Stickney is also subjected to harassment and threats in his own home.
26 In late June, an individual was seen taking pictures of Mr. Stickney’s home while his daughter
27 played outside. Shortly after Referendum 71 was presented to the Secretary of State on May 4,
28 2009, Mr. Stickney received a phone call at 2:00 a.m. from a woman who sounded frantic and
 deranged, and who said various obscene and vile things to him. (Verified Compl., ¶¶ 28 & 30.)

1 Mr. Stickney has taken these threats seriously. For example, early in the campaign to
2 circulate the petition, Mr. Stickney made his children sleep in an interior living room because he
3 feared for their safety if they slept in their own bedrooms. (Verified Compl., ¶ 27.)

4 Unfortunately, anyone who follows the debate over marriage would not be surprised by the
5 harassment and threats that have been leveled at Mr. Stickney. This sort of behavior is commonly
6 directed at supporters of traditional marriage, and past supporters of a definition of marriage as
7 between one man and one woman have been subjected to similar—and often worse—threats,
8 harassment, and reprisals for their support. *See* (Decl. of Scott F. Bieniek in Supp. of Pls. Mot.
9 for TRO & Prelim. Inj., Ex. 12 & Ex. 13.) (consisting of nearly sixty declarations from
10 California, each recounting at least one instance of threats, harassment, and reprisals directed at
11 supporters of Proposition 8, a ballot proposition that added a definition of marriage as between
12 one man and one woman to the California Constitution)

13 As set forth above, under the reasonable-probability test, the similar situations of the
14 California supporters of Proposition 8 to Referendum 71 allows the Court to consider the threats,
15 harassment, and reprisals directed at supporters of Proposition 8 when determining whether to
16 issue a preliminary injunction in this similar situation. *See Buckley*, 424 U.S. at 74; *Averill*, 325
17 F. Supp. 2d at 1175.

18 Supporters of traditional marriage in California were physically assaulted and threatened.
19 For example, an individual participating in a sign-waving event supporting traditional marriage
20 had an object thrown at her. (Decl. of Scott F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim.
21 Inj., Ex. 13, p. 31 (John Doe #16).) Another supporter of Proposition 8 received an email that
22 stated, “I tolerate you because I don’t come to where you are and slaughter you.” (Decl. of Scott
23 F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 13, p. 122 (John Doe #30).)

24 Supporters of traditional marriage were also harassed and threatened in their own homes.
25 One supporter had the back window of her car broken out while it sat in front of her home. (Decl.
26 of Scott F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 13, p. 7 (John Doe #11).)
27 Another supporter’s home was egged and floured on multiple occasions. (Decl. of Scott F.
28 Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 13, p. 17 (John Doe #14).) Still another

1 supporter of traditional marriage had a stairway at her home doused in urine. (Decl. of Scott F.
2 Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 13, p. 10 (John Doe #12).) Threats
3 aimed at people in their homes are of particular concern here, where the individuals running the
4 websites that will seek the names of the petition signers will have the addresses of the petition
5 signers, *See* (Decl. of Scott F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 2, p. 2,
6 Ex. 8, p. 1.)

7 Exacerbating the problems of the supporters of traditional marriage in California was a lack
8 of response from public officials. A supporter of traditional marriage reported vandalism and
9 theft of materials supporting traditional marriage on three separate occasions to the local police
10 department, yet never once received a response from the police department. (Decl. of Scott F.
11 Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 13, p. 182 (John Doe #42).)

12 The possibility that such physical harm could be directed at supporters of traditional
13 marriage has chilled the speech of supporters of traditional marriage, and will continue to do so
14 in the future. One father, concerned about the safety of his children, will no longer speak out
15 publicly in support of traditional marriage. (Decl. of Scott F. Bieniek in Supp. of Pls. Mot. for
16 TRO & Prelim. Inj., Ex. 13, p. 119 (John Doe #30).) Another supporter of traditional marriage
17 refused to make a public display of her support, because of aggression directed toward her family
18 and friends. (Decl. of Scott F. Bieniek in Supp. of Pls. Mot. for TRO & Prelim. Inj., Ex. 13, p.
19 164 (John Doe #39).)

20 The evidence of threats, harassment, and reprisals already occurring in Washington, together
21 with the evidence of past threats, harassment, and reprisals directed at supporters of similar
22 causes elsewhere demonstrate that there is a reasonable probability that those who signed the
23 Petition will be subject to threats, harassment, and reprisals, unless this Court prevents the
24 compelled disclosure of the names of the Petition signers through a temporary restraining order
25 and preliminary injunction.

26 **2. Plaintiffs have, and will continue, to suffer irreparable harm if defendants are not**
27 **restrained.**

28 Plaintiffs find themselves in the emergency situation contemplated by FRCP 65(b):

1 “Applicants for injunctive relief occasionally are faced with the possibility that irreparable injury
2 will occur before the hearing for a preliminary injunction required by Rule 65(a) can be held. In
3 that event a temporary restraining order may be available under Rule 65(b).” 11A Wright &
4 Miller, Federal Practice and Procedure § 2951 (2d ed. 2009).

5 A Rule 65(b) temporary restraining order “is designed to preserve the status quo until there
6 is an opportunity to hold a hearing on the application for a preliminary injunction and may be
7 issued with or without notice to the adverse party.” *Id.* As soon as the names of those who
8 signed the Referendum 71 petition become public, the First Amendment rights of those
9 individuals will be immediately and irreparably harmed. Issuing a temporary restraining order
10 will secure the status quo—and the all-important First Amendment rights of those who signed the
11 petition—until a preliminary injunction hearing can be held.

12 Even if this Court ultimately decides at the preliminary injunction hearing that a preliminary
13 injunction enjoining the release of the names of the petition signers should not issue, Defendants
14 and the individuals who may seek the names of the petition signers will only suffer a delay of
15 several days in their seeking of the information contained on the petition. When weighing the
16 rights of those seeking the names of those who signed the petition against the First Amendment
17 rights of the petition signers themselves, the rights of the petition signers must be protected.

18 Here, the Secretary of State’s office has informed Plaintiffs’ counsel that they will be
19 releasing the names of those who signed the petition to anyone desiring such names as early as
20 the middle of this week. This release will be done without notifying any of the petition signers.
21 Without a temporary restraining order, Plaintiffs will suffer the irreparable injury of the loss of
22 their First Amendment right to remain anonymous, and prevent threats, harassment, and
23 reprisals.

24 “Deprivations of speech rights presumptively constitute irreparable harm for purposes of a
25 preliminary injunction: ‘The loss of First Amendment freedoms, even for minimal periods of
26 time, constitute[s] irreparable injury.’” *Sumnum v. Pleasant Grove City*, 483 F.3d 1044 (10th
27 Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Yahoo!, Inc. v. La Ligue*
28 *Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (quoting *Elrod*);

1 *Brown v. Cal. Dept. Of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that a risk of
2 irreparable injury may be presumed when Plaintiffs state a colorable First Amendment claim);
3 *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (“Where a
4 plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature
5 of the harm may be presumed.”).

6 If the names of the petition signers are disclosed to the public by the State, those petition
7 signers will be denied their First Amendment rights twice over—even though each one of the
8 reasons alone would prevent the disclosure of the names of the petition signers. First, because the
9 State has no compelling state interest in the disclosure of the names of the petition signers, the
10 Public Records Act a applied violates the First Amendment rights of the petition signers. Second,
11 by disclosing the names of the petition signers, the State would subject those signers to threats,
12 harassment, and reprisals, thus chilling the First Amendment rights of the petition signers.

13 **3. Defendants will suffer no meaningful harm from complying with a temporary**
14 **restraining order and preliminary injunction.**

15 In the Ninth Circuit, “[T]he fact that a case raises serious First Amendment questions
16 compels a finding that there exists the potential for irreparable injury, or that at the very least the
17 balance of hardships tips sharply in [Appellants’] favor.” *Sammartano v. First Judicial District*
18 *Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotations
19 and citations omitted). This is true even where “the merits of the constitutional claim were not
20 clearly established at this early stage in the litigation.” *Id.* (internal quotations and citations
21 omitted). In the case at bar, however, Plaintiffs have firmly established the merits of their
22 constitutional claims.

23 Once the names of the petition signers are released to the groups that have indicated they
24 will be placing the names of the signers on the internet, who plan to contact the petition signers,
25 and encourage the harassment of the petition signers, the First Amendment rights of those who
26 signed the Referendum 71 petition will be violated. Issuing a temporary restraining order will
27 secure the status quo—and the all-important First Amendment rights of the petition signers
28—until a preliminary injunction hearing can be held.

1 In the meantime, if this Court ultimately decides at the preliminary injunction hearing that a
2 preliminary injunction enjoining the release of the petition signers should not issue, Defendants
3 and the individuals who may seek the names of the petition signers will only suffer a delay of
4 several days in their seeking of the information contained on the petition. When weighing the
5 rights of those seeking the names of the petition signers against the First Amendment rights of
6 the Petition signers themselves, the rights of the petition signers must be protected.

7 **4. Issuance of a temporary restraining order and a preliminary injunction will serve**
8 **the public interest.**

9 The Ninth Circuit Court of Appeals has recognized that “it is always in the public interest to
10 prevent the violation of a party's constitutional rights.” *Sammartano*, 303 F.3d at 974 (quoting
11 with approval *G & V Lounge, Inc. v. Mich. Liquor Control Com’n*, 23 F.3d 1071, 1079 (6th
12 Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion,
13 been overcome by “a strong showing of other competing public interests,” *Sammartano*, 303
14 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest in order for a
15 court to find that it is in the public interest to deny injunctive relief. *Id.* (noting that the appellees
16 had made no showing that their challenged regulation, which infringed on appellants’ First
17 Amendment rights, could “plausibly be justified,” and so granting appellants’ request for
18 injunctive relief). In the case before this Court, there simply is no interest—strong or
19 otherwise—which can justify the challenged laws. It is, however, in the public interest that First
20 Amendment freedoms be preserved. The political speech of Plaintiffs will be burdened and
21 chilled if the names of the petition signers are released. Enjoining the offending conduct is the
22 only way to overcome that pernicious effect. Thus, an injunction is in the public interest and this
23 Court should grant it.

24 **IV. CONCLUSION**

25 For the foregoing reasons, a temporary restraining order should immediately issue, and a
26 preliminary injunction should issue after a proper hearing. Because of the complex constitutional
27 issues involved here, Plaintiffs believe that oral argument would be helpful to the Court in
28 determining whether a preliminary injunction should issue, and therefore request oral argument.

1 No security should be required, or it should be nominal, because Defendants have no
2 monetary stake in the outcome of this litigation.

3
4 Dated this 28th day of July, 2009.

5 Respectfully submitted,

6
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**Pro Hac Vice Application Pending*