

1 James Bopp, Jr. (Ind. State Bar No. 2838-84)*
 Richard E. Coleson (Ind. State Bar No. 11527-70)*
 2 Barry A. Bostrom (Ind. State Bar No.11912-84)*
 Sarah E. Troupis (Wis. State Bar No. 1061515)*
 3 Scott F. Bieniek (Ill. State Bar No. 6295901)*
 BOPP, COLESON & BOSTROM
 4 1 South Sixth Street
 Terre Haute, IN 47807-3510
 5 Telephone: (812) 232-2434
 Facsimile: (812) 235-3685
 6 Counsel for All Plaintiffs

7 Benjamin W. Bull (AZ Bar No. 009940)*
 ALLIANCE DEFENSE FUND
 8 15100 North 90th Street
 Scottsdale, Arizona 85260
 9 Telephone: (480) 444-0020
 Facsimile: (480) 444-0028
 10 Counsel for All Plaintiffs

11 Timothy D. Chandler (Cal. State Bar No. 234325)**
 ALLIANCE DEFENSE FUND
 12 101 Parkshore Drive, Suite 100
 Folsom, CA 95630
 13 Telephone: (916) 932-2850
 Facsimile: (916) 932-2851
 14 Counsel for All Plaintiffs

15 * *Admitted Pro Hac Vice*
 16 ** *Designated Counsel for Service*

**United States District Court
 Eastern District of California
 Sacramento Division**

<p>19 PROTECTMARRIAGE.COM, et al.,</p> <p style="text-align: center;">20 Plaintiffs,</p> <p style="text-align: center;">21 vs.</p> <p>22 DEBRA BOWEN, et al.,</p> <p style="text-align: center;">23 Defendants.</p>	<p>Case No. 2:09-CV-00058-MCE-DAD</p> <p>PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT</p> <p>Date: Aug. 13, 2009 Time: 2:00 P.M. Courtroom: 7, 14th Floor Judge Morrison C. England, Jr.</p>
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**Plaintiffs' Memorandum in Support
 of Motion for Summary Judgment**

Table of Contents

1		
2	Introduction	1
3	Procedural History	2
4	Statement of Undisputed Facts	2
5	Argument	3
6	I. Compelled disclosure provisions are subject to strict scrutiny.	3
7	II. Compelled disclosure provisions impose substantial burdens	
8	on First Amendment rights.	5
9	A. Technological advances have qualitatively changed the	
10	landscape in which compelled disclosure takes place.	6
11	B. While compelled disclosure imposes substantial burdens	
12	on First Amendment rights, compelled <i>public</i> disclosure	
13	increases the burdens exponentially.	12
14	C. Research demonstrates that compelled disclosure has a	
15	significant chilling effect on political speech.	13
16	III. There is a reasonable probability that any individuals supporting	
17	a traditional definition of marriage will be subjected to threats,	
18	harassment, and reprisals.	16
19	A. The standards of the disclosure exemption test.	17
20	B. The quantum and quality of evidence required	
21	to meet the reasonable-probability test.	18
22	1. Plaintiffs are not required to establish a direct causal	
23	link between disclosure and specific instances of	
24	threats, harassment, and reprisals.	19
25	2. Plaintiffs need not demonstrate that they, or their	
26	members, have been subjected to threats, harassment,	
27	and reprisals.	19
28		

1	3. The reasonable-probability test requires only	
2	that threats, harassment, and reprisals exist,	
3	not that they be severe.	20
4	4. The exemption is not limited to minor political parties.	22
5	5. The test does not require any threats, harassment, or	
6	reprisals to be directed at Plaintiffs by government	
7	officials.	24
8	C. There is a reasonable probability of threats,	
9	harassment, and reprisals.	25
10	IV. The PRA’s \$100 reporting threshold is unconstitutional,	
11	facially and as-applied.	32
12	A. California lacks a compelling interest sufficient to justify	
13	compelled ballot measure disclosure.	32
14	B. The PRA’s \$100 reporting threshold fails strict scrutiny.	35
15	1. California has only a limited compelling	
16	informational interest in disclosure.	35
17	2. The \$100 reporting threshold is not narrowly	
18	tailored to the State’s interest.	40
19	3. The PRA’s failure to account for inflation must	
20	factor into the strict-scrutiny analysis.	41
21	4. California cannot support its \$100 disclosure	
22	provision by arguing that it is necessary to	
23	enforce some higher constitutional threshold.	44
24	C. The threshold is unconstitutional as-applied to Plaintiffs	
25	because there is a reasonable probability of threats,	
26	harassment, and reprisals.	44
27	V. Post-election public ballot-measure reporting and the failure	
28	to purge public reports after the election are unconstitutional.	45

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2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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23
24
25
26
27
28

A. California does not have a compelling state interest in the
public disclosure of donors to a ballot measure *after*
the election. 45

B. Post-election public disclosure is not the least restrictive
means of addressing the potential interests of the State. 47

Conclusion 51

Table of Authorities

Cases:

AFL-CIO v. FEC,

333 F.3d 168 (D.C. Cir. 2003) 13

Alaska Right to Life Comm. v. Miles,

441 F.3d 773 (9th Cir. 2006) 5

Am. Civil Liberties Union of Nev. v. Heller,

378 F.3d 979 (9th Cir. 2004) 5, 12, 13, 47

Am. Constitutional Law Found., Inc. v. Meyer,

120 F.3d 1092 (10th Cir. 1997) 34

Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 106 S. Ct. 2505 (1986) 3

Averill v. City of Seattle,

325 F. Supp. 2d 1173 (W.D. Wash. 2004) 19, 21, 27, 31

Bay Area Citizens Against Lawsuit Abuse,

982 S.W.2d 371 (Tex. 1998) 21

Brown v. Socialist Workers '74 Campaign Comm.,

459 U.S. 87, 103 S. Ct. 416 (1982) 18, 21, 29

Buckley v. Valeo,

424 U.S. 1, 96 S. Ct. 612 (1976) *passim*

Buckley v. Am. Constitutional Law Found., Inc.,

525 U.S. 182, 119 S. Ct. 636 (1999) 5, 34

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328 F.3d 1088 (9th Cir. 2003) *passim*

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507 F.3d 1172 (9th Cir. 2007) *passim*

Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,

556 F.3d 1021 (9th Cir. 2009) *passim*

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2	454 U.S. 290, 102 S. Ct. 434 (1981)	3
3	<i>Davis v. FEC,</i>	
4	_ U.S. _, 128 S. Ct. 2759 (2008)	4, 5, 12
5	<i>Eu v. San Francisco County Democratic Cent. Comm.,</i>	
6	489 U.S. 214, 109 S. Ct. 1013 (1989)	35
7	<i>FEC v. Hall-Tyner Election Campaign Comm.,</i>	
8	678 F.2d 416 (2d Cir. 1982)	19
9	<i>FEC v. Wisconsin Right to Life, Inc.,</i>	
10	551 U.S. 449, 127 S. Ct. 2652 (2007)	4, 12, 44, 47
11	<i>First Nat’l Bank of Boston v. Bellotti,</i>	
12	435 U.S. 765, 98 S. Ct. 1407 (1978)	<i>passim</i>
13	<i>Indep. Newspapers, Inc. v. Brodie,</i>	
14	966 A.2d 432 (Md. 2009)	9
15	<i>Jansson v. Bowen,</i>	
16	No. 34-2008-00017351 (Sup. Ct. Of Cal., Dept. 29,	
17	Sacramento, Cal., Aug. 7, 2008)	37
18	<i>Marks v. United States,</i>	
19	430 U.S. 188, 97 S. Ct. 990 (1977)	12
20	<i>McArthur v. Smith,</i>	
21	716 F. Supp. 592 (S.D. Fla. 1989)	23, 25
22	<i>McConnell v. FEC,</i>	
23	251 F. Supp. 2d 176 (D.D.C. 2003)	13, 23
24	<i>McConnell v. FEC,</i>	
25	540 U.S. 93, 124 S. Ct. 619 (2003)	5, 18
26	<i>McIntyre v. Ohio Elections Comm’n.,</i>	
27	514 U.S. 334, 115 S. Ct. 1511 (1995)	4, 15, 21, 34
28		

1	<i>NAACP v. Alabama,</i>	
2	357 U.S. 449, 78 S. Ct. 1163 (1958)	<i>passim</i>
3	<i>New York Times Co. v. Sullivan,</i>	
4	376 U.S. 254, 84 S. Ct. 710 (1964)	24
5	<i>Oregon Socialist Workers 1974 Campaign Comm. v. Paulus,</i>	
6	432 F. Supp. 1255, 1259 (D. Or. 1977)	20, 23
7	<i>People v. Scott,</i>	
8	119 Cal. Rptr. 2d 797 (2002)	48
9	<i>Randall v. Sorrell,</i>	
10	548 U.S. 230, 126 S. Ct. 2479 (2006)	41, 42, 43
11	<i>Republican Party of Minnesota v. White,</i>	
12	536 U.S. 765, 122 S. Ct. 2528 (2002)	5, 35, 45
13	<i>Rutan v. Republican Party of Illinois,</i>	
14	497 U.S. 62, 110 S. Ct. 2729 (1990)	35
15	<i>Simon & Schuster v. New York State Crime Victims Bd.,</i>	
16	502 U.S. 105, 112 S. Ct. 501 (1991)	35
17	<i>Stromberg v. People of the State of California,</i>	
18	283 U.S. 359, 51 S. Ct. 532 (1931)	3
19	<i>Turner Broad. Sys. v. FEC,</i>	
20	512 U.S. 622, 114 S. Ct. 2445 (1994)	40, 50
21	<i>Constitutions, Statutes, Administrative Regulations, and Court Rules:</i>	
22	U.S. Const. amend. I	3
23	1931 Ohio Laws 113 v. 307 § 186	42
24	1931 Ohio Laws 114 v. 712	42
25	1980 Cal. Stat. 611 § 31	42
26	Cal. Elec. Code § 9050	37
27	Cal. Elec. Code § 9081	37, 39
28	Cal. Elec. Code § 9084	37, 39

1	Cal. Gov't Code § 81000	1
2	Cal. Gov't Code § 81001	38, 39
3	Cal. Gov't Code § 81008	8
4	Cal. Gov't Code § 82000	46
5	Cal. Gov't Code § 82003	46
6	Cal. Gov't Code § 84102	47
7	Cal. Gov't Code § 84106	47
8	Cal. Gov't Code § 84200	44, 49
9	Cal. Gov't Code §	48
10	Cal. Gov't Code § 84503	48
11	Cal. Gov't Code § 84504	47
12	Cal. Gov't Code § 84600	8
13	Cal. Gov't Code § 84602	11
14	Cal. Gov't Code § 88000	37, 39
15	Cal. Gov't Code § 88001	37, 39
16	Cal. Gov't Code § 91000	44, 49
17	Cal. Code Regs. tit. 2, § 18402	47, 48
18	E.D. Cal. R. 5-133	6
19	Fair Campaign Practices Act, Colorado (eff. Jan. 15, 1997)	42
20	Fed. R. Civ. P. 5.2	10, 11
21	Fed. R. Civ. P. 56	3
22	Laws 1979, c. 79-400 (Fla.)	42
23	Mass. Gen Laws ch. 345, §§ 3, 4	42
24	Wash. Rev. Code Ann. § 42.17.090(1)(b) (1991)	42
25	<i>Other Sources</i>	
26	AbsoluteAstronomy.com	6
27	Andres Araiza, <i>Prop 8 Threat: Fresno Police Close</i>	
28	<i>to Arrest</i> , ABC-30 (KFSN-TV) (Oct. 31, 2008)	28

1	ARPANET - The First Internet	6
2	Aurelio Rojas, <i>State to Prope Allegation of Mormon Church Role</i>	
3	<i>in Prop. 8</i> , Sacramento Bee (Nov. 25, 2008)	48
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6	<i>Overly Complex and Unduly Burdensome: The Critical</i>	
7	<i>Need to Simplify the Political Reform Act</i> (July 2000)	43
8	Bob Egelko, <i>Prop. 8 Stands; More Ballot Battles Ahead</i> ,	
9	San Francisco Chronicle (May 27, 2009)	23
10	Brad Stone, <i>Prop. 8 Donor Web Site Shows Disclosure Law</i>	
11	<i>Is 2-Edged Sword</i> , N.Y. Times (Feb. 8, 2009)	9
12	Bureau of Labor Statistics, CPI Inflation Calculator	42, 43
13	California Secretary of State - CalAccess - Campaign Finance,	
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17	http://www.calvoter.org/about/index.html	12
18	Center for Governmental Studies, <i>Democracy by Initiative: Shaping</i>	
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21	<i>Denied: Electronic Reporting of Campaign Finance Activity</i>	
22	(Winter 2000)	7, 8
23	David S. Broder, <i>Democracy Derailed: Initiative Campaigns</i>	
24	and the Power of Money (2000)	37, 38
25	Dick M. Carpenter II, <i>Disclosure Costs: Unintended Consequences</i>	
26	<i>of Campaign Finance Reform</i> (March 2007)	<i>passim</i>
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2	Report, Jan. 15, 2009	7
3	<i>Hilton, Miss California Take Sides on “Today,”</i>	
4	San Francisco Chronicle (Apr. 23, 2009)	20
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7	<i>Elections: Davis, White, and the Future of Judicial Campaign</i>	
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14	<i>in America 2007</i> , Jan. 2008	6, 7
15	<i>Newsom Tweets in to Governor’s Race</i> , San Francisco Chronicle,	
16	A-14 (Apr. 22, 2009)	10
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18	PCMag.com, <i>PC Magazine Online Encyclopedia</i> ,	
19	http://www.pcmag.com/encyclopedia	10, 26
20	PONG-Story	6
21	<i>Prop 8 Maps</i> , http://www.eightmaps.com/	9, 26
22	Stuart Silverstein and Johanna Neuman, <i>Joe Biden is Obama’s</i>	
23	<i>Running Mate</i> , L.A. Times (Aug. 23, 2008)	10
24	William McGeeveran, <i>Mrs. McIntyre’s Checkbook: Privacy</i>	
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26	Xerox Factbook	6
27		
28		

1 **INTRODUCTION**

2 Plaintiffs ProtectMarriage.com—Yes on 8, a Project of California Renewal
3 (“**ProtectMarriage.com**”), National Organization for Marriage—Yes on 8, Sponsored by
4 National Organization for Marriage (“**NOM-California**”), John Doe #1, an individual, and as a
5 representative of the proposed Class of Major Donors (“**Major Donors**”),¹ and National
6 Organization for Marriage California PAC (“**NOM-California PAC**”)² seek summary judgment
7 on all counts in their Third Amended Complaint, declaring:

- 8 (1) The Political Reform Act of 1974, Cal. Gov’t Code §§ 81000 *et seq.* (the “PRA”), is
9 unconstitutional as applied to Plaintiffs because compliance with the PRA will expose
10 Plaintiffs to a reasonable probability of threats, harassment, and reprisals;
11 (2) The PRA’s requirement that committees report the name, address, occupation, and
12 employer for every contributor of \$100 or more is unconstitutionally overbroad and in
13 violation of the First Amendment because it is not narrowly tailored to serve a
14 compelling government interest;
15 (3) The PRA’s requirement that reports submitted after an election on a ballot measure be
16 publicly disclosed is unconstitutional under the First Amendment, facially and as-
17 applied, because it is not narrowly tailored to serve a compelling government interest;
18 and
19 (4) The PRA is unconstitutional under the First Amendment, facially and as-applied,
20 because it lacks a mechanism for purging public reports related to a ballot measure after
21 the election to which they relate has occurred.

22
23
24 ¹ Plaintiffs filed their Motion for Class Certification and Memorandum in Support of Motion
25 for Class Certification concurrently with their Motion for Summary Judgment.

26 ² Together, ProtectMarriage.com, NOM-California, NOM-California PAC and the Class of
27 Major Donors are referred to as “**Plaintiffs.**” ProtectMarriage.com and NOM-California are
28 referred to collectively as “**Ballot Committee Plaintiffs.**” Plaintiffs ProtectMarriage.com,
NOM-California, and NOM-California PAC are referred to collectively as “**Committee
Plaintiffs.**”

1 **PROCEDURAL HISTORY**

2 Plaintiffs filed suit on January 7, 2009, challenging various PRA provisions. On January 9,
3 2009, Plaintiffs filed a Motion for Preliminary Injunction along with their First Amended
4 Complaint, adding Plaintiff John Doe #1 and the proposed class of Major Donors. On January
5 22, 2009, Plaintiffs filed their Second Amended Complaint, substituting Defendant Herrera for
6 Defendant Teichert. A hearing on the Preliminary Injunction Motion was held on January 29,
7 2009. At the close of the hearing, this Court denied Plaintiffs’ Motion for Preliminary Injunction.
8 A written order and memorandum followed on January 30, 2009. On May 28, 2009, Plaintiffs
9 filed their Third Amended Complaint, adding Plaintiff NOM-California PAC. Plaintiffs now file
10 a Motion for Summary Judgment, together with this Memorandum in Support of Motion for
11 Summary Judgment.

12 **STATEMENT OF UNDISPUTED FACTS**

13 Plaintiffs have set forth the facts in their Statement of Undisputed Facts, filed concurrently
14 with this Memorandum in Support of Motion for Summary Judgment. Since the preliminary
15 injunction hearing, Plaintiffs have uncovered an alarming amount of harassment—including
16 evidence of a larger, coordinated campaign designed to intimidate any supporter of Proposition 8
17 or a traditional definition of marriage. The forty-nine additional declarations filed concurrently
18 with this motion supplement the nine declarations originally filed in support of Plaintiffs’
19 Motion for Preliminary Injunction, each of which details an example of the type of threats,
20 harassment, and reprisals directed at supporters of a traditional definition of marriage. In some
21 instances the harassment can be traced directly to an individual’s financial contribution to a
22 committee that supported Proposition 8. For example, John Doe #11 had the back window of her
23 car smashed for supporting Proposition 8 and John Doe #14 had his home egged and floured.
24 John Doe Decl. #11 & #14. Moreover, the declarations demonstrate that the threats, harassment,
25 and reprisals described in earlier declarations continue to occur months after the election and are
26 likely to occur in the future. *See* John Doe Decl. #10 (stating his only activity in support of
27 Proposition 8 was a financial contribution first reported on February report, harassment occurred
28 shortly after his contribution was publicly reported) & #54 (same).

ARGUMENT

Summary judgment is appropriate where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). This does not mean that there cannot be some dispute as to the facts: “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10 (1986). Further, “[f]actual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248, 106 S. Ct. at 2510. Here, there is no genuine issue as to any material fact that might affect the outcome and Plaintiffs are entitled to judgment on all claims in their Third Amended Complaint.

I. Compelled disclosure provisions are subject to strict scrutiny.

The First Amendment to the United States Constitution states, “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I.³ The freedoms of speech and association protected by the First Amendment have their “fullest and most urgent application precisely to the conduct of campaigns for political office,” *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct. 612, 632 (1976) (citation omitted), and the protections undoubtedly apply in the context of both candidate and ballot measure elections. *Citizens Against Rent Control v. Berkley*, 454 U.S. 290, 295, 102 S. Ct. 434, 436-37 (1981) (citation omitted). In the context of a ballot measure, the First Amendment is especially important because it ensures that a collection of individuals “can make their views known, when, individually, their voices would be faint or lost.” *Id.* at 294, 102 S. Ct. at 436; *see also infra* n. 40 (discussing the tremendous amount of resources it takes to circulate a petition and campaign for a ballot measure).

//

³ The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. People of the State of California*, 283 U.S. 359, 368, 51 S. Ct. 532, 535 (1931).

1 Compelled disclosure provisions such as those contained in the PRA undeniably impinge
2 upon the core freedoms protected by the First Amendment. *Davis v. FEC*, _ U.S. _, 128 S. Ct.
3 2759, 2774-75 (2008). “[C]ompelled disclosure cannot be justified by a mere showing of some
4 legitimate government interest. . . . [It] must survive exacting scrutiny. . . . [T]here must be a
5 ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the
6 information required to be disclosed.” *Buckley*, 424 U.S. at 64, 96 S. Ct. at 656.

7 Furthermore, exacting scrutiny is required “even if any deterrent effect on the exercise of
8 First Amendment rights arises, not through direct government action, but indirectly as an
9 unintended but inevitable result of the government’s conduct in requiring disclosure.” *Id.* at 65,
10 96 S. Ct. at 656 (*citing NAACP v. Alabama*, 357 U.S. 449, 463, 78 S. Ct. 1163, 1172 (1958)).⁴

11 “Exacting scrutiny,” as used in *Buckley*, is “strict scrutiny.” *Buckley* required “exacting
12 scrutiny” of FECA’s compelled disclosure provisions, *id.* at 64, 96 S. Ct. at 656, which it
13 referred to as the “strict test,” *id.* at 66, 96 S. Ct. at 657, and by which it meant “strict scrutiny.”
14 *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 2669 n.7 (2007)
15 (*Buckley*’s use of “exacting scrutiny,” 424 U.S. at 44, 96 S. Ct. at 647, was “strict scrutiny”)
16 (“*WRTL II*”); *see also McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347, 115 S. Ct. 1511,
17 1519 (1995) (*citing First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S. Ct. 1407,
18 1421 (1978)) (equating “exacting” scrutiny with “strict” scrutiny).⁵ Under strict scrutiny,
19

20 ⁴ California is not required to take direct action to restrict the First Amendment rights of
21 Plaintiffs for the provisions of the PRA challenged herein to be found unconstitutional. *NAACP*
22 *v. Alabama*, 357 U.S. at 463, 78 S. Ct. at 1172. “In the domain of these indispensable liberties,
23 whether of speech, press, or association, the decisions of this Court recognize that abridgement
24 of such rights, *even though unintended*, may inevitably follow from varied forms of governmen-
25 tal action.” *Id.* at 461, 78 S. Ct. at 1171. “The crucial factor is the interplay of governmental and
private action, for it is only after the initial exertion of state power represented by the production
order that private action takes hold.” *Id.* at 463, 78 S. Ct. at 1172. *See also infra* Part III.B.5.

26 ⁵ In *Canyon Ferry*, the Ninth Circuit again declined to clarify whether strict scrutiny applies
27 in the context of ballot measure disclosure. *Canyon Ferry Road Baptist Church of East Helena,*
28 *Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009) (striking Montana’s disclosure statute
under any standard of review). *See also Cal. Council Pro-Life, Inc. v. Randolph*, 507 F.3d 1172

(continued...)

1 “California bears the burden of proving that the PRA provisions at issue are ‘(1) narrowly
2 tailored, to serve (2) a compelling state interest.’” *Cal. Pro-Life Council, Inc. v. Randolph*, 507
3 F.3d 1172, 1178 (9th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765,
4 774-75, 122 S. Ct. 2528, 2534 (2002)) (“*CPLC II*”).

5 **II. Compelled disclosure provisions impose substantial burdens on First Amendment**
6 **rights.**

7 The Supreme Court has consistently held that compelled disclosure provisions such as those
8 contained in the PRA impose substantial burdens on the First Amendment freedoms of speech
9 and association. *Davis*, 128 S. Ct. at 2774-75 (citing *Buckley*, 424 U.S. at 64, 96 S. Ct. at 656).
10 Indeed, the Supreme Court predicted that compelled disclosure provisions might deter some
11 individuals from contributing because of the risk that compelled disclosure would expose
12 contributors to harassment and retaliation. *Buckley*, 424 U.S. at 68, 96 S. Ct. at 656; *see also id.*
13 at 237, 96 S. Ct. at 735 (Burger, C.J., concurring in part and dissenting in part) (discussing the
14 social costs of public disclosure and a \$100 threshold he called “irrational”). Yet the Supreme
15 Court made this prediction on the assumption that “sunlight is said to be the best of

16
17 ⁵ (...continued)

18 (9th Cir. 2007)(applying strict scrutiny); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773,
19 787-88 (9th Cir. 2006) (assuming without deciding that strict scrutiny applies); and *Am. Civil*
20 *Liberties Union of Nev. v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004) (applying strict scrutiny).

21 Other cases have indicated that the “the strength of the governmental interest must reflect
22 the seriousness of the actual burden on First Amendment rights.” *Davis*, 128 S. Ct. at 2775.
23 Severe burdens on First Amendment rights must be narrowly tailored to serve a compelling
24 government interest. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 206-07, 119
25 S. Ct. 636, 649 (1999) (Thomas, J., concurring). Regulations that “entail only a marginal
26 restriction upon [First Amendment rights]” are subject to “closely drawn scrutiny.” *See*
27 *McConnell v. FEC*, 540 U.S. 93, 137, 124 S. Ct. 619, 656 (2003) (discussing contribution limits
28 and how such limits still permit individuals to exercise their First Amendment speech and
associational rights). Such regulations need only be “closely drawn” to a “sufficiently important
interest.” *Id.* at 136, 124 S. Ct. at 656.

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

1 disinfectants,” without the benefit of any social science research on the effect of compelled
2 disclosure on First Amendment rights, and on a record devoid of any meaningful discussion as to
3 the proper level at which to impose record-keeping and disclosure. *Id.* at 67, 72, 83, 96 S. Ct. at
4 658, 660, 665. Furthermore, there have been many technological advances since *Buckley*,
5 advances that have altered the fundamental nature of campaign finance disclosure in ways the
6 *Buckley* Court could never have imagined.

7 **A. Technological advances have qualitatively changed the landscape in which**
8 **compelled disclosure takes place.**

9 To say that technology has advanced in the years since 1974 would be a vast
10 understatement. In 1974, the year California citizens enacted the PRA, communication systems
11 and technology were advancing at a rapid pace. Two years earlier, many Americans had their
12 first taste of a computer with the arrival of the video game Pong in bars. PONG-Story, *available*
13 *at* <http://www.pong-story.com/arcade.htm>. The “Internet” consisted of a grand total of sixty-two
14 computers at various universities and other locations connected to a system called ARPANET.
15 ARPANET— The First Internet, *available at* http://www.livinginternet.com/i/ii_arpanet.htm.
16 With the introduction of the Exxon Qwip, the fax machine began its invasion of offices across
17 the United States. AbsoluteAstronomy.com, *available at* [http://www.absoluteastronomy.com/](http://www.absoluteastronomy.com/topics/Fax)
18 [topics/Fax](http://www.absoluteastronomy.com/topics/Fax). The first commercial copier to use plain paper—the Xerox 914—celebrated its
19 fifteenth birthday in 1974. Xerox Factbook, *available at* [http://www.xerox.com/go/xrx/template/](http://www.xerox.com/go/xrx/template/019d.jsp?view=Factbook&id=Historical&Xcntry=USA&Xlang=en_US)
20 [019d.jsp?view=Factbook&id=Historical&Xcntry=USA&Xlang=en_US](http://www.xerox.com/go/xrx/template/019d.jsp?view=Factbook&id=Historical&Xcntry=USA&Xlang=en_US). The revolutionary IBM
21 Correcting Selectric II typewriter had just been introduced; it was the first typewriter “in the
22 history of typing to actually make typing errors disappear from original copies.” IBM Archives,
23 The Typewriter: An Informal History, Aug. 1977, *available at* [http://www-03.ibm.com/ibm/](http://www-03.ibm.com/ibm/history/exhibits/modelb/modelb_informal.html)
24 [history/exhibits/modelb/modelb_informal.html](http://www-03.ibm.com/ibm/history/exhibits/modelb/modelb_informal.html).

25 Fast forward 35 years, to the present day. Personal computers are a necessary part of daily
26 life. For example, parties to this lawsuit are required to file documents electronically. *See* E.D.
27 Cal. R. 5-133. Broadband access to the Internet is available to 99% of the American population,
28 a far cry from the sixty-two computers connected to the Internet’s predecessor in 1974. Nat’l

1 Telecomm. & Info. Admin., *Networked Nation: Broadband in America 2007*, Jan. 2008,
2 available at <http://www.ntia.doc.gov/reports/2008/NetworkedNationBroadbandinAmerica2007>
3 .pdf. For the first time ever, the majority of computers sold in the United States are notebook
4 computers. *Notebook Sales Surpass PCs for First Time in U.S.*, Oct. 29, 2008, available at
5 http://afp.google.com/article/ALeqM5hkYOf_SCQ1ugSXKLXCsSs7qWnsQA. These notebooks
6 have “wireless” technology, allowing their users to access the Internet through “wi-fi hotspots”
7 and cellular data networks from coast to coast. Speaking of portability, as of 2007, the Federal
8 Communications Commission estimated that there were 263 million mobile phone
9 subscribers—an increase of over 20 million subscribers from 2006. Federal Communications
10 Commission, *13th Annual CMRS Competition Report*, ¶ 194, Jan. 15, 2009 available at
11 http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf. Many of these mobile
12 phones are capable of accessing the Internet, sending email, or looking up a map to a person’s
13 home with the push of a few buttons. *Id.* at ¶ 201 (over 50% of mobile phone subscribers used
14 data services on their cell phones). Instead of faxing a document—a technology introduced to the
15 market, universally accepted, and one that has become nearly obsolete, in the 35 years since the
16 passage of the PRA—one can scan and send a document via email. Moreover, one can send that
17 document to a nearly unlimited number of recipients, at little to no cost, with almost
18 instantaneous delivery. And American kids would have trouble putting a piece of paper into a
19 typewriter, let alone using the machine to create a document.

20 All of these technological advances have completely changed the way in which campaign
21 finance data is compiled, accessed, and disseminated. As one commentator has said, “the law
22 may remain the same, but its effect is entirely different.” William McGeveran, *Mrs. McIntyre’s*
23 *Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. L. 1, 11 (2003)
24 (“McGeveran”). For example, in 1974, reports of campaign contributions were kept on
25 handwritten forms that often contained completely illegible entries. Craig B. Holman & Robert
26 M. Stern, *Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activity*,
27 *Public Integrity*, Winter 2000 (available at <http://www.cgs.org/images/publications/Access>
28 [DelayedisAccessDenied.pdf](http://www.cgs.org/images/publications/AccessDelayedisAccessDenied.pdf)) (“*Access Delayed*”). In theory, reports were public records, but

1 access was extremely limited because it entailed a trip to a governmental office during normal
2 business hours. *See, e.g.*, Cal. Gov't. Code § 81008 (1975) (copies available at the Secretary of
3 State's office in Sacramento, the Registrar-Recorder's office in Los Angeles, and the Department
4 of Elections' office in San Francisco). Copies had to be prepared by hand or at a cost to the
5 individual requesting copies on a per-page basis.⁶ To search, an individual had to manually flip
6 through page after page of reports. And the process was complicated by candidates seeking to
7 game the system, such as former New York Governor George Pataki, who is famous for
8 organizing his lists alphabetically by *first* name. *Access Delayed* at 1. If an individual overcame
9 all of these obstacles, he or she still needed to find a way to communicate the message to the
10 public, a task virtually impossible in 1974 without the assistance of the mainstream media.

11 Today, disclosure records are kept and prepared using complex computer databases.
12 California requires reports to be filed electronically and also makes them available to the public
13 in electronic format. *See* Cal. Gov't Code § 84600 *et seq.* An individual no longer has to visit a
14 government office; he can obtain a copy of the reports from the privacy of his living room, and
15 he has a choice between an online, html format, and a downloadable Microsoft Excel
16 spreadsheet.⁷ *See* California Secretary of State - CalAccess - Campaign Finance, [http://cal-](http://cal-access.sos.ca.gov/Campaign/)
17 [access.sos.ca.gov/Campaign/](http://cal-access.sos.ca.gov/Campaign/) ("Cal-Access"). Having the donor information available on Cal-
18 Access in html format makes the information easily searchable and the spreadsheet format
19 allows individuals to manipulate the data even further. For example, using the spreadsheet, one
20 can organize the donors by first name, last name, or any other piece of publicly disclosed
21 information. Searches can also be combined—in a matter of seconds you can find every dentist
22 in San Francisco that gave more than \$500 in support of Proposition 8 in the month of October.

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26 ⁶ If one were to make a copy of ProtectMarriage.com's final report of 2,800 pages, at five
27 cents per page, the total cost of a final report would be \$140.

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

1 The spreadsheet can also be easily combined with other information, such as addresses and
2 phone numbers available on Internet white page directories.⁸ See, e.g., *Prop 8 Maps*, [http://www.](http://www.eightmaps.com)
3 [eightmaps.com](http://www.eightmaps.com) (“EightMaps.com”). Ironically, the creators of EightMaps.com have exercised
4 their First Amendment right to remain anonymous, a choice the financial supporters of
5 Proposition 8 cannot make because of the PRA.⁹ Brad Stone, *Prop 8 Donor Web Site Shows*
6 *Disclosure Law is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009).

7 Furthermore, the costs associated with accessing and disseminating donor information
8 today—both in terms of time and money—are virtually non-existent. In 1974, it was highly
9 unlikely that an employer would take the time to make a trip to one of the government offices to
10 search campaign finance records for the name of his or her employees. Today, that same
11 employer can run a single search from the comfort of his or her office and instantly learn if any
12 employee gave to the Proposition 8 campaign, to which side, and in what amount. The same can
13 be said about curious customers, suppliers, and neighbors. And an individual no longer needs to

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

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

1 rely on the mainstream media to spread the word, he can now email, blog,¹⁰ text, tweet,¹¹ and
2 Facebook.¹²

3 In today's "information age," the legislature and courts simply cannot ignore the tremendous
4 invasions of privacy that occur when donor information is made widely available to the public.
5 For example, the Federal Rules of Civil Procedure require litigants to redact certain personal
6 identifying information, including social security numbers, taxpayer-identification numbers,
7 birth dates, names of minors, and financial account numbers.¹³ Fed. R. Civ. P. 5.2. The rule goes
8 even further, allowing parties to make a motion to redact additional information and or to limit
9

10 ¹⁰ The word "blog" is a contraction of the words "web" and "log," and is defined as "a
11 website that contains dated text entries in reverse chronological order (most recent first) about a
12 particular topic. Blogs serve many purposes, from online newsletters to personal journals to
13 "ranting and raving." Written by one person or a group of contributors, entries contain commen-
14 tary and links to other Web sites, and images and videos as well as a search facility may be
15 included." PC Magazine Online Encyclopedia, PCMag.com, "blog," [http://www.pcmag.com/](http://www.pcmag.com/encyclopedia)
encyclopedia ("PCMag.com"). The word has become so popular that it has been turned into a
verb, e.g., "I'll blog about that topic next week." *Id.*

16 ¹¹ "Twitter" is "a Web site and service that lets users send short text messages from their
17 cellphones to a group of friends. Launched in 2006, Twitter (www.twitter.com) was designed for
18 people to broadcast their current activities and thoughts. Twitter expanded 'mobile blogging'
19 (updating a blog from a cellphone) into 'microblogging,' the updating of an activities blog
20 (microblog) that distributes the text to a list of names. Messages can also be sent and received
21 via instant messaging, the Twitter Web site or a third-party Twitter application. A MySpace
account can also be updated." PCMag.com, "Twitter." The individual messages are called
"tweets," and like "blog," the term has become so popular that individuals now use it as a verb,
e.g., "I'm going to tweet about that." *Id.*

22 ¹² For example, rather than holding a traditional press conference, President Barack Obama
23 first announced his selection of Senator Joe Biden as his Vice Presidential nominee to supporters
24 via text message. Stuart Silverstein and Johanna Neuman, *Joe Biden is Obama's Running Mate*,
L.A. Times (Aug. 23, 2008) (*available at* [http://www.latimes.com/news/printedition/front/la-na-](http://www.latimes.com/news/printedition/front/la-na-biden23-2008aug23,0,7564344.story)
25 [biden23-2008aug23,0,7564344.story](http://www.latimes.com/news/printedition/front/la-na-biden23-2008aug23,0,7564344.story)). San Francisco's mayor, Gavin Newsom, announced his
26 2010 candidacy for California governor via a "tweet" on Twitter, as well a post on Facebook.
Newsom Tweets in to Governor's Race, San Francisco Chronicle, A-14, Apr. 22, 2009 (*available*
at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/22/EDO1176DR8.DTL>).

27 ¹³ The rule provides that filings should contain only the last four digits of the social-security
28 number and taxpayer-identification number, the year of the individual's birth, the minor's
initials, and the last four digits of the financial-account number. Fed. R. Civ. P. 5.2.

1 or prohibit a non-party's remote electronic access to a document filed with the court for good
2 cause. *Id.* Indeed, the California legislature appears to have at least recognized the potential harm
3 that comes with making information available on the Internet, allowing committees to redact the
4 street addresses from any electronically filed reports. Cal. Gov't Code § 84602(d). But the
5 legislature grossly underestimated the potential harm. As the facts of this case demonstrate,
6 individuals can, will, and do use the compelled disclosure reports to harass and intimidate
7 individuals exercising their First Amendment rights.

8 In an area as sensitive as the First Amendment, the burden is on the government to
9 demonstrate that its statute is narrowly drawn to serve a compelling government interest. Here,
10 individuals that contributed as little as \$100 to a campaign that raised and spent over \$70 million
11 dollars have been subjected to what this Court has already called "the deplorable nature of many
12 of [the] acts alleged by Plaintiffs." (Mem. & Order, p. 41, Jan. 30, 2009.) Countless others were
13 no doubt intimidated from putting up a sign or contributing to the cause for fear of similar
14 harassment. Yet these individuals are a far cry from the monied interests that campaign
15 disclosure statutes are meant to uncover. Because the PRA and its irrational \$100 threshold, *see*
16 *Buckley*, 424 U.S. at 237, 96 S. Ct. at 735 (Burger, C.J., concurring in part and dissenting in
17 part), California citizens must make a Hobson's choice: refrain from exercising their First
18 Amendment rights or be prepared to be harassed for engaging in the political process. The First
19 Amendment simply cannot tolerate a law that forces citizens to make such a choice, and
20 certainly not at the dollar level contained in the PRA. As Kim Alexander, president of the
21 California Voter Foundation, recently said, "This is not really the intention of voter disclosure
22 laws. But that's the thing about technology. You don't really know where it is going to take
23 you."¹⁴ *Stone, supra*, at 9.

24
25 ¹⁴ The California Voter Foundation is a non-profit, nonpartisan organization that promotes
26 the responsible use of technology to improve the democratic process. Its mission statement
27 includes the following language, "CVF advances accountability in government and ensures
28 voters are empowered to make informed, confident decisions by making it possible to 'follow the
money.' CVF is a pioneer of electronic filing and Internet disclosure of campaign finance

(continued...)

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

3 An important distinction needs to be drawn in this case between disclosure of donor
4 information and *public* disclosure of donor information. There is no dispute that compelled
5 disclosure represents a burden on First Amendment rights. *See Davis*, 128 S. Ct. at 2774-75;
6 *Buckley*, 424 U.S. at 64, 96 S. Ct. at 656. However, in prior cases discussing compelled
7 disclosure provisions, there has been a failure—or lack of need—to address the difference
8 between compelled “private” disclosure (i.e., disclosure made only to the government) and
9 compelled “public” disclosure (i.e., disclosure made available to the public). As discussed above,
10 the technological advances that have occurred in the last thirty years make it imperative for the
11 Court to consider the differences between private and public disclosure, and the respective
12 benefits and burdens associated with each.¹⁵

13 Strict scrutiny requires that each application of a statute restricting speech must be
14 supported by a compelling government interest. *WRTL II*, 127 S. Ct. at 2672.¹⁶ *See also Heller*,
15 378 F.3d at 991 (“[I]t is not just *that* a speaker’s identity is revealed, but how and when that

16
17 ¹⁴ (...continued)
18 records, shining ‘digital sunlight’ on money in politics throughout the state and nation. CVF’s
19 work advancing online disclosure opens up public access to this data and provides voters with
20 crucial information about who is funding candidates and measures.” California Voter Founda-
21 tion, *About CVF*, <http://www.calvoter.org/about/goals.html>.

22 ¹⁵ As set forth in more detail below, there is also a difference between pre- and post-election
23 reporting. *See infra* Part V. In applying strict scrutiny, these differences must be factored into the
24 analysis. For example, a provision requiring pre-election *public* reporting might be constitu-
25 tional, whereas a post-election *public* reporting provision may be unconstitutional. *See Heller*,
26 378 F.3d at 991 (“[I]t is not just *that* a speaker’s identity is revealed, but how and when that
27 identity is revealed, that matters in a First Amendment analysis of a state’s regulation of political
28 speech.”) (emphasis in original).

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

1 identity is revealed, that matters in a First Amendment analysis of a state’s regulation of political
2 speech.”) (emphasis in original) Thus, in applying strict scrutiny to the provisions of the PRA
3 challenged herein, the Court must be cognizant of the fact that private and public reporting
4 provisions impact First Amendment rights in slightly different ways. A compelled disclosure
5 system that requires only private reporting may be constitutional in a situation where public
6 reporting may not.

7 **C. Research demonstrates that compelled disclosure has a significant chilling effect**
8 **on political speech.**

9 Campaign disclosure statutes are often trumpeted on the grounds that “sunlight is the best
10 disinfectant” and as enjoying wide public support. *See Buckley*, 424 U.S. at 67, 96 S. Ct. at 658;
11 *CPLC II*, 507 F.3d at 1179. Yet few have actually studied whether campaign disclosure actually
12 solves the problems it seeks to address, and fewer still have probed voters about the specifics of
13 compelled disclosure statutes.¹⁷

14 In 2007, the Institute for Justice commissioned a study to examine the burdens of compelled
15 disclosure provisions on First Amendment rights. *See Dick Carpenter, Ph.D, Disclosure Costs:*
16 *Unintended Consequences of Campaign Finance Reform*, Institute for Justice, March 2007
17 (available at <http://www.ij.org/publications/other/disclosurecosts.html>) (“*Disclosure Costs*”).

19 ¹⁷ Evidence of the social costs associated with compelled public disclosure was part of the
20 record in *McConnell v. FEC*. 251 F. Supp. 2d 176, 227-229 (D.D.C. 2003) (per curiam). The
21 evidence ranged from large numbers of contributions at just below the disclosure trigger amount,
22 to vandalism after public disclosure, to non-contribution because of concerns about a group’s
23 ability to retain confidentiality, to concerns about employers, neighbors, other business entities,
24 and others knowing of support are not popular everywhere and the results of such disclosure. *Id.*
25 *See also AFL-CIO v. FEC*, 333 F.3d 168, 176, 179 (D.C. Cir. 2003) (recognizing that releasing
26 names of volunteers, employees, and members would make it hard to recruit personnel, applying
27 strict scrutiny, and striking down an FEC rule requiring public release of all investigation
28 materials upon conclusion of an investigation); Dick M. Carpenter II, *Disclosure Costs:*
Unintended Consequences of Campaign Finance Reform (2007) (available at [http://www.ij.org/](http://www.ij.org/publications/other/disclosurecosts.html)
[publications/other/disclosurecosts.html](http://www.ij.org/publications/other/disclosurecosts.html)); William McGeveran, *Mrs. McIntyre’s Checkbook:*
Privacy Costs of Political Contribution Disclosure, 6 U. Pa. J. Const. L. 1 (2003); James Bopp,
Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of*
Judicial Campaign Financing, 86 Denv. U. L. Rev. 195, 218-20 (2008) (discussing the burdens
of disclosure).

1 Prior to this study, “no one [had] analyzed systematically the effects of campaign-finance
2 regulations on freedom of speech or association.” Jeffrey Milyo, Ph.D., *The Political Economics*
3 *of Campaign Finance*, The Independent Review, Vol. 3, Issue 4, 537, 537 (Spring 1999).

4 Carpenter’s study is important for several reasons. First, the study specifically addresses
5 opinions regarding campaign finance disclosure in the context of ballot measures. *Disclosure*
6 *Costs* at 5. The few studies conducted prior to Carpenter’s focused almost exclusively on
7 candidate disclosure. The distinction is important because the courts have said that the state
8 possesses fewer interests with respect to ballot measure disclosure. *See infra* n. 37. Second, the
9 sample population for the survey was drawn from six states that allow citizen-initiated ballot
10 measures, including California. *Disclosure Costs* at 6. Third, each of the states included in the
11 sample population compels disclosure of ballot measure contributions after an initial threshold is
12 met and the disclosed information includes the contributor’s name, address, contribution amount,
13 and employer. *Id.* Finally, each of these states publishes at least some of the donor information
14 collected on a campaign finance website. *Id.*

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

19 When the issue was personalized, support for public disclosure waned significantly. Only
20 40% of respondents were comfortable with their *own* name and address being posted on a
21 government website as a result of a contribution to a ballot committee. *Id.* Even fewer
22 respondents (24%) felt that their employer’s name should be posted on the Internet because of
23 their political contribution. *Id.* Nearly 60% of respondents indicated that they would think twice
24

25 ¹⁸ Respondents were asked to state how they felt about the following statement. “The
26 government should require that the identities of those who contribute to ballot issue campaigns
27 should be available to the public.” This finding is consistent with the findings of David Binder,
28 relied upon by the court in *CPLC II*, where 71% of respondents felt that it was important to
know the identities of individuals that contributed to a ballot measure committee. *CPLC II*, 507
F.3d at 1179.

1 about donating if it meant that their name and address would be released to the public. *Id.*
2 Furthermore, after comparing general support for disclosure laws with an individual’s likelihood
3 of contributing to a campaign if their information is made public, Carpenter found that “even
4 those who strongly support forced disclosure laws will be less likely to contribute to an issue
5 campaign if their contribution and personal information will be made public.” *Id.* at 7. When
6 asked why they would think twice before donating, respondents cited a desire to remain
7 anonymous, fear of retaliation (both personal and economic), and that public disclosure would
8 take away their right to a secret ballot. *Id.* See also *McIntyre*, 514 U.S. at 343, 115 S. Ct. at 1517
9 (“The specific holding in *Talley* related to advocacy of an economic boycott, but the Court’s
10 reasoning embraced a respected tradition of anonymity in the advocacy of political causes. This
11 tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one’s
12 conscience without fear of retaliation.”). As Carpenter concluded

13 while voters appear to like the idea of disclosure in the abstract (that is, as it applies to
14 someone else), their support weakens dramatically in the concrete (that is, when it involves
15 them). Stated succinctly, it is ‘disclosure for thee, but not for me.’ . . . But the potential
16 costs do not end there. Most respondents also reported themselves less likely to contribute
17 to an issue campaign if their personal information was disclosed . . . Thus, the cost of
18 disclosure also seems to include a chilling effect on political speech and association as it
19 relates to ballot issue campaigns. . . . The vast majority of respondents possessed no idea
20 where to access lists of contributors and never actively seek out such information before
21 they vote. At best, some learn of contributors through passive information sources, such
22 as traditional media, but even then only a minority of survey participants could identify
23 *specific* funders of campaigns related to the ballot issue foremost in their mind. . . . Such
24 results hardly point to a more informed electorate as a result of mandatory disclosure . . .
25 .¹⁹

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

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

Carpenter’s research indicates that nearly two-thirds of the voters rely upon traditional

(continued...)

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

4 **III. There is a reasonable probability that any individuals supporting a traditional**
5 **definition of marriage will be subjected to threats, harassment, and reprisals.**

6 Summary judgment should be granted on Plaintiffs' first count because there is a reasonable
7 probability that compliance with the PRA's compelled disclosure provisions will expose

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10
11 ¹⁹ (...continued)

12 forms of media, including newspaper, television, and radio, as sources of information on ballot
13 measures. *Id.* at 12. Only 12% indicated that they used the Internet, but the study does not
14 indicate how the Internet was used. In other words, the voter could have been visiting the
15 websites of traditional news sources. *Id.* at 12.

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

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

1 Plaintiffs and their contributors to a reasonable probability of threats,²⁰ harassment,²¹ and
2 reprisals.²² Plaintiffs must meet but one test for an exemption from the reporting requirements to
3 be granted—the “reasonable-probability test.” Under this test, Plaintiffs must demonstrate a
4 reasonable probability that the compelled disclosure will subject individuals identified to threats,
5 harassment, or reprisals. As set forth below, Plaintiffs have demonstrated that individuals and
6 organizations supporting Proposition 8 and a traditional definition of marriage have been
7 subjected to the sort of threats, harassment, and reprisals prior courts have considered and found
8 sufficient to grant a disclosure exemption.²³ Given the existence and prevalence of the threats,
9 harassment, and reprisals directed at supporters of Proposition 8 and a traditional definition of
10 marriage, there is a reasonable probability that any individual supporting Proposition 8 or a
11 traditional definition of marriage identified as a result of the compelled disclosure provisions of
12 the PRA will be subjected to similar threats, harassment, and reprisals.

13 **A. The standards of the disclosure exemption test.**

14 In *Buckley*, the Court created the reasonable-probability test in response to, and in rejection
15 of, the argument that the proof of a chill on expressive association would be impossible. *Buckley*,
16 424 U.S. at 73, 96 S. Ct. at 660. An opinion dissenting in part from the lower court’s decision in
17 *Buckley* argued that a blanket exemption must be created for minor parties because the “evils of
18 chill and harassment are largely incapable of formal proof.” *Id.* (citation omitted). The dissenter
19

20 ²⁰ “Threat, *n.* 1. A communicated intent to inflict harm or loss on another or on another’s
21 property, esp. One that might diminish a person’s freedom to act voluntarily or with lawful
22 consent 2. An indication of an approaching menace 3. A person or thing that might
well cause harm” Black’s Law Dictionary 1489-90 (7th ed. 1999).

23 ²¹ “Harassment Words, conduct, or action (usu. repeated or persistent) that, being
24 directed at a specific person, annoys, alarms, or causes substantial emotional distress in that
25 person and serves no legitimate purpose.” Black’s Law Dictionary 721 (7th ed. 1999).

26 ²² “Reprisal 3. Any act or instance of retaliation, as by an employer against a complain-
ing employee.” Black’s Law Dictionary 1305 (7th ed. 1999).

27 ²³ Plaintiffs are not required to establish a causal link between the compelled disclosure
28 statute and the instances of threats, harassment, and reprisals. *Buckley*, 424 U.S. at 74, 96 S. Ct.
at 661.

1 noted the difficulty of obtaining “witnesses who are too fearful to contribute but not too fearful
2 to testify about their fear.” *Id.* at 74, 96 S. Ct. at 661. The Supreme Court rejected this argument
3 by establishing the reasonable-probability test, including its mandate of “sufficient flexibility” in
4 evidence to fit the situation where witnesses would be difficult to obtain because they are chilled
5 by fear of threats, harassment, or reprisals. *Id.* Rather than create the blanket exemption urged by
6 the lower court’s dissent, the Supreme Court recognized the inherent problem created by the
7 threat of threats, harassment, or reprisals after disclosure (or the possibility of such threats,
8 harassment, or reprisals), and then required only a minimal amount of proof—but some proof,
9 nonetheless—for those requesting an exemption from reporting.

10 Thus, to obtain a disclosure exemption, Plaintiffs must meet only *one* test: whether there is a
11 “reasonable probability that the compelled disclosure of a party’s contributors’ names will
12 subject them to threats, harassment, or reprisals from either Government officials or private
13 parties.” *McConnell*, 540 U.S. at 198, 124 S. Ct. at 692 (2003) (citation omitted). If that test is
14 met, Plaintiffs must receive an exemption. There is no further test or balancing because the
15 Supreme Court has already done the balancing and established the reasonable-probability test as
16 the sole criterion a party needs to meet to gain a disclosure exemption.²⁴ *Id.*

17 **B. The quantum and quality of evidence required to meet the reasonable-probability**
18 **test.**

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

23 //

24
25 ²⁴ Nevertheless, if the Court were to weigh California’s interest in disclosure against the
26 First Amendment harms, the evidence set forth in Part II, *supra*, demonstrates that the balance
27 tips even more in favor of Plaintiffs than it did in *Buckley* or *Brown v. Socialist Workers ‘74*
28 *Campaign Comm.*, 459 U.S. 87, 103 S. Ct. 416 (1982), because of the technological changes that
have altered the dynamics of public disclosure, and the social science research that has illumi-
nated these harms and dispelled the notion that donor information solves the problem of voter
ignorance.

1 **1. Plaintiffs are not required to establish a direct causal link between disclosure**
2 **and specific instances of threats, harassment, and reprisals.**

3 First, the Supreme Court has rejected the notion that a causal link must be established
4 between the threats, harassment, and reprisals, and public disclosure. *Buckley*, 424 U.S. at 74, 96
5 S. Ct. at 661. (“A strict requirement that chill and harassment be directly attributable to the
6 specific disclosure from which the exemption is sought would make the task even more
7 difficult.”). In the present case, the critical question is whether each particular individual was
8 subjected to threats, harassment, or reprisals because of his or her support for Proposition 8 or a
9 traditional definition of marriage.²⁵ If the answer is “yes,” then the Court can assume, as a matter
10 of law, that there is a reasonable probability that any individual who is disclosed because he or
11 she gave to an organization that supported Proposition 8 or a traditional definition of marriage
12 will likewise be subjected to threats, harassment, and reprisals. To the extent that Plaintiffs can
13 demonstrate a causal link, it only strengthens their case and demonstrates that the assumption is
14 well-justified.

15 **2. Plaintiffs need not demonstrate that they, or their members, have been**
16 **subjected to threats, harassment, and reprisals.**

17 Similarly, the second “sufficient flexibility” standard allows an organization to rely not only
18 on evidence of specific incidents of harassment directed at its members or the organization itself,
19 but also on evidence of threats, harassment, or reprisals directed at other individuals and
20 organizations holding similar views. Thus, in *Averill v. City of Seattle*, the court granted an
21 exemption to a specific candidate’s campaign committee primarily upon evidence of threats and
22 harassment directed at the Freedom Socialist Party and Radical Women generally. 325 F. Supp.
23 2d 1173, 1175 (W.D. Wash. 2004). The only additional evidence submitted by the committee
24 consisted of several harassing and crank calls directed at contributors to the committee. *Id.* at

25
26 ²⁵ The Second Circuit provides a helpful application of the reasonable-probability test in
27 *FEC v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), in which it,
28 *inter alia*, makes clear that those seeking exemption have no burden to prove “harassment will
certainly follow compelled disclosure” because “breathing space” is required in the First
Amendment context. *Id.* at 421.

1 1178.²⁶ Once Plaintiffs have established such evidence, there is, as a matter of law, a reasonable
2 probability of threats, harassment, and reprisals. The fact that Plaintiffs themselves have been
3 harassed only strengthens their case and demonstrates that the analytical inference is well-
4 justified.

5 **3. The reasonable-probability test requires only that threats, harassment, and**
6 **reprisals exist, not that they be severe.**

7 Third, the reasonable-probability test does not require threats, harassment, or reprisals to be
8 substantial or severe, only that threats, harassment, and reprisals exist. The test is one of
9 probability, making numerosity a logical criterion. However, the nature of the claim makes it
10 difficult to rely solely on the number of instances of threats, harassment, and reprisals that have
11 occurred. As the Court recognized in *Buckley*, plaintiffs face a daunting task in trying to find
12 witness who are “too fearful to contribute but not too fearful to testify about their fear.” 424 U.S.
13 at 74, 96 S. Ct. at 661.

14 Accordingly, the courts must look to a variety of other factors. The severity of reprisals
15 certainly has a proper role to play in the analysis. When the incidents occurred may be relevant.²⁷

16
17 ²⁶ In cases where the courts have found it inappropriate to look to evidence of harassment
18 directed at other organizations, they have done so on the grounds that it was impossible to
19 determine the specific cause of the harassment. *See, e.g., Oregon Socialist Workers 1974*
20 *Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1259 (D. Or. 1977) (noting that the harassment
21 was “at least as likely to be the product of the other political activities of the affiants.”). The
22 numerous declarations filed in this case leave little doubt as to the cause of the harass-
23 ment—each individual was threatened or harassed because he or she supported a traditional
24 definition of marriage. Together, this evidence demonstrates that there is a reasonable probability
25 that any individuals advocating a traditional definition of marriage will be subjected to similar
26 threats, harassment, and reprisals.

27 ²⁷ The evidence presented in this case suggests that the threats, harassment, and reprisals
28 directed at individuals supporting a traditional definition of marriage are not limited to the
election surrounding Proposition 8. First, the threats and harassment have occurred both before,
see, e.g., John Doe Decl. #30, and after the election. *See, e.g., John Doe Decl. #54* (specifically
making reference to the February 2, 2009 disclosure report). In late April, a national controversy
erupted when Carrie Prejean, First Runner-Up, Miss USA, said she did not support gay marriage
when answering a question from Miss USA judge Perez Hilton. *See Hilton, Miss California Take*
Sides on “Today,” S.F. Chronicle, Apr. 23, 2009 (indicating that her answer may have cost her

(continued...)

1 So too might the geographic dispersion and publicity surrounding the incidents.²⁸ However, it is
2 inappropriate to distinguish any case on a single factor. A few severe and public threats could be
3 sufficient to warrant an exemption. Likewise, relatively minor instances of threats, harassment,
4 and reprisals may be sufficient if they are widespread. In fact, *Averill* recognized that “even
5 small threats” could be sufficient. *Averill*, 325 F. Supp. 2d at 1176.

6 Thus, in determining whether there is a reasonable probability of threats, harassment, and
7 reprisals, the courts have considered everything from boycotts to death threats to determine
8 whether there is a reasonable probability of future threats, harassment, and reprisals. *See, e.g.,*
9 *Brown v. Socialist Workers ‘74 Campaign Comm.*, 459 U.S. 87, 99, 103 S. Ct. at 423-24 (1982)
10 (threatening phone calls and hate mail, the burning of organizational literature, destruction of
11 members’ property, police harassment, and shots fired into organization’s office); *Bay Area*
12 *Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998) (boycotts).²⁹ Each has a proper role

14 ²⁷ (...continued)
15 the Miss USA crown). The evidence suggests that the threats and harassment directed at
16 individuals supporting a traditional definition of marriage are anything but isolated incidents.

17 ²⁸ Plaintiffs have submitted numerous declarations, not only from individuals throughout the
18 State of California, but also, across the entire United States. *See* John Doe Decl. #19 (Louisiana);
19 #27 (Michigan); #29 (New York); & #32 (Ohio).

20 ²⁹ Much was made at the preliminary injunction stage about boycotts and whether it is
21 appropriate to consider them as a form of reprisal. Plaintiffs maintain that a boycott is no less a
22 form of a reprisal than a death threat. One may be more severe and illegal, but each is a reprisal
23 nonetheless.

24 Plaintiffs do not mean to suggest that supporters of Proposition 8 who choose to make their
25 support of Proposition 8 public should be free from the lawful consequences of their speech.
26 Those who voluntarily make their position known (e.g., by placing a “Yes on 8” sign in a store
27 window) should be prepared to accept the lawful consequences of their speech.

28 But this case is not about the individuals who *voluntarily* chose to speak by placing a sign in
their window. Instead, this case is about the thousands of individuals who were *compelled* to
speak because of their relatively modest financial contribution. And as the Supreme Court has
said, there is nothing inherently wrong or suspect with an individual wanting to keep his support
for a particular issue private. *See McIntyre*, 514 U.S. at 341-42, 115 S. Ct. at 1516 (“The
decision in favor of anonymity may be motivated by fear of economic or official retaliation, by
concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as
possible.”).

(continued...)

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

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

4 Fourth, while *Buckley* and *Brown* make references to “minor parties,” nothing in *NAACP v.*
5 *Alabama*, 357 U.S. 449, 78 S. Ct. 1163—the opinion on which the exemption is
6 premised—suggests that the exemption is so limited. The “minor party” language in *Buckley*
7 results from the parties’ argument for a “blanket exemption” for minor parties from the
8 disclosure requirements without first having to demonstrate the requisite level of harm under
9 *NAACP v. Alabama*. See *Buckley*, 424 U.S. at 68-74, 96 S. Ct. at 658-61. As the *NAACP v.*
10 *Alabama* Court put it, compelled disclosure is just as “likely to affect adversely the ability of
11 petitioner and its members to pursue their collective effort to foster beliefs which they admittedly
12 have the right to advocate, in that it may induce members to withdraw from the Association and
13 dissuade others from joining it because of fear of exposure of their beliefs shown through their

14 _____
15 ²⁹ (...continued)

16 The problem is not the boycotts, it is what they represent. These boycotts, like the death
17 threats, are directed at individuals merely because they supported a traditional definition of
18 marriage. Each creates an environment likely to discourage protected First Amendment activity
19 and is therefore proper to consider in determining whether a reasonable probability of threats,
20 harassments, and reprisals exists. The question here is not whether particular organizations can
21 boycott businesses that supported Proposition 8, it is whether the state can continue to *compel*
22 speech that would otherwise not be forthcoming in light of the very realistic probability of a
23 reprisal. Under *Buckley* and *Brown*, the answer is that California cannot. See *NAACP v.*
24 *Alabama*, 357 U.S. at 461, 78 S. Ct. at 1171 (“In the domain of these indispensable liberties,
25 whether of speech, press, or association, the decisions of this Court recognize that abridgement
26 of such rights, *even though unintended*, may inevitably follow from varied forms of governmen-
27 tal action.”).

28 Whether Plaintiffs are granted an exemption does not affect any individual’s First Amend-
ment right to engage in a legal boycott. The only difference is that if an exemption is granted,
California cannot *compel* a business to disclose whether it is “Yes on 8” or “No on 8.” California
citizens would remain free to boycott any business that voluntarily chooses to make its position
known on Proposition 8.

An analogous situation is that of employer-employee, particularly if the employee is “at-
will.” Taking away a contributors right to make an anonymous contribution ensures that the
contributor cannot take a position contrary to that of his or her employer without risking some
form of reprisal.

1 associations and of the consequences of this exposure.” 357 U.S. at 462-63, 78 S. Ct. at 1172.
2 Indeed, in *McConnell v. FEC*, the Court expressly affirmed the analysis and holding of the
3 district court, which applied the reasonable-probability test to entities that were, by no stretch of
4 the imagination, minor parties. *McConnell v. FEC*, 251 F. Supp. 2d 176, 245-47 (D.D.C. 2003)
5 (applying the reasonable-probability test to a Chamber of Commerce coalition, the American
6 Builders and Contractors, Associated General Contractors of America, the American Civil
7 Liberties Union, and the National Rifle Association). The exemption has also been applied in
8 non-partisan elections. *McArthur v. Smith*, 716 F. Supp. 592, 594 (S.D. Fla. 1989). Non-partisan
9 elections, like ballot measures, are about the issues, not the political party of the candidate. *See*
10 *also Oregon Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1257 (D.
11 Or. 1977) (noting that courts must be especially vigilant in cases involving minor parties, but in
12 no way limiting the exemption to minor parties).

13 Furthermore, “the First Amendment does not ‘belong’ to any definable category of persons
14 or entities: It belongs to all who exercise its freedoms.” *Bellotti*, 435 U.S. at 802, 98 S. Ct. at
15 1429 (Burger, J., concurring). As the *Buckley* court put it, age, size, and political success, are all
16 poor factors upon which to create a blanket exemption. *Buckley*, 424 U.S. at 73, 96 S. Ct. at 660.
17 The Court explained that some “long-established parties are winners—some are consistent
18 losers,” and sometimes a new party “may garner a great deal of support if it can associate itself
19 with an issue that has captured the public’s imagination.” *Id.* Today’s winners might be
20 tomorrow’s losers, and the First Amendment must protect both.³⁰ Tying the *Brown* exemption to
21 minor parties fails to protect the First Amendment’s goal of encouraging “uninhibited, robust,
22

23
24 ³⁰ The issue of same-sex marriage was also before the voters in 2000, and it appears that the
25 issue of same-sex marriage will once again be before the California voters in 2010. *See* Website
26 of the Secretary of State of California, [http://cal-access.ss.ca.gov/Campaign/Measures/list.aspx?](http://cal-access.ss.ca.gov/Campaign/Measures/list.aspx?session=1999)
27 [session=1999](http://cal-access.ss.ca.gov/Campaign/Measures/list.aspx?session=1999) (Proposition 22 “2000 Definition of Marriage” on November 2000 general
28 election ballot); Website of the Secretary of State of California, [http://www.sos.ca.gov/elections/](http://www.sos.ca.gov/elections/elections_j.htm#circ)
[elections_j.htm#circ](http://www.sos.ca.gov/elections/elections_j.htm#circ) (Ballot measure titled “Reinstates Right of Same-Sex Couples to Marry”
currently in circulation; Another ballot measure titled “Substitutes Domestic Partnership for
Marriage in California Law” also currently in circulation). *See also* Bob Egelko, *Prop. 8 Stands;*
More Ballot Battles Ahead, San Francisco Chronicle (May 27, 2009).

1 and wide-open” debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721
2 (1964). All parties, whether large or small, new or well-established, winners or losers, must be
3 free to advocate their position free from the deplorable acts directed at supporters of Proposition
4 8 and a traditional definition of marriage.³¹

5 **5. The test does not require any threats, harassment, or reprisals to be directed**
6 **at Plaintiffs by government officials.**

7 Finally, it is of little import that none of the threats, harassment, and reprisals introduced
8 into evidence come directly at the hands of state actors. As the Supreme Court said in *NAACP v.*
9 *Alabama*, “it is only after the initial exertion of state power represented by the production order
10 that private action takes hold.” 357 U.S. at 463, 78 S. Ct. at 1172. An exemption is warranted
11 from the most well-intentioned disclosure statute if there is a reasonable probability of threats,
12 harassment, and reprisals. *See id.* (noting the deterrent effect of *unintended*, but *inevitable* results
13

14 ³¹ The fact that the criminal code may apply to some of the activity directed at supporters of
15 Proposition 8 is irrelevant. First, criminal sanctions are *post hoc*, if they are forthcoming at all.
16 *See* John Doe Decl. #42 (reported sign theft but police refused to take any action).

17 Second, criminal sanctions cannot address the First Amendment chill that occurs as a result
18 of the threats, harassment, and reprisals. Like the burglary victim who can’t return home without
19 worrying that he or she will open the door to a scene of theft and destruction, individuals who
20 have had their speech chilled will always think twice before speaking in the future, lest their
21 speech be once again chilled.

22 Third, *post hoc* criminal remedies only serve to remedy the specific physical harm that one
23 person suffered - they do not address the larger First Amendment chill that occurs when
24 incidents of violence, theft, and harassment are publicized.

25 The threats, harassment, and reprisals directed at supporters of Proposition 8 are designed to
26 discourage support for Proposition 8 and have their desired effect whether or not criminal
27 sanctions are forthcoming. As soon as a person feels that he or she cannot exercise his or her
28 First Amendment rights in a future election without being subjected to similar threats,
harassment, and reprisals, the damage has been done. *See, e.g.,* John Doe Decl. #13 (would be
hesitant about supporting a similar cause); #19 (will “think twice” about support in the future);
#23 (will not contribute if he has to make his identity known); #18 (less likely to get involved
unless confidentiality can be assured); #30 (will not speak out in public with his opinion); #39
(would not place bumper sticker on car during Proposition 8 campaign because of fear of
aggression); #43 (will be careful to avoid association with a cause such as Proposition 8 in the
future); #45 (concerned about the effect political activity could have on his family’s safety); #51
(less likely to donate if it cannot be done anonymously). These actions are nothing short of
domestic terrorism.

1 flowing from compelled disclosure provisions); *McArthur*, 716 F. Supp. at 594 (“The Court
2 clearly stated that the first amendment prohibits compelled disclosure of contributors or
3 recipients’ names if the revelation would subject them to harassment from *either* government
4 officials or private parties. The Court’s use of ‘either’ indicates that harassment, reprisals or
5 threats from private persons is sufficient to allow this court to enforce the plaintiff’s first
6 amendment rights by cloaking the contributors and recipients’ names in secrecy.” (emphasis in
7 original)). Under the First Amendment and the reasonable-probability test announced in *Buckley*,
8 California simply cannot stick its head in the sand and ignore the real and inevitable
9 consequences that flow from its compelled-disclosure statute, however well-intentioned that
10 statute may be. In light of these burdens, California’s interest in ballot measure disclosure must
11 give way to greater First Amendment concerns in order to protect the free and robust debate
12 necessary to preserve our form of government.

13 **C. There is a reasonable probability of threats, harassment, and reprisals.**

14 Plaintiffs, through the numerous declarations filed in support of their motions for
15 preliminary injunction and summary judgment, have demonstrated that compliance with the
16 compelled disclosure provisions of the PRA will expose Plaintiffs and their contributors to a
17 reasonable probability of threats, harassment, and reprisals. The evidence demonstrates that the
18 reprisals recited in the declarations are not isolated events perpetuated by one or two individuals,
19 but are instead, part of a larger campaign designed to silence any individual supporting
20 Proposition 8 or a traditional definition of marriage. In light of such evidence, Plaintiffs are
21 entitled to summary judgment because their right to exercise their First Amendment freedoms of
22 expression and association free from threats, harassment, and reprisals outweighs California’s
23 interest in compelled disclosure.

24 Although Plaintiffs are not required to establish a causal link between the compelled
25 disclosure and the incidents of threats, harassment, and reprisals, *see supra* Part III.B.1, there is
26 significant evidence that the public disclosure of the campaign finance reports led directly to
27 contributors being singled out for their donation. For example, John Doe #54 received an email
28 shortly after this Court denied Plaintiffs’ Motion for Preliminary Injunction. John Doe Decl. #54.

1 The email specifically referenced this Court’s order and the declarant’s financial contribution
2 first disclosed on the February 2, 2009 report. John Doe Decl. #54 (“The judge released the
3 names today of the donors who supported Prop 8, and your name is on the list as having donated
4 . . . You’re a queer-hating douchebag. Fuck you. Best, Julia”). A few days later, John Doe #54
5 received a handwritten letter at his home address that read, in its entirety, “STUPID MOTHER
6 FUCKER. MAKE A DONATION Like that AND YOU ARE LISTED.” *Id.* Likewise, John Doe
7 #53 and his co-workers began receiving harassing phone calls at work shortly after his donation
8 was made public in the February report. John Doe Decl. #53. The declarations contain countless
9 other examples of individuals being singled out after their financial support became public. *See,*
10 *e.g.,* John Doe Decl. #2; #4; #5; #6; #10; #17; #19; #20; #27; #28; #29; #30; & #32. This
11 evidence is extremely relevant because, in addition to demonstrating that there is a reasonable
12 probability of threats, harassment and reprisals, the evidence demonstrates that individuals are in
13 fact using information obtained from the campaign finance reports to harass individuals that
14 support a traditional definition of marriage.

15 As discussed above, *see* Part II.A., *supra*, technological advances have changed how
16 information about donors is used by the public. The campaign against any individual that
17 financially supported Proposition 8 is enabled in part by Internet web sites that combine
18 information gleaned from the campaign finance reports and elsewhere with other publicly
19 available information, enabling those opposing Proposition 8 and a traditional definition of
20 marriage to harass these individuals at home and at work. For example, the web site
21 EightMaps.com is a GoogleMaps “mashup” that combines data contained in the campaign
22 finance reports with an interactive map.³² An individual can use the website to search for any
23 city (e.g., Sacramento) and print a map graphically illustrating the name, address, amount,
24 occupation, and employer of each individual that donated to Proposition 8 located in

26
27
28 ³² PCMag.com, “Mashup” (“A mixture of content or elements. For example, an application
that was built from routines from multiple sources or a Web site that combines content and/or
scripts from multiple sources is said to be a mashup. The term became popular in the 2005 time
frame.”).

1 Sacramento. However, these web sites do more than facilitate reprisals by further disseminating
2 information regarding donors to the Proposition 8 campaign; some web sites encourage
3 individuals to harass donors. *See, e.g.*, <http://www.californiansagainsthate.com> (stated purpose of
4 web site is to “identify and take action against those who want to deny us our equal protection
5 rights”). *See also* <http://www.antigayblacklist.com>.³³ Internet message boards have been used to
6 exchange information about donors and coordinate harassment efforts. *See, e.g.*, <http://broadway>
7 world.com/board/readmessage.cfm?thread=983640&boardid=2. These web sites are just the
8 newest method of harassing individuals that supported Proposition 8 and a traditional definition
9 of marriage; supporters of Proposition 8 have also been subjected to the forms of threats,
10 harassment, and reprisals previously found sufficient to warrant an exemption from compelled
11 disclosure provisions.

12 Like the petitioners in *Averill*, 325 F. Supp. 2d at 1178 (granting an exemption upon
13 evidence of frequent hang-ups and crank calls), countless supporters of Proposition 8 and a
14 traditional definition of marriage have been subjected to threatening phone calls, e-mails, and
15 postcards. *See, e.g.*, John Doe Decl. #1 (multiple threatening phone calls); #28 (received a voice
16 mail message from a caller identifying himself as a “neighbor” and calling declarant a “scum-
17 fuck”); #52 (public relations director assisting Proposition 8 campaign received one to three
18 phone calls per day, as well as emails, from angry callers prior to election; after election, the
19 calls and emails of this nature increased and became more threatening; one caller called and re-
20 called to the point where business was interrupted and the Sheriff became involved); #53
21 (received phone calls at work); #54 (received letter calling him a “stupid mother fucker”); #4
22 (received multiple emails at his business address including one that read, “hello propagators &
23 litigators [sic] burn in hell,” and another that read, “congratulations. For your support of prop 8,
24 you have won our tampon of the year award”); #2 (flyer circulated in his neighborhood, calling
25 him a “Bigot” and listing his occupation, employer, and the amount of his contribution); #6

27 ³³ The web site AntiGayBlacklist.com appears to have been removed at some point after
28 May 10, 2009. It is still available as a “cached” web site on Google. Search
“antigayblacklist.com” and click on “Cached.”

1 (received a postcard chastising her for her support of Proposition 8); #10 (received an email
2 calling her “rotten”); #17 (received a phone call where female caller sarcastically told him he
3 must be proud of his decision to donate to Proposition 8); #19 (colleagues received email from
4 an alumna who refused to donate to her employer because of her contribution); #29 (received
5 over 50 emails, including a threat of a boycott, destruction of her art work, and warning her not
6 to show up at any gathering of homosexuals); #51 (received many emails which called him a
7 “bigot” and a “gay hater”); & #56 (received voice mail at work calling him a “bigot”).

8 In some instances the phone calls and emails were accompanied by threats of physical
9 violence. These threats are made all the more plausible by web sites listing the addresses of the
10 donors. *See, e.g.,* John Doe Decl. #16 (passenger in car threw unidentified object at her while she
11 participated in sign-waving event) & #29 (received email stating “I tolerate you because I don’t
12 come to where you are and slaughter you”). Fresno Mayor Alan Autry received a death threat
13 after participating in a rally in support of Proposition 8. Andres Araiza, *Prop 8 Threat: Fresno*
14 *Police Close to Arrest*, ABC-30 (KFSN-TV) (Oct. 31, 2008) (*available at* [http://abclocal.go.com](http://abclocal.go.com/kfsn/story?section=news/local&id=6479879)
15 [/kfsn/story?section=news/local&id=6479879](http://abclocal.go.com/kfsn/story?section=news/local&id=6479879)).

16 Others live in constant fear of the physical harm that may be directed at them or their family
17 because they supported Proposition 8 and a traditional definition of marriage. *See, e.g.,* John Doe
18 Decl. #13 (feared physical violence would erupts at sign-waving events that she attended;
19 refused to bring her children to the events; worried about future violence to her family if she
20 supports a similar cause in the future); #18 (Proposition 8 incidents “shook” declarant “to the
21 core”); #19 (donor in Louisiana worried that someone “could go after” her family in California);
22 #20 (would not host a wave party without a man present because of safety concerns); #23
23 (concerned about the safety of his children and instructed principal that only he or his wife could
24 pick them up from school); #30 (will not speak out publicly in the future because he “would fear
25 for the safety of [his] children”); #39 (did not display a bumper sticker on her car because of
26 aggression directed toward family and friends who supported Proposition 8); #45 (would have to
27 “seriously consider . . . the safety of [her] family in the future when deciding to support a cause
28 similar to Proposition 8”); & #52 (fears for her safety and the safety of her daughters).

1 Like the petitioners in *Brown*, 459 U.S. at 99, 103 S. Ct. at 424 (granting an exemption in
2 part upon evidence of destruction of personal property), supporters of Proposition 8 and a
3 traditional definition of marriage have seen their car windows broken, homes vandalized, and
4 their cars spray painted and scratched. *See, e.g.*, John Doe Decl. #11 (back window of car broken
5 out while parked in front of declarant’s house); #12 (car scratched and tires deflated while car
6 parked at grocery store; staircase leading downstairs from her home covered in urine with a
7 puddle of urine at the bottom); #13 (car scratched, leaving 27-inch gash); #14 (home egged and
8 floured multiple times; car egged, floured, and honeyed multiple times; motorbike tipped over);
9 #24 (bumper sticker ripped off of car while parked in a shopping area); & #26 (bumper sticker
10 ripped off of family car while parked at school).

11 The threats, harassment, and reprisals have also affected the work lives of individuals that
12 supported Proposition 8 and a traditional definition of marriage. One individual reported that she
13 is worried that she may lose her job as a result of her support for Proposition 8. John Doe Decl.
14 #16 (“I suspect that [my support] has put [my job] in jeopardy”). Others have had their
15 employers contacted because they supported Proposition 8. *See, e.g.*, John Doe Decl. #10
16 (emailer stated that she was going to contact the parents of the students at the school where
17 declarant works); & #17 (human resources department at declarant’s workplace notified of
18 declarant’s support of Proposition 8).

19 Businesses have also been targeted because the owners or employees supported Proposition
20 8. *See, e.g.*, John Doe Decl. #20 (lesbian couple who patronized business of declarant for several
21 years told declarant they would no longer support her business and have not patronized her
22 business since); #1 (organized protest at his business and numerous reports of organized
23 boycotts); #4 (received an email stating that, “I AM BOYCOTTING YOUR ORGANIZATION
24 AS A RESULT OF YOUR SUPPORT OF PROP 8”); #5 (received email suggesting that his
25 business would suffer as a result of his donation in support of Proposition 8); #27 (name posted
26 on an Internet “Boycott H8ers List”); #29 (boycott of artist threatened via email); #30 (received
27 email stating “Your company is now on a list I am producing of those that will be boycotted and
28 shut down soon”); #20 (business review of declarant’s business on YellowPages.com makes a

1 reference to declarant’s support of Proposition 8); #52 (declarant’s business received so many
2 calls at work from one person that no customers could get through and Sheriff had to intervene);
3 & #56 (voice mail left at work calling him a “bigot”).

4 Something seemingly as simple as standing on a street corner with a sign supporting
5 Proposition 8 often led to harassment and physical or verbal assault. *See, e.g.*, John Doe Decl.
6 #13 (participated in 6-7 sign-waving events; at each event, people would shout obscenities at,
7 make obscene gestures to, and argue with supporters of Proposition 8); #16 (while holding sign
8 supporting Proposition 8 on a street corner, was called a “filthy bag of shit” and “bitch”;
9 unknown object thrown at her); #25 (people driving by peaceful sign demonstration by
10 supporters of Proposition 8 made obscene gestures and yelled obscenities); & #56 (people
11 regularly made obscene gestures and yelled at people participating at wave parties).

12 Family relationships and friendships have ended or been strained by support for Proposition
13 8. *See, e.g.*, John Doe Decl. #15 (brother no longer speaks to declarant because of her support for
14 Proposition 8); #21 (openly gay members of declarant’s country club give him looks of disdain
15 and do not greet him as he passes, unlike formerly warm greetings); & #49 (friendship with long-
16 time friend risked because of declarant’s support for Proposition 8).

17 Reprisals were also directed at churches that supported Proposition 8. *See, e.g.*, John Doe
18 Decl. #3 (church window broken using “Yes on 8” yard sign); #14 (helped clean up graffiti at his
19 church’s temple); & #23 (face of Mary statue outside church painted orange). Even churches
20 whose hierarchy supported Proposition 8 have not always been safe havens for supporters of
21 Proposition 8. *See* John Doe Decl. #18 (while placing signs supporting Proposition 8 at his
22 Roman Catholic church, a church member and her daughter told declarant that they did not like
23 him putting up the signs supporting Proposition 8); & #49 (declarant’s pastor at a Roman
24 Catholic church told declarant that she should find another church because of her support for
25 Proposition 8).

26 At least one supporter of Proposition 8 received no help from the police after reporting
27 threats, harassment, and reprisals. John Doe Decl. #42 (reported yard sign theft and vandalism to
28 police on three separate occasions, but received no response from police department). Another

1 supporter did not even bother reporting harassment, because she felt that she would not receive
2 any help for her problems. John Doe Decl. #46 (declarant spoke to police dispatcher about sign
3 theft, but never reported any theft because she did not believe that reporting would prevent future
4 sign theft).³⁴

5 Plaintiffs have also submitted several declarations demonstrating that the threats,
6 harassment, and reprisals are chilling First Amendment speech. *See, e.g.*, John Doe Decl. #13
7 (would hesitate before donating in the future); #19 (will think twice before donating in the
8 future); #20 (would alter the way she supports issues in the future); #23 (will not donate if his
9 name must be disclosed); #25 (would change how he supports issue in the future); #27 (less
10 likely to give in the future); & #30 (will change how he supports similar issues in the future). *See*
11 *also* John Doe Decl. #37; #39; #43; #44; #45; #47; #49; #51; & #52. Evidence of chill is not
12 required for an exemption to be granted under the reasonable-probability test. *Averill*, 325 F.
13 Supp. at 1179 (“Although the Supreme Court took great pains to explain how the likelihood of
14 threats and harassment could discourage political associations and silence alternative viewpoints,
15 it required a showing of only the first of the three elements set forth in SMC 2.04.320.”).³⁵ A
16 reasonable probability of threats, harassment, and reprisals creates the “*legal presumption* that
17 such disclosure would adversely impact rights of association and advocacy.” *Id.* (emphasis
18 added). Chill merely demonstrates that there is a reasonable probability of threats, harassment,
19 and reprisals. *Id.* Plaintiffs have submitted evidence of chill to demonstrate that there is a
20 reasonable probability of threats, harassment, and reprisals, and to demonstrate that the legal
21 presumption that such threats will chill First Amendment activities is well justified.

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24 ³⁴ *See supra* n. 31 (discussing how criminal sanctions do not cure the chilling effect of the
25 threat, harassment, or reprisal directed at an individual merely for espousing his political views).

26 ³⁵ The Seattle Ethics and Elections Commission required a party to demonstrate (1) a
27 reasonable probability of future threats, (2) interference with advocacy, and (3) a chill on the
28 exercise of First Amendment rights. *Averill*, 325 F. Supp. At 1179. The court found the Commis-
sion’s requirement to be inconsistent with *Buckley*, which requires proof of only the first
element. *Id.*

1 Together, this evidence demonstrates that supporters of Proposition 8 and a traditional
2 definition of marriage have been subjected to exactly the sort of threats, harassment, and
3 reprisals that the courts have previously found sufficient to warrant an exemption from
4 compelled disclosure; indeed, for some of them, these threats, harassment, and reprisals arose
5 only because of California’s compelled disclosure system. Thus, Plaintiffs have demonstrated
6 that there is a reasonable probability of threats, harassment, and reprisals unless this Court
7 prevents further compelled disclosure of donors to groups that supported the passage of
8 Proposition 8 or a traditional definition of marriage. Therefore, Plaintiffs are entitled to summary
9 judgment on their as-applied challenge to the constitutionality of the PRA on the grounds that
10 their First Amendment rights outweigh the State’s interest in compelled disclosure.

11 **IV. The PRA’s \$100 reporting threshold is unconstitutional, facially and as applied.**

12 Compelled disclosure provisions such as those contained in the PRA must survive strict
13 scrutiny. Strict scrutiny requires a narrowly tailored remedy to serve a compelling government
14 interest. California lacks a compelling government interest sufficient to justify the compelled
15 disclosure of ballot-measure contributors. However, even if the Court finds that California has a
16 compelling government interest, the \$100 reporting threshold still fails strict scrutiny because it
17 is not narrowly tailored to serve the only potential compelling state interest: preventing voter
18 ignorance. Further, because the PRA does not account for inflation, the disconnect between the
19 \$100 threshold and the only possible state interest continues to grow farther apart every year as a
20 result of inflation. Thus, the \$100 must be found unconstitutional because it is not narrowly
21 tailored to serve a compelling government interest.

22 **A. California lacks a compelling interest sufficient to justify compelled ballot measure**
23 **disclosure.**

24 In *Buckley*, the Supreme Court stated that “disclosure requirements, as a general matter,
25 directly serve [three] substantial governmental interests.” 424 U.S. at 68, 96 S. Ct. at 658. “First,
26 disclosure provides the electorate with information as to where political campaign money comes
27 from and how it is spent by the candidate in order to aid the voters in evaluating those who seek
28 federal office [(“Informational Interest”)]. . . . Second, disclosure requirements deter actual

1 corruption and avoid the appearance of corruption by exposing large contributions and
2 expenditures to the light of publicity [(“Corruption Interest”)]. . . . Third, . . . recordkeeping,
3 reporting, and disclosure requirements are an essential means of gathering the data necessary to
4 detect violations of the contribution limits [(“Enforcement Interest”).]” *Id.* at 66-68, 96 S. Ct.
5 657-58.

6 Subsequent courts have clarified that the Corruption and Enforcement Interests are unique to
7 candidate elections, and; therefore, cannot be relied upon to justify compelled ballot-measure
8 disclosure. *See Bellotti*, 435 U.S. at 789-90, 98 S. Ct. at 1422-23 (holding that the state lacked a
9 compelling interest in combating corruption in the context of a ballot-measure election because
10 there is no risk of *quid pro quo* corruption); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d
11 1088, 1105 n.23 (same) (“*CPLC I*”). *See also Canyon Ferry Road*, 556 F.3d at 1031-32 (noting
12 that the Enforcement Interest cannot justify ballot-measure disclosure because it necessary only
13 to enforce contribution limits—limits that are unconstitutional in the context of a ballot-measure
14 election); *CPLC I*, 328 F.3d at 1105 n.23 (9th Cir. 2003) (same). However, these courts have
15 suggested that the Informational Interest may be sufficient to justify compelled ballot-measure
16 disclosure, a conclusion that appears to be premised on a misreading of *Buckley* and the
17 Informational Interest discussed therein. *See, e.g., CPLC II*, 507 F.3d at 1178-80.³⁶

18 In *Buckley*, the Supreme Court stated that information regarding contributions and
19 expenditures “allows voters to place each candidate in the political spectrum” and that the
20 “sources of a candidate’s financial support also alert the voter to the interests to which a
21 candidate is most likely to be responsive and thus facilitate predictions of future performance.”
22 424 U.S. at 67, 96 S. Ct. at 657. The need to provide this information to voters is a direct result
23 of the realities of a political campaign involving *candidates*; candidates often discuss their
24 general policies regarding education, health care, and taxes, but rarely disclose detailed policy

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27 ³⁶ The issue as to whether California has a compelling interest sufficient to justify compelled
28 disclosure provisions was not litigated in *CPLC II* because the plaintiffs had conceded that
California has a compelling interest in regulating true contributions in the context of a ballot
measure. *CPLC II*, 507 F.3d at 1172.

1 positions about those topics. Issues that escape the attention of the media are simply not
2 discussed. Thus, information regarding contributors to a candidate allows voters to better predict
3 some of the difficult policy decisions that an elected official is called to make in office,
4 especially on those issues that are not discussed publicly during a campaign.

5 By comparison, everything the voter needs to know about a ballot measure is contained in
6 the text of the measure itself. There is no “political spectrum” and certainly no “future
7 performance.” Initiatives can be incredibly complex pieces of legislation, but the first *Buckley*
8 interest is not about simplifying the message for voters. *See Bellotti*, 435 U.S. at 792, 98 S. Ct. at
9 1424 (“But if there be any danger that the people cannot evaluate the information and arguments
10 advanced . . . it is a danger contemplated by the Framers of the First Amendment.”). Information
11 about contributors no doubt may change perceptions about a ballot measure, but it simply does
12 not change the nature of the ballot measure itself. The First Amendment grants advocates the
13 right to separate their message from their identity to ensure that the message will not be
14 prejudged simply because voters do not like the proponent. *McIntyre*, 514 U.S. at 342, 115 S. Ct.
15 at 1517. The identity of the speaker is no doubt helpful in evaluating the message, “but the best
16 test of truth is the power of the thought to get itself accepted in the competition of the market.”
17 *Id.* at 348 n. 11, 115 S. Ct. at 1519 n. 11 (citations omitted). “Don’t underestimate the common
18 man. People are intelligent enough to evaluate the source of anonymous writing. They can
19 evaluate its anonymity along with its message, as long as they are permitted, as they must be, to
20 read that message. And then, once they have done so, it is for them to decide what is
21 ‘responsible’, what is valuable, and what is truth.” *Id.*

22 Because the identity of the speaker does not change the message communicated and because
23 it simply cannot alter the text of the measure itself, California lacks a compelling government
24 interest to force a speaker to make a statement that he would otherwise omit. *See id.* *See also*
25 *Buckley II*, 525 U.S. at 203, 119 S. Ct. at 647 (noting that ballot-measure expenditure reporting
26 adds little insight as to the measure), *aff’g Am. Constitutional Law Found., Inc. v. Meyer*, 120
27 F.3d 1092, 1104-05 (10th Cir. 1997) (“The first and third [*Buckley* interests] are inapplicable
28 because [the statute] addresses expenditures, not contributions.”).

1 **B. The PRA’s \$100 reporting threshold fails strict scrutiny.**

2 However, even if the Court determines that California has a compelling interest sufficient to
3 justify compelled ballot measure disclosure, the \$100 threshold fails to survive the second part of
4 the strict scrutiny analysis. To survive strict scrutiny, the law or regulation in question must also
5 be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County*
6 *Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S. Ct. 1013, 1019 (1989). A law can fail to be
7 narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does
8 not implicate the government’s compelling interest in the statute. *Simon & Schuster v. New York*
9 *State Crime Victims Bd.*, 502 U.S. 105, 121, 112 S. Ct. 501, 511 (1991). The regulation may also
10 be underinclusive if it fails to restrict speech that does implicate the government’s interest. *See,*
11 *e.g., White*, 536 U.S. at 779-80, 122 S. Ct. at 2537. Finally, a regulation is not narrowly tailored
12 if the state’s compelling interest can be achieved through a less restrictive means. *Rutan v.*
13 *Republican Party of Illinois*, 497 U.S. 62, 75, 110 S. Ct. 2729, 2737 (1990).

14 **1. California has only a limited compelling informational interest in disclosure.**

15 In the context of ballot initiatives, from *Buckley* forward, courts have recognized only one
16 possible state interest sufficient to justify the disclosure of contributions and expenditures:
17 combating voter ignorance by informing voters about who supports and opposes a ballot issue.³⁷

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19 ³⁷ In *Buckley*, the Supreme Court stated that “disclosure requirements, as a general matter,
20 directly serve [three] substantial governmental interests.” 424 U.S. at 68, 96 S. Ct. at 658. “First,
21 disclosure provides the electorate with information as to where political campaign money comes
22 from and how it is spent by the candidate in order to aid the voters in evaluating those who seek
23 federal office. . . . Second, disclosure requirements deter actual corruption and avoid the
24 appearance of corruption by exposing large contributions and expenditures to the light of
25 publicity. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential
26 means of gathering the data necessary to detect violations of the contribution limits.” *Buckley*,
27 424 U.S. at 66-68, 96 S. Ct. at 657-58.

28 In subsequent decisions, courts have expanded upon *Buckley*’s analysis of the reasons why
the second interest (the “corruption interest”) and the third interest (the “enforcement interest”)
do not apply to ballot measure disclosure. *See Bellotti*, 435 U.S. at 789-90, 98 S. Ct. at 1422-23
(holding that the state lacked a compelling interest in combating corruption in the context of a
ballot measure election because there is no risk of *quid pro quo* corruption); *CPLC I*, 328 F.3d at
1105 n.23 (same). *See also Canyon Ferry Road*, 556 F.3d at 1031-32 (noting that the third

(continued...)

1 *Canyon Ferry Road*, 556 F.3d at 1032-33; *CPLC I*, 328 F.3d at 1105 n.23 (9th Cir. 2003)
2 (quoting *Bellotti*, 435 U.S. at 789-90, 98 S. Ct. at 1422-23); see also *Buckley*, 424 U.S. at 68, 96
3 S. Ct. at 658. This interest carries with it three significant limitations. First, it is limited to
4 identifying those “persons *financially* supporting or opposing a . . . ballot measure.” *Canyon*
5 *Ferry Road*, 556 F.3d at 1032. Second, the interest is compelling only if it is directed at
6 combating voter ignorance. See *Buckley*, 424 U.S. at 68, 96 S. Ct. at 658; *Canyon Ferry Road*,
7 556 F.3d at 1032, 1034. Third, the interest is temporal in nature—voter ignorance can only be
8 addressed prior to a voter casting his or her vote; once the vote has been cast, the interest is
9 extinguished, because voter ignorance (or knowledge) is immediately a moot point. See *infra*
10 Part V.

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

16 First, the issues submitted to the voters through ballot measures have become increasingly
17 complex. *CPLC I*, 328 F.3d at 1105. Donor disclosure is said to alleviate these problems in an
18 indirect manner by providing donors with an analytical shortcut, premised on the assumption that
19 only those with a vested interest in the outcome of the ballot campaign would expend resources
20 in support or opposition to the measure, and that, knowing this, voters will actively seek out
21 information on these donors to know who is supporting a ballot measure to find out who will
22 benefit from the ballot measure. See *CPLC I*, 328 F.3d at 1106. *But see Disclosure Costs* at 4
23 (discussing how little information voters actually consult). Common sense dictates that it is the
24 information regarding the major donors to either side that is most likely to provide a meaningful

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27 ³⁷ (...continued)

28 interest cannot justify ballot measure disclosure because it necessary only to enforce contribution
limits—limits that are unconstitutional in the context of a ballot measure election); *CPLC I*, 328
F.3d at 1105 n.23 (same).

1 voting cue.³⁸ Furthermore, knowing who donated to a ballot measure does little to lessen the
2 complexity of the ballot issue itself. Instead, the issue of complexity is dealt with by making the
3 measure simpler and clearer for the voter—an issue that has been addressed by the California
4 legislature through other means.³⁹

5 Second, campaigns surrounding ballot measures are not cheap and are often dominated by
6 special interest groups that pour millions of dollars into ballot measure campaigns.⁴⁰ *CPLC I*,

8 ³⁸ Further, what little research that exists on the use of compelled donor disclosure for voter
9 decision-making related indicates that public disclosure is an insignificant factor in providing
10 voters with knowledge about ballot measures. *See supra* n. 19.

11 ³⁹ For example, under California Elections Code § 9050, the Attorney General determines
12 the “ballot title for each measure submitted to the voters of the whole state.” This power extends
13 to changing the ballot title after petitions have been circulated and signed, yet before the measure
14 is submitted to the voters. A lawsuit was brought against just such a change in the ballot title of
15 Proposition 8. *See Jansson v. Bowen*, No. 34-2008-00017351 (Sup. Ct. of Cal., Dept. 29,
16 Sacramento, Cal., Aug. 7, 2008) (available at [http://ag.ca.gov/cms_attachments/press/pdfs/n1597](http://ag.ca.gov/cms_attachments/press/pdfs/n1597_ruling_on_proposition_8.pdf)
17 [_ruling_on_proposition_8.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1597_ruling_on_proposition_8.pdf)).

18 Moreover, the California legislature has tasked the Secretary of State with compiling and
19 drafting a ballot pamphlet that can be read and understood by the average voter. *See* Cal. Elec.
20 Code §§ 9081, 9084 (e); Cal. Gov’t Code §§ 88000, 88001(e). The necessary mechanisms for
21 clarifying the sometimes difficult concepts of California ballot measures have been put in place
22 by the legislature; whether they are being properly and effectively used is an issue unrelated to
23 campaign disclosures.

24 ⁴⁰ The amount spent on ballot measure campaigns is enormous: “From 2000 through 2006,
25 special interests spent over \$1.3 billion passing or defeating ballot measures. . . . The median
26 initiative campaign spent \$4.3 million in 2000, and median expenditures rose steadily since then
27 to \$15.7 million in 2006—with the extreme exception of the November 2005 election, when the
28 median campaign spent \$36.7 million.” Center for Governmental Studies, *Democracy by*
Initiative: Shaping California’s Fourth Branch of Government, 282 (2d ed. 2008) (available at
http://cgs.org/images/publications/cgs_dbi_full_book_f.pdf) (“*Democracy by Initiative*”).

Even the basic task of getting a ballot measure on the ballot is a difficult and expensive
proposition that prevents small, unorganized donors—such as those who are only contributing
\$100—from being able to influence an election. In his 2000 book, *Democracy Derailed:*
Initiative Campaigns and the Power of Money, David S. Broder discussed at length the industry
that has built up around the complicated process of getting an initiative on the California ballot.
Those who specialize in ballot measure campaigns agreed that even ten years ago, the cost to get
an initiative on the ballot was prohibitively expensive to all but the wealthy:

As it is, that cost [of getting initiatives on the ballot] is so great that, with rare

(continued...)

1 328 F.3d at 1105. As set forth in greater detail below, it is the information about these special
2 interest groups that is important to voters; those who give a small amount have no discernable
3 influence on the ballot measure campaign. A small donor no longer has any influence on a ballot
4 initiative campaign in California. *Democracy by Initiative* at 289 (“With large contributions
5 coming from all sides, ballot measure campaigns have become battles between fewer and fewer
6 major interests, while contributions from small donors have become insignificant”). In a
7 campaign that spent a combined \$70 million, the identity of small donors is irrelevant. *See*
8 *Canyon Ferry Road*, 556 F.3d at 1036 (Noonan, J., concurring) (“How do the names of small
9 contributors affect anyone else’s vote? Does any voter exclaim, ‘Hank Jones gave \$76 to this
10 cause. I must be against it!’”). Therefore, disclosing the identity of thousands of small donors is
11 irrelevant to alleviating voter ignorance.

12 Third, the public has neither the time nor the ability to “independently study the propriety of
13 individual ballot measures,” a problem exacerbated by a ballot measure pamphlet provided by
14 the state that is virtually incomprehensible. *CPLC I*, 328 F.3d at 1105 (voters have neither the
15 time or ability to independently study each measure); Cal. Gov’t Code § 81001(g) (pamphlet
16 provided by the State is virtually incomprehensible). Here, as with the first factor, the issue is

17 _____
18 ⁴⁰ (...continued)

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

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

1 already dealt with through other legislative means.⁴¹ Any tangential relationship compelled
2 disclosure has to this third factor is dealt with by the concerns addressed below.

3 Finally, groups supporting or opposing ballot measures often use “ambiguous or
4 misleading” names, and voters may never know the identity of veiled political actors that have
5 poured “tens of millions of dollars” into a campaign.⁴² *CPLC II*, 507 F.3d at 1179. Public
6 disclosure of campaign contributions is chiefly addressed to remedy this last of the four
7 difficulties. Sandy Harrison, a former journalist and government employee, described the
8 problem as follows:

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

17 *CPLC I*, 507 F.3d at 1179.

18 The goal of campaign disclosure then, is to prevent “the wolf from masquerading in sheep’s
19 clothing.” *CPLC I*, 328 F.3d at 1106 n.24. Accordingly, in applying strict scrutiny, the essential
20 question for the Court is whether the PRA’s \$100 disclosure threshold addresses the “wolf in
21 sheep’s clothing” problem, alleviating concerns that donors who donate an amount substantial
22 enough to influence a campaign are masking their support for, or opposition to, a particular
23 ballot measure, and causing voter ignorance.

24 ⁴¹ Under California law, the Secretary of State is charged with preparing the state ballot
25 pamphlet. Cal. Elec. Code § 9081; *see also* Cal. Gov’t Code § 88000 (also charging Secretary of
26 State with preparing the state ballot pamphlet). The Secretary of State is required to include in
27 the ballot pamphlet “[t]ables of contents, indexes, art work, graphics, and other materials that the
28 Secretary of State determines will make the ballot pamphlet easier to understand or more useful
for the average voter.” Cal. Elec. Code § 9084(e); *see also* Cal. Gov’t Code § 88001(e) (identical
language to Cal. Elec. Code § 9084(e)). While there is a significant amount of information that
must be included in the ballot pamphlet under California law, the California legislature has
already designated that the Secretary of State handle the issues of clarity in the ballot pamphlet.

⁴² The statute itself lists only the confusing nature of the ballot pamphlet mailed to voters by
the state and the influence of *large campaign contributions* as the justifications for ballot
measure disclosure. Cal. Gov’t Code § 81001(g).

1 **2. The \$100 reporting threshold is not narrowly tailored to the State’s interest.**

2 The \$100 threshold for reporting contributors is not narrowly tailored to the State’s interest
3 in avoiding the “wolf in sheep’s clothing” problem that donors whose real identity could
4 influence an election are hiding their identity. California may have an interest in providing voters
5 with the information necessary to determine “who [is] really behind [a] proposition.” *CPLC II*,
6 507 F.3d at 1179. However, common sense dictates—and the Ninth Circuit has found—that the
7 “value of this financial information to the voters declines drastically as the value of the
8 expenditure or contribution sinks to a negligible level.” *Canyon Ferry Road*, 556 F.3d at 1033.
9 Voters gain little, if any, information from the disclosure of small donors. As Justice Noonan
10 said in *Canyon Ferry Road*, “[h]ow do the names of small contributors affect anyone else’s vote?
11 Does any voter exclaim, ‘Hank Jones gave \$76 to this cause. I must be against it!’” *Canyon*
12 *Ferry Road*, 556 F.3d at 1036 (Noonan, J., concurring).

13 The question is undoubtedly one of degree, not kind, because at some level, the State’s
14 informational interest may be sufficient to warrant the compelled disclosure of campaign
15 expenditures and contributions. *Canyon Ferry Road*, 556 F.3d at 1033. However, while the
16 Supreme Court has stated that the legislature should be granted some deference in determining
17 where disclosure should begin, *Buckley*, 424 U.S. at 83, 96 S. Ct. 665, in the context of the First
18 Amendment, the usual deference granted to the legislature does ““not foreclose [a court’s]
19 independent judgment of the facts bearing on an issue of constitutional law.”” *Turner Broad. Sys.*
20 *v. FEC*, 512 U.S. 622, 666, 114 S. Ct. 2445, 2471 (1994) (citation omitted). The Court’s role is
21 to assure that the legislature “has drawn *reasonable inferences* based on *substantial* evidence.”
22 *Id.* (emphasis added). California’s disclosure threshold cannot survive this level of review.

23 California’s disclosure statute, which requires an organization to report the name, address,
24 occupation, and employer for any individual or organization that contributes \$100 or more to a
25 ballot-measure committee and then makes some of that information available to the public via
26 the Internet, burdens substantially more speech than is necessary to serve the state’s interest. A
27 \$100 disclosure threshold simply does not address the problem of the “wolf in sheep’s clothing”
28 in a direct and material way. *Id.* at 664, 114 S. Ct. at 2470. Furthermore, the individual who

1 donates as little as \$100 incurs the same burdens on his First Amendment rights as the donor
2 who has given \$10,000. *Compare* John Doe Decl. #54 (professor received harassing email and
3 letter regarding donation in the \$100 to \$1,000 range) *with* John Doe Decl. #6 (received
4 harassing post card for donation of more than \$10,000). At some point, the marginal
5 informational gain that results from the disclosure of small donors is insufficient to overcome the
6 substantial burdens on First Amendment rights. *Canyon Ferry Road*, 556 F.3d at 1034 (“at some
7 point enough must be enough”). This Court need not set the lower limit, but a disclosure
8 threshold that requires an organization to disclose the name, occupation, and employer of every
9 individual that contributes as little as \$100 on the Internet is so widely overinclusive and far
10 removed from the State’s interest in providing voters with information as to the major donors
11 supporting or opposing a particular ballot measure that it cannot survive strict scrutiny.

12 **3. The PRA’s failure to account for inflation must factor into the strict-scrutiny**
13 **analysis.**

14 As the Supreme Court noted in *Randall v. Sorrell*, 548 U.S. 230, 261, 126 S. Ct. 2479, 2499
15 (2006), limits that are not adjusted for inflation decline in real value each year.⁴³ California’s
16 disclosure threshold is already far lower than necessary to serve the state’s potential interest of
17 identifying major donors and it grows even farther from that interest each year as a result of
18 inflation.

19
20 ⁴³ In *Randall*, the Court considered the constitutionality of expenditure limits and
21 contribution limits in a Vermont campaign finance statute, and found that both were
22 unconstitutional under the First Amendment. 548 U.S. at 236, 126 S. Ct. at 2485. The Court
23 quickly dispatched the expenditure limits as unconstitutional before proceeding to an in-depth
24 discussion of the contribution limits. *Id.* at 246, 126 S. Ct. at 2490-91. The Court reviewed the
25 contribution limits under a standard requiring them to be “closely drawn to match a sufficiently
26 important interest.” *Id.* at 247, 126 S. Ct. at 2491 (citation omitted). This standard is much more
27 relaxed than the strict scrutiny standard that applies here, and gave the state more leeway in
28 *Randall* than they have here to show the Constitutionality of the statute.

The *Randall* Court analyzed five factors that led them to the decision that the contribution
limits at issue were not closely drawn to meet the statute’s objectives. *Id.* at 253, 126 S. Ct. at
2495. Although the *Randall* Court does consider the effect of the contribution limits on the
ability of a person to effectively advocate for election, *id.* at 253-54, 126 S. Ct. at 2495, this is
not one of the factors considered in *Buckley* regarding compelled disclosure—a case decided
under the higher strict scrutiny standard that applies here.

1 The current disclosure threshold found in the PRA was set in 1980,⁴⁴ when it was increased
2 from \$50 to \$100.⁴⁵ 1980 Cal. Stat. 611, § 31. If this amount is adjusted to account for inflation,
3 the current threshold would be \$258. Bureau of Labor Statistics, CPI Inflation Calculator,
4 (*available at* http://www.bls.gov/data/inflation_calculator.htm). But it is probably more helpful
5 to perform the calculation in the other direction—\$100 today is the equivalent of approximately
6

7 ⁴⁴ The failure to re-evaluate and adjust campaign disclosure thresholds for inflation is not
8 limited to California. For example, of the states included in Dr. Carpenter’s studies, the
9 thresholds were last adjusted as follows:

- 10 1931 Ohio (\$0). 1931 Ohio Laws 114 v. 712; 1931 Ohio Laws 113 v. 307 § 186, eff.
11 June 30, 1931.
12 1979 Florida (\$0). Laws 1979, c. 79-400.
13 1986 Massachusetts (\$50). Mass. Gen. Laws ch. 345, §§ 3, 4 (1986).
14 1991 Washington (\$100). Wash. Rev. Code Ann. § 42.17.090(1)(b) (1991).
15 1996 Colorado (\$20). Fair Campaign Practices Act, eff. Jan. 15, 1997 (The citizens of
16 Colorado repealed and reenacted the entire campaign finance act in 1996. The
17 disclosure threshold did not change as a result of the re-enactment.).

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

19 Furthermore, the disclosure statutes in states with no threshold (Alaska, Florida, Louisiana,
20 Maryland, Michigan, and New Mexico) are suspect in light of *Canyon Ferry*, 556 F.3d 1021,
21 1021. *See* (Mem. & Order, p. 49, Jan. 30, 2009.)

22 ⁴⁵ Plaintiffs acknowledge that the Supreme Court upheld a \$100 disclosure threshold in
23 *Buckley*. 424 U.S. at 82-85. However, the decision is not controlling for several reasons.

24 First, the Supreme Court expressly reserved judgment on whether “information concerning
25 gifts [of less than \$100] can be made available to the public without trespassing impermissibly
26 on First Amendment rights.” *Id.* at 84. When this value is adjusted for inflation, as the Court’s
27 decision in *Randall* suggests that it must, it can be said that the Supreme Court has reserved
28 judgment on disclosure of amounts less than \$371.08 in 2009 dollars. Bureau of Labor Statistics,
CPI Inflation Calculator, *available at* http://www.bls.gov/data/inflation_calculator.htm.
California’s disclosure threshold thus falls below the level at which the Supreme Court has
reserved judgment.

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

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

1 \$39.00 in 1980 dollars.⁴⁶ *Id.* Yet the state’s disclosure threshold remains at \$100. By failing to
2 account for inflation, California’s disclosure threshold is quickly approaching the *de minimis*
3 levels struck down in *Canyon Ferry Road*, 556 F.3d at 1034 (“at some point enough must be
4 enough”).

5 This problem is exacerbated by the fact that the \$100 threshold applies equally to candidate
6 and ballot-measure elections. This places the burden of adjusting the thresholds “upon
7 incumbent legislators who may not diligently police the need for changes in limit levels.” *See*
8 *Randall*, 548 U.S. at 261, 126 S. Ct. at 2499. A legislator, with a sizeable war-chest by virtue of
9 his incumbency, may be less likely to adjust the level, ensuring that he will know the identity of
10 any individual who has contributed to his opponent’s campaign. *Id.*

11 Even if such a cynical view of California legislators is unwarranted, the legislature may
12 have other priorities and cannot continually adjust the disclosure threshold. *See* Bipartisan
13 Commission on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The*
14 *Critical Need to Simplify the Political Reform Act*, p. 25 (July 2000) (“McPherson
15 Commission”). The McPherson Commission was created to investigate and assess the effects of
16 the PRA. *Id.* at 15. The McPherson Commission’s very first recommendation was that the
17 disclosure threshold should be raised immediately, noting that:

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

20 *Id.* at 25 (emphasis added). Nearly nine years have elapsed since the McPherson Commission
21 issued its report and recommendation that the disclosure threshold should be raised and the
22 legislature has yet to adopt the change. In light of the legislative inaction, the disconnect between
23 the State’s informational interest and disclosure beginning at \$100, and the First Amendment
24 burdens that result from such a low disclosure threshold, the statute must be found
25 unconstitutional.

26 //

28 ⁴⁶ That is, it would take \$100 today to purchase an item that cost \$39 in 1980.

1 **4. California cannot support its \$100 disclosure provision by arguing that it is**
2 **necessary to enforce some higher constitutional threshold.**

3 California lacks a compelling interest sufficient to justify a \$100 disclosure threshold, and it
4 cannot create such an interest by arguing that \$100 disclosure is necessary to enforce some
5 higher constitutional threshold. The Supreme Court has rejected “such a prophylaxis-upon-
6 prophylaxis approach,” *WRTL II*, 127 S. Ct. at 2672. The State must demonstrate a separate,
7 compelling interest for setting its limit at \$100, separate and apart from enforcing some higher
8 constitutional limit.

9 Furthermore, public disclosure is not the least restrictive means of policing and enforcing
10 some much higher constitutional limit. The PRA already requires Committee Plaintiffs to keep
11 detailed records of contributions exceeding twenty-five dollars and imposes substantial civil and
12 criminal penalties for non-compliance with the record-keeping and reporting provisions. Cal.
13 Gov’t Code 84200 *et seq.* (reporting provisions); Cal. Gov’t Code § 91000 *et seq.* (enforcement
14 provisions). As the Supreme Court said in *Buckley*, “[t]here is no indication that the substantial
15 criminal penalties for violating the [Act] combined with the political repercussions of such
16 violations will be insufficient to police the contribution provisions.” 424 U.S. at 56 96 S. Ct. at
17 652. California simply cannot impose the substantial burdens on First Amendment rights that
18 occur from \$100 disclosure merely to enforce a higher disclosure threshold that passes
19 constitutional muster.

20 **C. The threshold is unconstitutional as-applied to Plaintiffs because there is a**
21 **reasonable probability of threats, harassment, and reprisals.**

22 In Part II.C, *supra*, as well as the declarations accompanying this Motion for Summary
23 Judgment and Plaintiffs’ Motion for Preliminary Injunction, Plaintiffs set forth the very real
24 danger of threats, harassment, and reprisals that accompany a person’s support for Proposition 8.
25 The State must narrowly tailor its threshold for disclosure because of the First Amendment rights
26 at stake for contributors to ballot measures. As-applied to Plaintiffs, the PRA does not survive
27 strict scrutiny. Contributors to Plaintiffs—even contributors at the \$100 threshold—have been
28 singled out for harassment, threats, and reprisals. The burden here is on the State to demonstrate

1 that the PRA is narrowly tailored to meet some compelling state interest. *See CPLC II*, 507 F.3d
2 at 1178 (*citing White*, 536 U.S. at 774-75, 122 S. Ct. at 2534).

3 **V. Post-election public ballot-measure reporting and the failure to purge public reports**
4 **after the election are unconstitutional.**

5 Counts three and four of Plaintiffs’ Third Amended Complaint address the related issues of
6 post-election public disclosure and the purging of reports filed pre-election, which remain
7 publicly available after the election. As set forth in detail above, California has but one possible
8 interest sufficient to justify the compelled public disclosure of donors in the context of a ballot
9 measure—a limited informational interest designed to combat the problem of voter ignorance.
10 Furthermore, this interest has a temporal component—it is limited to alleviating voter ignorance
11 with respect to the particular ballot measure to which the disclosure relates.⁴⁷ Public ballot-
12 measure disclosure does not address the problem of voter ignorance, and must therefore be found
13 unconstitutional because the State lacks a compelling interest sufficient to justify the burdens on
14 Plaintiffs’ First Amendment rights.

15 **A. California does not have a compelling state interest in the public disclosure of**
16 **donors to a ballot measure after the election.**

17 The only possible state interest sufficient to justify compelled public disclosure of
18 contributors to a ballot measure, whether pre- or post-election, is a limited informational interest
19 designed to combat the problem of voter ignorance. *See Canyon Ferry Road*, 556 F.3d at 1032-
20 33; *CPLC I*, 328 F.3d at 1105 n. 23 (*quoting Bellotti*, 435 U.S. at 789-90, 98 S. Ct. at 1422-23);
21 *supra* Part IV.A. But the problem of voter ignorance is, by definition, a pre-election concern.
22 Compelled public-disclosure provisions are designed to address the pre-election problem of
23 voter ignorance by making citizens more informed voters, providing them with voting cues to
24

25 ⁴⁷ In the context of candidate elections, this temporal element is relaxed because the state
26 has an additional interest in preventing *quid pro quo* corruption that simply does not exist in
27 ballot measure elections, where the only possible interest is informational. *Bellotti*, 435 U.S. at
28 789-90, 98 S. Ct. at 1422-23 (holding that the state lacked a compelling interest in combating
corruption in the context of a ballot measure election because there is no risk of *quid pro quo*
corruption).

1 determine “who [is] really behind [a] proposition,” *CPLC II*, 507 F.3d at 1179, and to prevent
2 “the wolf from masquerading in sheep’s clothing.” *CPLC I*, 328 F.3d at 1106 n.24.

3 Accordingly, no later than twelve days before the election, Plaintiffs are required to file
4 public reports that contain the name, address, occupation, and employer of every individual that
5 had contributed a combined \$100 or more to the committee up until seventeen days before the
6 election. Cal. Gov’t Code § 82000.7. Furthermore, during the 90-day election cycle, i.e., the 90
7 days prior to the election, Plaintiffs are also required to file reports within 24 hours for any
8 individual who, in a single contribution, contributes \$1,000 or more to the campaign. Cal. Gov’t
9 Code § 82003. During approximately the last two weeks of the election, Plaintiffs must file
10 reports within 24 hours for any individual who contributes a total of \$1,000 or more to the
11 campaign, even if those contributions are made in smaller single donations. *Id.*

12 The public disclosure of the names and personal information of a donor to a ballot measure
13 *after* the election has occurred does not, and indeed cannot, serve California’s interest in
14 combating voter ignorance. The moment the vote is cast—whether the voter casts his or her vote
15 ignorantly, or with full knowledge of the issues involved—voter ignorance is no longer a
16 concern. *See Bellotti*, 435 U.S. at 791, 98 S. Ct. 1423-24 (“[T]he people in our democracy are
17 entrusted with the responsibility for judging and evaluating the relative merits of conflicting
18 arguments. . . . But if there be any danger that the people cannot evaluate the information and
19 arguments advanced by appellants, it is a danger contemplated by the Framers of the First
20 Amendment.”). Additional information after the election cannot alter an individual’s vote on the
21 particular ballot measure at issue.⁴⁸ The ability to access donor information after an election has
22 occurred—be it one day or nine years later—does nothing to decrease voter ignorance.

23 Moreover, public disclosure after the election, or the continued availability of reports filed
24 pre-election, are not narrowly tailored to serve other lesser interests. As set forth above,
25 California cannot create an interest in its public disclosure provisions by asserting that post-

26
27 ⁴⁸ Plaintiffs will address the concerns about voters who may have been misled, and the
28 State’s lack of a “speculative” interest in allowing voters to use the information to determine
how a person may act in the future in turn, below.

1 election public reporting provisions are necessary to enforce other provisions of the PRA (e.g.,
2 pre-election public disclosure). *See supra* Part IV.A.4.; *see also* *WRTL II*, 127 S. Ct. 2672
3 (rejecting prophylactic upon prophylactic approach). The post-election public disclosure
4 provisions, as well as the continued public availability of pre-election reports, must be supported
5 by their own compelling governmental interest. *See WRTL II*, 127 S. Ct. 2652, 2672. *See also*
6 *Heller*, 378 F.3d at 991 (“[I]t is not just *that* a speaker’s identity is revealed, but how and when
7 that identity is revealed, that matters in a First Amendment analysis of a state’s regulation of
8 political speech.”). Because post-election reporting cannot address the problem of voter
9 ignorance, California lacks a compelling interest sufficient to justify the substantial First
10 Amendment burdens and privacy concerns that compelled-public-disclosure statutes impose.

11 **B. Post-election public disclosure is not the least restrictive means of addressing the**
12 **potential interests of the State.**

13 Although Plaintiffs challenge the constitutionality of the compelled *public* disclosure of
14 donors to ballot measures, Plaintiffs do not mean to suggest that California does not have an
15 interest in enforcing the unchallenged provisions of the PRA or some limited form of disclosure.
16 In order for the PRA to be effective, pre-election reports must be both timely and accurate. Post-
17 election reports play a vital role in this process because they allow the State to assess the
18 accuracy of the pre-election reports. For obvious administrative reasons, the final accounting
19 must occur at some point after the election. But having this *private* interest in disclosure is not
20 the same as having a compelling interest in the *public* disclosure of post-election reports. Post-
21 election *public* disclosure is not the least restrictive means of addressing compliance, and must
22 therefore be found unconstitutional.

23 First, the prevention of violations of the PRA begins before an election. California has
24 enacted numerous provisions designed to prevent voters from being “tricked” into supporting a
25 ballot measure by a donor attempting to conceal his or her identity. *See, e.g.*, Cal. Gov’t Code §
26 84102(d) (committee name must indicate whether the committee supports or opposes the
27 measure); Cal. Gov’t Code § 84106 (committee must identify any sponsoring organization in the
28 committee name); Cal. Gov’t Code § 84504, Cal. Code Regs. tit. 2, § 18402(c)(3)(A) (the

1 committee name must include a name or phrase that clearly “identifies the economic or other
2 special interest of its major donors of fifty thousand dollars (\$50,000) or more”); Cal. Code Reg.
3 tit. 2, § 18402(c)(3)(B) (if any of the Major Donors share a common employer, the identity of the
4 employer must also be included in the committee name); Cal. Gov’t Code § 84503 (committees
5 must include a disclaimer on *every* advertisement which, in addition to disclosing information
6 about the committee, must also identify the two highest donors who have contributed \$50,000 or
7 more to committee); Cal. Gov’t Code § 84302 (prohibition on contributions by intermediaries,
8 i.e., individual who collects contributions on behalf of another, who then makes a contribution to
9 a committee without disclosing the name of the original donor). To require compelled public
10 disclosure of donors of as little as \$100 because the State is failing to do its job of enforcing its
11 laws would be a backward system.

12 Second, the possibility that voters may have been “tricked” into supporting a ballot measure
13 that they would not otherwise support by an organization that failed to comply with the
14 provisions of the PRA also provides little justification for post-election public disclosure. This
15 argument presupposes that voters would have voted differently had the organization filed reports
16 in compliance with the PRA—an assumption that is speculative at best.⁴⁹ In the event that the
17 voters are misled in a material way, they have remedies to redress their grievances, and none of
18 the remedies require the public disclosure of campaign finance reports.⁵⁰

19
20 ⁴⁹ For example, the Church of Latter Day Saints has been accused of providing substantial
21 in-kind support to organizations that supported Proposition 8 that went un-reported in official
22 campaign reports. Aurelio Rojas, *State to Probe Allegation of Mormon Church Role in Prop. 8*,
23 *Sacramento Bee* (Nov. 25, 2008) Because this support was made public through other channels
24 before the election, one would be hard pressed to find a voter before the election that did not
25 understand that the Church of Latter Day Saints supported Proposition 8, even if their name did
26 not appear on an official government report. Thus, the alleged violation is more of a technical
27 violation than one that substantively misled the voters.

28 ⁵⁰ For example, voters could bring a post-election challenge in the courts alleging “deficien-
cies [that] affected the ability of the voters to make an informed choice.” *See People v. Scott*, 119
Cal. Rptr. 2d 797, 800 (2002). To the extent that violations do not rise to the level necessary to
overturn the ballot measure through a post-election challenge, voters can attempt to convince the
electorate to repeal, or in the case of a ballot measure that failed, enact, the ballot measure in a

(continued...)

1 Third, the PRA requires organizations to maintain detailed records of contributions and
2 expenditures, Cal. Gov't Code § 84200 *et seq.*, and imposes substantial civil and criminal
3 penalties for non-compliance. Cal. Gov't Code § 91000 *et seq.*, to ensure that the PRA is properly
4 enforced. These provisions represent a more direct method of ensuring that voters are provided
5 with the most accurate and reliable pre-election information. The State remains free to review
6 the final reports, and to the extent that it finds a violation, it can, and will, impose substantial
7 civil and criminal penalties. As the State pointed out in their preliminary injunction briefing,
8 Defendant Fair Political Practices Commission has imposed substantial penalties for non-
9 compliance on many occasions in the past. (State Defs.'Opp. to Pls.' Mot. for Prelim. Inj., p. 19.)
10 This evidence suggests that the administrative-review process, coupled with the substantial civil
11 and criminal penalties, are an adequate method of ensuring that pre-election reports are accurate.
12 As the Supreme Court said in *Buckley*, there is no indication that the "political repercussion of
13 such violations will be insufficient to police" the relevant provisions. *Buckley*, 424 U.S. at 56, 96
14 S. Ct. at 652.

15 Fourth, while pre-election reporting is meant to provide voters with the information
16 necessary to cast an informed ballot, post-election reporting can only be used by the electorate to
17 "evaluate the appropriateness of its decision." (Mem. & Order, p. 56, Jan. 30, 2009.) However,
18 this is *not* the limited informational interest directed at voter ignorance that the Supreme Court
19 found sufficient in *Buckley* to justify compelled public disclosure. The voter cannot go back and
20 get a "do-over" of his or her vote. Gaining this knowledge after the election is only helpful in the
21 event of some future—and wholly hypothetical—election, where absolutely everything about
22 this hypothetical future election, from the wording of the ballot measure, to the donors, remains
23 exactly the same as the election to which the disclosure relates. Assuming the marketplace of
24 ideas works as it should, one would expect at least some individuals to change their positions,
25 making the dated campaign finance reports misleading in and of themselves.

26
27 ⁵⁰ (...continued)
28 future election. *See, e.g.*, Website of the Secretary of State of California, http://www.sos.ca.gov/elections/elections_j.htm#circ (Ballot measure titled "Reinstates Right of Same-Sex Couples to Marry" currently in circulation; another ballot measure titled "Substitutes Domestic Partnership for Marriage in California Law" also currently in circulation).

1 Fifth, when it comes to maintaining donors information online after the election, the
2 evidence in the wake of Proposition 8 demonstrates an alternative, more likely, use of donor
3 information. Individuals, upset with the results at the ballot box, can use it to harass and
4 intimidate any individual that can be identified as supporting a traditional definition of marriage
5 in an attempt to discourage them from supporting a similar cause in the future.

6 Finally, the urgency that exists pre-election for disclosure is virtually non-existent after an
7 election. As discussed above, voters will learn about violations through the State's enforcement
8 process, and even then, the violations may do little to undermine the electorate's confidence in
9 its decision. *See supra* n. 49 (discussing allegations that the Church of Latter Day Saints did not
10 properly report in-kind contributions and how few were misled by such a technical violation).
11 And, the PRA is fatally over-inclusive because it requires countless organizations that are in
12 fullcompliance with the PRA to publicly disclose information after the election that will have
13 little or no effect on any voter's perceptions while imposing substantial First Amendment
14 burdens.

15 The substantial First Amendment burdens imposed by compelled public disclosure
16 provisions require the State's compelling interest to address a real problem in a direct and
17 material way. *Turner Broad. Sys.*, 512 U.S. at 664, 114 S. Ct. at 2470. Here, the State's interest
18 in reassuring voters that they made the "right" choice, or in providing the electorate with
19 information necessary to determine who might support a similar measure in the future is merely
20 speculative and not directed at a real problem that necessitates the substantial First Amendment
21 burdens that occur as a result of compelled public disclosure. California's post-election interest
22 is one of enforcement, and as this Court recognized, committees must be given sufficient time to
23 wind down their operations. However, this interest only extends as far as necessary to determine
24 compliance with legal reporting requirements. Determining compliance does not require
25 disclosure to the public at large, because it is not the job of the public to determine whether
26 compliance has occurred, and therefore the statute is not narrowly tailored.

27 //

28 //

1 **CONCLUSION**

2 Plaintiffs have met their burden for finding in their favor on summary judgment. Therefore,
3 this Court should grant Plaintiffs summary judgment on all the counts in their Third Amended
4 Complaint.

5
6 Dated this 3rd day of June, 2009.

7 Respectfully submitted,

8 /s/ Scott F. Bieniek

9 Benjamin W. Bull (Ariz. State Bar No. 009940)
10 ALLIANCE DEFENSE FUND
11 15100 North 90th Street
12 Scottsdale, Arizona 85260
13 Counsel for All Plaintiffs

James Bopp, Jr. (Ind. Bar No. 2838-84)
Barry A. Bostrom (Ind. Bar No. 11912-84)
Sarah E. Troupis (Wis. Bar No. 1061515)
Scott F. Bieniek (Ill. Bar No. 6295901)
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
Counsel for All Plaintiffs

12 Timothy D. Chandler (Cal. Bar No. 234325)
13 ALLIANCE DEFENSE FUND
14 101 Parkshore Drive, Suite 100
15 Folsom, CA 95630
16 Counsel for All Plaintiffs
17 Designated Counsel for Service
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20
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1 **CERTIFICATE OF SERVICE**

2 I, Scott F. Bieniek, am over the age of 18 years and not a party to the within action. My
3 business address is 1 South Sixth Street, Terre Haute, Indiana 47807.

4 On June 3, 2009, I electronically filed the foregoing document described as Plaintiffs'
5 Memorandum in Support of Motion for Summary Judgment, with the Clerk of Court using the
6 CM/ECF system which will send notification of such filing to:

7 Zackery P. Morazzini
8 zackery.morazzini @doj.ca.gov
Attorney for Defendants Debra Bowen and Edmund G. Brown, Jr.

9 Judy W. Whitehurst
10 jwhitehurst@counsel.lacounty.gov
Attorney for Defendant Dean C. Logan

11 Terence J. Cassidy
12 tcassidy@porterscott.com
Attorney for Defendant Jan Scully

13 Mollie M, Lee
14 mollie.lee@sfgov.org
*Attorney for Defendants Dennis J. Herrera and
15 Department of Elections - City and Count of San Francisco*

16 Lawrence T. Woodlock
17 lwoodlock@fppc.ca.gov
*Attorney for Defendant Members of the Fair
Political Practices Commission*

18 I declare under the penalty of perjury under the laws of the State of Indiana that the above is
19 true and correct. Executed this 3rd day of June, 2009.

20
21 /s/ Scott F. Bieniek
22 Scott F. Bieniek (Ill. Bar No. 6295901)
Counsel for All Plaintiffs