NO. 09-35818

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

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

# Appellees' Opposition to Appellants' Emergency Motion to Stay and Expedite

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## I. Introduction

Appellants Sam Reed, Secretary of State of Washington, and Brenda Galarza, Public Records Officer for the Secretary of State of Washington (collectively "the State"), filed a motion seeking a stay of the District Court's order granting John Doe #1, John Doe #2, and Protect Marriage Washington's (collectively "PMW") motion for a preliminary injunction pending the State's appeal of that order, or, in the alternative, an expedited handling of the State's appeal. (Appellant's Emergency Motion Under 9 th Cir. R. 27-3 ("State's Mot.") at iv.) PMW now files this opposition to the State's request for stay and expedited handling.[1]

The State seeks to stay a preliminary injunction issued by the District Court that is preventing the release of the names of over 138,000 Washington citizens who signed a referendum petition. In a carefully reasoned decision arrived at after extensive briefing and a hearing, the District Court ruled that signatures on a referendum petition are political speech and, because the State had failed to demonstrate that the Public Records Act, RCW § 42.56.001 *et seq.*, is narrowly tailored to serve a compelling government interest, the First Amendment rights of the petition signers would be violated by the release of the petitions. The District Court

[1]PMW has reviewed Fed. R. App. P. 27(d)(2) regarding page limits. The State has submitted two Motions for this Court's consideration (a motion to stay and a motion to expedite). For the Court's convenience, PMW has combined its response to both motions, and the brief thus exceeds 20 pages.

thus issued a preliminary injunction preventing the State from releasing the names of the petition signers pending a final decision on the merits.

The State is now asking the Court to allow the names of the petition signers to be released to the public. Granting the relief sought by the State in this Motion will immediately end the case. If a stay is granted, the names will be released, and the individuals who signed the referendum petition will lose their First Amendment right to engage in protected political speech. To grant such relief on a Motion to Stay, thus effectively ending the case despite the carefully reasoned opinion of the District Court and without a hearing on appeal, would also be in contravention of the standards governing Motions to Stay under Fed. R. App. P. 8(a), as set forth below.

## II. Statement of Facts

On May 18, 2009, Washington Governor Christine Gregoire signed Engrossed Second Substitute Senate Bill 5688.[2] The bill expands the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses. The bill is often referred to simply as the "everything but marriage" domestic partnership bill.

[2] The facts of this case pertinent to this Motion are set forth in great detail by the District Court. (State's App. C at 1-7.) PMW restates the basic facts here for the Court's convenience.

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

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

Several groups are now attempting to make an end run around this provision and have requested copies of the Referendum 71 petitions submitted to the Secretary of State pursuant to Washington's Public Records Act. RCW § 42.56.001 *et seq*. (*See*

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

PMW App. 1at ¶¶ 33-39.) The State has stated that referendum petitions are "public records" within the meaning of RCW § 42.56.10(2) and are subject to public disclosure pursuant to RCW § 42.56.070.[4] If the preliminary injunction is stayed pending appeal, the petitions will be released to the groups that have submitted public records requests for the petitions.

Two groups that submitted public records requests, KnowThyNeighbor.org and WhoSigned.org, have publicly stated that they intend to publish the names of petition signers on the internet and to make the names searchable, with the goal of encouraging individuals to have personal and uncomfortable conversations with any individual that signed the petition. (*See* PMW App. 2.) The news media has widely reported that KnowThyNeighbor.org and WhoSigned.org intend to publish the names of petition signers on the internet.[5] (*See id*. at ¶¶ 6-13.)

On September 10, 2009, the District Court, after extensive briefing by the parties and intervenors, and a preliminary injunction hearing, issued a preliminary injunction

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[4] The parties appear to agree that the Public Records Act does not contain a specific exemption for referendum petitions. (State's App. C at 4, n. 2.)

[5] As set forth in the second count of PMW's Verified Complaint, the release of the names of the petition signers for this particular referendum petition would also result in a reasonable probability that those petition signers whose names were revealed would be subject to threats, harassment, and reprisals. However, the Court did not make a decision on this second count of PMW's Verified Complaint, and it is not properly before the Court at this time. *See* Section IV.A.3, *infra*.

preventing the release of the names of the petition signers. Specifically, the District Court ruled that PMW "established that it is likely that supporting the referral of a referendum is protected political speech" and "that the Public Records Act is not narrowly tailored to achieve the compelling government interest of preserving the integrity of the referendum process." (State's App. C at 15-16.)

## III. Standards of Review

### A. Standards for a Stay Pending Appeal

Under Fed. R. App. P. 8(a), an appellate court is granted the authority to grant a "stay of the judgment or order of a district court pending appeal." In determining whether to issue a stay pending appeal, the appellate courts consider four factors:

> (1) whether the stay applicant has made a *strong showing* that he is likely to succeed on the merits;
> (2) whether the applicant will be irreparably injured absent a stay;
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
> (4) where the public interest lies.

*Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (emphasis added); *see also Golden Gate Restaurant Assoc. v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). A stay pending appeal is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009). The burden of demonstrating that a stay should issue pending the appeal rests with the party seeking the stay. *Id.* at 1760-61. Finally, a stay must be awarded only

upon a clear showing that the movant is entitled to such relief. *See id.* at 1761 (noting the similarity between the standards for a stay and a preliminary injunction and discussing the Court's analysis in *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008)).

**B. Standard of review of an order granting a preliminary injunction**

The State has appealed an order granting a preliminary injunction. Therefore, the first stay factor (*i.e.*, whether the applicant has made a strong showing that it is likely to prevail on the merits of its appeal) must be evaluated in light of the appellate court's standard of review applicable to such an appeal. An order granting a preliminary injunction is reviewed under an abuse of discretion standard. *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 901 (9th Cir. 2007). The Court asks "only whether the district court employed the appropriate legal standards which govern the issuance of a preliminary injunction, and whether the district court correctly apprehended the law with respect to the underlying issues in litigation." *Cal. Pro-Life Council Political Action Comm. v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999) ("*CPLC PAC*"). The Court does not decide whether the district court correctly applied the facts to those legal principles. *Id*. ("[W]hether or not [the appellate court] would have arrived at a different result if it had applied the law to the facts of the case is irrelevant."); *see also Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)

("Stated differently, '[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.' (*quoting Wildwest Inst. v. Bull*, 472 F.3d 587, 590 (9th Cir. 2006).")).

## IV. Argument

The State cannot meet the heavy burden necessary to warrant the issuance of a stay pending appeal under Fed. R. App. P. 8(a). The State has failed to demonstrate that it is highly likely to succeed on the merits of its appeal and that it will suffer irreparable injury if a stay is not issued. The State has also completely ignored the substantial and irreparable injury that John Doe #1, John Doe#2, Protect Marriage Washington, and over 138,000 signatories to the Referendum 71 petition will suffer if a stay is granted before the parties can obtain a full hearing on the merits of the State's appeal. Finally, as the District Court correctly concluded, an injunction of the Public Records Act is in the public interest. (State's App. C at 17.) Accordingly, the State's motion for a stay pending appeal should be denied.

### A. The State has failed to make a strong showing that it is likely to succeed on the merits of its appeal.

The first stay factor requires the State to make a strong showing that it is likely to succeed on the merits of its appeal. Because the State is appealing an order granting a preliminary injunction, the State must demonstrate that the District Court applied the

wrong legal standards governing the issuance of a preliminary injunction, or that it did not correctly comprehend the law with respect to the underlying issues of the litigation. The District Court correctly concluded that referendum signatures are core political speech and that the Public Records Act, which would compel their disclosure, is subject to strict scrutiny. To succeed on the merits of its appeal, the State must demonstrate why the District Court applied the wrong legal standards in arriving at these conclusions. The State does not make such a showing.

The State's request for a stay is premised upon the notion that the District Court incorrectly determined that referendum signatures are political speech deserving of further First Amendment analysis and that because of this, the Public Records Act is subject to strict scrutiny.[6] (State's Mot. at 14.) Accordingly, this Court is asked to determine whether the State is highly likely to succeed in its claims that referendum signatures are not political speech and that the Public Records Act is not subject to strict scrutiny. If this Court agrees that referendum signatures are political speech and

[6] As a threshold matter, the District Court appears to have applied the correct legal standards governing the issuance of a preliminary injunction. (State's App. C at 8) (setting forth preliminary injunction standard); (*Id*. at 15-16) (stating finding with respect to likelihood of success on the merits); (*Id*. at 16) (stating finding of irreparable harm in absence of injunctive relief); (*Id*. at 16-17) (stating finding regarding balance of equities); (*Id*. at 17) (stating finding regarding the public interest). Accordingly, its appears that the State's appeal is directed at the District Court's comprehension of the law with respect to the underlying issues in litigation.

that the Public Records Act is subject to strict scrutiny, this Court must defer to the District Court's application of the facts to the law and the preliminary injunction factors, even if this Court would have arrived at a different result with respect to the issuance of a preliminary injunction. *CPLC PAC*, 164 F.3d at 1190. For the reasons set forth below, the District Court correctly concluded that referendum petitions are political speech and that regulations compelling their public disclosure are subject to strict scrutiny.

**1. The District Court correctly concluded that the submission of referendum petitions is protected political speech and that the Public Records Act is subject to strict scrutiny.**

In focusing on the District Court's conclusion that referendum signatures are "anonymous political speech," the State misses the underlying analysis applicable to cases implicating the First Amendment. (State's App. C at 9.) When a litigant challenges a statute on First Amendment grounds, the initial question must always be: Does this activity burden expression that the First Amendment was meant to protect? *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765. 776 (1978). If the court answers that question in the affirmative it must then ask what level of review is applicable to the statute. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206-09 (1999) (Thomas, J., concurring) (discussing the two standards of review that the courts apply in First Amendment cases) ("*Buckley II*").

When a law restricts "core political speech" or "imposes 'severe burdens' on speech or association," the law must be narrowly tailored to serve a compelling government interest (*i.e.*, the law is subject to exacting/strict scrutiny).[7] *Id.* at 206. Here, the District Court correctly determined that referendum signatures are "core political speech," and that the release of those names under Washington's Public Records Act must survive exacting scrutiny.

**a. Referendum signatures are core political speech.**

The District Court correctly determined that referendum signatures are the type of expression that the First Amendment was meant to protect. The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[8] 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 v. Valeo*, 424 U.S. 1, 15 (1976) (citation omitted), and the protections undoubtedly apply in the context of both candidate and referendum elections. *Citizens Against Rent*

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[7] The level of scrutiny to be applied when a law restricts core political speech or imposes severe burdens on speech or association is not entirely clear; a more in-depth discussion of this topic, which was not raised by the State, follows at Section IV.A.2, *infra*.

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

*Control v. Berkeley*, 454 U.S. 290, 295 (1981) (citation omitted). In the context of a referendum petition, the application of the First Amendment's protection of political speech is especially important because it ensures that a collection of individuals "can make their views known, when, individually, their voices would be faint or lost." *Id*. at 294.

The Supreme Court has also explicitly stated that "petition circulation is 'core political speech.'" (State's App. C at 11) (*citing Buckley II*, 525 U.S. at 187); *see also Meyer v. Grant*, 486 U.S. 414, 421 (1988) (noting "the circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change"); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (holding that the circulation of a petition is protected speech). Further, the District Court noted that it does not appear that any court has directly addressed the question as to whether the "referral of a referendum is likely protected political speech." (State's App. C at 11). Counsel have uncovered one unreported case where the court explicitly ruled that "signing a petition . . . constitutes speech requiring further First Amendment analysis." *Hegarty v. Tortolano*, No. Civ.A. 04-11668-RWZ, 2006 WL 721543, *2 (D. Mass. Mar. 17, 2006) (PMW App. 3).

The District Court also properly rejected two arguments raised by the State that referendum signatures are not "core political speech." Both at the District Court and

in their Motion to this Court, the State argues that the signatories to the referendum petition somehow waived their First Amendment rights by signing the petition. (State's App. C at 10; *see also* State's Mot. at 8.) In particular, the State argues that because the signatories disclosed their identities to the individuals responsible for circulating the petition and to the Secretary of State for the limited purpose of canvassing and verifying their signatures, they cannot seek the protection of the First Amendment. (State's Mot. at 11-13.) As discussed above, this is clearly incorrect. Referendum signatures are protected political speech deserving of further First Amendment analysis, and a citizen does not waive his or her First Amendment rights by signing a referendum petition.

The second argument raised by the State here and at the District Court is that citizens act as "quasi-legislators" when submitting a referendum petition to the State. (State's App. C at 10; *see also* State's Mot. at 16.) However, accepting the State's argument demonstrates the untenable consequences of accepting this argument of citizens as a "quasi-legislators" in the context of signing a referendum petition. If a citizen signing a petition is a "quasi-legislator" as the State suggests, the act of signing a petition is *not* a vote for or against the petition, but merely a statement that the "quasi-legislator" believes that the petition's subject should be proposed to the "legislature" as a whole. It is then the full "legislature"—i.e., the voting citizens of

Washington—who are truly acting as "quasi-legislators" and voting on the subject of the referendum petition. If that is the case, the State's logical position must be that the votes of the entire "legislature" should be part of the public record and subject to review. However, the State has not suggested that the votes at the general election should also be public, as would be necessary to their argument that citizens act as "quasi-legislators" in the context of referendum petitions.

In rejecting these arguments, it cannot be said that the District Court incorrectly concluded that signatures on a referendum petition are political speech deserving of further First Amendment analysis.

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

After correctly determining that referendum signatures are protected First Amendment expression, the District Court correctly turned to the question as to the appropriate level of review to use in analyzing the constitutionality of the Public Records Act. The District Court properly noted that, in regulating this sort of protected speech, "the government may infringe on an individual's right to free speech but only to the extent that such infringement is narrowly tailored to achieve a compelling governmental interest." (State's App. C at 12 (*citing McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995).) Put simply, the District Court determined that the release of the signatures through Washington's Public Records

Act should be subject to strict scrutiny.[9] *See also Buckley II*, 525 U.S. at 206-09 (Thomas, J., concurring) (laws implicating "core political speech" or that impose substantial burdens on First Amendment rights are always subject to strict scrutiny); *Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure cannot be justified by a mere showing of some legitimate government interest. . . . [It] must survive exacting scrutiny. . . . [T]here must be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed.").

A potentially problematic issue here involving the proper level of scrutiny was deftly handled by the District Court. Courts have used two terms ("exacting scrutiny" and "strict scrutiny") to label the level of scrutiny to be applied here. "Exacting scrutiny," as used in *Buckley*, is "strict scrutiny." *Buckley* required "exacting scrutiny" of 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 FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, n.7 (2007) (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, was "strict scrutiny")("*WRTL II*"); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (*citing First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765,

[9] Under *NAACP v. Alabama*, 357 U.S. 449, 463 (1958), strict scrutiny is required "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure."

786 (1978)) (equating "exacting" scrutiny with "strict" scrutiny).[10] The District Court recognized that courts have used two terms for the level of scrutiny applied in this situation, but determined that the two levels of scrutiny were equivalent before proceeding to apply strict scrutiny. (State's App. C at 12, n. 6.)

Under strict scrutiny, Washington "bears the burden of proving that the [Public Records Act] provisions at issue are '(1) narrowly tailored, to serve (2) a compelling state interest.'" *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (*citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002). On this motion for stay or on an appeal of the preliminary injunction, the District Court's conclusion that the State has failed to meet its burden under a strict scrutiny analysis is entitled to deference by this Court, even if this Court, in applying strict scrutiny, would have found that the Public Records Act as applied to referendum

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[10] In *Canyon Ferry*, the Ninth Circuit again declined to clarify whether strict scrutiny applies in the context of ballot measure disclosure. *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009) (striking Montana's disclosure statute under any standard of review). *See also Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (applying strict scrutiny); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 787-88 (9th Cir. 2006) (assuming without deciding that strict scrutiny applies); and *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004) (applying strict scrutiny).

However, regardless of whether this Court accepts that "exacting scrutiny" is always the same as "strict scrutiny," strict scrutiny must apply to the Public Record Act's disclosure provisions because compelled disclosure provisions constitute substantial First Amendment burdens. *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008). Further, this is not the stage of the case to address this issue.

petitions is narrowly tailored to a compelling interest of the State. *See CPLC PAC*, 164 F.3d at 1190.

**2. On a Motion to Stay or the Appeal of a Preliminary Injunction, this Court Must Defer to the District Court's Application of the Strict Scrutiny Standard.**

If this Court decides that the District Court correctly determined that referendum petitions are subject to First Amendment protections and that the Public Records Act is subject to strict scrutiny, this Court must defer to the District Court's conclusion that the Act is not narrowly tailored to serve a compelling government interest. *CPLC PAC*, 164 F.3d at 1190. ("[W]hether or not [the appellate court] would have arrived at a different result if it had applied the law to the facts of the case is irrelevant.")

In its motion to stay, the State attempts to refrain this case as one about the right to anonymous political speech and the waiver of that right. (State's Mot. at 7-13.) First, as discussed above, whether referendum signatures constitute anonymous political speech does not answer the question of whether the Act is narrowly tailored to serve a compelling government interest. Second, disclosure to the Secretary is not an example of waiver of one's First Amendment rights, but instead, an example of a narrowly tailored statute. This limited disclosure ensures that the State does not waste valuable resources on a referendum election that does not have an adequate level of public support.

Accordingly, the State failed to carry its heavy burden of demonstrating that the Public Records Act is narrowly tailored to serve a compelling government interest in the District Court, and this Court should defer to the District Court's determination.

### 3. The District Court Did Not Issue an Order on the Second Count of PMW's Verified Complaint and it is Not Properly Before This Court.

Although the State spends nearly four pages discussing the second count of PMW's Verified Complaint, this second count is not properly before the Court at this time. Having issued a preliminary injunction on PMW's first count, the District Court did not reach the merits of PMW's second claim for relief. (State's App. C at 16 ("At this time, the Court need not reach the merits of Plaintiffs' second claim for relief".) In the event the District Court found the Public Records Act constitutional as applied to referendum petitions in general, PMW's second count asked the District Court to prevent the release of the names of the signers of Referendum 71 because of the reasonable probability of threats, harassment, and reprisals that would be directed at the signers of the petition if their names were released. Because the Order does not extend to PMW's second count, the State cannot appeal it at this time.[11]

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[11] Indeed, even if this Court reaches a decision that a stay should issue on the first count of PMW's Verified Complaint, or that the District Court issued the preliminary injunction on PMW's first count in error, due to the nature of the claims in PMW's second count, it would be imperative for this Court to extend temporary relief preventing the release of the names until such time as the District Court could address whether the claims in PMW's second count merit a preliminary injunction. Any order of this Court pertaining to PMW's first claim

**B. The State will not be irreparably harmed absent a stay.**

The remaining stay factors are virtually identical to the factors the District Court considered in granting the preliminary injunction and the District Court's findings should only be disturbed if they are based upon incorrect assumptions of law. *CPLC PAC*, 164 F.3d at 1190.[12]

The second stay factor requires the State to demonstrate the it will suffer irreparable harm if a stay is not issued. *Hilton*, 481 U.S. at 776. The State fails to discuss how it would suffer irreparable harm in the absence of a stay pending its appeal. And if this Court ultimately grants the State's request for an expedited appeal in an attempt to render a decision before the November 3, 2009 election, the State will suffer virtually no injury.[13] Accordingly, the State's request for a stay should be denied.

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should be tailored to allow further review of the second claim by the District Court before any names of the petition signers can be released.

[12] The State's motion does not appear to explicitly address the remaining stay factors.

[13] The District Court concluded that "the equities tip in favor of Plaintiffs." (D. Doc. 63 - Order at 17.)

**C. The issuance of a stay will result in immediate, substantial, and irreparable injury to the non-moving parties.**

The third stay factor requires the Court to address the degree of harm that other parties would suffer if a stay is granted. *Hilton*, 481 U.S. at 776. The practical consequences of the State's request demonstrates that a stay will result in immediate, substantial, and irreparable injury to John Doe #1, John Doe #2, Protect Marriage Washington, and over 137,000 other signatories to the Referendum 71 petition. In its request for a stay, the State has asked this Court to allow it to release copies of the referendum petition during the pendency of this appeal. Once the petitions have been released, the very harm that the parties filing this suit sought to prevent will be complete. An order affirming the District Court's order granting the preliminary injunction will do little to undue the harm perpetuated upon 137,000 Washington citizens if a stay is granted and the State is permitted to release the names prior to a hearing on the merits of the State's appeal.

As the District Court correctly stated, "'The loss of First Amendment Freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" (Order at 16) (*citing Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007). *See also*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Brown v. Cal. Dep't of Transp.*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that irreparable injury may be presumed when a plaintiff states a colorable First Amendment claim); *Chaplaincy of Full Gospel*

*Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (same). Therefore, because a stay would result in substantial and irreparable injury to the non-moving party, the State's request for a stay should be denied.

**D. A stay is not in the public interest.**

The final stay factor requires the Court to examine whether a stay is in the public interest. *Hilton*, 481 U.S. at 776. The District Court correctly noted that "it is always in the public interest to prevent the violation of a party's constitutional rights." (State's App. C at 17) (*citing Sammartano v. First Judicial Dist. Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002)). And while this presumption may sometimes be overcome upon a strong showing of competing interests, the State has failed to make such a showing in the instant action. *See id.* Furthermore, if the State's request for an expedited appeal is granted, the public harm can virtually be eliminated by a decision before the November 3, 2009 election. Thus, the State's request for a stay should be denied.

## V.The Appeal Should Not be Expedited

The State has failed to demonstrate that good cause exists to warrant an expedited appeal under 9th Cir. R. 27-12. The State offers one argument in support of its motion to expedite: "In the absence of expedited treatment, the voters of Washington will suffer irreparable harm. Referendum 71 will be on the ballot for the November 3

general election, yet information with respect to it will be denied Washington voters." (State' Mot. at 19.) The State suggests that it has an "informational interest" in releasing copies of the signature petitions and that voters will be "permanently deprived of the information." (State's Mot. at 19.) This argument fails for three reasons.

First, the State requires referendum petitions to ensure that it does not waste valuable resources on a referendum that does not have even a minimal level of public support. (State's Mot. at 8-9.) Consistent with this goal, the Secretary of State is granted the authority to verify and canvass the names fo the legal voters on the petition," RCW 29A.72.230, and as the District Court noted, it appears that the referendum provisions "evidence an intent on the part of the Legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption." (State's App. C at 15) (*citing State v. Superior Court of Thurston County*, 81 Wn. 623 647, 143 P. 461 (1914). While the statute also provides for public access of the verification process, it specifically provides that observers shall "make no record of the names, addresses, or other information on the petitions or related records during the verification process." RCW 29A.72.230. The referendum statute never authorizes the Secretary of State to disseminate the signed referendum petitions, either during the verification process, or otherwise. If the State has an informational interest in the

public dissemination of the signed referendum petitions it would not wait for a third party—who may or may not publicly disseminate the petitions—to first make a public records request under a separate statute. *See, e.g.*, RCW 42.17.367 (requiring the Public Disclosure Commission to make copies of campaign finance reports available on its website).[14] Nothing in the referendum petitions suggests that the State has an interest the public disclosure of a referendum petition.

Second, the public release of referendum petition does not implicate the "informational interest" previously found sufficient to support compelled public disclosure provisions. This Court recently clarified that the "informational interest" discussed in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 n. 23 (9th Cir. 2003) ("*CPLC I*"), is limited to identifying those "persons *financially* supporting or opposing a . . . ballot measure."[15] *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009) (emphasis in original). Importantly, this Court added, "the disclosure requirements are not designed to advise the public generally what groups may be in favor of, or opposed to, a

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[14] Campaign finance reports are available at: http://www.pdc.wa.gov/QuerySystem/Default.aspx

[15] In *CPLC I*, this Court noted that two other interests implicated in a candidate election are inapplicable in the context of a referendum election. *See Buckley*, 424 U.S. at 66-68(identifying an "informational interest," a "corruption interest," and an "enforcement interest").

particular candidate or ballot issue; they are designed to inform the public what groups have demonstrated an interest in the passage or defeat of a candidate or ballot issue by their *contributions* or *expenditures* directed to that result." *Id.* at 1032-33 (emphasis in original). This Court went on to hold that this limited information interest is not absolute. *Id.* at 1033-34 (striking the *de minimis* reporting requirement at issue because the marginal informational gain that resulted did not justify the substantial burden resulting from compelled public disclosure). The District Court correctly noted that "the Court nor the parties have the ability to identify whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public." (State's App. C at15.) In other words, an individual's signature on a referendum petition simply does not serve the "informational interest" as defined by this Court.

Furthermore, the State has had an adequate opportunity to present this appeal prior to the filing of their Emergency Motion; their contention that this is an emergency is belied by their failure to avail themselves of the opportunity to contest the temporary restraining order at any time prior to the hearing on the preliminary injunction.

The first opportunity that the State had to contest the temporary restraining order occurred at the time the temporary restraining order was issued by the District Court.

On July 28, 2009, Protect Marriage Washington filed the Verified Complaint in this case, as well as a Motion for Temporary Restraining Order and Preliminary Injunction. (PMW App. 1 & District Court Docket at 3.) That same day, the Court held a hearing and required the Plaintiffs to personally serve the State and to inform them of the hearing on the temporary restraining order, which the Court scheduled for July 29, 2009. (PMW App. 4.)

On July 29, 2009, prior to the scheduled hearing on the Motion for Temporary Restraining Order, James K. Pharris, who handled this case for the Attorney General at the District Court, informed counsel for Protect Marriage Washington that the State would not make an appearance at the hearing on the temporary restraining order, and that Protect Marriage Washington could inform the Court that the State would not be appearing.[16] (PMW App. 4.) On July 29, 2009, the District Court conducted a hearing and entered an Order Granting Plaintiffs' Motion for Temporary Restraining Order. (PMW App. 4.)

Moreover, the State did not object to the extended briefing schedule on the preliminary injunction, which extended the temporary restraining order beyond the

[16] The Attorney General's decision not to appear was widely noted by the media. *See, e.g.*, Curt Woodward, *Judge Halts Release of Wash. Referendum Signatures*, Seattle Times, July 29, 2009 ("The state did not oppose the restraining order request . . . .")

customary length of ten days, to over thirty-five days.[17] (PMW App. 4.) The State did not object to the extension of the temporary restraining order after the hearing on the preliminary injunction when the District Court took the case under advisement, which further extended the temporary restraining order to over 40 days. (State's App. C.) That the State now claims it faces an "emergency" and expedition is contrary to all of their previous actions with regard to the temporary restraining order.

## VI. Conclusion

For the reasons set forth herein, Plaintiffs/Appellees respectfully request this Court deny Appellant's Emergency Motion to Stay and Expedite.

Respectfully submitted this 18th day of September, 2009.

s/ James Bopp, Jr.

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[17] Though temporary restraining orders are typically not appealable due to their shortened nature, this may have been a case where, due to the length of the temporary restraining order, the State could have appealed prior to the entry of the preliminary injunction. *See Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002) (allowing appeal of a "temporary restraining order" that had been subject to a hearing and had been in effect for three times longer than the 10 day period of Fed. R. Civ. P. 65).

**Certificate of Service**

I, Scott F. Bieniek, am over the age of eighteen years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On September 18, 2009, the foregoing document described as Appellees' Opposition to Appellants' Emergency Motion to Stay and Expedite was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

William B. Collins
Deputy Solicitor General
*Counsel for Defendants/Appellants Sam Reed and Brenda Galarza*

And, pursuant to Fed. R. App. P. 25(c)(1)(B) & 25(c)(1)(B)(3), I served the foregoing documents by placing a true and correct copy of the document in sealed Federal Express envelope, priority overnight, Saturday delivery, at Terre Haute, Indiana, addressed to the following non-CM/ECF participants:

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[18] Intervenor/Appellant Washington Coalition for Open Government filed a Notice of Appeal in the District Court on September 15, 2009. They did not join in the briefing of the State on the State's Emergency Motion.

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*Intervenor*[19]
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And as a courtesy, I provided an e-mail copy of the aforementioned document to counsel at the e-mail addresses set forth above, on Friday, September 18, 2009.

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 18th day of September, 2009.

/s/ Scott F. Bieniek
Scott F. Bieniek
Counsel for Plaintiffs/Appellees

[19] Mr. West filed a Notice of Appeal in the District Court on September 15, 2009. The District Court denied Mr. West's motion to intervene on September 16, 2009. (D. Doc. 73.)