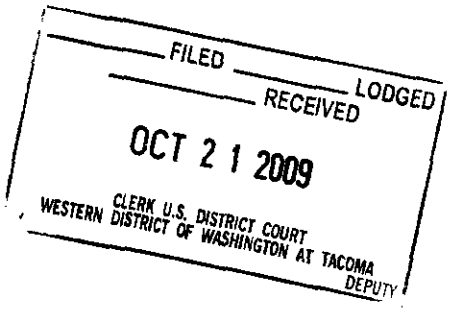

09-CV-05662-M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

FAMILY PAC,

Plaintiff,

vs.

SAM REED, in his official capacity as Secretary of State of Washington, ROB MCKENNA, in his official capacity as Attorney General of Washington, JIM CLEMENTS, DAVID SEABROOK, JANE NOLAND, and KEN SCHELLBERG, members of the Public Disclosure Commission, in their official capacities, and, CAROLYN WEIKEL, in her official capacity as Auditor of Snohomish County, Washington,

Defendants.

NO. C09 5662 RBL

Plaintiff's 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:

The Honorable _____

ORAL ARGUMENT REQUESTED

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TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

YOU ARE HEREBY GIVEN NOTICE THAT as SOON AS THEY MAY BE HEARD, in the United States District Court for the Western District of Washington, Tacoma Division, located at 1717 Pacific Avenue, Tacoma, Washington, Plaintiff Family PAC, will and hereby does move for a temporary restraining order against Defendants.

YOU ARE ALSO HEREBY GIVEN NOTICE THAT on A DATE TO BE DETERMINED BY COURT ORDER, in the United States District Court for the Western District of Washington, Tacoma Division, located at 1717 Pacific Avenue, Tacoma, Washington, Plaintiff Family PAC, will and hereby does move for a preliminary injunction against Defendants.

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

Pursuant to this notice, Plaintiff Family PAC moves for a preliminary injunction to:

(1) Enjoin Defendants from enforcing Wash. Rev. Code ("RCW") § 42.17.090;

(2) Enjoin Defendants from enforcing Wash. Admin. Code 390-16-034; and

(3) Enjoin Defendants from enforcing RCW § 42.17.105(8).

In support thereof, Plaintiff presents the following Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

I. Introduction

Plaintiff Family PAC seeks a temporary restraining order and preliminary injunction to: (1) enjoin Defendants from enforcing RCW § 42.17.090; (2) enjoin Defendants from enforcing Wash. Admin. Code 390-16-034; (3) enjoin Defendants from enforcing RCW § 42.17.105(8); (4) enjoin Defendants from enforcing any provision of the Public Disclosure Law, RCW § 42.17.010 *et seq.* ("PDL"), against Plaintiff; and (5) stop Defendants from publishing or otherwise continuing to make available, whether directly, or indirectly, any reports filed by Plaintiff in accordance with the Public Disclosure Law.

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A temporary restraining order and preliminary injunction is necessary to prevent Plaintiff from suffering substantial, immediate, and irreparable harm in the form of deprivations of its First Amendment rights as a result of certain provisions of the the PDL.

If a temporary restraining order and preliminary injunction do not issue, the Plaintiff will be irreparably prejudiced by the provisions of the PDL challenged herein before this Court has an adequate opportunity to consider the merits of Plaintiff's claims.

II. Procedural Background and Statement of Facts

A. Procedural Background

Concurrently with this motion, Plaintiff filed its Verified Complaint, alleging that several provisions of Washington's Public Disclosure Law, RCW § 42.17.010, *et seq.*, violate the First Amendment to the United States Constitution.

B. Statement of Facts

Plaintiff Family PAC is a continuing political committee under Washington law organized pursuant to RCW § 42.17.040, that is, a "political committee . . . of continuing existence not established in anticipation of any particular election campaign" under RCW § 42.17.020(14) (definition of "continuing political committee"). It intends to support traditional family values in Washington State by soliciting and receiving contributions, and by making contributions and expenditures to support or oppose ballot propositions in the 2009 election and beyond. Its initial project is to support referendum 71 on SB 5688 and to encourage voters to reject SB 5688. In the future, it will only support or oppose ballot measures, not candidates.

As a continuing political committee, Family PAC has various registration and reporting requirements pursuant to the PDL. *See* RCW §§ 42.17.040 (registration statement); 42.17.080 (campaign statements); 42.17.510 (identification of sponsors); 42.17.105 (late contribution reports); 42.17.180 (major donor reports).

Plaintiff Family PAC must file reports with the Public Disclosure Commission that include the name, address, and contribution amount, of every contributor that has given more than $25 in the aggregate to Family PAC. RCW §§ 42.17.080(2)(a), 42.17.090(1)(b). For contributors of

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more than $100, Family PAC must also disclose the contributor's occupation, employer, and employer's address. Wash. Admin. Code 390-16-034.

Furthermore, pursuant to RCW § 42.17.105(8), Family PAC is prohibited from receiving any contribution after October 12, 2009, to election day, in the aggregate in excess of $5,000 from any person.

III. Argument

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

In determining whether to grant injunctive relief prior to trial, the Court must consider four factors: (1) the plaintiff's likelihood of success in the underlying dispute between the parties; (2) whether the plaintiff will suffer irreparable injury if the injunction is not issued; (3) the injury to the defendant if the injunction is issued; and (4) the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ____, ____, 129 S.Ct. 365, 374 (2008) (rejecting the Ninth Circuit's "possibility" standard).

"Ex parte temporary restraining orders are no doubt necessary in certain circumstances, . . . but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 439 (1974) (citation omitted); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane ("Wright & Miller"), Federal Practice and Procedure § 2951 (2d ed. 2009) ("The issuance of an ex parte temporary restraining order is an emergency procedure and is appropriate only when the appellant is in need of immediate relief").

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Where free speech is involved, preliminary injunction standards must be speech-protective. First, preliminary injunction standards involving expressive association must reflect our

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constitutional principles that "[i]n a republic . . . the people are sovereign," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), and there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted). *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007) ("*WRTL II*") (opinion of Roberts, C.J., stating holding), requires that we recall that we deal with the First Amendment, which mandated that "'Congress shall make no law . . . abridging the freedom of speech,'" *id.* at 482. So "no law," i.e., "freedom of speech" and expressive association, is the constitutional *default* and must be the overriding *presumption* where expressive association is at issue.

Second, the "freedom of speech" presumption means that First Amendment protections must be incorporated into the preliminary injunction standards, not limited to merits consideration. So if exacting or strict scrutiny applies, as here, the preliminary injunction burden shifts to the state to prove the elements of strict scrutiny, just as the state has the burden on the merits:

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

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006).[1]

Third, because exacting or strict scrutiny is the antithesis of deference or a presumption of constitutionality, no deference or favorable presumption must be afforded the regulation of speech in preliminary injunction balancing. This is required by the "freedom of speech"

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[1] *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); *Broward Caol. of Condos., Homeowners Ass'ns and Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2008 WL 4791004 at *5 (N.D. Fla. Oct. 29, 2008) (preliminary injunction burden tracks trial burden (citing *Gonzales*, 546 U.S. at 429)).

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presumption and because "the *Government* must prove that applying [the challenged provision to the communication at issue] furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL II*, 551 U.S. at 464 (emphasis in original).

Fourth, the necessary incorporation of First Amendment protections into preliminary injunction standards requires that in determining the balance of harms and the public interest, courts must apply *WRTL II*'s requirement that "'[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.'" *Center for Individual Freedom v. Ireland*, 613 F. Supp.2d 777, 808 (S.D. W.Va. 2009) (preliminary-injunction order) (applying principle to consideration of public harm (*quoting WRTL II*, 551 U.S. at 474)).

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. Beyond that, their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond their interest in the preliminary injunction balancing of harms: "It is difficult to fathom any harm to Defendants [enforcement officials] as it is simply their responsibility to enforce the law, whatever it says." *Id.* at 807.

Sixth, where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal citation omitted).[2] Against this need for proof or real harm if a law of questionable constitutionality is preliminarily enjoined is the paramount fact that "the protection of First Amendment rights is very much in the public's interest ... ." *Center for Individual Freedom v. Ireland*, 613 F. Supp.2d at 808.

In this case, an emergency temporary restraining order and a preliminary injunction are both

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[2] *See also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n. 22 (1984) ("[This Court] may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its 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).

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necessary and appropriate because Plaintiff has a strong likelihood of success and would suffer immediate and irreparable harm if such interim relief is denied. Defendants, by contrast, will not be meaningfully harmed by the issuance of the requested temporary restraining order and a preliminary injunction, and the requested relief will best serve the public interest and the principles embodied in the First Amendment to the Constitution of the United States. *See Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 970 (8th Cir. 1999).

B. Plaintiff is likely to succeed on the merits.

For the reasons set forth below, Plaintiff has demonstrated a substantial likelihood of success. First, Plaintiff has demonstrated that the $25 and $100 disclosure thresholds violate the First Amendment because they are not narrowly tailored to serve a compelling government interest. Second, Plaintiff has demonstrated that the prohibition on contributions in excess of $5,000 during the critical twenty-one day period preceding an election violates the First Amendment as applied to referenda elections because the Supreme Court has determined that contribution limits are unconstitutional as applied to referenda elections. Thus, Plaintiff has met the first requirement for the issuance of a temporary restraining order and a preliminary injunction.

1. The challenged provisions are subject to strict scrutiny.

The First Amendment to the United States Constitution states "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[3] The freedoms of speech and association protected by the First Amendment have their "fullest and most urgent application precisely to the conduct of campaigns for political office," *Buckley*, 424 U.S. at 15, and the protections undoubtedly apply in the context of both candidate and referenda elections. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) ("*CARC*"). In the context of referenda elections, the First Amendment is especially important because it ensures that a collection of individuals "can make their views known, when individually, their voices would be

[3] The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

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faint or lost." *Id.* at 294. Thus, regulations that impose burdens upon the referenda process are deserving of further First Amendment analysis.

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 "strict scrutiny"). *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring) ("*ACLF*"). Regulations that "entail only a marginal restriction upon [First Amendment rights]" are subject to "closely drawn scrutiny." *See McConnell v. FEC*, 540 U.S. 93, 137 (2003) (discussing contribution limits and how limits still permit individuals to exercise their First Amendment speech and associational rights).

The Supreme Court has consistently held that compelled disclosure provisions such as the compelled disclosure of a contributor's name and address, or a restriction on expenditures, constitute substantial burdens on the First Amendment freedoms of speech and association. *Davis v. FEC*, 554 U.S. ____, ____, 128 S. Ct. 2759, 2774-75 (2008) (*citing Buckley*, 424 U.S. at 64). "[C]ompelled disclosure cannot be justified by a mere showing of some legitimate government interest . . . . [I]t 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." *Buckley*, 424 U.S. at 64. "Exacting scrutiny," as used in *Buckley*, is "strict scrutiny." *Buckley* required "exacting scrutiny" of FECA's 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 WRTL II*, 551 U.S. at 474 n. 7 (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, as "strict scrutiny"); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (equating "exacting scrutiny" with "strict scrutiny"). Accordingly, the challenged PDL provisions must survive strict scrutiny.[4]

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[4] In *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), the Ninth Circuit again declined to clarify whether strict scrutiny applies to compelled disclosure provisions in the context of ballot measure elections. *Id.* at 1031 (striking Montana's *de minimis* threshold for reporting contributions 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); *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004) (applying strict scrutiny).

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Under strict scrutiny, Washington bears the burden of proving that the challenged provisions are "'(1) narrowly tailored, to serve (2) a compelling state interest.'"[5] *CPLC II*, 507 F.3d at 1178 (*citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)). *See also Gonzales*, 546 U.S. at 428.

2. Compelled disclosure provisions impose substantial burdens on First Amendment Rights.

The Supreme Court has consistently held that compelled disclosure provisions impose substantial burdens on the First Amendment freedoms of speech and association. *Davis*, 128 S. Ct. at 2774-75. Indeed, the Supreme Court predicted that compelled disclosure provisions might deter some individuals from contributing because of the risk that compelled disclosure would expose contributors to harassment and retaliation. *Buckley*, 424 U.S. at 68; *see also id.* at 237 (Burger, C.J., concurring in part and dissenting in part) (discussing the social costs of public disclosure and a $100 disclosure threshold he called "irrational"). Yet the Supreme Court made this prediction on the assumption that "sunlight is said to be the best of disinfectants," without the benefit of any social science research on the effect of compelled disclosure on First Amendment rights, and on a record devoid of any meaningful discussion as to the proper level at which to impose record-keeping and disclosure. *Id.* at 67, 72, 83. Furthermore, there have been many technological advances since *Buckley*, advances that have altered the fundamental nature of campaign finance disclosure in ways the *Buckley* Court could never have imagined.

a. Technological advances have qualitatively changed the landscape in which compelled disclosure takes place.

To say that technology has advanced in the thirty-three years since Supreme Court decided *Buckley* and the thirty-seven years since Washington Citizens enacted the PDL as part of Initiative 276 in November 1972 would be a vast understatement. In 1973, communication systems and technology were advancing at a rapid pace. Just the year before, many Americans had their first interaction with a computer when the video game "Pong" appeared in bars. PONG-

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[5] It makes little difference that the voters, through Initiative 276, and not the legislature, adopted the disclosure thresholds at issue in this suit. *CARC*, 454 U.S. at 295 ("[T]he voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.").

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Story, *available at* http://www.pong-story.com/arcade.htm. The "Internet" consisted of a grand total of sixty-two computers at various universities and other locations connected to a system called ARPANET. ARPANET— The First Internet, *available at* http://www.livinginternet.com/i/ii_arpanet.htm. With the introduction of the Exxon Qwip, the fax machine began its invasion of offices across the United States. AbsoluteAstronomy.com, *available at* http://www.absoluteastronomy.com/topics/Fax. The first commercial copier to use plain paper—the Xerox 914—celebrated its fourteenth birthday in 1973. Xerox Factbook, *available at* http://www.xerox.com/go/xrx/template/019d.jsp?view=Factbook&id=Historical&Xcntry=USA&Xlang=en_US. The revolutionary IBM Correcting Selectric II typewriter had just been introduced—the first typewriter "in the history of typing to actually make typing errors disappear from original copies." IBM Archives, The Typewriter: An Informal History, Aug. 1977, *available at* http://www-03.ibm.com/ibm/history/exhibits/modelb/modelb_informal.html.

Fast forward thirty-six years to the present. Personal computers are a necessary and indispensable part of daily life. For example, parties to this lawsuit are required to file documents electronically. *See* Local Rules W.D. Wash. CR 10(e)(8). Broadband access to the Internet is available to 99% of the American population, a far cry from the sixty-two computers connected to the Internet's predecessor in 1974. Nat'l Telecomm. & Info. Admin., *Networked Nation: Broadband in America 2007*, Jan. 2008, *available at* http://www.ntia.doc.gov/reports/2008/NetworkedNationBroadbandinAmerica2007.pdf. For the first time ever, the majority of computers sold in the United States are notebook computers. *Notebook Sales Surpass PCs for First Time in U.S.*, Oct. 29, 2008, *available at* http://afp.google.com/article/ALeqM5hkYOf_SCQ1ugSXKLXCsSs7qWnsQA. These notebooks have "wireless" technology, allowing their users to access the Internet through "wi-fi hotspots" and cellular data networks from coast to coast. Speaking of portability, as of 2007, the Federal Communications Commission estimated that there were 263 million mobile phone subscribers—an increase of over 20 million subscribers from 2006. Federal Communications Commission, *13th Annual CMRS Competition Report*, ¶ 194, Jan. 15, 2009 *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf. Many of these mobile phones are capable of accessing the Internet, sending email, or

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looking up a map to a person's home with the push of a few buttons. *Id.* at ¶ 201 (over 50% of mobile phone subscribers used data services on their cell phones). Instead of faxing a document—a technology introduced to the market, universally accepted, and one that has become nearly obsolete, in the thirty-six years since the PDL was enacted—one can scan and send a document via email. Moreover, one can send that document to a nearly unlimited number of recipients, at little to no cost, with almost instantaneous delivery. And American kids would have trouble putting a piece of paper into a typewriter, let alone using the machine to create a document.

All of these technological advances have completely changed the way in which campaign finance data is compiled, accessed, and disseminated. As one commentator has said, "the law may remain the same, but its effect is entirely different." William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. L. 1, 11 (2003) ("McGeveran"). For example, in 1973, reports of campaign contributions were kept on handwritten forms that often contained completely illegible entries. Craig B. Holman & Robert M. Stern, *Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activity*, Public Integrity, Winter 2000 (*available at* http://www.cgs.org/images/publications/AccessDelayedisAccessDenied.pdf) ("*Access Delayed*"). In theory, reports were public records, but access remained extremely limited because it entailed a trip to a governmental office during normal business hours. *See*, RCW § 42.17.440 (1973). Copies had to be prepared by hand or at a cost to the individual requesting copies on a per-page basis. *Id.*[6] To search, an individual had to manually flip through page after page of reports. And the process was complicated by candidates seeking to game the system, such as former New York Governor George Pataki, who is famous for organizing his lists alphabetically by *first* name. *Access Delayed* at 1. If an individual

[6] The Secretary of State has noted that the sheer cost of requesting paper copies of referendum petitions made it cost-prohibitive for any group to submit public record's requests for such petitions until relatively recent advances in technology (cd-roms and dvds) made it more cost efficient to make such copies available. *See* Washington Secretary of State Blogs, *The Disclosure History of Petition Sheets*, From Our Corner (Sept. 17, 2009) (*available at* http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/). Presumably, the same argument could be made with respect to campaign finance reports.

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overcame all of these obstacles, he or she still needed to find a way to communicate the message to the public, a task virtually impossible in 1973 without the assistance of the mainstream media.

Today, disclosure records are kept and prepared using complex computer databases. Washington requires reports to be filed electronically and also makes them available to the public in electronic format. *See* RCW § 42.17.3691; http://www.pdc.wa.gov/QuerySystem/Default.aspx (allowing internet access to the electronic database). An individual no longer has to visit a government office; he can obtain a copy of the reports from the privacy of his living room, and he has a choice between an online, html format, and a downloadable Microsoft Excel spreadsheet.[7] *See* http://www.pdc.wa.gov/QuerySystem/Default.aspx. Having the donor information available on the internet in html format makes the information easily accessible and searchable, but the spreadsheet format allows individuals to manipulate the data even further. For example, using the spreadsheet, one can organize the donors by first name, last name, or any other piece of publicly disclosed information. Searches can also be combined—in a matter of seconds you can find every lawyer in Seattle that gave more than $50 to Family PAC in the month of August.

The spreadsheet can also be easily combined with other information, such as addresses and phone numbers available on Internet white page directories.[8] *See, e.g.*, Dominic Holden, *Why do you hate me?*, The Stranger (Sept. 1, 2009) (stating that the "newspaper" obtained the names of contributors from the Public Disclosure Commission and then located the donors contact information (*i.e.*, phone numbers) in order to personally confront them); *see also Prop 8 Maps*, http://www.eightmaps.com ("EightMaps.com") (demonstrating how the disclosure reports can be manipulated); Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*,

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[7] The federal government and a majority of states make campaign disclosure information available on the Internet. *See Access Delayed* at 4.

[8] Fordham law professor Joel Reidenberg was excoriated by Supreme Court Justice Antonin Scalia after he asked his students to compile personal information about the Justice. The students turned in a fifteen page dossier that included Justice Scalia's home address, phone number, home value, food and movie preferences, his wife's *personal* e-mail address, and photos of his grandchildren. Martha Neil, *Fordham Law Class Collects Personal Info About Scalia; Supreme Ct. Justice is Steamed*, ABA Journal (Apr. 29, 2009) (*available at* http://www.abajournal.com/weekly/fordham_law_class_collects_scalia_info_justice_is_steamed).

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N.Y. Times (Feb. 8, 2009). Ironically, the creators of EightMaps.com exercised their First Amendment right to remain anonymous, a choice the financial supporters of Proposition 8 in California and supporters of Family PAC cannot make because of campaign finance statutes with extremely low reporting thresholds.[9]

Furthermore, the costs associated with accessing and disseminating donor information today–both in terms of time and money–are virtually non-existent. For example, in 1973, it was highly unlikely that an employer would take the time to make a trip to a government office to search campaign finance records for the name of his or her employees. Today, that same employer can run a single search from the comfort of his or her office and instantly learn if any employee gave to the Referendum 71 campaign, to which side, and in what amount. The same can be said about curious customers, suppliers, friends, and neighbors.[10] And an individual no

[9] Any individual seeking to learn the identity of the creators of EightMaps.com would find that the task is extremely difficult given the sensitive First Amendment concerns raised in the context of the internet. *See, e.g.*, *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456 (Md. 2009). By citing this case, Plaintiff do not mean to suggest that the creators of EightMaps.com are entitled to any less protection by the First Amendment. Instead, it is cited to demonstrate just how zealous the courts are and should be in protecting First Amendment rights.

[10] As the campaign surrounding Proposition 8 made so painfully clear, individuals looking to do harm to those who disagree with them will also take full advantage of the public disclosure database to locate their victims. Although it is still relatively early in the Referendum 71 campaign, the same types of threats, harassment, and reprisals have been directed at individuals encouraging Washington citizens to "oppose" Referendum 71.

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longer needs to rely on the mainstream media to spread the word, he can now email, blog,[11] text, tweet,[12] and Facebook.[13]

In today's "information age," the legislature and courts simply cannot ignore the tremendous invasions of privacy that occur when donor information is made widely available to the public. For example, the Federal Rules of Civil Procedure require litigants to redact certain personal identifying information, including social security numbers, taxpayer-identification numbers, birth dates, names of minors, and financial account numbers.[14] Fed. R. Civ. P. 5.2. The rule goes even further, allowing parties to make a motion to redact additional information and or to limit or prohibit a non-party's remote electronic access to a document filed with the court for good cause. *Id.*

In an area as sensitive as the First Amendment, the burden is on the government to demonstrate that its statute is narrowly drawn to serve a compelling government interest. Here,

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[11] The word "blog" is a contraction of the words "web" and "log," and is defined as "a website that contains dated text entries in reverse chronological order (most recent first) about a particular topic. Blogs serve many purposes, from online newsletters to personal journals to "ranting and raving." Written by one person or a group of contributors, entries contain commentary and links to other Web sites, and images and videos as well as a search facility may be included." PC Magazine Online Encyclopedia, PCMag.com, "blog," http://www.pcmag.com/encyclopedia ("PCMag.com"). The word has become so popular that it has been turned into a verb, e.g., "I'll blog about that topic next week." *Id.*

[12] "Twitter" is "a Web site and service that lets users send short text messages from their cellphones to a group of friends. Launched in 2006, Twitter (www.twitter.com) was designed for people to broadcast their current activities and thoughts. Twitter expanded 'mobile blogging' (updating a blog from a cellphone) into 'microblogging,' the updating of an activities blog (microblog) that distributes the text to a list of names. Messages can also be sent and received via instant messaging, the Twitter Web site or a third-party Twitter application. A MySpace account can also be updated." PCMag.com, "Twitter." The individual messages are called "tweets," and like "blog," the term has become so popular that individuals now use it as a verb, e.g., "I'm going to tweet about that." *Id.*

[13] For example, rather than holding a traditional press conference, President Barack Obama first announced his selection of Senator Joe Biden as his Vice Presidential nominee to supporters via text message. Stuart Silverstein and Johanna Neuman, *Joe Biden is Obama's Running Mate*, L.A. Times (Aug. 23, 2008) (*available at* http://www.latimes.com/news/printedition/front/la-na-biden23-2008aug23,0,7564344.story). San Francisco's mayor, Gavin Newsom, announced his 2010 candidacy for California governor via a "tweet" on Twitter, as well a post on Facebook. *Newsom Tweets in to Governor's Race*, San Francisco Chronicle, A-14, Apr. 22, 2009 (*available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/22/EDO1176DR8.DTL).

[14] The rule provides that filings should contain only the last four digits of the social-security number and taxpayer-identification number, the year of the individual's birth, the minor's initials, and the last four digits of the financial-account number. Fed. R. Civ. P. 5.2.

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individuals that contributed as little as $25 have been subjected to deplorable acts merely for engaging in the political process. Countless others have no doubt been intimidated from putting up a sign or contributing to the cause for fear of similar harassment. Yet these individuals are a far cry from the monied interests that campaign disclosure statutes are meant to uncover. Because the PDL and its irrational disclosure thresholds, *see Buckley*, 424 U.S. at 237 (Burger, C.J., concurring in part and dissenting in part), Washington citizens must make a Hobson's choice: refrain from exercising their First Amendment rights or be prepared to be harassed for engaging in the political process. The First Amendment simply cannot tolerate a law that forces citizens to make such a choice, and certainly not at the dollar level contained in the PDL. As Kim Alexander, president of the California Voter Foundation, recently said, "This is not really the intention of voter disclosure laws. But that's the thing about technology. You don't really know where it is going to take you."[15] Stone, *supra*, at 9.

b. While compelled disclosure imposes substantial burdens on First Amendment rights, compelled *public* disclosure increases the burdens exponentially.

An important distinction needs to be drawn 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). As discussed above, the technological advances that have occurred in the last

[15] The California Voter Foundation is a non-profit, nonpartisan organization that promotes the responsible use of technology to improve the democratic process. Its mission statement includes the following language, "CVF advances accountability in government and ensures voters are empowered to make informed, confident decisions by making it possible to 'follow the money.' CVF is a pioneer of electronic filing and Internet disclosure of campaign finance records, shining 'digital sunlight' on money in politics throughout the state and nation. CVF's work advancing online disclosure opens up public access to this data and provides voters with crucial information about who is funding candidates and measures." California Voter Foundation, *About CVF*, http://www.calvoter.org/about/goals.html.

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thirty years make it imperative for the Court to consider the differences between private and public disclosure, and the respective benefits and burdens associated with each.

Strict scrutiny requires that each application of a statute restricting speech must be supported by a compelling government interest. *WRTL II*, 551 U.S. at 478.[16] *See also Heller*, 378 F.2d 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 original) Thus, in applying strict scrutiny to the provisions of the PDL challenged herein, the Court must 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.

c. Research demonstrates that compelled disclosure has a significant chilling effect on political speech.

Campaign disclosure statutes are often trumpeted on the ground that "sunlight is the best disinfectant" and as enjoying wide public support. *See Buckley*, 424 U.S. at 67; *CPLC II*, 507 F.3d at 1179. Yet few have actually studied whether campaign disclosure actually solves the problems it seeks to address, and fewer still have probed voters about the specifics of compelled disclosure statutes.[17]

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[16] The cited opinion is by Chief Justice Roberts, joined by Justice Alito. As the controlling *WRTL II* opinion, the principal opinion states the holding of the Court and will herein simply be referred to as *WRTL II*. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (citation omitted)).

[17] Evidence of the social costs associated with compelled public disclosure was part of the record in *McConnell v. FEC*. 251 F. Supp.2d 176, 227-229 (D.D.C. 2003) (per curiam). The evidence ranged from large numbers of contributions at just below the disclosure trigger amount, to vandalism after public disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support are not popular everywhere and the results of such disclosure. *Id.* *See also AFL-CIO v. FEC*, 333 F.3d 168, 176, 179 (D.C. Cir. 2003) (recognizing that releasing names of volunteers, employees, and members would make it hard to recruit personnel, applying strict scrutiny, and striking down an FEC 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/publications/other/disclosurecosts.html); William McGeveran, *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.

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

Carpenter's study is important for several reasons. First, the study specifically addresses opinions regarding campaign finance disclosure in the context of ballot measures. *Disclosure Costs* at 5. The few studies conducted prior to Carpenter's focused almost exclusively on candidate disclosure. The distinction is important because the courts have said that the state possesses fewer interests with respect to ballot measure disclosure. *See infra* n. 20. Second, the sample population for the survey was drawn from six states that allow citizen-initiated ballot measures, including Washington. *Disclosure Costs* at 6. Third, each of the states included in the sample population compels disclosure of ballot measure contributions after an initial threshold is met and the disclosed information includes the contributor's name, address, contribution amount, and employer. *Id.* Finally, each of these states publishes at least some of the donor information collected on a campaign finance website. *Id.*

The results of the study are consistent in one respect with prior studies on campaign finance disclosure—over 80% of the respondents agreed that the government should make public the identities of those who contribute to ballot measures.[18] *Id.* at 7. However, that is where the similarities end.

L. Rev. 195, 218-20 (2008) (discussing the burdens of disclosure).

[18] Respondents were asked to state how they felt about the following statement. "The government should require that the identities of those who contribute to ballot issue campaigns should be available to the public." This 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.

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

> while voters appear to like the idea of disclosure in the abstract (that is, as it applies to someone else), their support weakens dramatically in the concrete (that is, when it involves them). Stated succinctly, it is 'disclosure for thee, but not for me.' . . . But the potential costs do not end there. Most respondents also reported themselves less likely to contribute to an issue campaign if their personal information was disclosed . . . . Thus, the cost of disclosure also seems to include a chilling effect on political speech and association as it relates to ballot issue campaigns. . . . The vast majority of respondents possessed no idea where to access lists of contributors and never actively seek out such information before they vote. At best, some learn of contributors through passive information sources, such as traditional media, but even then only a minority of survey participants could identify *specific* funders of campaigns related to the ballot issue foremost in their mind. . . . Such results hardly point to a more informed electorate as a result of mandatory disclosure. . . .[19]

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

Campaign disclosure is typically justified on the ground that "[voters are] cognitively limited decision makers,

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

3. The $25 and $100 reporting thresholds violate the First Amendment.

Compelled disclosure provisions such as the $25 threshold for reporting a contributor's name and address, and the $100 threshold for reporting a contributor's occupation, employer, and employer's address must survive strict scrutiny. Strict scrutiny requires a narrowly tailored remedy to serve a compelling government interest. Washington lacks such a compelling government interest sufficient to justify the compelled disclosure of referenda contributors. However, even if the Court finds that Washington has a compelling government interest, the $25 and $100 reporting thresholds fail strict scrutiny because they are not narrowly tailored to serve

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processing only a small fraction of the information to which they are exposed. Rather than engaging in a comprehensive information search and then deliberating to achieve an optimal choice, the argument goes, individuals tend to rely on cues to make judgments." *Disclosure Costs* at 4.

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

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.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.*. 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.

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the only potential compelling state interest: preventing voter ignorance. Further, because the PDL has not adequately accounted for inflation, the disconnect between the $25 and $100 thresholds and the only possible potential state interest continues to grow farther apart every year as a result of inflation. Thus, the reporting thresholds must be found unconstitutional because they are not narrowly tailored to serve a compelling government interest.

a. Washington lacks a compelling interest sufficient to justify compelled ballot measure disclosure.

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 ballot-measure disclosure. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978) (holding that the state lacked a compelling interest in combating corruption in the context of a ballot-measure election because there is no risk of *quid pro quo* corruption); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003) (same) ("*CPLC I*"). *See also Canyon Ferry*, 556 F.3d at 1031-32 (noting that the Enforcement Interest cannot justify ballot-measure disclosure because it necessary only to enforce contribution limits—limits that are unconstitutional in the context of a ballot-measure election); *CPLC I*, 328 F.3d at 1105 n.23 (9th Cir. 2003) (same). However, these courts have suggested that the Informational Interest may be sufficient to justify compelled ballot-measure disclosure, a conclusion that appears to be

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premised on a misreading of *Buckley* and the Informational Interest discussed therein. *See, e.g.*, *CPLC II*, 507 F.3d at 1178-80.

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

By comparison, everything the voter needs to know about a ballot measure is contained in the text of the measure itself. There is no "political spectrum" and certainly no "future performance." Initiatives can be incredibly complex pieces of legislation, but the first *Buckley* interest is not about simplifying the message for voters. *See Bellotti*, 435 U.S. at 792 ("But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment."). Information about contributors no doubt may change perceptions about a ballot measure, but it simply does not change the nature of the ballot measure itself. The First Amendment grants advocates the right to separate their message from their identity to ensure that the message will not be prejudged simply because voters do not like the proponent. *McIntyre*, 514 U.S. at 342. The identity of the speaker is no doubt helpful in evaluating the message, "but the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 348 n. 11 (citations omitted). "Don't underestimate the common man. People are intelligent enough to evaluate the

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source of anonymous writing. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth." *Id.*

Because the identity of the speaker does not change the message communicated and because it simply cannot alter the text of the measure itself, Washington lacks a compelling government interest to force a speaker to make a statement that he would otherwise omit. *See id. See also ACLF*, 525 U.S. at 203 (noting that ballot-measure expenditure reporting adds little insight as to the measure), *aff'g Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1104-05 (10th Cir. 1997) ("The first and third [*Buckley* interests] are inapplicable because [the statute] addresses expenditures, not contributions.").

b. The Public Disclosure Law's $25 and $100 reporting thresholds are not narrowly tailored to serve a compelling government interest.

However, even if the Court determines that Washington has a compelling interest sufficient to justify compelled ballot measure disclosure, the reporting thresholds fail to survive the second part of the strict scrutiny analysis. To survive strict scrutiny, the law or regulation in question must also be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). A law can fail to be narrowly tailored in one of several ways. It may be overinclusive 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 underinclusive if it fails to restrict speech that does implicate the government's interest. *See, e.g., White*, 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 Illinois*, 497 U.S. 62, 75 (1990).

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1) Washington has only a limited compelling informational interest in disclosure.

In the context of ballot initiatives, courts have recognized only one possible state interest sufficient to justify the disclosure of contributions and expenditures: combating voter ignorance by informing voters about who supports and opposes a ballot issue.[20] *Canyon Ferry*, 556 F.3d at 1032-33; *CPLC I*, 328 F.3d at 1105 n.23 (*quoting Bellotti*, 435 U.S. at 789-90); *see also Buckley*, 424 U.S. at 68. This interest carries with it three significant limitations. First, it is limited to identifying those "persons *financially* supporting or opposing a . . . ballot measure." *Canyon Ferry*, 556 F.3d at 1032. Second, the interest is compelling only if it is directed at combating voter ignorance. *See Buckley*, 424 U.S. at 68; *Canyon Ferry*, 556 F.3d at 1032, 1034. Third, the interest is temporal in nature—voter ignorance can only be addressed prior to a voter casting his or her vote; once the vote has been cast, the interest is extinguished, because voter ignorance (or knowledge) is immediately a moot point.

Because the State's informational interest is compelling only if the chosen remedy addresses the problem of voter ignorance, it is necessary to accurately define voter ignorance before attempting to conduct the requisite strict-scrutiny analysis. Voter ignorance with regard to ballot measures can be based on a variety of factors, only one of which is more than tangentially related to the compelled disclosure of donors.

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[20] 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. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits." *Buckley*, 424 U.S. at 66-68.

In subsequent decisions, courts have expanded upon *Buckley*'s analysis of the reasons why the second interest (the "corruption interest") and the third interest (the "enforcement interest") do not apply to ballot measure disclosure. *See Bellotti*, 435 U.S. at 789-90 (holding that the state lacked a compelling interest in combating corruption in the context of a ballot measure election because there is no risk of *quid pro quo* corruption); *CPLC I*, 328 F.3d at 1105 n.23 (same). *See also Canyon Ferry*, 556 F.3d at 1031-32 (noting that the third interest cannot justify ballot measure disclosure because it necessary only to enforce contribution limits—limits that are unconstitutional in the context of a ballot measure election); *CPLC I*, 328 F.3d at 1105 n.23 (same).

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First, the issues submitted to the voters through ballot measures have become increasingly complex. *CPLC I*, 328 F.3d at 1105. Donor disclosure is said to alleviate these problems in an indirect manner by providing donors with an analytical shortcut, premised on the assumption that only those with a vested interest in the outcome of the ballot campaign would expend resources in support of or opposition to the measure, and that, knowing this, voters will actively seek out information on these donors to know who is supporting a ballot measure to find out who will benefit from the ballot measure. *See CPLC I*, 328 F.3d at 1106. *But see Disclosure Costs* at 4 (discussing how little information voters actually consult). Common sense dictates that it is the information regarding the major donors to either side that is most likely to provide a meaningful voting cue.[21] Furthermore, knowing who donated to a ballot measure does little to lessen the complexity of the ballot issue itself. Instead, the issue of complexity is dealt with by making the measure simpler and clearer for the voter—an issue that has been addressed by the Washington legislature through other means.[22]

Second, campaigns surrounding ballot measures are not cheap and are often dominated by special interest groups that pour millions of dollars into ballot measure campaigns.[23] *CPLC I*, 328

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[21] Further, what little research that exists on the use of compelled donor disclosure for voter decision-making indicates that public disclosure is an insignificant factor in providing voters with knowledge about ballot measures. *See supra* n. 19.

[22] For example, the Attorney General is charged with formulating a ballot title and summary of the measure. RCW § 29A.72.060. *See also* §§ 29A.72.290 (requiring ballot title and summary to be included on ballot); 29A.72.025 (requiring a fiscal impact statement drafted in "clear and concise language" that avoids "legal and technical terms."); 29A.72.100 (requiring petitions to contain a "readable, full, true, and corect copy of the proposed measure" on the reverse side of referenda petitions).

[23] The following study regarding the initiative process in California is illustrative:"From 2000 through 2006, special interests spent over $1.3 billion passing or defeating ballot measures. . . . The median initiative campaign spent $4.3 million in 2000, and median expenditures rose steadily since then to $15.7 million in 2006—with the extreme exception of the November 2005 election, when the median campaign spent $36.7 million." Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government*, 282 (2d ed. 2008) (*available at* http://cgs.org/images/publications/cgs_dbi_full_book_f.pdf) ("*Democracy by Initiative*").

Even the basic task of getting a ballot measure on the ballot is a difficult and expensive proposition that prevents small, unorganized donors—such as those who are only contributing $100—from being able to influence an election. In his 2000 book, *Democracy Derailed: Initiative Campaigns and the Power of Money*, David S. Broder discussed at length the industry that has built up around the complicated process of getting an initiative on the

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F.3d at 1105. As set forth in greater detail below, it is the information about these special interest groups that is important to voters; those who give a small amount have no discernable influence on the ballot measure campaign. Small donors no longer have any influence on a ballot initiative campaigns. *See, e.g., Democracy by Initiative* at 289 ("With large contributions coming from all sides, ballot measure campaigns have become battles between fewer and fewer major interests, while contributions from small donors have become insignificant"). The identity of small donors has become irrelevant. *See Canyon Ferry*, 556 F.3d at 1036 (Noonan, J., 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!'").

Third, the public has neither the time nor the ability to "independently study the propriety of individual ballot measures." *CPLC I*, 328 F.3d at 1105 (voters have neither the time or ability to independently study each measure). Here, as with the first factor, the issue is already dealt with through other legislative means.[24] Any tangential relationship compelled disclosure has to this third factor is dealt with by the concerns addressed below.

California ballot. Those who specialize in ballot measure campaigns agreed that even ten years ago, the cost to get an initiative on the ballot was prohibitively expensive to all but the wealthy:

> As it is, that cost [of getting initiatives on the ballot] is so great that, with rare exceptions, only the wealthy can apply. I asked most of the proprietors I interviewed to tell me what they would say if I walked into their office carrying a proposal I wanted put on the ballot in California. Mike Arno [founder of American Political Consultants, a company specializing in initiatives] gave me the fullest answer. "The first question I've got to ask you is, 'Can you raise the money?' And not just raise the money for our services but raise the money to have a lawyer draft it, to do a poll to make sure you've drafted it correctly, and then you still have to think about the campaign. It would be at least half a million to get a statute on the ballot here; for a Constitutional amendment [requiring more signatures] I'd say $800,000 or maybe $900,000 to be safe."

David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money*, 68-69 (2000). *See also Democracy by Initiative* at 284 ("Today, qualifying a measure on the ballot can cost between $500,000 and $3 million . . . . Any individual, corporation or organization with approximately $1.5 million to spend can now place any issue on the ballot and at least have a chance of enacting a state law. Says Fred Kimball of the signature-gathering firm Kimball Petition Management, 'If you want to have your kid's birthday as a holiday, give me a million and a half dollars and I'll at least get it on the ballot for people to vote on.'").

[24] *See, supra* n. 22.

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Finally, groups supporting or opposing ballot measures often use "ambiguous or misleading" names, and voters may never know the identity of veiled political actors that have poured "tens of millions of dollars" into a campaign. *CPLC II*, 507 F.3d at 1179. Public disclosure of campaign contributions is chiefly addressed to remedy this last of the four difficulties. Sandy Harrison, a former journalist and government employee, described the problem as follows:

> A prime example of this was Proposition 188 on the November 1994 ballot, an effort to overturn California's recently enacted workplace smoking ban. Supporters falsely portrayed the measure as a grassroots effort by small businesses. By reviewing the campaign finance report, I was able to report to readers that it was not the work of small businesses, but actually giant tobacco Companies. . . . If the campaign finance report had not been public, I could not have substantiated or conveyed this important information to the readers, and they may never have learned the truth about who was really behind this proposition.

CPLC II, 507 F.3d at 1179.

The goal of campaign disclosure then, is to prevent "the wolf from masquerading in sheep's clothing." *CPLC I*, 328 F.3d at 1106 n.24. Accordingly, in applying strict scrutiny, the essential question for the Court is whether the PDL's disclosure thresholds address the "wolf in sheep's clothing" problem, alleviating concerns that donors who donate an amount substantial enough to influence a campaign are masking their support for, or opposition to, a particular ballot measure, and causing voter ignorance.

2) The $25 and $100 reporting thresholds are not narrowly tailored to Washington's limited informational interest.

The reporting thresholds are not narrowly tailored to the State's interest in avoiding the "wolf in sheep's clothing" problem that donors whose real identity could influence an election are hiding their identity. Washington may have an interest in providing voters with the information necessary to determine "who [is] really behind [a] proposition." *CPLC II*, 507 F.3d at 1179. However, common sense dictates—and the Ninth Circuit has found—that the "value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level." *Canyon Ferry*, 556 F.3d at 1033. Voters gain little, if any, information from the disclosure of small donors. As Justice Noonan said in *Canyon Ferry Road*, "[h]ow do the names of small contributors affect anyone else's vote? Does any voter

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exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'" *Canyon Ferry*, 556 F.3d at 1036 (Noonan, J., concurring).

The question is undoubtedly one of degree, not kind, because at some level, the State's informational interest may be sufficient to warrant the compelled disclosure of campaign expenditures and contributions. *Canyon Ferry*, 556 F.3d at 1033. However, while the Supreme Court has stated that the legislature should be granted some deference in determining where disclosure should begin, *Buckley*, 424 U.S. at 83, in the context of the First Amendment, the usual deference granted to the legislature does "'not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law.'" *Turner*, 512 U.S. at 666 (citation omitted). The Court's role is to assure that the legislature "has drawn *reasonable inferences* based on *substantial* evidence." *Id.* (emphasis added). Washington's disclosure threshold cannot survive this level of review.

Washington's disclosure statute, which requires a political committee to report the name, address, occupation, employer, and employer's address for any person contributing as little as $25 to a ballot-measure committee and then makes that information available to the public via the Internet, burdens substantially more speech than is necessary to serve the state's interest. The $25 and $100 disclosure thresholds simply do not address the problem of the "wolf in sheep's clothing" in a direct and material way. *Id.* at 664. Furthermore, the individual who donates as little as $25 incurs the same burdens on his First Amendment rights as the donor who has given $10,000. At some point, the marginal informational gain that results from the disclosure of small donors is insufficient to overcome the substantial burdens on First Amendment rights. *Canyon Ferry*, 556 F.3d at 1034 ("at some point enough must be enough"). This Court need not set the lower limit, but a disclosure threshold that requires an organization to disclose the name, address, occupation, employer, and employer's address for a person that contributes as little as $25 and then publishes that information on the Internet is so widely overinclusive and far removed from

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the State's interest in providing voters with information as to the major donors supporting or opposing a particular ballot measure that it cannot survive strict scrutiny.

3) The PDL's failure to account for inflation must factor into the strict-scrutiny analysis.

As the Supreme Court noted in *Randall v. Sorrell*, 548 U.S. 230, 261 (2006), limits that are not adjusted for inflation decline in real value each year.[25] Washington's disclosure threshold is already far lower than necessary to serve the state's potential interest of identifying major donors and it grows even farther from that interest each year as a result of inflation.

The current disclosure threshold found in the PDL was set in 1982,[26] when it was increased from $10 to contributions of $25 or more.[27] RCW §42.17.090 (1982); 1982 c. 147 § 7.[28] If this

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[25] In *Randall*, the Court considered the constitutionality of expenditure limits and contribution limits in a Vermont campaign finance statute, and found that both were unconstitutional under the First Amendment. 548 U.S. at 236. The Court quickly dispatched the expenditure limits as unconstitutional before proceeding to an in-depth discussion of the contribution limits. *Id.* at 246. The Court reviewed the contribution limits under a standard requiring them to be "closely drawn to match a sufficiently important interest." *Id.* at 247 (citation omitted). This standard is much more relaxed than the strict scrutiny standard that applies here, and gave the state more leeway in *Randall* than they have here to show the Constitutionality of the statute.

The *Randall* Court analyzed five factors that led them to the decision that the contribution limits at issue were not closely drawn to meet the statute's objectives. *Id.* at 253. Although the *Randall* Court does consider the effect of the contribution limits on the ability of a person to effectively advocate for election, *id.* at 253-54, this is not one of the factors considered in *Buckley* regarding compelled disclosure—a case decided under the higher strict scrutiny standard that applies here.

[26] The failure to re-evaluate and adjust campaign disclosure thresholds for inflation is not limited to Washington. For example, of the states included in Dr. Carpenter's studies, the thresholds were last adjusted as follows:

1931	Ohio ($0). 1931 Ohio Laws 114 v. 712; 1931 Ohio Laws 113 v. 307 § 186, eff. June 30, 1931.
1980	California ($100). 1980 Cal. Stat. 611, § 31.
1979	Florida ($0). Laws 1979, c. 79-400.
1986	Massachusetts ($50). Mass. Gen. Laws ch. 345, §§ 3, 4 (1986).
1996	Colorado ($20). Fair Campaign Practices Act, eff. Jan. 15, 1997 (The citizens of Colorado repealed and reenacted the entire campaign finance act in 1996. The disclosure threshold did not change as a result of the re-enactment.).

The same can be said about the disclosure thresholds in virtually every other state.

Furthermore, the disclosure statutes in states with no threshold (Alaska, Florida, Louisiana, Maryland, Michigan, and New Mexico) are suspect in light of *Canyon Ferry*, 556 F.3d 1021, 1021.

[27] Plaintiff acknowledge that the Supreme Court upheld a $100 disclosure threshold in *Buckley*. 424 U.S. at 82-85. However, the decision is not controlling for several reasons.

First, the Supreme Court expressly reserved judgment on whether "information concerning gifts [of less than

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amount is adjusted to account for inflation, the current threshold would be $56. Bureau of Labor Statistics, CPI Inflation Calculator, (*available at* http://www.bls.gov/data/inflation_calculator.htm). That is, it would take $56 today to purchase something that cost $25 in 1982. Performing the calculation the other way is even more alarming, $25 is the equivalent of $11 in 1982 dollars. Yet the state's disclosure threshold remains at $25.

The $100 threshold for reporting the occupation, employer, and employer's address suffers from a similar flaw. The employer information requirement was added by the Commission, not the legislature, in 1993.[29] Wash. Admin. Code 390-16-034 (1993). Performing the same calculations, the $100 threshold would need to be increased to $150 to account for inflation. Performing the calculation in the other direction, $100 today is the equivalent of approximately $67 in 1993 dollars, nearly half the level originally enacted by the Commission. By failing to account for inflation, Washington's disclosure threshold is quickly approaching the *de minimis* levels struck down in *Canyon Ferry*, 556 F.3d at 1034 ("at some point enough must be enough"), and the thresholds are requiring political committees to report the name, address, occupation, employer, and employer's address of substantially more contributors than originally intended.

$100] can be made available to the public without trespassing impermissibly on First Amendment rights." *Id.* at 84. When this value is adjusted for inflation, as the Court's decision in *Randall* suggests that it must, it can be said that the Supreme Court has reserved judgment on disclosure of amounts less than $371.08 in 2009 dollars. Bureau of Labor Statistics, CPI Inflation Calculator, *available at* http://www.bls.gov/data/inflation_calculator.htm. Washington's disclosure threshold thus falls below the level at which the Supreme Court has reserved judgment.

Second, *Buckley* involved candidate elections. As discussed above, there are different interests at stake in candidate elections than in ballot-measure elections. *See supra* n. 37. Because the state has fewer interests with respect to ballot-measure elections, *Buckley*'s approval of $100 disclosure thresholds is not controlling.

Third, the technological differences between 1974 and today are vast, as set forth above, and these differences have resulted in a compelled public disclosure system that is vastly different than that which existed at the time of *Buckley*. *See supra* Part III.B.2.a, p. 11. While we cannot know how the *Buckley* court would have decided *Buckley* in light of these technological advances, a re-examination of the threshold set in *Buckley* is appropriate in light of those advances.

[28] The statute was changed to its present text of "no more than twenty-five dollars" in 1989. 1989 Wash. Legis. Serv. page no. 14 (West).

[29] It appears that the language of Wash. Admin. Code 390-16-034 was changed to read "more than one hundre dollars" in 2002.

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This problem is exacerbated by the fact that the $25 threshold applies equally to candidate and ballot-measure elections. This places the burden of adjusting the thresholds "upon incumbent legislators who may not diligently police the need for changes in limit levels." *See Randall*, 548 U.S. at 261. A legislator, with a sizeable war-chest by virtue of his incumbency, may be less likely to adjust the level, ensuring that he will know the identity of any individual who has contributed to his opponent's campaign. *Id.* And the Commission has shirked its statutory responsibility to adjust the disclosure thresholds, RCW § 42.17.370(11), despite routine adjustments to other thresholds applicable throughout the PDL.[30] *See* Wash. Admin. Code 390-05-400 (adjusting contribution limits). Even if such a cynical view of Washington legislators and the Commission is unwarranted, the legislature may have other priorities and cannot continually adjust the disclosure threshold.[31] In light of the legislative inaction, the Commission's failure to perform its statutory duties, the disconnect between the State's informational interest and the disclosure thresholds, and the First Amendment burdens that result from such a low disclosure threshold, especially in light of the technological advances since the PDL was originally enacted, the statute must be found unconstitutional.

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[30] RCW § 42.17.370 states that the adjustments "shall equally affect all thresholds within each category." It goes without saying that the Commission has failed to follow this edict.

[31] For example, in California, a commission was established to study the effects of its own campaign finance law. *See* Bipartisan Commission on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* (July 2000) ("McPherson Commission"). The McPherson Commission was created to investigate and assess the effects of the Political Reform Act. *Id.* at 15. The McPherson Commission's very first recommendation was that the $100 disclosure threshold should be raised immediately, noting that:

> These disclosure thresholds have not been adjusted for many years, and in some instances, much longer. These thresholds should be adjusted *immediately*, as well as periodically thereafter in order to eliminate some of the *burden of unnecessary reporting*.

Id. at 25 (emphasis added). Nearly nine years have elapsed since the McPherson Commission issued its report and recommendation that the disclosure threshold should be raised and the California legislature has yet to adjust the disclosure threshold. *See* Cal. Gov't Code § 84211(f).

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4) Washington cannot support its $25 and $100 disclosure thresholds by arguing that they are necessary to enforce some other provision of the Public Disclosure Law.

Washington lacks a compelling interest sufficient to justify disclosure at the $25 and $100 disclosure thresholds, and it cannot create such an interest by arguing that the thresholds are necessary to enforce some higher constitutional provision. The Supreme Court has rejected "such a prophylaxis-upon-prophylaxis approach," *WRTL II*, 551 U.S. at 479. The State must demonstrate a separate, compelling interest for setting its thresholds at $25 and $100, separate and apart from enforcing some higher constitutional limit.

Furthermore, public disclosure is not the least restrictive means of policing and enforcing some much higher constitutional limit. The PDL already requires political committees to keep detailed records of all contributions and imposes substantial civil penalties for non-compliance with the record-keeping and reporting provisions. RCW §§ 42.17.090(1)(b) (record-keeping requirement) & 42.17.390 (authorizing civil penalties and sanctions). As the Supreme Court said in *Buckley*, "[t]here is no indication that the substantial criminal penalties for violating the [Act] combined with the political repercussions of such violations will be insufficient to police the contribution provisions." 424 U.S. at 56. Washington simply cannot impose the substantial burdens on First Amendment rights that occur from compelled public disclosure at such insignificant levels merely to enforce a higher disclosure threshold that passes constitutional muster.

4. The prohibition on contributions in excess of $5,000 during the twenty-one days preceding an election violates the First Amendment.

As discussed above, regulations that impose substantial burdens upon the freedoms of speech and association must survive strict scrutiny. Washington's prohibition on contributions in excess of $5,000 during the twenty-one days preceding an election is not narrowly tailored to

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serve a compelling government interest and must be found unconstitutional.[32]

RCW § 42.17.105(8) states, in relevant part, that:

> It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17.090 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election.

Family PAC is a political committee as defined by RCW § 42.17.020(39) and any contribution to it is reportable pursuant to RCW § 42.17.090. Furthermore, "state office" is defined as "legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commission or public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer." RCW § 42.17.020(46). Thus, Family PAC is subject to the $5,000 contribution limit during the twenty-one days preceding an election because a "ballot proposition," RCW § 42.17.020(4), is not included within the definition of "state office."

In *CARC*, the Supreme Court emphatically struck down contribution limits in the context of referenda elections, noting that in the context of referenda elections, contribution limits "operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure." *CARC*, 454 U.S. at 299-300. Admittedly, Washington's contribution limit is somewhat more permissive than the contribution limits struck down in *CARC*. *Id.* at 292 (stating that the contribution limit at issue was $250 and applicable only to city ballot questions). However, the Supreme Court did not state that the contribution limit was too low, it stated that all contribution limits are unconstitutional as applied to referenda elections because they are not supported by a compelling state interest. *Id.* at 299-300. *See also*, *Randall*, 548 U.S. 230 (indicating that candidate contribution limits, generally constitutional, can fall below a constitutional level).

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[32] In the context of candidate elections, limitations on contributions are generally subject to lesser scrutiny than limitations on expenditures. *See McConnell*, 540 U.S. at 134-35. However, in the context of referenda elections, contribution limits serve as direct limits on expenditures and; therefore, are subject to strict scrutiny. *CARC*, 454 U.S. at 299-300.

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Furthermore, RCW 42.17.105(8) is also woefully underinclusive because it imposes different contribution limits based upon when a person makes his, her, or its contributions. Under the PDL, a person may make unlimited contributions at any time except the twenty-one days preceding an election. Thus, an individual could donate $1,000,000 on October 12, 2009, and another $5,000 during the twenty-one day window, for an effective contribution limit of $1,005,000. However, his neighbor who makes his first contribution on October 13, 2009 has a contribution limit of $5,000. Any argument that large contributions on day twenty-one are more problematic than day twenty-two will pose a "challenge to the credulous," *White*, 536 U.S. at 780, because such underinclusiveness diminishes "the credibility of the government's rationale for restricting speech in the first place." *City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994). Furthermore, Washington cannot argue that major contributions on the eve of the election will go unreported because the State requires 24-hour reports for all contributions exceeding $1,000 during the twenty-one days preceding an election. *See* RCW § 42.17.105. Thus, Washington's limited informational interest, *supra* Part III.B.3.b.1) , p. 24, is adequately served by the disclosure of such large donors on the 24-hour reports. And as previously discussed, Washington cannot impose any contribution limits in the context of referenda elections. *CARC*, 454 U.S. at 299-300. Accordingly, Plaintiff has established a high likelihood of success on its claim that RCW § 42.17.105(8) violates the First Amendment to the United States Constitution.

C. Plaintiff has suffered, and will continue to suffer, irreparable harm if Defendants are not restrained.

Plaintiff finds itself in the emergency situation contemplated by FRCP 65(b): "Applicants for injunctive relief occasionally are faced with the possibility that irreparable injury will occur before the hearing for a preliminary injunction required by Rule 65(a) can be held. In that event a temporary restraining order may be available under Rule 65(b)." 11A Wright & Miller, Federal Practice and Procedure § 2951 (2d ed. 2009).

A Rule 65(b) temporary restraining order "is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction and may be

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issued with or without notice to the adverse party." *Id.* Here, the disclosure thresholds pose a very serious threat to Family PAC's ability to raise the funds necessary to advocate its message. The prohibition on contributions exceeding $5,000 during the twenty-one days preceding the election will further diminish the debate surrounding Referendum 71. *See CARC*, 454 U.S. at 299. Issuing a temporary restraining order will secure the status quo—and the all-important First Amendment rights of Plaintiff—until a preliminary injunction hearing can be held.

Even if this Court ultimately decides at the preliminary injunction hearing that a preliminary injunction should not issue, Defendants and the public will only suffer a delay of several days before the information is disclosed. When weighing the harms occurring from such a delay against the First Amendment rights of Plaintiff, a temporary restraining order and preliminary injunction should issue. "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 (1976); *see also Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (quoting *Elrod*); *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1226 (9th Cir. 2003) (noting that a risk of irreparable injury may be presumed when Plaintiff state 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.").

D. Defendants will suffer no meaningful harm from complying with a temporary restraining order and preliminary injunction.

In the Ninth Circuit, "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants'] favor." *Sammartano 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). This is true even where "the merits of the constitutional claim were not

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clearly established at this early stage in the litigation." *Id.* (internal quotations and citations omitted). In the case at bar, however, Plaintiff has firmly established the merits of its constitutional claims.

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. Beyond that, their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond their interest in the preliminary injunction balancing of harms: "It is difficult to fathom any harm to Defendants [enforcement officials] as it is simply their responsibility to enforce the law, whatever it says." *Id.; Center for Individual Freedom*, 613 F. Supp.2d at 807 (*quoting WRTL II*, 551 U.S. at 473-74).

E. A temporary restraining order and preliminary injunction are in the public interest.

The Ninth Circuit Court of Appeals has recognized that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano*, 303 F.3d at 974 (quoting with approval *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion, been overcome by "a strong showing of other competing public interests," *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest in order for a court to find that it is in the public interest to deny injunctive relief. *Id.* (noting that the appellees had made no showing that their challenged regulation, which infringed on appellants' First Amendment rights, could "plausibly be justified," and so granting appellants' request for injunctive relief). As previously discussed, the State lacks such an interest in this case. Thus, an injunction is in the public interest and this Court should grant it.

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IV. Conclusion

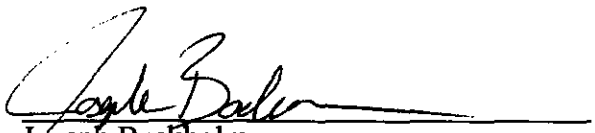
For the foregoing reasons, a temporary restraining order should immediately issue, and a preliminary injunction should issue after a proper hearing. Because of the complex constitutional issues involved here, Plaintiff believes that oral argument would be helpful to the Court in determining whether a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

V. Bond

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

Dated this 21st day of October 2009.

Respectfully submitted,



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