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[Doc. 7104206, filed October 15, 2009]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, et al.,)
Plaintiffs-Appellees,)
)
v.) No. 09-35818
)
SAM REED, et al.,)
Defendants-)
Appellants)

JOHN DOE #1, et al.,)
Plaintiffs-Appellees,)
)
v.)
)
SAM REED, et al.,)
Defendants-)
Appellants) No. 09-35826
)
and)
)
WASHINGTON)
COALITION FOR)
OPEN GOVERNMENT,)
Defendants-)
Appellants-)
Intervenors.)

JOHN DOE #1, et al.,)	
Plaintiffs-Appellees,)	
)	
v.)	
)	
SAM REED, et al.,)	
Defendants-)	
Appellants)	No. 09-35863
)	
and)	
)	
WASHINGTON)	
FAMILIES STANDING)	
TOGETHER,)	
Defendants-)	
Appellants-)	
Intervenors.)	

ORDER

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

It is therefore **ordered**:

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

2. An opinion setting forth the reasons for the court's reversal of the Preliminary Injunction Order

shall be issued expeditiously and in due course.

[Editor's Note: Page numbers from the unreported opinion () and the reported opinion, __ F.3d __, 2009 WL 3401297 (**), are indicated. Only the Westlaw citation is available as of the printing of this appendix.]*

[Doc. 7095972, filed October 22, 2009]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, et al.,)	
Plaintiffs-Appellees,)	
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v.)	No. 09-35818
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SAM REED, et al.,)	
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COALITION FOR)	
OPEN GOVERNMENT,)	

Defendants-Appellants-)
Intervenors.)

JOHN DOE #1, et al.,)
Plaintiffs-Appellees,)

v.)

SAM REED, et al.,)
Defendants-Appellants)

and)

WASHINGTON FAMILIES)
STANDING TOGETHER)
Defendants-Appellants)
Intervenors.)

No. 09-35863

OPINION

[1]** Washington’s Secretary of State and Public Records Officer (together, the “State”) and Intervenors, Washington Coalition for Open Government (“WCOG”) and Washington Families Standing Together (“WFST”), appeal a decision of the district court granting Plaintiffs, Protect Marriage Washington (“PMW”) and two individual signers of the Referendum 71 petition, a preliminary injunction prohibiting the State from making referendum petitions available in response to requests made under Washington’s Public Records Act (the “PRA”). Wash. Rev. Code § 42.56.001 *et seq.*

Under the Washington Constitution, a referendum must be ordered on a bill passed by the legislature if a

specified percentage of voters sign a petition for a referendum. The Referendum 71 petition calls for a statewide election on Engrossed Second Substitute Senate Bill 5688 (“SB 5688”), which would expand the rights and responsibilities accorded state-registered domestic partners. The PRA makes public records, including referendum petitions, available for public [*4] inspection. In seeking a preliminary injunction, Plaintiffs argued that, as applied to referendum petitions, the PRA violates the First Amendment. We have jurisdiction over this appeal from the district court’s grant of a preliminary injunction under 28 U.S.C. § 1292(a)(1). We reverse.

BACKGROUND

I. Washington’s Public Records Act

The PRA requires state agencies to make public records available for public inspection and copying. Wash. Rev. Code § 42.56.070. It provides that “[i]n the event of conflict between the provisions of [the PRA] and any other act, the provisions of [the PRA] shall govern.” Wash. Rev. Code § 42.56.030. Although the PRA contains some exemptions, none applies to referendum petitions. The PRA was enacted through the initiative process and includes its own rule of construction:

The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

Wash. Rev. Code § 42.56.030.

II. Washington's Referendum Process

[*5] Under the Washington Constitution, although legislative authority is vested in the state legislature, the people reserve to themselves the power to reject any bill or law through the referendum process. Wash. Const., art. II, §§ 1 & 1(b).¹ To initiate the referendum process, petitions must be filed with the Secretary of State containing the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor in the immediately preceding gubernatorial election. Wash. Rev. Code § 29A.72.150. Referendum petition sheets must include a place for each signer to sign and print his or her name, address, city, and county at which he or she is registered to vote. Wash. Rev. Code § 29A.72.130.

****2]** Once the referendum petition is filed, the Secretary of State must verify and canvass the names of the voters who signed the petition. Wash. Rev. Code § 29A.72.230. The verification and canvassing “may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county.” *Id.* The Secretary of State may limit the number of **[*6]** observers to two opponents and two proponents of the referendum if the Secretary of State deems that “a greater number would cause undue delay or disruption of the verification process.” *Id.*

After verification and canvassing, the Secretary of

¹ The Washington Constitution includes some exceptions to this reserved power, but none applies in this case.

State issues a determination of whether the referendum petition contains the requisite number of valid signatures. Any citizen dissatisfied with that determination may apply to the Thurston County Superior Court for a citation requiring the Secretary of State to submit the petition to the superior court “for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be.” Wash. Rev. Code § 29A.72.240. Within five days of the superior court’s decision, a party may seek review by the Washington Supreme Court. *Id.*

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

III. Referendum 71

The Washington Governor signed SB 5688 on May 18, 2009. Known as the “everything but marriage act,” the bill expands the rights and responsibilities of state-registered domestic partners. On or about May 4, 2009, Larry Stickney, the [*7] campaign manager for PMW,² filed notice with the Secretary of State of his intent to circulate a referendum petition on SB 5688. On July 25, 2009, PMW submitted the petition with more than 138,500 signatures to the Secretary of State for verification and canvassing.³

² PMW was organized as a state political committee pursuant to Wash. Rev. Code § 42.17.040. Its purposes are to collect the requisite number of signatures to place Referendum 71 on the ballot and to encourage Washington voters to reject SB 5688.

³ The State asserts that about 122,000 signatures were valid. Presumably, the PRA would make available all 138,500 signa-

The petition, entitled “Preserve Marriage, Protect Children,” includes a table for the following information for each signer: printed name, signature, home address, city and county, and an optional email address. The petition also states:

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

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

[*8][3]**Pursuant to Wash. Rev. Code § 29A.72.140, the petition warns that “[e]very person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs the petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both.”

As of August 20, 2009, the Secretary of State had received public record requests for the Referendum 71 petition from Brian Murphy of WhoSigned.org, Toby Nixon of WCOG, Arthur West, Brian Spencer on behalf of Desire Enterprises, and Anne Levinson on behalf of

tures, however, because all petition sheets, not only valid signatures, comprise the public records.

WFST. Two entities, KnowThyNeighbor.org and WhoSigned.org, publicly stated that they intend to publish the names of petition signers on the internet. Plaintiffs allege that these two groups have encouraged individuals to contact petition signers to have “personal” and “uncomfortable” conversations.⁴

IV. Procedural History

[*9] On July 28, 2009, Plaintiffs filed this action, seeking to enjoin the State from publicly releasing documents showing the names and contact information of the individuals who signed petitions in support of Referendum 71. Count I of the complaint alleges that, as applied to referendum petitions, the PRA violates the First Amendment because the PRA is not narrowly tailored to serve a compelling government interest. Count II alleges that, as applied to the Referendum 71 petition, the PRA is unconstitutional because “there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals.”

The district court granted Plaintiffs a temporary restraining order on July 29, 2009, and, after a hearing, granted Plaintiffs’ motion for a preliminary injunction on September 10, 2009, enjoining release of

⁴ Plaintiffs appear to be referring to a June 8, 2009, press release:

“What does happen,” says [Aaron Toleos, co-director of KnowThyNeighbor.org], “is that conversations are triggered between people that already have a personal connection like friends, relatives, and neighbors.”

“These conversations can be uncomfortable for both parties,” he said, “but they are desperately needed to break down stereotypes and to help both sides realize how much they actually have in common.”

the Referendum 71 petition.⁵ The district court applied strict scrutiny to the PRA and concluded that Plaintiffs established they were likely to succeed on Count I of their complaint.⁶ The State and Intervenors timely appealed.

On September 14, 2009, the State moved this court for an emergency stay and to expedite its appeal. We consolidated the State's appeal with those of [*10] Intervenors WCOG and WFST. Because the election on Referendum 71 is set for November 3, 2009, we ordered expedited briefing on the consolidated appeals and heard oral argument on October 14, 2009, on the merits of the appeals, as well as on the stay motion.⁷ On October 15, 2009, we granted a stay pending our disposition on the merits of these appeals.⁸ We now reverse the preliminary injunction.

STANDARD OF REVIEW

As recently articulated by the Supreme Court, a “plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits,

⁵ On September 3, 2009, the district court granted the motions to intervene of WFST and WCOG.

⁶ The district court based its preliminary injunction only on Count I. Because the district court did not reach the merits of Count II, we likewise do not reach Count II in reviewing the injunction.

⁷ We appreciate all counsel's efforts and cooperation in meeting a highly-expedited briefing schedule.

⁸ On October 19, 2009, the Circuit Justice stayed our stay order. *Doe #1 v. Reed*, No.09A356 (U.S. Oct. 19, 2009) (Kennedy, Circuit Justice). The application was thereafter referred to the full Court which confirmed the stay. *Id.* (Oct. 20, 2009). Noting in either of those orders affects our consideration of the merits of these appeals.

[2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

[4]** We review the district court’s grant of a preliminary injunction for abuse of discretion. *Am. Trucking Ass’ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. **[*11]** 2009) (citing *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007)). A district court abuses its discretion if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Am. Trucking*, 559 F.3d at 1052). Thus, application of an incorrect legal standard in granting preliminary injunctive relief or with regard to an underlying issue is grounds for reversal. See *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003) (citation omitted).

ANALYSIS

We are presented with the novel questions of whether referendum petition signatures are protected speech under the First Amendment and, if so, what level of scrutiny applies to government action that burdens such speech. For the purposes of our analysis, we assume, as did the district court, that the act of signing a referendum petition is speech, such that the First Amendment is implicated.⁹ See *First Nat’l Bank*

⁹ The State contends, with some force, that signing a referendum petition is not speech, but is instead, a legislative act, *i.e.*, that it is an integral part of the exercise of the legislative power reserved to the people by the Washington Constitution. See *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) (“A referendum . . . is an exercise of the reserved power of the people

of *Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (noting that when a litigant challenges a statute on First Amendment grounds, the threshold question [*12] is whether the statute burdens expression the First Amendment protects). Even assuming that speech is involved, however, we conclude that the district court applied an erroneous legal standard when it subjected the PRA to strict scrutiny.

I. District court's analysis

The district court's analysis was based on the faulty premise that the PRA regulates anonymous political speech. The signatures at issue, however, are not anonymous. First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition. Second, each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers. Third, any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise. In fact, the PRA provides to the contrary. Fourth, Washington law specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process. Thus, the district court's finding that the

to legislate” (quoting *Belas v. Kiga*, 959 P.2d 1037, 1040-41 (Wash. 1998)). Because we assume, for purposes of this case, that signing a referendum petition is speech, we do not reach this argument and intimate no view on it.

speech at issue is anonymous is clearly erroneous.¹⁰ And, because it was based on [*13] that faulty premise, the district court’s application of anonymous speech cases requiring strict scrutiny was error.

To the extent the district court did not rely exclusively on anonymous speech cases, the district court nonetheless erred in applying strict scrutiny. Relying on *Meyer v. Grant*, 486 U.S. 414, 420–21 (1988), and *Buckley v. Am. Constitutional Law Found. (Buckley II)*, 525 U.S. 182, 197 (1999), the district court concluded that petition signing, like petition circulation, is protected political speech, and suggested that any regulation of protected political speech is subject to strict scrutiny. This suggestion is unsupported by the applicable case law. Even assuming, as we do here, that petition signing is protected political speech, it does not follow that a regulation that burdens such speech is necessarily subject to strict scrutiny. *See e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) (applying intermediate scrutiny for viewpoint- and content-neutral time, place, and manner restrictions on speech); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (applying balancing test to election restriction that burdened First Amendment rights); *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th [*14] Cir. 2002) (“[T]he level of constitutional scrutiny that we apply to a statutory restriction on

¹⁰ This appears to be more an assumption than a finding. All that the (continued...) (...continued) district court “found” on this issue was that “at this time, the Court is not persuaded that waiver of one’s fundamental right to anonymous political speech is a prerequisite for participation in Washington’s referendum process.” All of the facts underlying this finding are undisputed. We have, nonetheless, applied the deferential clear error standard of review to this finding.

political speech and associational freedom is dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue.”).

II. Applicable level of scrutiny

[5]** Having concluded that the district court’s basis for applying strict scrutiny was in error, we turn to the PRA and determine what standard should be applied. As noted above, not all laws that burden First Amendment rights are subject to strict scrutiny. A regulation that has an incidental effect on expressive conduct is constitutional as long as it withstands intermediate scrutiny. *See United States v. O’Brien*, 391 U.S. 367, 376 (1968); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008).

In *O’Brien*, a student was arrested for burning his draft card in protest of the Vietnam War. 391 U.S. at 369-70. The student argued the statute was an unconstitutional infringement upon his right to engage in political speech. *Id.* at 370. The Supreme Court first assumed that “the alleged communicative element in O’Brien’s conduct [was] sufficient to bring into play the First Amendment.” *Id.* at 376. The Court then concluded that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental **[*15]** interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *Id.* at 376. Applying intermediate scrutiny, the Court concluded that the draft card statute was not unconstitutional as applied to O’Brien. *Id.* at 377. As in *O’Brien*, we assume for the purposes of our analysis that signing a referendum petition has a “speech” element such that petition signing qualifies as expressive

conduct. We also assume that the PRA's public access provision has an incidental effect on referendum petition signers' speech by deterring some would be signers from signing petitions. Given these assumptions, we conclude that intermediate scrutiny applies to the PRA.¹¹

¹¹ We note that "election regulations" are subject to a different analysis altogether. Instead of applying *O'Brien* intermediate scrutiny, courts apply a balancing test to determine whether an election regulation is a permissible infringement on First Amendment free speech rights. See *Caruso v. Yamhill County ex rel. County Comm'r*, 422 F.3d 848, 859 (9th Cir. 2005) (when an election regulation imposes only "reasonable, nondiscriminatory" restrictions upon First and Fourteenth Amendment rights, "the [s]tate's important regulatory interests are generally sufficient" to justify the restrictions) (quoting *Burdick*, 504 U.S. at 434); see also *Burdick*, 504 U.S. at 434 (holding that only when the regulation subjects such rights to severe restrictions must it be narrowly drawn to advance a compelling state interest). We assume, however, that the PRA is not an election regulation. No case offers a sound definition of an election regulation, and its meaning is not entirely discernible. However, Justice Thomas, in his *Buckley II* concurrence, provides examples of cases that would likely be election regulation cases, see 525 U.S. at 207, and none of them seems to parallel the current case. For example, Justice Thomas cites *Burson v. Freeman*, 504 U.S. 191, 198 (1992), wherein the Court subjected to strict scrutiny a Tennessee law prohibiting (continued...) (...continued) solicitation of voters and distribution of campaign literature within 100 feet of the entrance of a polling place. *Id.* He also cited *Anderson v. Celebrezze*, 460 U.S. 780, 788–90 (1983), which dealt with a challenge to an Ohio regulation that imposed a filing deadline for independent candidates. *Id.* He cited several other cases. See e.g. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Meyer*, 486 U.S. at 421. *Id.* at 206-07. All of these cases, however, dealt with regulations that were content-based; they all dealt directly and specifically with the election process. The PRA, on the other hand, only incidentally deals with the election process and only has attenuated consequences. It does not

[*16] Under intermediate scrutiny, as articulated in *O'Brien*, application of the PRA to referendum petitions is constitutional if the PRA is within the constitutional power of the government to enforce, it furthers an important government interest unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms is no greater than necessary to justify the interest. *O'Brien*, 391 U.S. at 377; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

III. Constitutionality of the PRA

Applying *O'Brien*, we begin by noting that Plaintiffs do not contend that “aside from its impact on speech, [the PRA] is beyond the constitutional power of the [State] to enforce.” *See Clark*, 468 U.S. at 298-99. We thus turn next to the government interests the PRA furthers. The State has asserted two interests: (1) **[*17]** preserving the integrity of the election by promoting government transparency and accountability; and (2) providing Washington voters with information about who supports placing a referendum on the ballot. Both interests plainly qualify as important.¹²

[6]** “A [s]tate indisputably has a compelling interest in preserving the integrity of the election process.” *Eu v. S.F. County Democratic Cent. Comm.*,

prevent the petition signers from signing the petitions or from otherwise lawfully qualifying their referendum for a vote. At most, it *might* deter *some* voters from signing the petition.

¹² In making its strict scrutiny analysis, the district court recognized only one of these interests, “preserving the integrity of its election process,” as a “compelling governmental interest.” It did not address the State’s interest, furthered by the PRA, of an informed electorate.

489 U.S. 214, 231 (1989) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)); *see also Buckley II*, 525 U.S. at 191 (“States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process . . .”). In Washington, the PRA plays a key role in preserving the integrity of the referendum process by serving a government accountability and transparency function not sufficiently served by the statutory scheme governing the referendum process. The oversight procedure provided by statute allows the Secretary of State to limit observers to two opponents and two proponents of the referendum. *See* Wash. Rev. Code § 29A.72.230. This procedure is insufficient to shift oversight from the special interest groups to the general public. *See Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994) (“Without tools such as [*18] the [PRA], government of the people, by the people, for the people, risks becoming government of the people by the bureaucrats, for the special interests.”). Without the PRA, the public is effectively deprived of the opportunity independently to examine whether the State properly determined that a referendum qualified, or did not qualify, for the general election.

Moreover, the PRA is necessary for citizens to make meaningful use of the state superior court challenge also provided by statute. *See* Wash. Rev. Code § 29A.72.240.¹³ The superior court procedure would be at

¹³ That statute provides:

Any citizen dissatisfied with the determination of the secretary of state that . . . [a] referendum petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requir-

best inefficient and at worst useless, if citizens have no rational basis on which to decide whether they are “dissatisfied” with the Secretary of State’s determination before filing a challenge – and they cannot gain that understanding without the right to inspect the petition sheets.

[*19] We have also recognized the State’s “informational interest” as important. *See Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 nn.8-9 (9th Cir. 2007) (noting that the informational interest was “well-established” and that California presented persuasive evidence demonstrating that it was compelling); *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009) (having “little trouble” concluding that the state’s informational interest was important).

Plaintiffs correctly note that *Cal. Pro-Life* and *Canyon Ferry* dealt with the interest in disclosure of financial backers of referenda, not “generally what groups may be in favor of, or opposed to, a particular . . . ballot issue.” *Canyon Ferry*, 556 F.3d at 1032-33 (holding that requiring disclosure of *de minimus* in-kind contributions was unconstitutional because the marginal informational gain did not justify the burden of disclosure). Referendum petition signers, however, cannot be considered “generally” in favor of a particular ballot issue. Referendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect. The

ing the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the . . . petition, or for an injunction to prevent the certification thereof

Wash. Rev. Code § 29A.72.240.

interest in knowing who has taken such action is undoubtedly greater than knowing generally what groups are in favor of or opposed to a ballot issue.

[*20][7]** We conclude that each of the State’s asserted interests is sufficiently important to justify the PRA’s incidental limitations on referendum petition signers’ First Amendment freedoms. *See O’Brien*, 391 U.S. at 376-77. We conclude also that the incidental effect of the PRA on speech is no greater than necessary. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (holding that a restriction need not be the least restrictive means of furthering the State’s interest to survive intermediate scrutiny).

Finally, no one has claimed that the State’s interests are at all related to the suppression or regulation of expression. The stated aim of the PRA, which itself was passed through the initiative process, is to keep the citizens “informed so that they may maintain control over the instruments that they have created.” Wash. Rev. Code § 42.56.030. There is no indication that despite this clear statement, the PRA was nonetheless intended to suppress free expression.

Accordingly, we hold that the PRA as applied to referendum petitions does not violate the First Amendment.¹⁴

¹⁴ Because we conclude that Plaintiffs have failed to satisfy the first *Winters* factor – likelihood of success on the merits – we need not examine the three remaining *Winters* factors, *see supra* at 10 (quoting the four-factor *Winters* test), although we note that the district court’s analysis of the remaining *Winters* factors relied on presumptions, rather than findings of fact, arising from its erroneous legal conclusion that Plaintiffs’ First Amendment rights were likely violated.

[*21] CONCLUSION

The district court applied an erroneous legal standard when it applied strict scrutiny to the PRA. The proper analysis was to apply intermediate scrutiny. Applying this analysis, we conclude that the PRA is constitutional as applied to referendum petitions.

The district court's grant of the preliminary injunction is

REVERSED.

[Order List 558 U.S. ___, Oct. 20, 2009]

SUPREME COURT
OF THE UNITED STATES

JOHN DOE #1, et al.,)	
Applicants,)	
)	
v.)	No. 09A-356
)	
SAM REED, et al.,)	

ORDER IN PENDING CASE

The application presented to Justice Kennedy and by him referred to the Court is granted. The order of the United States Court of Appeals for the Ninth Circuit, case Nos. 09-35818, 09-35826, and 09-35863, entered October 15, 2009, is hereby stayed. The September 10, 2009 order of the United States District Court for the Western District of Washington, case No. C09-5456BHS, granting the motion for preliminary injunction shall remain in effect pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice Stevens would deny the application.

[Case No. 09A356, Oct. 19, 2009]

SUPREME COURT
OF THE UNITED STATES

<u>JOHN DOE #1, et al.,</u>)	
Applicants,)	
)	
v.)	No. 09A-356
)	
<u>SAM REED, et al.,</u>)	

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the order of the United States Court of Appeals for the Ninth Circuit, case Nos. 09-35818, 09-35826, and 09-35863, issued October 15, 2009, which stayed the district court's order granting a preliminary injunction, is hereby stayed. The September 10, 2009, order of the United States District Court for the District of Washington, case No. C09-5456BHS, therefore remains in effect pending further order of the undersigned or of the Court.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

[Doc. 63, filed September 10, 2009]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, et al.,)	
Plaintiffs,)	
)	
v.)	
)	
SAM REED, et al.,)	
Defendants,)	
)	
and)	Case No. C09-5456BHS
)	
WASHINGTON)	The Honorable
COALITION FOR)	Benjamin H. Settle
OPEN GOVERNMENT,)	
Defendants-)	
Intervenors,)	
)	
and)	
)	
WASHINGTON)	
FAMILIES STANDING)	
TOGETHER,)	
Defendants-)	
Intervenors.)	

ORDER GRANTING
PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

This matter comes before the Court on the Plaintiffs' motion for preliminary injunction (Dkt. 3). The

Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file, and hereby grants the motion for the reasons stated herein.

I. BACKGROUND

A. PROCEDURAL BACKGROUND

On July 28, 2009, Plaintiffs filed a complaint and motion for temporary restraining order and preliminary injunction, seeking to enjoin the Secretary of State of Washington (“Secretary of State”) from any public release of documents showing the names and contact information of those individuals who signed petitions in support of Referendum [*2] Measure No. 71 (“R-71”). Dkts. 2 (Plaintiffs’ Complaint) and 3 (Motion for Temporary Restraining Order and Preliminary Injunction).

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

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

2009. Dkt. 62.

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

B. WASHINGTON’S REFERENDUM PROCESS

In Washington, while legislative authority is vested in the state legislature, the people reserve to themselves the power to reject any bill or law through the referendum process. Wash. Const., art. II, § 1 and 1(b).¹ A referendum petition against any bill passed by the legislature must be filed with the Secretary of State within 90 days after [*3] adjournment of the legislative session at which the bill was enacted. *Id.*, § 1(d); RCW 29A.72.160; *see also* WAC 434-379-005 (filing of proposed referendum with Secretary of State).

In order to initiate the referendum process, the state constitution requires the filing of petitions with the Secretary of State that contain the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the Secre-

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

tary of State. Wash. Const., art II, § 1(b); *see also* RCW 29A.72.150. Referendum petition sheets must include a place for each signer to sign and print his or her name, and the address, city, and county at which he or she is registered to vote. RCW 29A.72.130.

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

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

Id.

Upon completion of this verification and canvassing process, the Secretary of State must issue a determination as to whether a referendum petition does or does not contain the requisite number of valid signatures. *See* RCW 29A.72.240. Any citizen dissatisfied with the

Secretary of State’s determination may file an action in state superior court for a citation requiring the Secretary of State to submit the petition to the state court “for [*4]examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be.” *Id.* Within five days of the state superior court’s decision, the party may seek review by the Washington Supreme Court. *Id.*

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

C. WASHINGTON’S PUBLIC RECORDS ACT

Washington’s Public Records Act generally makes all public records available for public inspection and copying. RCW 42.56.070.² The term “public record” is defined as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency.” RCW 42.56.010(2). The Public Records Act provides that “[i]n the event of conflict between the provisions of [the Public Records Act] and any other act, the provisions of [the Public Records Act] shall govern.” RCW 42.56.030. Exemptions to the Public Records Act must either be included in the act itself, or clearly expressed in another statute. RCW 42.56.070(1).

The Public Records Act also contains the following

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

language:

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

RCW 42.56.030.

[*5] D. OTHER RELEVANT STATE LAW

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

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

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

E. REFERENDUM MEASURE NO. 71

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

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

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

On July 25, 2009, Protect Marriage submitted a petition containing over 138,500 [*6] signatures to the Secretary of State for verification and canvassing. *Id.* at 7. According to Nick Handy, Director of Elections for the Secretary of State, the petition sheets were delivered in an “open, public forum,” with R-71 supporters and opponents in attendance. Dkt. 26 at 2 (Declaration of Nick Handy). The Elections Division began the process of counting and verifying individual signatures shortly after the petition sheets were filed. *Id.* at 3.

The petition appears to conform with Washington state’s formatting requirements set out in RCW

29A.72.130 and contains the following language:

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

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

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

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

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

As of August 20, 2009, the Secretary of State has

received public record requests of the Referendum 71 petition from the following individuals or entities: (1) Brian Murphy of WhoSigned.org (Dkt. 23 at 10); (2) Toby Nixon, President of the Washington Coalition for Open Government (*id.* at 12); (3) Arthur West (*id.* at 14); (4) Brian Spencer, [*7] on behalf of Desire Enterprises (Dkt. 30 at 9); and (5) Anne Levinson, on behalf of Washington Families Standing Together (*id.* at 11).⁴

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

II. PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION

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

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

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

[*8] A. PRELIMINARY INJUNCTION STANDARD

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

1. Likelihood of Success

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

a. Individual Right

Plaintiffs assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. *Id.* [*9] The type of free speech in question is anonymous political speech. As the Honorable Thomas S. Zilly, United States District Judge, has previously stated:

The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. *See generally* [McIntyre v. Ohio Elec-

tions Comm'n, 514 U.S. 334, 341-342, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995)]. Anonymous speech is a great tradition that is woven into the fabric of this nation's history.

When speech touches on matters of public political life, such as debate over the qualifications of candidates, discussion of governmental or political affairs, discussion of political campaigns, and advocacy of controversial points of view, such speech has been described as the "core" or "essence" of the First Amendment. *See McIntyre*, 514 U.S. at 346-47.

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

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. amend. I.⁵ The Supreme Court has consistently held that a component of the First Amendment is the right to anonymously participate in a political process. *See e.g., Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (invalidating, on First Amendment Grounds, a Colorado statute that required initiative petition circulators to wear identification badges); *McIntyre*, 514 U.S. at 357 (overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature, holding that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent prac-

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

tice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority.”); *Talley v. California*, 326 U.S. 60, 65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (invalidating a California statute prohibiting the distribution of “any handbill in any place under any circumstances” that did not contain the name and address of the [*10] person who prepared it, holding that identification and fear of reprisal might deter “perfectly peaceful discussions of public matters of importance”).

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

Defendants do assert that Washington’s Constitution requires public disclosure of the personally identifying information provided when a person signs a referendum petition. Dkt. 25 at 8. But Washington’s Constitution states only that “all such petitions shall be filed with the secretary of state,” and it does not state that the information contained on the petition

must also be considered public information. *See* Wash. Const., art. II, § 1(d). In fact, both the Supreme Court and the Washington Supreme Court have previously held that an initiative process falls within the protections of political speech. *Meyer v. Grant*, 486 U.S. 414, 421, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); *Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 239 (“It is undisputed that gathering initiative signatures in some manner, at some place, is a constitutionally guaranteed practice. It is at the core of both the First Amendment and Const. art. 1, s 5.”).

Defendants also argue that participation should not be considered protected political speech because the petition signers act as quasi-legislators. Dkt. 25 at 10-11. Defendants reason that because the referendum and initiative processes are reserved powers by the people to legislate, the petition signer acts like a legislator with such action [*11] being inherently public. *Id.* To support this argument, Defendants rely on *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999), and *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000). Dkt. 25 at 10. But both of these cases are distinguishable. First, the *Heavey* court addressed the question of whether a writ of mandamus should issue against a state officer when the officer defended the constitutionality of a referendum. 138 Wn.2d at 803-804. While the *Heavey* court did state that referendum and initiative measures involve the people in their legislative capacity, it was only to note that such legislation “remain[s] subject to the mandates of the Constitution.” *Id.* at 808. The court did not hold that a “quasi-legislative” action requires waiver of a funda-

mental right to anonymous political speech.

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

In this case, it is important to note that the Court is unaware of any authority that is directly on point for the question before the Court. The weight of authority, however, counsels toward the finding that supporting the referral of a referendum is likely protected political speech. For example, in *Meyer*, the Court noted that, of necessity, "the circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421. In fact, the Court explicitly stated that the "record in this case demonstrates that the circulation of appellees' petition involved political speech." *Id.*, n.4. Moreover, in *Buckley*, the Court held that petition circulation is "core political speech," because it involves "*interactive* communication concerning political change." 525 U.S. at 187 (quoting *Meyer*, 486 U.S. at 422) (emphasis added). The *Buckley* Court also noted that "First Amendment protection for such *interaction* . . . is at its zenith." *Id.* at 187 (internal quotations omitted) (emphasis added). It would seem that if the circulator is protected by [*12] the First Amendment and the process is at the core of the First Amendment, then the people signing the petition in support of referral of the referendum would also be entitled to the protections of the First Amendment. In fact, the *Buckley* Court touched upon the protection of

the “interaction” in the circulation process, which involved a “political conversation” and the “exchange of ideas.” *Id.* at 192. By necessity, an interaction involves the circulator as well as one who may support the referral of a referendum. Based on these authorities, the Court finds that it is likely that an individual who supports the referral of a referendum is entitled to protection under the First Amendment.

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

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

⁶ Some of the relevant cases discuss a level of review called “exacting” scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (a compelled disclosure

[*13] b. Governmental Interest

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

It is important to reiterate two points: (1) for the purposes of preliminary relief, the Court must determine only whether Plaintiffs are likely to succeed on the merits of their claim (*see Winter, supra*); and (2) Plaintiffs are only challenging the Public Records Act that requires disclosure of public documents and are not challenging the requirement of RCW 29A.72.130

case). But “exacting” scrutiny is “strict” scrutiny. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (citing *First Nat’l Bank of Boston v. Bellotti*, 436 U.S. 765, 786 (1978) (equating “exacting” scrutiny with “strict” scrutiny). *See also Fed. Elec. Comm’n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (reiterating *McIntyre*’s holding that “exacting” scrutiny is applied to determine whether the law is narrowly tailored to serve an overriding state interest and applying “strict” scrutiny to a federal campaign statute).

that those who sign in support of referral of the referendum disclose identifying information. Based on the record before the Court, the Court finds that Plaintiffs have established a likelihood of success on the claim that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process.

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

We have several times said no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made. But the [*14] First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. We therefore . . . are satisfied that . . . the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.

Id. (internal citations and quotations omitted). The Court held that the law violated the petition circulators' First Amendment free speech guarantee. *Id.* at 205. In reaching this conclusion, the Court

separated what it considered necessary or proper ballot-access controls from restrictions that unjustifiably inhibit the circulation of ballot initiative petitions. *Id.* at 192-93. The Court noted that evidence was presented that “demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process.” *Id.* at 197-98 (internal citations omitted).

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

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

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

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

The verification and canvass of signatures on

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

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

In light of the State’s own verification process and the State’s own case law, at this time the Court is not persuaded that full public disclosure of referendum petitions is necessary as “an important check on the integrity of the referendum election process.” In the alternative, Defendants assert that there exists a second “compelling” interest in favor of disclosure. Dkt. 25 at 17. Defendants argue that the electorate is entitled to know “who is essentially lobbying for their vote, and thus, who likely will benefit from the measure.” *Id.* (citing *California Pro-Life Council v. Getman*, 328 F. 3d 1088, 1105-07) (9th Cir. 2003). But this argument is unavailing because neither the Court nor the parties have the ability to identify whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public. In other words, the identity of the person who supports the referral of a referendum

is irrelevant to the voter as the voting public must consider the content of the referendum and be entitled to a process by which it can ensure that the petitions are free from fraud.

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

c. Conclusion - Likelihood of Success

The Court finds that Plaintiffs have established that it is likely that supporting the referral of a referendum is protected political speech. The Court also finds that Plaintiffs have established that it is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the [*16] referendum process. Therefore, the Court concludes that Plaintiffs have established that they are likely to succeed on the merits of their claim that the Public Records Act is unconstitutional as applied to the disclosure of referendum petitions. At this time, the Court need not reach the merits of Plaintiffs' second claim for relief.

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

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

“Deprivations of speech rights presumptively constitute irreparable harm for purposes of a prelimi-

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

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

3. Balance of the Equities

In determining whether to grant or deny a motion for preliminary injunction, the court must balance the equities of the respective parties’ interests. *Winter, supra*. Where a case raises serious First Amendment questions, a court is compelled to find the potential [*17] for irreparable harm, “or that at the very least the balance of hardships tips sharply in [the moving party’s] favor” *Summartano v. First Judicial District Court, in and for County of Carson City*, 303 F. 3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). Because this Court finds that Plaintiffs have established that this case likely raises serious First

Amendment questions in regard to protected speech and this Court thereby presumes irreparable injury, under *Summartano*, this court also finds that the equities tip in favor of the Plaintiffs. *See id.*

4. Public Interest

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

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

III. ORDER

Therefore, it is hereby

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

DATED this 10th day of September, 2009.

/s Benjamin H. Settle

BENJAMIN H. SETTLE

United States District Judge

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington Constitution, article II, §1(b)

The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: Provided, That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the

legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

Revised Code of Washington § 29A.68.011
Prevention and correction of election frauds and errors.

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

(1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or

(2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or

(3) The name of any person has been or is about to be wrongfully placed upon the ballots; or

(4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or

(5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or

(6) An error or omission has occurred or is about to occur in the official certification of the election.

An affidavit of an elector under subsections (1) and (3) of this section when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the filing period for nominations for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsection (6) of this section shall be filed with the appropriate court no later than ten days following the official certification of the election as provided in RCW 29A.60.190, 29A.60.240, or 29A.60.250 or, in the case of a recount, ten days after the official certification of the amended abstract as provided in RCW 29A.64.061.

Revised Code of Washington § 29A.72.200

Petitions — Destruction on final refusal.

If no appeal is taken from the refusal of the secretary of state to file a petition within the time prescribed, or if an appeal is taken and the secretary of state is not required to file the petition by the mandate of either

the superior or the supreme court, the secretary of state shall destroy it.

Revised Code of Washington § 29A.72.230

Petitions — Verification and canvass of signatures, observers — Statistical sampling — Initiatives to legislature, certification of.

Upon the filing of an initiative or referendum petition, the secretary of state shall proceed to verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county. The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides. The secretary of state may use any statistical sampling techniques for this verification and canvass which have been adopted by rule as provided by chapter 34.05 RCW. No petition will be rejected on the basis of any statistical method employed, and no petition will be accepted on the basis of any statistical method employed if such method indicates that the petition contains fewer than the requisite number of signatures of legal voters. If the secretary of state

finds the same name signed to more than one petition, he or she shall reject all but the first such valid signature. For an initiative to the legislature, the secretary of state shall transmit a certified copy of the proposed measure to the legislature at the opening of its session and, as soon as the signatures on the petition have been verified and canvassed, the secretary of state shall send to the legislature a certificate of the facts relating to the filing, verification, and canvass of the petition.

Revised Code of Washington § 29A.72.240**Count of signatures — Review.**

Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be. Such application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined.

The decision of the superior court granting or refusing to grant the writ of mandate or injunction may be reviewed by the supreme court within five days after the decision of the superior court, and if the supreme court decides that a writ of mandate or

injunction, as the case may be, should issue, it shall issue the writ directed to the secretary of state; otherwise, it shall dismiss the proceedings. The clerk of the supreme court shall forthwith notify the secretary of state of the decision of the supreme court.

Revised Code of Washington § 29A.84.210

Violations by officers.

Every officer who willfully violates any of the provisions of chapter 29A.72 RCW or RCW 29A.32.010 through *29A.32.120, for the violation of which no penalty is herein prescribed, or who willfully fails to comply with the provisions of chapter 29A.72 RCW or RCW 29A.32.010 through *29A.32.120, is guilty of a gross misdemeanor punishable to the same extent as a gross misdemeanor that is punishable under RCW 9A.20.021.

Revised Code of Washington § 29A.84.230

Violations by signers.

(1) Every person who signs an initiative or referendum petition with any other than his or her true name is guilty of a class C felony punishable under RCW 9A.20.021.

(2) Every person who knowingly signs more than one petition for the same initiative or referendum measure or who signs an initiative or referendum petition knowing that he or she is not a legal voter or

who makes a false statement as to his or her residence on any initiative or referendum petition, is guilty of a gross misdemeanor.

Revised Code of Washington § 29A.84.250

Violations — Corrupt practices.

Every person is guilty of a gross misdemeanor who:

(1) For any consideration or gratuity or promise thereof, signs or declines to sign any initiative or referendum petition; or

(2) Provides or receives consideration for soliciting or procuring signatures on an initiative or referendum petition if any part of the consideration is based upon the number of signatures solicited or procured, or offers to provide or agrees to receive such consideration any of which is based on the number of signatures solicited or procured; or

(3) Gives or offers any consideration or gratuity to any person to induce him or her to sign or not to sign or to vote for or against any initiative or referendum measure; or

(4) Interferes with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum petition or with the right to vote for or against an initiative or referendum measure by threats, intimidation, or any other corrupt means or practice; or

(5) Receives, handles, distributes, pays out, or gives away, directly or indirectly, money or any other thing of value contributed by or received from any person, firm, association, or corporation whose residence or

principal office is, or the majority of whose members or stockholders have their residence outside, the state of Washington, for any service rendered for the purpose of aiding in procuring signatures upon any initiative or referendum petition or for the purpose of aiding in the adoption or rejection of any initiative or referendum measure. This subsection does not apply to or prohibit any activity that is properly reported in accordance with the applicable provisions of chapter 42.17 RCW. A gross misdemeanor under this section is punishable to the same extent as a gross misdemeanor that is punishable under RCW 9A.20.021.

Revised Code of Washington § 42.17.010

Declaration of policy.

It is hereby declared by the sovereign people to be the public policy of the state of Washington:

(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

(2) That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings.

(3) That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interest.

(4) That our representative form of government is founded on a belief that those entrusted with the offices of government have nothing to fear from full public disclosure of their financial and business hold-

ings, provided those officials deal honestly and fairly with the people.

(5) That public confidence in government at all levels is essential and must be promoted by all possible means.

(6) That public confidence in government at all levels can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and decisions.

(7) That the concept of attempting to increase financial participation of individual contributors in political campaigns is encouraged by the passage of the Revenue Act of 1971 by the Congress of the United States, and in consequence thereof, it is desirable to have implementing legislation at the state level.

(8) That the concepts of disclosure and limitation of election campaign financing are established by the passage of the Federal Election Campaign Act of 1971 by the Congress of the United States, and in consequence thereof it is desirable to have implementing legislation at the state level.

(9) That small contributions by individual contributors are to be encouraged, and that not requiring the reporting of small contributions may tend to encourage such contributions.

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level

must be assured as a fundamental and necessary precondition to the sound governance of a free society.

The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected. In promoting such complete disclosure, however, this chapter shall be enforced so as to insure that the information disclosed will not be misused for arbitrary and capricious purposes and to insure that all persons reporting under this chapter will be protected from harassment and unfounded allegations based on information they have freely disclosed.

Revised Code of Washington § 42.56.001

Finding, purpose.

The legislature finds that chapter 42.17 RCW contains laws relating to several discrete subjects. Therefore, the purpose of chapter 274, Laws of 2005 is to recodify some of those laws and create a new chapter in the Revised Code of Washington that contains laws pertaining to public records.

Revised Code of Washington § 42.56.010(2)**Definitions.**

(2) “Public record” includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

Revised Code of Washington § 42.56.070**Documents and indexes to be made public.**

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be

explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights

of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating

the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include

all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED

FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act.

Initiative 276 § 28 (1972)
(codified at RCW 42.17.270 (1973))
(current version at RCW 42.56.080)

Times for Inspection and Copying. Public records shall be available for inspection and copying during the customary office hours of the agency: PROVIDED, that if the agency does not have customary office hours of at least thirty hours per week, the public records shall be available from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the person making the request and the agency or its representative agree on a different time.

[Washington Attorney General
Opinion, Aug. 25, 1938]

Initiative and Referendum - Petitions - Inspection by Interested Persons

Olympia, Wash., August 25, 1938

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

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

official ruling of this office.

I wish to inform you that it was only an unofficial letter which did not express the opinion of this office, and the ruling made in that letter is hereby overruled. A copy of an opinion of this office under date of March 14, 1938, to The Honorable Cliff Yelle, state auditor, is enclosed which discusses the matter more thoroughly as to what constitutes public records in any office.

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

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

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

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

G.W. Hamilton, *Attorney General*

[Washington Attorney General
Opinion, May 28, 1956]

**INITIATIVE PETITION SIGNATURES - -
PUBLIC NATURE OF**

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

May 28, 1956

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

Dear Sir:

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

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

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

ANALYSIS

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

Each voter is required to sign in triplicate a registra-

tion card containing his full name and address and listing the precinct in which he is registered. RCW 29.07.090. The third copy of registration cards is filed with the secretary of state.

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

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

RCW 29.79.200 provides in part:

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

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

While there is no specific statute on the precise ques-

tion presented, the above statutes demonstrate, in our view, a tendency on the part of the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege.

RCW 29.79.240 provides as follows:

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

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

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

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

With the exception of representatives of the public entitled to be present during the canvass of the signatures, we reaffirm our previous opinion. We conclude that to regard the names appearing on such petitions

as public records for any purpose other than to assure an accurate canvass and to permit prosecuting attorneys to prosecute violations is contrary to public policy.

We hope the foregoing analysis will prove helpful.

Very truly yours,
Don Easvold
Attorney General
Andy G. Engebretsen
Assistant Attorney General

[A. Ludlow Kramer, Letter to State Senator
Hubert F. Donohue, July 13, 1973]

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

Dear Senator Donahue:

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

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

As you well know, you are entitled to seek an attorney general's opinion if you so wish, but my position

will remain unchanged unless so directed by either the attorney general, the Legislature or the courts.

Sincerely,

/s A. Ludlow Kramer

A. Ludlow Kramer

[A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973]

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

Secretary Kramer's statement reads as follows:

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

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