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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PROTECTMARRIAGE.COM, et al.,                   No. 2:09-cv-00058-MCE-DAD  
      Plaintiffs,  
      v.    **MEMORANDUM AND ORDER**  
DEBRA BOWEN, et al.,  
      Defendants.

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ProtectMarriage.com - Yes on 8, a Project of California  
Renewal ("ProtectMarriage.com"), National Organization for  
Marriage, - Yes on 8, Sponsored by National Organization for  
Marriage ("NOM-California"), and John Doe #1, an individual, and  
as representative of the Class of Major Donors ("Major Donors")  
(collectively "Plaintiffs"), each committees under California  
election law, filed the current action challenging California's  
statutory requirement that they disclose the names and other  
personal information of those contributors of \$100 or more.  
Presently before the Court are Plaintiffs' Motions for  
Preliminary Injunction and Protective Order.

1 Plaintiffs ask that this Court: 1) enjoin Defendants from  
2 enforcing the semiannual reporting requirements under California  
3 Government Code § 84200; 2) enjoin Defendants from commencing  
4 criminal or civil actions for failing to comply with those  
5 reporting requirements; and 3) enjoin Defendants from both  
6 publishing reports or making available prior reports or campaign  
7 statements filed by Plaintiffs pursuant to California's Political  
8 Reform Act of 1974, Cal. Gov. Code § 81000 et seq. ("PRA").  
9 Hearing on the matter was held on January 29, 2009, with  
10 representatives for all parties present. For the following  
11 reasons, Plaintiffs' Motion for Preliminary Injunction is denied  
12 and the Protective Order already in place is extended.

13  
14 **BACKGROUND**

15  
16 On November 4, 2008, the citizens of California adopted a  
17 ballot measure, Proposition 8, that changed the California  
18 Constitution such that marriage would only thereafter exist  
19 "between a man and a woman." Plaintiffs are primarily formed  
20 ballot committees under the PRA and were established specifically  
21 to support the passage of Proposition 8.

22 The PRA requires committees such as Plaintiffs to report  
23 detailed information regarding their contributors. Specifically,  
24 Plaintiffs are required to file semiannual reports including the  
25 name, street address, occupation, name of employer, or if self-  
26 employed, the name of the business, the date and amount received  
27 during the period covered by the statement and the cumulative  
28 amount of contributions. Cal. Gov. Code §§ 84200, 84211(f).

1 This information is then available, inter alia, on the website of  
2 the Secretary of State. Additionally, opponents of Proposition 8  
3 have reproduced such information on a variety of their own  
4 websites and have also included other publicly-available personal  
5 information such as telephone numbers. At least one such website  
6 provides contributor information via an interactive map detailing  
7 the contributors' address, occupation, and contribution amount.  
8 See Declaration of Sarah E. Troupis (Second) ("Second Troupis  
9 Decl."), 2:6-9.<sup>1</sup>

10 Plaintiffs allege that, as a consequence of their support of  
11 Proposition 8, their contributors have been subject to threats,  
12 reprisals, and harassment. Plaintiffs submitted numerous  
13 articles elaborating various death threats, physical violence,  
14 and threats of violence directed against Proposition 8  
15 supporters, as well as acts of vandalism, protests, and boycotts.  
16 See Declaration of Sarah E. Troupis ("First Troupis Decl.").

17 Specifically, Plaintiffs provided evidence that Fresno Mayor  
18 Alan Autry and Pastor Jim Franklin, of Fresno's Cornerstone  
19 Church, both supporters of Proposition 8, received a death  
20 threat. *Id.*, Exh. C. That threat stated in part:

21 Hey Bubba,

22  
23 You really acted like a real idiot at the Yes of  
24 [sic] Prop 8 rally this past weekend. Consider  
25 yourself lucky. If I had a gun I would have gunned you  
26 down along with each and every other supporter. It's a  
27 blessing that you won't be our Mayor for much longer.

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28 <sup>1</sup> The Court is aware that Defendants have raised numerous  
challenges to Plaintiffs' evidence. Defendants' objections are  
noted and, in light of the Court's disposition of this case, are  
overruled as moot.

...

Anybody who has a YES ON PROP 8 sign or banner in front of their house or bumper sticker on the car in Fresno is in danger of being shot or firebombed. Fresno is not safe for anyone who supports Prop 8. I've also got a little surprise for Pastor Franklin and his congregation of lowlife's in the coming future. Keep letting him preach hate and he'll be sorry. He will be meeting his maker sooner than expected. Take this as a warning or anyway you want, but believe it. If you thought 9/11 was bad, you haven't seen anything yet. [Expletive] Fresno and the homophobic idiots who live there. Mark my words.

Id., Exh. E. Pastor Franklin's home, church and church office were also "egged." Id.

Additionally, Plaintiffs provided several articles stating that, in November, a small group of evangelical Christians, known to frequent San Francisco's Castro District on a weekly basis to pray, sing hymns, and attempt to convert homosexuals to a "straight lifestyle," were the subject of backlash from opponents of Proposition 8. Id., Exh. F, G. One of the articles further reported that opponents of the measure interrupted church services in Michigan and that two Mormon temples and one Knights of Columbus headquarters received envelopes containing white powder. Id., Exhs. F, I.

In early November, fifteen people were arrested while attending a protest against Proposition 8 in Long Beach. Id., Exh. K. Despite police statements that the event was a "great success considering the number of people who attended," at the end of the event approximately 100 individuals blocked traffic, refused to leave and then allegedly attempted to incite a riot. Id. Plaintiffs documented additional protests and boycotts as well. Id., Exhs., L-N.

1 Furthermore, several individuals have allegedly been forced  
2 to resign from their jobs amidst criticism over their monetary  
3 support of the ballot measure. See *id.*, Exh. N (artistic  
4 director for the California Musical Theatre donated \$1,000 to the  
5 "Yes on 8" campaign and subsequently resigned), AD (manager of El  
6 Coyote restaurant took a voluntary leave of absence after reports  
7 of her \$100 donation to support Proposition 8 led to boycotts and  
8 protestors at the establishment owned by her mother), AH  
9 (director of Los Angeles Film Festival resigned in the wake of  
10 criticism over the \$1500 he contributed to Proposition 8).

11 There have also been scattered reports of the theft of "Yes  
12 on 8" signs, vandalism of both residential and commercial  
13 buildings, and vandalism of church property, including one  
14 instance in which opponents of Proposition 8 apparently arranged  
15 "Yes on 8" signs in the form of a swastika on church grounds.  
16 *Id.*, Exhs. H, Q, S-Z.

17 Finally, Plaintiffs filed anonymous declarations from  
18 several individuals who allege to have suffered personal  
19 repercussions because of their support of Proposition 8:

20 Declaration of John Doe #1

21 John Doe #1 donated funds to ProtectMarriage.com,  
22 placed a yard sign in front of his home, and made phone  
23 calls supporting Proposition 8 on behalf of a church  
24 group. He was required to list the name of his  
25 business when he contributed to ProtectMarriage.com,  
26 and, consequently, in October, someone papered the cars  
27 in his parking lot with flyers referencing his support  
28 for Proposition 8 and the amount of his contribution.  
His business has since been targeted by numerous  
boycotts, several orchestrated through Facebook. At  
one point, someone paid for a sponsored link on Google  
so that a search for John Doe #1's store resulted in a  
website referencing his support for Proposition 8 and  
urging a boycott.

1 Additionally, several negative reviews of his business  
2 were posted on Yelp.com referencing his donation to  
Plaintiff. Other websites have posted similar reviews.

3 John Doe #1's business has twice been picketed  
4 and, in November, opponents of Proposition 8 allegedly  
orchestrated a march intended to culminate in further  
5 picketing of John Doe #1's business.

6 According to John Doe #1, the protesters have  
7 become quite aggressive and he has received numerous  
8 letters and hundreds of emails condemning his support  
of the Proposition. Approximately 30-40 people have  
9 frequented his business to express their displeasure  
with his support of the ballot initiative. John Doe #1  
10 eventually became concerned that opponents of  
Proposition 8 would tamper with his products so he  
11 installed sixteen additional security cameras. John  
Doe #1 contends that he will not contribute in the  
future and does not believe his business should suffer  
repercussions because of his personal donation.

12 Declaration of John Doe #2

13 John Doe #2 made two donations to  
14 ProtectMarriage.com and posted a "Yes on 8" bumper-  
sticker on his car. Subsequently, in November, someone  
15 distributed a flyer, in the town of his residence,  
labeling him a bigot. Additionally, the flyer listed  
16 his religious affiliation and the dollar amount of his  
contributions. According to John Doe #2, no one but  
17 his family was aware of his financial contribution, so  
he believes the information must have derived from  
18 public disclosure by the State. John Doe #2 also  
claims that he will be unlikely to contribute to  
19 similar causes in the future.

20 Declaration of John Doe #3

21 John Doe #3 is a pastor at a Lutheran Church.  
Prior to the passage of Proposition 8, he informed his  
22 congregation that the Bible supports marriage between  
one man and one woman. He further stated that the  
23 congregation should vote accordingly.

24 Also prior to the passage of Proposition 8, an  
individual placed a "Yes on 8" sign on church property.  
25 In November, someone used the sign and a heavy object  
to break a large window in the church building.

26 Declaration of John Doe #4

27 John Doe #4, an attorney who is the sole  
28 shareholder in his firm, donated funds to NOM-  
California.

1 In support of Proposition 8, John Doe #4 wrote articles  
2 supporting Proposition 8 and conducted lectures to  
local groups in support of the initiative.

3 He also held a fundraiser at his home to support  
4 the ProtectMarriage.com - Yes on 8 campaign. A group  
of protesters conducted a demonstration at the entrance  
5 to his community and attempted to hand flyers to guests  
as they passed through the gate to the neighborhood.

6 Over the course of November 13-16, John Doe #4  
7 received approximately 15-20 harassing emails. One  
8 email stated, "hello propogators & litigators burn in  
hell." Exh. B. Another stated, "Congratulations. For  
9 your support of prop 8, you have won our tampon of the  
year award. Please contact us if you would like to  
10 pick up your prize." Id. At least one message  
referenced the amount of John Doe #4's contributions  
and the amount of an additional short-term loan John  
11 Doe #4 had provided to ProtectMarriage.com.

12 Finally, John Doe #4's name, business and the  
13 amount he donated were posted on the website  
www.californiansagainsthate.org.

14 Declaration of John Doe #5

15 John Doe #5 contributed funds to  
ProtectMarriage.com. In November, John Doe #5 received  
16 an email suggesting that his company's image would be  
damaged as a result of his support of Proposition 8.  
17 John Doe #5 now feels threatened and uneasy knowing  
that his company could be targeted.

18 Declaration of John Doe #6

19 John Doe #6 donated funds to ProtectMarriage.com.  
20 He did not engage in any other public support of the  
initiative. His name and the amount of his donation  
was listed on www.californiansagainsthate.com. At the  
21 end of November, he received a postcard allegedly  
insulting him for supporting the ballot measure.

22 The postcard was typed and stated in part, "We  
23 just hope you are proud of your participation in this  
Great Crusade. Just think of how you have contributed  
24 to the economy with the money you donated! It doesn't  
matter that there are thousands of worthwhile charities  
25 that could have used those funds to feed starving  
people, clothe the homeless, and find cures for cancer  
26 and other life-threatening diseases. You must be so  
proud!"

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1 Declaration of John Doe #7

2 John Doe #7 is the senior pastor of a church and  
3 donated funds to ProtectMarriage.com. His family  
4 members displayed bumper stickers on their cars and  
5 displayed yard signs in front of their house. John Doe  
6 #7's church served as a distribution center for the  
7 petitions initially circulated in support of the  
8 Proposition. The church also distributed yard signs  
9 and bumper stickers. Additionally, members of the  
10 church telephoned approximately 275 people on behalf of  
11 ProtectMarriage.com.

12 John Doe #7 received one phone call at the church  
13 stating that if he was against gay marriage, he should  
14 equally be against divorce. Twice, the "Yes on 8"  
15 bumper stickers were ripped off of his wife's car at  
16 her place of employment. One of these times, an anti-  
17 Proposition 8 note was left on the windshield. The  
18 typed note stated, "Why would you want to deprive  
19 others of fundamental human rights? What if a close  
20 friend, family member or co-worker was gay and wanted  
21 to get married? Wouldn't you want to support the love  
22 they have for their partner and want them to have the  
23 same rights as you and others? Please re-think your  
24 position. There are so many more important issues in  
25 this world that need our attention rather than gay  
26 marriage. We need to learn tolerance, acceptance and  
27 love of each other. PLEASE VOTE NO ON PROP. 8." Exh.  
28 A. Thereafter, he placed bumper stickers inside of the  
car windows with tape so that they could not be  
removed.

John Doe #8

John Doe #8 contributed funds to  
ProtectMarriage.com, displayed a bumper sticker on his  
car, and placed a yard sign in his front yard. John  
Doe #8 also attended numerous rallies, three press  
conferences, and spoke at a number of churches in Los  
Angeles, Orange County, and San Diego in support of  
Proposition 8. Additionally, he participated in panel  
discussions involving same-sex marriage. Finally, John  
Doe #8 attended an election night gathering at which he  
was photographed. That photograph was published in at  
least one periodical and possibly in numerous others.

John Doe #8's yard sign was twice stolen and  
destroyed. After his photograph was published, he  
began receiving harassing letters, e-mails and at least  
one phone call at his workplace. One such message  
stated, "Jesus doesn't love you! He will punish you in  
hell for voting to deny a minority the same equal  
rights the rest of us have.



1 You're as bad as the racist white people who used to  
2 enjoy banning black people the same rights as them.  
3 The rest of the world is disgusted by your actions.  
4 Best start rethinking your position NOW!" Exh. B. He  
5 has also received harassing messages on his MySpace and  
6 Facebook accounts.

7 As a result, John Doe #8 will be reluctant to  
8 contribute to similar causes in the future.

9 John Doe #9

10 John Doe #9 attended an election night gathering  
11 for supporters of Proposition 8. A photograph taken of  
12 him that night was published in at least one periodical  
13 and may have appeared in numerous others.

14 Since publication of this picture, John Doe #9  
15 began receiving harassing messages on his MySpace and  
16 Facebook accounts. Many of these contained profanity  
17 and one threatened him with assault.

18 In November, John Doe #9 arrived home to a  
19 harassing message on his answering machine. A man, in  
20 a mocking tone, stated that the people in the picture  
21 with him were "Nazis" and against human rights.  
22 Additionally, he stated, "I certainly hope that someday  
23 somebody takes away something from you and then you'll  
24 realize what a [expletive] [expletive] you are."

25 John Doe #9 also received several harassing emails  
26 and phone calls at work. Some of the messages stated  
27 that the individuals knew where he worked and that they  
28 were going to attempt to have him fired. Additionally,  
other departments and employees received an email  
stating that he came "from a long line of bigots and  
racists."

In November, in response to the above incidents,  
John Doe #9 filed a police report, began coordinating  
with security to ensure his safety at work, and changed  
his home phone number.

As a result, John Doe #9 would think carefully  
about the possible consequences of donating to or  
publicly supporting a similar cause in the future.

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1 Plaintiffs initiated this action because they are  
2 statutorily required to again file semiannual reports on  
3 January 31, 2009.<sup>2</sup> Plaintiffs contend that their contributors  
4 and the Major Donors will suffer irreparable harm in the form of  
5 threats, harassment and reprisals if Plaintiffs are required to  
6 adhere to the PRA's mandates.

7 Accordingly, Plaintiffs seek injunctive relief arguing first  
8 that they are "entitled to an as-applied blanket exemption from  
9 California's compelled disclosure provisions because Plaintiffs  
10 have demonstrated a reasonable probability that compelled  
11 disclosure will result in threats, harassment, and reprisals  
12 because of their support for Proposition 8." Plaintiffs'  
13 Memorandum in Support of Motion for Temporary Restraining Order  
14 ("Motion"), 5:21-24. Additionally, Plaintiffs contend that  
15 "California's threshold for compelled disclosure of contributors  
16 is not narrowly tailored to serve a compelling government  
17 interest in violation of the First Amendment to the United States  
18 Constitution." Id., 6:1-3. Namely, Plaintiffs challenge the  
19 \$100 threshold after which individual contributors must be  
20 disclosed. Finally, according to Plaintiffs, "any ballot measure  
21 regulation that requires compelled disclosure regarding ballot  
22 measure activity after the election has occurred in  
23 unconstitutional because it cannot logically be related to a  
24 compelling state interest." Id., 6:12-14.

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27 <sup>2</sup> Since the thirty-first falls on a Saturday, and since  
28 Plaintiffs can file electronically, they are not technically  
required to file until Monday, February 2, 2009. Cal. Code Regs.  
tit. 2, § 18116; Cal. Gov. Code § 84600 et seq.

**STANDARD**

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3 A preliminary injunction is an extraordinary remedy, and  
4 Plaintiffs have the burden of proving the propriety of such a  
5 remedy by clear and convincing evidence. See Granny Goose Foods,  
6 Inc. v. Teamsters, 415 U.S. 423, 442 (1974). In order to warrant  
7 issuance of such relief, Plaintiffs must demonstrate either: 1) a  
8 combination of probable success on the merits and a likelihood of  
9 irreparable injury; or 2) that serious questions are raised and  
10 the balance of hardships tips sharply in favor of granting the  
11 requested injunction. Stuhlberg Int'l Sales Co., Inc. v. John D.  
12 Brush & Co., Inc., 240 F.3d 832, 839-40 (9th Cir. 2001); Winter  
13 v. Natural Resources Defense Council, 129 S. Ct. 365, 375 (2008).  
14 (likelihood rather than possibility of success on the merits  
15 required for issuance of preliminary injunctive relief).

16 These two alternatives represent two points on a sliding  
17 scale, pursuant to which the required degree of irreparable harm  
18 increases or decreases in inverse correlation to the probability  
19 of success on the merits. Roe v. Anderson, 134 F.3d 1400, 1402  
20 (9th Cir. 1998); United States v. Nutri-cology, Inc., 982 F.2d  
21 394, 396 (9th Cir. 1992). Under either formulation of the test  
22 for granting injunctive relief, however, Plaintiffs must  
23 demonstrate a significant threat of irreparable injury. Oakland  
24 Tribune, Inc. v. Chronicle Publ. Co., 762 F.2d 1374 (9th Cir.  
25 1985).

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1 **ANALYSIS**

2 **I. PRELIMINARY INJUNCTION**

3 **A. Likelihood of Success on the Merits**

4  
5 The debate over the merits of Proposition 8 has proved  
6 divisive, both locally and nationally. The issue of whether  
7 homosexuals have the same right to marry as do their heterosexual  
8 counterparts has garnered both passionate support and opposition,  
9 gripping the attention of communities across the country.

10 However, this case is not about gay marriage. This case is  
11 not about whether that right to marry exists and from where that  
12 right might derive, nor is it about the content of a California  
13 referendum already appropriately before the California Supreme  
14 Court.

15 This case is about the First Amendment.

16 Before this Court is the narrow issue of whether  
17 California's compelled disclosure law violates the guarantees  
18 afforded the citizens of the United States under the First  
19 Amendment. Thus, the Court must consider the State's power to  
20 regulate its own electoral process, and the tension between that  
21 governmental power and the free, uninhibited, and robust  
22 discourse necessary to the American way of life. It must  
23 evaluate a challenge to the PRA, itself a law enacted directly by  
24 the people and in place for over thirty years, a law that has  
25 never before been attacked on the specific grounds currently  
26 before this Court.

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1 Specifically, at issue is whether compelled disclosure of  
2 the names of Plaintiffs' contributors will result in a threat of  
3 harm so substantial as to warrant an exemption from California's  
4 disclosure requirements, an exemption historically reserved for  
5 small groups promoting ideas almost unanimously rejected. At  
6 issue are the harms alleged to await Plaintiffs because those who  
7 disagree with Plaintiffs' beliefs have engaged in repugnant and  
8 despicable acts that, rather than justify in their own right the  
9 protections afforded by the shield of First Amendment, are being  
10 wielded as a sword to improperly attack Plaintiffs' contributors.

11 Consequently, the issues before this Court are decidedly  
12 narrow: 1) Whether Plaintiffs are entitled to an as-applied  
13 blanket exemption from California's compelled disclosure  
14 requirements because there is a reasonable probability that  
15 disclosure will result in threats, harassment, and reprisals to  
16 their contributors; 2) whether California's \$100 compelled  
17 disclosure threshold is unconstitutionally low because such a low  
18 figure is not appropriately related to a proper government  
19 interest; and 3) whether California's post-election reporting  
20 requirement is unconstitutional for the same reason.

21 Accordingly, the only question this Court can and will answer is  
22 whether a preliminary injunction is necessary to rectify the  
23 alleged infringement of Plaintiffs' First Amendment rights. Any  
24 other discussion, despite its potential relevance to the  
25 marketplace of ideas, is simply not before the Court.

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1 The First Amendment to the United States Constitution  
2 states, "Congress shall make no law respecting an establishment  
3 of religion, or prohibiting the free exercise thereof; or  
4 abridging the freedom of speech, or of the press; or the right of  
5 the people peaceably to assemble, and to petition the Government  
6 for a redress of grievances."<sup>3</sup> U.S. Const. amend. I.

7 It cannot be denied that "[e]ffective advocacy of both  
8 public and private points of view, particularly controversial  
9 ones, is...enhanced by group association." National Association  
10 for the Advancement of Colored People v. Alabama, 357 U.S. 449,  
11 460 (1958) ("NAACP v. Alabama"). State-mandated compelled  
12 disclosure of contributors to committees such as Plaintiffs  
13 indisputably impinges on those vital freedoms of belief and  
14 assembly. See Buckley v. Valeo, 424 U.S. 1, 64 (1976).

15 Thus, the Supreme Court has stated that "significant  
16 encroachments on First Amendment rights of the sort that  
17 compelled disclosure imposes cannot be justified by a mere  
18 showing of some legitimate government interest...[T]he  
19 subordinating interests of the State must survive exacting  
20 scrutiny...[T]here must be a 'relevant correlation' or  
21 'substantial relation' between the governmental interest and the  
22 information required to be disclosed.

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27 <sup>3</sup> The First Amendment is applicable to the states through  
28 the Fourteenth Amendment. Stromberg v. People of the State of  
California, 283 U.S. 359, 368 (1931).

1 This type of scrutiny is necessary even if any deterrent effect  
2 on the exercise of First Amendment rights arises, not through  
3 direct government action, but indirectly as an unintended but  
4 inevitable result of the government's conduct in requiring  
5 disclosure." Buckley at 64-65 (internal citations omitted).<sup>4</sup>

6 Plaintiffs therefore contend that Buckley and its progeny  
7 require the Court to apply strict scrutiny in evaluating  
8 California's current compelled disclosure regime. However, such  
9 a conclusion is not as easily reached as Plaintiffs imply.

10 Supreme Court precedent regarding the appropriate standard  
11 of review is not a model of clarity. The Court has repeatedly  
12 relied on Buckley's ambiguous "exacting scrutiny" test to  
13 evaluate campaign finance regulations. See Davis v. Federal  
14 Election Commission, 128 S. Ct. 2759, 2765 (2008)

15 The Ninth Circuit, on the other hand, has expressly applied  
16 strict scrutiny in a case similar to the one before this Court,  
17 stating, "Although the First Amendment tolerates some regulation  
18 of express ballot-measure advocacy, it does not necessarily  
19 follow that the PRA regulations are constitutional.

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24 <sup>4</sup> The compelled disclosure discussion undertaken in Buckley,  
25 a case involving federal regulation of candidate elections,  
26 applies equally in the ballot measure context. See CPLC v.  
27 Getman 328 F.3d 1088, 1104 (9th Cir. 2003), quoting McIntyre v.  
28 Ohio Elections Com'n, 514 U.S. 334, 347 (1995) ("[T]here can be  
no doubt that states may regulate express ballot-measure advocacy  
through disclosure laws. Such speech is political in nature and  
'[t]he principles enunciated in Buckley extend equally to issue-  
based elections...'" ("Getman I").

1 For California to regulate individuals or organizations...who  
2 engage in activities other than political advocacy, California  
3 must have a compelling interest, and the regulation imposed must  
4 be narrowly tailored to advance the relevant interest." Getman  
5 I, 328 F.3d at 1101.

6 Nevertheless, in a related footnote, the Getman I court also  
7 recognized:

8 [T]he Supreme Court has been less than clear as to  
9 the proper level of judicial scrutiny we must apply in  
10 deciding the constitutionality of disclosure regulations  
11 such as those in the PRA. The Buckley Court claimed to  
12 apply "exacting scrutiny" in analyzing the FECA  
13 disclosure and reporting requirements, 424 U.S. at 64,  
14 but then noted that its review was whether a "'substantial  
15 relation' existed between the governmental interest and  
16 the information required to be disclosed." Id. In C&C  
17 Plywood, a case filed two years after Buckley, we  
18 observed that disclosure regulations for express ballot-  
19 measure advocacy may be enacted "without a showing of a  
20 compelling state interest." 583 F.2d 421, 425 (9th Cir.  
21 1978). We obviously assumed there that strict judicial  
22 review of disclosure statutes was inappropriate.

23 Notwithstanding Buckley and C & C Plywood, we  
24 subject California's disclosure requirements to strict  
25 scrutiny. In doing so, we follow the Court's post-  
26 Buckley decision of [Federal Election Com'n v.  
27 Massachusetts Citizens for Life, Inc.], 479 U.S. 238  
28 (1986). There the Court subjected disclosure and  
reporting provisions of FECA to strict scrutiny because  
those provisions applied to "organizations whose major  
purpose is not campaign advocacy, but who occasionally  
make independent expenditures on behalf of candidates."  
479 U.S. at 252-53. The Court recognized that reporting  
and disclosure requirements are more burdensome for  
multipurpose organizations (such as CPLC) than for  
political action committees whose sole purpose is  
political advocacy. See id. at 255-56. Given that the  
MCFL Court considered FECA's disclosure requirements to  
be a severe burden on political speech for multipurpose  
organizations, we must analyze the California statute  
under strict scrutiny. Post- Buckley, the Court has  
repeatedly held that any regulation severely burdening  
political speech must be narrowly tailored to advance a  
compelling state interest.

Getman at 1101 n.16 (final citations omitted).



1 The Ninth Circuit has not since clarified matters. See  
2 Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 787-788 (9th  
3 Cir. 2006); American Civil Liberties Union of Nev. v. Heller, 378  
4 F.3d 979, 992-993 (9th Cir. 2004).

5 Thus, the appropriate standard of review is an open  
6 question, and it will remain so until another day. Today,  
7 because Plaintiffs' likelihood of success on the merits is  
8 minimal even under the most stringent review, the Court will  
9 assume without deciding that strict scrutiny applies.

10 Accordingly, the Government "bears the burden of proving that the  
11 [statutory] provisions are (1) narrowly tailored, to serve (2) a  
12 compelling state interest." CPLC v. Randolph, 507 F.3d 1172,  
13 1178 (9th Cir. 2007).

14 Plaintiffs' concede, as they must, that California has a  
15 compelling justification for requiring disclosure of Plaintiffs'  
16 contributors. Plaintiffs' concession, however, gives short  
17 shrift to both the nature and magnitude of the State's actual  
18 interest.

19 According to Buckley, California's interests in its current  
20 compelled disclosure regime potentially fall into three  
21 categories. 424 U.S. at 66. "First, disclosure provides the  
22 electorate with information as to where political campaign money  
23 comes from and how it is spent by the candidate in order to aid  
24 the voters in evaluating those who seek federal office...Second,  
25 disclosure requirements deter actual corruption and avoid the  
26 appearance of corruption by exposing large contributions and  
27 expenditures to the light of publicity...Third,...recordkeeping,  
28 reporting, and disclosure requirements are an essential means of

1 gathering the data necessary to detect violations of the  
2 contribution limitations." Id. at 66-68.

3 However, unlike the election before the Buckley Court, which  
4 concerned candidates, the instant case bears on a recent ballot-  
5 initiative measure. Since Buckley, the Ninth Circuit has  
6 determined that "[o]nly the informational interest applies in the  
7 ballot-measure context." See Getman I, 328 F.3d at 1105 n.23.  
8 Nevertheless, the Supreme Court has repeatedly emphasized the  
9 importance of disclosure as it relates to the passage of  
10 initiatives. See CPLC v. Getman, No. 00-1698, slip op. at 15:9-  
11 11 (E.D. Cal. February 25, 2005) ("Getman II").

12 Such import derives, in no small part, from the fact that  
13 "[e]very other year, California voters decide the fate of complex  
14 policy proposals of supreme public significance...California  
15 voters have passed propositions increasing the sentences for  
16 'third strike' criminal offenders, rendering illegal aliens  
17 ineligible for public services, banning affirmative action,  
18 mandating that public education be conducted in English, and  
19 imposing contribution limits for political campaigns." Getman I,  
20 328 F.3d at 1105. In 1974, California voters even passed the  
21 initiative necessary to establish the PRA and its disclosure  
22 requirements. See Cal. Gov't code § 81000.

23 "California's high stakes form of direct democracy is not  
24 cheap. Interest groups pour millions of dollars into campaigns  
25 to pass or defeat ballot measures. Nearly \$200 million was spent  
26 to influence voter decisions on the 12 propositions on the 1998  
27 ballot. Of that total, \$92 million was spent on one gaming  
28 initiative.

1 The total amount spent by proponents and opponents of ballot  
2 measures has even outpaced spending by California's legislative  
3 candidates." Getman I, 328 F.3d at 1105.

4 Despite the fact that powerful issues are presented to the  
5 California voters and that the economic support for state  
6 initiatives is staggering, Plaintiffs argue that the public's  
7 "general want of knowledge" is insufficient to sustain the burden  
8 disclosure imposes on contributors' First Amendment liberties.  
9 Motion, 28:11-13. However, the Government's interest before the  
10 Court cannot be diminished by characterization as a general want  
11 of knowledge. The influx of money referenced above "produces a  
12 cacaphony of political communications through which California  
13 voters must pick out meaningful and accurate messages. Given the  
14 complexity of the issues and the unwillingness of much of the  
15 electorate to independently study the propriety of individual  
16 ballot measures,...being able to evaluate who is doing the  
17 talking is of great importance." Getman I, 328 F.3d at 1105.

18 "Voters rely on information regarding the identity of the  
19 speaker to sort through this 'cacophony,' particularly where the  
20 effect of the ballot measure is not readily apparent. While the  
21 ballot pamphlet sent to voters by the state contains the text and  
22 a summary of ballot measure initiatives, many voters do not have  
23 the time or ability to study the full text and make an informed  
24 decision.

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1 Since voters might not understand in detail the policy content of  
2 a particular measure, they often base their decisions to vote for  
3 or against it on cognitive cues such as the names of individuals  
4 supporting or opposing a measure, as listed in the ballot  
5 pamphlet, or the identity of those who make contributions or  
6 expenditures for or against the measure, which is often disclosed  
7 by the media or in campaign advertising. Such cues play a larger  
8 role in the ballot measure context, where traditional cues, such  
9 as party affiliation and voting record, are absent." Getman II,  
10 No. 00-1698 at 17:12-28.

11 Moreover, this Court cannot ignore the fact that, "[v]oters  
12 act as legislators in the ballot-measure context, and interest  
13 groups and individuals advocating a measure's defeat or passage  
14 act as lobbyists; both groups aim at pressuring the public to  
15 pass or defeat legislation.... Californians, as lawmakers, have  
16 an interest in knowing who is lobbying for their vote, just as  
17 members of Congress may require lobbyists to disclose who is  
18 paying for the lobbyists' services and how much." Getman I, 328  
19 F.3d at 1106. It follows that "[i]f our Congress 'cannot be  
20 expected to explore the myriad pressures to which they are  
21 regularly subjected,' then certainly neither can the general  
22 public. People have jobs, families, and other distractions.  
23 While we would hope that California voters will independently  
24 consider the policy ramifications of their vote, and not render a  
25 decision based upon a thirty-second sound bite they hear the day  
26 before the election, we are not that idealistic nor that naive.

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1 By requiring disclosure of the source and amount of funds spent  
2 for express ballot-measure advocacy, California -at a minimum-  
3 provides its voters with a useful shorthand for evaluating the  
4 speaker behind the sound bite." Id.

5 That shorthand is arguably even more necessary to the  
6 evaluation of ballot initiatives than it is in the scrutiny of  
7 candidates for political office. "'Even more than candidate  
8 elections, initiative campaigns have become a money game, where  
9 average citizens are subjected to advertising blitzes of  
10 distortion and half-truths and are left to figure out for  
11 themselves which interest groups pose the greatest threats to  
12 their self-interest.' Knowing which interested parties back or  
13 oppose a ballot measure is critical, especially when one  
14 considers that ballot-measure language is typically confusing,  
15 and the long-term policy ramifications of the ballot measure are  
16 often unknown. At least by knowing who supports or opposes a  
17 given initiative, voters will have a pretty good idea of who  
18 stands to benefit from the legislation." Getman I, 328 F.3d at  
19 1105-1106.

20 More to the point, "[d]isclosure...prevents the wolf from  
21 masquerading in sheep's clothing. Proposition 199, which was on  
22 the March 1996 Primary Election ballot, provides such an example.  
23 That initiative was entitled the 'Mobile Home Fairness and Rental  
24 Assistance Act,' but the proposed law was hardly the result of a  
25 grassroots effort by mobile home park residents wanting  
26 'fairness' or 'rental assistance.' Two mobile home park owners  
27 principally backed the measure.

28 ///

1 After the real interests behind the measure were exposed, various  
2 newspaper editorials decried the initiative's 'subtly misleading  
3 name' and explained that the initiative's real purpose was to  
4 eliminate local rent control for mobile home parks. The measure  
5 was soundly defeated, though proponents outspent opponents \$3.2  
6 million to \$884,000." Getman I, 328 F.3d at 1106 n.24 (emphasis  
7 in original).

8 The Ninth Circuit made similar statements in CPLC v.  
9 Randolph, 507 F.3d 1172. In that case the appellate court  
10 stated, "[I]n the context of disclosure requirements, the  
11 government's interest in providing the electorate with  
12 information related to election and ballot issues is well-  
13 established." Id. 1179 n.8. As here, that plaintiff conceded  
14 the state's interest was compelling, but the court nevertheless  
15 engaged in an extensive discussion of why that the government's  
16 informational interest is not only compelling, but of the highest  
17 order.<sup>5</sup>

18 \_\_\_\_\_  
19 <sup>5</sup> That court stated:

20 Despite the fact that CPLC conceded that  
21 California has a compelling informational interest,  
22 California also presented persuasive evidence  
23 demonstrating the importance of providing the  
24 electorate with pertinent information. Researcher  
25 David Binder conducted a telephone survey from June 23-  
26 26, 2001. "The goals of this project were to determine  
27 objectively, using established methods of scientific  
28 public opinion research, what sources of information  
regarding candidates and ballot measures are important  
to California voters." According to Binder's findings,  
"[m]ore than seven of ten California voters (71%) state  
that it is important to know the identity of the source  
and amount of campaign contributions to the ballot  
measure by both supporters and opponents, including  
unions, businesses or other interest groups."

(continued...)

1  
2 <sup>5</sup>(...continued)

3 "Fifty seven percent (57%) of California voters state  
4 that endorsements by interest groups, politicians or  
5 celebrities are important in helping them make up their  
6 mind [sic] on how to vote on ballot measures." "A  
7 majority of California voters (57%) state they would be  
8 less likely to vote for a proposition to build senior  
9 citizen housing if the proposition was supported by a  
10 well-known and respected senior activist who was  
11 discovered to have been paid by developers to promote  
12 the proposition. Only one-third (34%) stated that this  
13 information would not make any difference in their  
14 vote."

15 Professor Bruce Cain, a Professor of Political  
16 Science at the University of California, Berkeley, and  
17 Director of the Institute of Governmental Studies,  
18 added that "there are several compelling reasons for  
19 such a requirement. Foremost among them is the fact  
20 that the names groups give themselves for disclosure  
21 purposes can be, and frequently are, ambiguous or  
22 misleading."

23 Sandy Harrison, a former journalist for radio  
24 stations and newspapers and since 1995, a press  
25 secretary and communications director for the president  
26 pro tem of the state Senate, the state Department of  
27 Finance, and the state Controller, emphasizes this  
28 point in her affidavit:

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

16 According to Stephen K. Hopcraft, the  
17 President and co-owner of "a full-service public  
18 relations firm specializing in grass roots and  
19 public education campaigns[,] "the information  
20 gleaned from ... disclosure reports is absolutely  
21 critical to assist news media and voters in

22 (continued...)

1 Thus, "because groups supporting and opposing ballot  
2 measures frequently give themselves ambiguous or misleading  
3 names, reliance on the group, without disclosure of its source of  
4 funds, can be a trap for unwary voters. For example, a tobacco  
5 manufacturing group that opposes regulations on smoking might  
6 call itself 'Citizens for Consumer Protection.' This name might  
7 mislead voters into thinking that Citizens for Consumer  
8 Protection is a consumer advocacy group when, in fact, it  
9 protects the commercial interest of the tobacco industry. If the  
10 organization's donor information is disclosed and opposing groups  
11 and the press publicize the information, voters have a better  
12 chance of discerning the organization's true interest." Getman  
13 II, No. 00-1698 at 18:1-12.<sup>6</sup>

14  
15 <sup>5</sup>(...continued)  
16 sorting through the claims and counter-claims in a  
17 ballot measure campaign.... With all the hyperbole  
18 in campaigning, the financial backing of each side  
19 gives voters a yardstick to measure the truth of  
20 the assertions." Indeed, CPLC admitted that  
21 "[b]ecause political operators in many states are  
22 able to avoid campaign finance disclosure  
23 requirements, citizens are likely to be uninformed  
24 and unaware of the tens of millions of dollars  
25 that are spent on ballot measure campaigns by  
26 veiled political actors ..."

27 Randolph, 507 F.3d at 1179 n.8 (emphasis in original).

28 <sup>6</sup> See also McConnell v. Fed. Election Comm'n, 540 U.S. 93,  
128 (2003) ("Because FECA's disclosure requirements did not apply  
to so-called issue ads, sponsors of such ads often used  
misleading names to conceal their identity. 'Citizens for Better  
Medicare,' for instance, was not a grassroots organization of  
citizens, as its name might suggest, but was instead a platform  
for an association of drug manufacturers. And 'Republicans for  
Clean Air,' which ran ads in the 2000 Republican Presidential  
primary, was actually an organization consisting of just two  
individuals-brothers who together spent \$25 million on ads  
supporting their favored candidate."); Id. at 128 n.23 ("Other  
(continued...)



1 "Interest groups also seek to conceal their political  
2 involvement by availing themselves of complicated arrangements  
3 consisting of nonprofit corporations, unregulated entities and  
4 unincorporated entities. Without disclosure requirements,  
5 citizens are likely to be uninformed and unaware that tens of  
6 millions of dollars are spent on ballot measure campaigns by such  
7 veiled political actors." Id. at 18:14-20. Of particular  
8 relevance in this case is the number of out-of-state individuals  
9 and corporations contributing to the passage of a California  
10 referendum. Surely California voters are entitled to information  
11 as to whether it is even citizens of their own republic who are  
12 supporting or opposing a California ballot measure.

13 Moreover, "[w]hen asked, voters have indicated that  
14 information regarding the source and amount of campaign  
15 contributions to ballot measures plays an important role in their  
16 decision-making. Voters rate such information as more valuable  
17 than newspaper endorsements, campaign mailings, TV and radio  
18 advertisements, and endorsements by interest groups, politicians  
19 or celebrities." Id. at 18:21-19:2.

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26 <sup>6</sup>(...continued)  
27 examples of mysterious groups included 'Voters for Campaign  
28 Truth,' 'Aretino Industries,' 'Montanans for Common Sense Mining  
Laws,' 'American Seniors, Inc.' 'American Family Voices,' and the  
'Coalition to Make our Voices Heard.'") (internal citations  
omitted).

1 "In light of the number and complexity of ballot measures  
2 confronted by California voters, the staggering sums expending to  
3 influence their passage or defeat, the very real potential for  
4 deception through the information of advocacy groups with  
5 appealing but misleading names, and voters' heavy reliance on  
6 funding source information when deciding to support or oppose  
7 ballot measures,...California has a compelling informational  
8 interest in providing the electorate with information regarding  
9 contributors and expenditures made to pass or defeat ballot  
10 measure initiatives." Id. at 19:3-12.

11 The disclosure requirements provide some of the only truly  
12 objective information on which the electorate can rely to make an  
13 informed decision, and the state surely has the utmost  
14 justification for requiring the disclosure of information likely  
15 to ensure that its electorate is informed and able to effectively  
16 evaluate ballot measures. If ever disclosure was important,  
17 indeed vital, to fuel the public discourse, it is in the case of  
18 ballot measures.

19 Thus, even if, as Plaintiffs argue, individual voters will  
20 not be "clamoring" to know the name and other pertinent  
21 information of every contributor of over \$100 to every  
22 initiative, the cumulative effect of disclosure ensures that the  
23 electorate will have access to information regarding the driving  
24 forces backing and opposing each bill. Accordingly, the  
25 Government's interest is not only compelling, but critical to the  
26 proper functioning of the State's system of direct democracy.

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1 Finally, "[i]n determining whether legislation is narrowly  
2 tailored, [the Court] consider[s] whether the restriction  
3 '(1) promotes a substantial government interest that would be  
4 achieved less effectively absent the regulation, and (2) [does]  
5 not burden substantially more speech than is necessary to further  
6 the government's legitimate interests.'" Randolph, 507 F.3d at  
7 1183, quoting Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 861 (9th  
8 Cir. 2001). To be narrowly tailored, a statute need not be the  
9 least restrictive means of furthering the government's interest,  
10 but the restriction may not burden substantially more speech than  
11 necessary." *Id.* at 1186, quoting Menotti v. City of Seattle, 409  
12 F.3d 1113, 1130-1131 (9th Cir. 2005).

13 According to Plaintiffs, neither the \$100 contribution  
14 threshold that triggers California's statutory disclosure  
15 requirements nor the post-election reporting requirements are  
16 narrowly tailored to a compelling state interest. Each of those  
17 arguments will be addressed in turn, but the Court first turns to  
18 Plaintiffs' as-applied challenge.

19  
20 **B. Plaintiffs' As-Applied Challenge to the Disclosure**  
21 **Statute: Whether There is a Reasonable Probability that**  
22 **Compelled Disclosure Will Result in Threats,**  
23 **Harassment, and Reprisals to Contributors to a Minor**  
24 **Party**

25 Plaintiffs' first argument, which raises an as-applied  
26 challenge to the application of California's disclosure laws,  
27 does not involve the above strict scrutiny analysis, but instead  
28 turns on a test first articulated in Buckley and later applied in  
Brown v. Socialist Workers '74 Campaign Comm. (Ohio),

1 459 U.S. 87 (1982), and its progeny. Nevertheless, the above  
2 departure into the nature of the State's interest is relevant to  
3 the Court's resolution of Plaintiffs' instant claim.

4 The test applicable to Plaintiffs' First Cause of Action was  
5 initially formulated in Buckley when the Supreme Court rejected  
6 an overbreadth challenge to all reporting requirements imposed on  
7 minor parties. 424 U.S. 1. Despite its rejection of a blanket  
8 disclosure exemption for all such groups, the Court left open the  
9 possibility that similar minor parties in the future might be  
10 able to seek such immunity if they could show that there was a  
11 reasonable probability their contributors would suffer from  
12 harassment, threats, or reprisals as a result of such revelation.

13 The Buckley Court began its discussion by noting that the  
14 "governmental interest in disclosure is diminished when the  
15 contribution in question is made to a minor party with little  
16 chance of winning an election. As minor parties usually  
17 represent definite and publicized viewpoints, there may be less  
18 need to inform the voters of the interests that specific  
19 candidates represent. Major parties encompass candidates of  
20 greater diversity. In many situations the label 'Republican' or  
21 'Democrat' tells a voter little. The candidate who bears it may  
22 be supported by funds from the far right, the far left, or any  
23 place in between on the political spectrum. It is less likely  
24 that a candidate of, say, the Socialist Labor Party will  
25 represent interests that cannot be discerned from the party's  
26 ideological position." Id. at 70.

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1           Additionally, that Court was cognizant that "the damage done  
2 by disclosure to the associational interests of the minor parties  
3 and their members and to supporters of independents could be  
4 significant. These movements are less likely to have a sound  
5 financial base and thus are more vulnerable to falloffs in  
6 contributions. In some instances fears of reprisal may deter  
7 contributions to the point where the movement cannot survive.  
8 The public interest also suffers if that result comes to pass,  
9 for there is a consequent reduction in the free circulation of  
10 ideas both within and without the political arena." Id. at 71.

11           Accordingly, the Buckley Court determined that, though such  
12 facts were not before it, "[t]here could well be a case...where  
13 the threat to the exercise of First Amendment rights is so  
14 serious and the state interest furthered by disclosure so  
15 insubstantial that the Act's requirements [could not] be  
16 constitutionally applied." Id. That Court further observed  
17 "that unduly strict requirements of proof could impose a heavy  
18 burden, but it does not follow that a blanket exemption for minor  
19 parties is necessary. Minor parties must be allowed sufficient  
20 flexibility in the proof of injury to assure a fair consideration  
21 of their claim. The evidence offered need show only a reasonable  
22 probability that the compelled disclosure of a party's  
23 contributors' names will subject them to threats, harassment, or  
24 reprisal from either Government officials or private parties.  
25 The proof may include, for example, specific evidence of past or  
26 present harassment of members due to their associational ties, or  
27 of harassment directed against the organization itself.

28 ///

1 A pattern of threats or specific manifestations of public  
2 hostility may be sufficient." Id. at 74.<sup>7</sup>

3 The Supreme Court later had occasion to apply the Buckley  
4 test in Brown. The Brown Court addressed the issue of "[w]hether  
5 certain disclosure requirements of the Ohio Campaign Expense  
6 Reporting Law...[could] be constitutionally applied to the  
7 Socialist Workers Party ["SWP"], a minor political party which  
8 historically ha[d] been the object of harassment by government  
9 officials and private parties." Brown, 459 U.S. at 88. That  
10 Court emphasized several points raised in Buckley reiterating  
11 that "[t]he government's interests in compelling disclosures are  
12 'diminished' in the case of minor parties...[and at] the same  
13 time, the potential for impairing First Amendment interests is  
14 substantially greater." Id. at 92, quoting Buckley, 424 U.S. at  
15 70.

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17 \_\_\_\_\_  
18 <sup>7</sup> The Buckley Court noted that the facts in NAACP v.  
19 Alabama could possibly have warranted sustaining an as-applied  
20 challenge to Alabama's compelled disclosure requirements. Id. at  
21 71. The NAACP v. Alabama Court stated, "We think that the  
22 production order, in the respects here drawn in question, must be  
23 regarded as entailing the likelihood of a substantial restraint  
24 upon the exercise by petitioner's members of their right to  
25 freedom of association. Petitioner has made an uncontroverted  
26 showing that on past occasions revelation of the identity of its  
27 rank-and-file members has exposed these members to economic  
28 reprisal, loss of employment, threat of physical coercion, and  
other manifestations of public hostility. Under these  
circumstances, we think it apparent that compelled disclosure of  
petitioner's Alabama membership is likely to affect adversely the  
ability of petitioner and its members to pursue their collective  
effort to foster beliefs which they admittedly have the right to  
advocate, in that it may induce members to withdraw from the  
Association and dissuade others from joining it because of fear  
of exposure of their beliefs shown through their associations and  
of the consequences of this exposure." NAACP v. Alabama, 357  
U.S. at 462-463.

1 In Brown, the Court had before it "'substantial evidence of  
2 both governmental and private hostility toward and harassment of  
3 SWP members and supporters.' Appellees introduced proof of  
4 specific incidents of private and government hostility toward the  
5 SWP and its members within the four years preceding the trial.  
6 These incidents, many of which occurred in Ohio and neighboring  
7 states, included threatening phone calls and hate mail, the  
8 burning of SWP literature, the destruction of SWP members'  
9 property, police harassment of a party candidate, and the firing  
10 of shots at an SWP office. There was also evidence that in the  
11 12-month period before trial, 22 SWP members, including four in  
12 Ohio, were fired because of their party membership. The evidence  
13 amply support[ed] the District Court's conclusion that 'private  
14 hostility and harassment toward SWP members make it difficult for  
15 them to maintain employment.'" Brown at 98-99.

16 Moreover, "[t]he District Court also found a past history of  
17 government harassment of the SWP. FBI surveillance of the SWP  
18 was 'massive' and continued until at least 1976. The FBI also  
19 conducted a counterintelligence program against the SWP and the  
20 Young Socialist Alliance, the SWP's youth organization. One of  
21 the aims of the 'SWP Disruption Program' was the dissemination of  
22 information designed to impair the ability of the SWP and the YSA  
23 to function. This program included 'disclosing to the press the  
24 criminal records of SWP candidates, and sending anonymous letters  
25 to SWP members, supporters, spouses, and employers.' Until at  
26 least 1976, the FBI employed various covert techniques to obtain  
27 information about the SWP, including information concerning the  
28 source of its funds and the nature of its expenditures.

1 The District Court specifically found that the FBI had conducted  
2 surveillance of the Ohio SWP and had interfered with its  
3 activities within the State. Government surveillance was not  
4 limited to the FBI. The United States Civil Service Commission  
5 also gathered information on the SWP, the YSA, and their  
6 supporters, and the FBI routinely distributed its reports to  
7 Army, Navy, and Air Force Intelligence, the United States Secret  
8 Service, and the Immigration and Naturalization Service." Id. at  
9 99-100.

10 Finally, "the Government possesse[d] about 8,000,000  
11 documents relating to the SWP, YSA...and their members...Since  
12 1960, the FBI ha[d] had about 300 informants who were members of  
13 the SWP and/or YSA and 1,000 non-member informants. Both the  
14 Cleveland and Cincinnati FBI field offices had one or more SWP or  
15 YSA member informants. Approximately 2 of the SWP member  
16 informants held local branch offices. Three informants even ran  
17 for elective office as SWP candidates. The 18 informants whose  
18 files were disclosed to [the Special Master] received total  
19 payments of \$358,648.38 for their services and expenses." Id. at  
20 100 n.18.

21 The Brown court determined that "the evidence of private and  
22 government hostility toward the SWP and its members establishe[d]  
23 a reasonable probability that disclosing the names of  
24 contributors and recipients [would] subject them to threats,  
25 harassment, and reprisals." Id. at 100.

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1 Accordingly, this Court must now evaluate whether Brown can  
2 properly be applied to groups that were successful at the polls,  
3 that have evidenced a very minimal effect on their ability to  
4 sustain their movement, and that are unable to produce evidence  
5 of pervasive animosity even remotely reaching the level of that  
6 present in Brown.

7  
8 **C. Balancing the Government's Interest with the Burden**  
9 **Imposed on Minor Parties**

10 Both Buckley and Brown addressed the need to balance the  
11 government's diminished interest in the disclosure of  
12 contributors to minor parties against the burden imposed on those  
13 small groups by requiring such disclosure. In light of clearly  
14 established precedent, this Court is unable to say that the  
15 State's interest here is similarly diminished or that the  
16 Plaintiffs' potential burden is even remotely comparable.

17 Unlike the facts in Brown, the proponents of Proposition 8  
18 succeeded in persuading over seven million voters to support  
19 their cause. They were successful in their endeavor to pass the  
20 ballot initiative and raised millions of dollars in the process.  
21 This set of circumstances is a far cry from the sixty-member SWP  
22 party, repeatedly unsuccessful at the polls, and incapable of  
23 raising sufficient funds. Indeed, it became abundantly clear  
24 during oral argument that Plaintiffs could not in good conscience  
25 analogize their current circumstances to those of either the SWP  
26 or the Alabama NAACP *circa* 1950.

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1           Additionally, the Court has already extensively evaluated  
2 the nature of the State's interest and, in light of the marked  
3 differences between this and every other case in which an  
4 exemption has been allowed, simply cannot by any stretch of the  
5 imagination say that the Government's interest "is so  
6 insubstantial that the Act's requirements cannot be  
7 constitutionally applied" to Plaintiffs. To the contrary, as  
8 applied to the massive movement waged by Plaintiffs, the State's  
9 interest in disclosure is at full force.

10           Similarly, the greater burden alleged to be imposed on  
11 Plaintiffs also necessarily derives from their minority status.  
12 The Second Circuit stated in Federal Election Commission v. Hall-  
13 Tyner Election Campaign Committee that "[a]cknowledging the  
14 importance of fostering the existence of minority political  
15 parties, we must also recognize that such groups rarely have a  
16 firm financial foundation. If apprehension is bred in the minds  
17 of contributors to fringe organizations by fear that their  
18 support of an unpopular ideology will be revealed, they may cease  
19 to provide financial assistance. The resulting decrease in  
20 contributions may threaten the minority party's very existence.  
21 Society suffers from such a consequence because the free flow of  
22 ideas, the lifeblood of the body politic, is necessarily reduced.  
23 Accordingly, a nation dedicated to free thought and free  
24 expression cannot ignore the grave results of facially innocuous  
25 election requirements." 678 F.2d 416, 420 (2d Cir. 1982).

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1           Moreover, “[t]he power of a government to repress dissent is  
2 substantial and can be exercised in a myriad of subtle ways.  
3 Privacy is an essential element of the right of association and  
4 the ability to express dissent effectively...[F]orced revelations  
5 would likely lead to ‘vexatious inquiries’ which consequently  
6 could instill in the public an unremitting fear of becoming  
7 linked with the unpopular or unorthodox.” Id.

8           Notably absent from this case is any evidence that those  
9 burdens hypothesized by the Supreme Court would befall the  
10 current Plaintiffs. There is no evidence that their financial  
11 backing is so tenuous as to render them susceptible to a  
12 relatively minor and entirely speculative fall-off in  
13 contributions. There is surely no evidence that the seven  
14 million individuals who voted in favor of Proposition 8 can be  
15 considered a “fringe organization” or that their beliefs would be  
16 considered unpopular or unorthodox. Finally, there is no  
17 evidence that any of Plaintiffs’ contributors intend to retreat  
18 from the marketplace of ideas such that available discourse will  
19 be materially diminished.

20           Finally, it would appear that, while minor status is a  
21 necessary element of a successful as-applied claim, even minor  
22 status alone could not independently sustain Plaintiffs’ current  
23 cause of action. Brown and its progeny each involved groups  
24 seeking to further ideas historically and pervasively rejected  
25 and vilified by both this country’s government and its citizens.

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1 In dicta, the Ninth Circuit addressed this pattern when it  
2 rejected a plea for exemption waged by a contributor to a minor  
3 party that "was not promoting a reviled cause or candidate."  
4 Goland v. U.S., 903 F.2d 1247, 1260 (9th Cir. 1990).

5 The facts in the current case could not be more  
6 distinguishable from those in which successful challenges have  
7 been brought. Here, Plaintiffs orchestrated a massive movement  
8 to amend the California Constitution. Proponents of the  
9 initiative were successful in their endeavor, raising nearly \$30  
10 million, securing 52.3% of the vote and convincing over seven  
11 million voters to support Proposition 8. Declaration of Lynda  
12 Cassady in Support of Defendants' Opposition to Motion for  
13 Preliminary Injunction, ¶ 7, Exh. A. Plaintiffs did not seek to  
14 promote a "reviled cause," and instead sought to legislate a  
15 concept steeped in tradition and history. Accordingly, in light  
16 of Plaintiffs' success at the polls and the State's above-  
17 discussed informational interest, the Court cannot say that the  
18 Government's interest in this case is so insubstantial or the  
19 burden on Plaintiffs so great as to warrant an exemption from  
20 disclosure.

21 Plaintiffs nonetheless would have the Court find these  
22 comparisons irrelevant. Plaintiffs contend that the Buckley  
23 Court's reference to "minor" parties is applicable only in the  
24 context of its rejection of the request before it for a blanket  
25 exemption. See Motion, 13:19-24. According to Plaintiffs, the  
26 Supreme Court determined in Buckley that if a group could prove  
27 there was a reasonable probability that disclosure would lead to  
28 harassment, threats, and reprisals, an exemption was required.

1 However, Plaintiffs' interpretation renders superfluous the  
2 Buckley Court's analysis of the relative governmental interest  
3 and individual burdens in the context of minor parties. Neither  
4 did the Brown Court so broadly interpret Buckley when it  
5 repeated, "The First Amendment prohibits a state from compelling  
6 disclosures by a minor party that will subject those persons  
7 identified to the reasonable probability of threats, harassment  
8 or reprisals." Brown, 459 U.S. at 101-102 (emphasis added).

9 Since Buckley, as-applied challenges have been successfully  
10 raised only by minor parties, specifically those parties, as  
11 discussed, having small constituencies and promoting historically  
12 unpopular and almost universally-rejected ideas. As stated, in  
13 Brown, the SWP consisted of only sixty members in Ohio. Id. at  
14 88. The parties' "aim was the abolition of capitalism and the  
15 establishment of a workers' government to achieve socialism."  
16 The party was historically unsuccessful at the polls though its  
17 members regularly ran for public office. Id. Additionally,  
18 campaign contributions and expenditures...averaged approximately  
19 \$15,000 annually." Id. at 89.

20 Similarly, in Hall-Tyner, a committee supporting the  
21 Communist Party successfully sought exemption from state  
22 disclosure laws. 678 F.2d 416. Later, in McArthur v. Smith,  
23 members of the SWP, described as a "small and unpopular political  
24 party," again successfully challenged state disclosure  
25 requirements. 716 F. Supp. 592, 593 (S.D. Fla. 1989). There is  
26 simply no plausible analogy to be had in this case.

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1 Finally, this Court is confident that the Supreme Court's  
2 decisions in Buckley and Brown, both of which narrowly  
3 articulated the instant exception to disclosure laws, were not  
4 made without great consideration. Prior courts surely were aware  
5 that members of major parties might potentially, on some future  
6 occasion, become the target of threats or harassment at the hands  
7 of extremist members of an opposing group. Despite that  
8 possibility, the Supreme Court created an exception not for the  
9 majority, but for those groups in which the government has a  
10 diminished interest.

11 This Court finds that the "minor party" requirement  
12 articulated in Buckley is very much relevant and intact.  
13 Accordingly, Plaintiffs' as-applied challenge to California's  
14 disclosure laws has only a very minimal chance of success in  
15 light of Plaintiffs' non-minor status and lack of evidence that  
16 they have suffered animosity rising to the level hypothesized in  
17 Buckley and existing in Brown.

18  
19 **D. Reasonable Probability of Threats, Harassment, and**  
20 **Reprisals**

21 Even if Plaintiffs were able to successfully navigate the  
22 precedents discussed above, Plaintiffs' claim would have little  
23 chance of success in light of the relatively minimal occurrences  
24 of threats, harassment, and reprisals. Plaintiffs allege that  
25 their supporters have been the victim of vandalism, protests that  
26 at times turned violent, and the threat of injury, up to and  
27 including one death threat.

28 ///

1 This Court is cognizant of the relaxed nature of proof required  
2 by the Supreme Court under such circumstances. Nevertheless, the  
3 Court cannot say that the threats and harassment here rise to the  
4 level previously found to justify the exemption sought.

5 Unlike prior cases, in which plaintiffs alleged to have  
6 suffered mistreatment over extended periods of time, the alleged  
7 harassment directed at Proposition 8 supporters occurred over the  
8 course of a few months during the heat of an election battle  
9 surrounding a hotly contested ballot initiative. Only random  
10 acts of violence directed at a very small segment of the  
11 supporters of the initiative are alleged.

12 Moreover, while Plaintiffs are quite correct that under  
13 Buckley evidence of harassment "from either Government officials  
14 or private parties" could suffice to establish the requisite  
15 proof of reprisals, the facts of subsequent cases evidence not  
16 only the existence of some governmental hostility, but quite  
17 pervasive governmental hostility at that. Buckley, 424 U.S. at  
18 74 (emphasis added); see also McArthur, 716 F. Supp. at 594  
19 ("[H]arassment, reprisals or threats from private persons are  
20 sufficient to allow [the] court to enforce the plaintiff's first  
21 amendment rights by cloaking the contributors and recipients'  
22 names in secrecy.").

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1           Indeed, the Brown Court was confronted with countless acts  
2 of government harassment and retribution against members of the  
3 SWP, which are detailed above. Furthermore, in Hall-Tyner, the  
4 Second Circuit stated, "[t]he evidence relied on by the district  
5 judge included the extensive body of state and federal  
6 legislation subjecting Communist Party members to civil  
7 disability and criminal liability, reports and affidavits  
8 documenting the history of governmental surveillance and  
9 harassment of Communist Party members, as well as affidavits  
10 indicating the desire of contributors to the Committee to remain  
11 anonymous." 678 F.2d at 419.

12           Plaintiffs do not, indeed cannot, allege that the movement  
13 to recognize marriage in California as existing only between a  
14 man and a woman is vulnerable to the same threats as were  
15 socialist and communist groups, or, for that matter, the NAACP.  
16 Proposition 8 supporters promoted a concept entirely devoid of  
17 governmental hostility. Plaintiffs' belief in the traditional  
18 concept of marriage, to disagreement, have not historically  
19 invited animosity. The Court is at a loss to find any principled  
20 analogy between two such greatly diverging sets of circumstances.

21           Finally, Plaintiffs' exemption argument appears to be  
22 premised, in large part, on the concept that individuals should  
23 be free from even legal consequences of their speech. That is  
24 simply not the nature of their right. Just as contributors to  
25 Proposition 8 are free to speak in favor of the initiative, so  
26 are opponents free to express their disagreement through proper  
27 legal means.

28 ///



1 While the Court is cognizant of the deplorable nature of  
2 many of acts alleged by Plaintiffs, the Court also must reiterate  
3 that the legality or morality of any specific acts is not before  
4 it. Thus, as much as the Court strongly condemns the behavior of  
5 those who resort to violence, and/or other illegal behavior, the  
6 Court need not, indeed cannot, evaluate the proper legal  
7 consequences of those actions today.

8 By the same token, nothing in the Court's decision immunizes  
9 or excuses those who have engaged in illegal acts from the  
10 consequences of their conduct. Those responsible for threatening  
11 the lives of supporters of Proposition 8 are subject to criminal  
12 liability. See Troupis Decl, Exh. C (noting that the Fresno  
13 chief of police stated the department was "close to making an  
14 arrest" in the case of the death threats delivered to the mayor  
15 and a local pastor.) Those choosing to vandalize the property of  
16 individuals or the public are likewise liable. Those mailing  
17 white powder to organizations are subject to federal prosecution.  
18 In each case, there are appropriate legal channels through which  
19 to rectify and deter the reoccurrence of such reprehensible  
20 behavior.

21 As much as those channels are available today, it is  
22 unlikely that groups previously successful in seeking exemptions  
23 were privy to the same opportunities. Again, Plaintiffs have  
24 shown no societal or governmental hostility to their cause.  
25 Contrary to groups such as the SWP, Plaintiffs can seek adequate  
26 relief from law enforcement and the legal system.

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1 Such was not the case for those thought to be supporting the SWP  
2 or communist groups, those subject to actual criminal liability  
3 based on their beliefs and their associations.

4 Moreover, the Court simply cannot ignore the fact that  
5 numerous of the acts about which Plaintiffs' complain are  
6 mechanisms relied upon, both historically and lawfully, to voice  
7 dissent. The decision and ability to patronize a particular  
8 establishment or business is an inherent right of the American  
9 people, and the public has historically remained free to choose  
10 where to, or not to, allocate its economic resources. As such,  
11 individuals have repeatedly resorted to boycotts as a form of  
12 civil protest intended to convey a powerful message without  
13 resort to non-violent means. The Supreme Court has acknowledged  
14 these rights on many an occasion:

15 In *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Court  
16 held that peaceful picketing was entitled to  
17 constitutional protection, even though, in that case,  
18 the purpose of the picketing "was concededly to advise  
19 customers and prospective customers of the relationship  
20 existing between the employer and its employees and  
21 thereby to induce such customers not to patronize the  
22 employer." *Id.* at 99. Cf. *Chauffeurs v. Newell*, 356  
23 U.S. 341. In *Edwards v. South Carolina*, 372 U.S. 229,  
24 we held that a peaceful march and demonstration was  
25 protected by the rights of free speech, free assembly,  
26 and freedom to petition for a redress of grievances.

27 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982).

28 Notably, "[s]peech does not lose its protected character...simply  
because it may embarrass others or coerce them into action." *Id.*  
at 910.

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1 Accordingly, this Court concurs in the assessment that  
2 "expression on public issues has always rested on the highest  
3 rung of the hierarchy of First Amendment values. Speech  
4 concerning public affairs is more than self-expression; it is the  
5 essence of self-government. There is a profound national  
6 commitment to the principle that debate on public issues should  
7 be uninhibited, robust, and wide-open." Id. at 913 (internal  
8 citations and quotations omitted). Accordingly, this Court  
9 cannot condemn those who have legally exercised their own  
10 constitutional rights in order to display their dissatisfaction  
11 with Plaintiffs' cause.<sup>8</sup>

12 Plaintiffs nevertheless contend that "while a boycott may be  
13 an acceptable method for exacting social change, the Supreme  
14 Court did not list providing the electorate with the information  
15 necessary to boycott supporters of a political position as an  
16 acceptable justification for compelled disclosure." Motion,  
17 28:17-20. Plaintiffs miss the point. California's interest in  
18 disclosure, an interest of paramount importance in the context of  
19 ballot measures, is based on its need to educate its electorate.

20 ///

21 ///

22 \_\_\_\_\_  
23 <sup>8</sup> The Court also finds great irony in the fact that  
24 Plaintiffs' lament the extent of their economic suffering at the  
25 hands of the anti-Proposition 8 contingent, but Plaintiffs' own  
26 evidence indicates that supporters of Proposition 8 engaged in  
27 remarkably similar tactics. See Troupis Decl., Exh. A ("Indeed,  
28 supporters of Prop. 8 engaged in pressure tactics. At least one  
businessman who donated to 'No on 8,' Jim Abbot of Abbot &  
Associates, a real estate firm in San Diego, received a letter  
from the Prop. 8 Executive Committee threatening to publish his  
company's name if he didn't also donate to the 'Yes on 8'  
campaign."). Apparently, the threat of economic injury was a  
sword wielded on both sides of this fight.

1 The fact that Plaintiffs' opponents may use publicly available  
2 information as the basis for exercising their own First Amendment  
3 rights does not in any way diminish the State's interest.

4 To the contrary, "[k]eeping the electorate fully informed of  
5 the sources of campaign-directed speech and the possible  
6 connections between the speaker and individual candidates,  
7 [itself] derives directly from the primary concern of the First  
8 Amendment. The vision of a free and open market place of ideas  
9 is based on the assumption that the people should be exposed to  
10 speech on all sides, so that they may freely evaluate and choose  
11 from among competing points of view. One goal of the First  
12 Amendment, then, is to ensure that the individual citizen has  
13 available all the information necessary to allow him to properly  
14 evaluate speech.... The allowance of free expression loses  
15 considerable value if expression is only partial. Therefore,  
16 disclosure requirements, which may at times inhibit the free  
17 speech that is so dearly protected by the First Amendment, are  
18 indispensable to the proper and effective exercise of First  
19 Amendment rights." Fed. Election Com'n v. Furgatch, 807 F.2d  
20 857, 862 (1987). Indeed, Defendants pointed out during oral  
21 argument that the Government's disclosure requirements actually  
22 serve to facilitate discourse.

23 The Court observes that Plaintiffs, the backers of a  
24 historically non-controversial belief, seem genuinely surprised  
25 to be on the receiving end of such powerful discord.

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1 However, such surprise does not warrant an injunction against the  
2 enforcement of the State of California's laws or this Court's  
3 censorship of information pertaining to one side of one  
4 initiative, information that, years ago, the voters of California  
5 determined should be available to the public. Indeed, the  
6 Court's acceptance of Plaintiffs' argument would effectively  
7 render California's legislative mandate obsolete. Such a  
8 decision would establish precedent for any group backing any  
9 controversial ballot initiative to come before this Court with  
10 evidence of the actions of fringe opposition groups to support  
11 their arguments for exemption from California's disclosure  
12 requirements. Such a holding would thwart the will of  
13 California's government and the will of the electorate to garner  
14 objective information necessary to evaluation their own  
15 legislation.

16 Thus, though the Court regards with contempt numerous of the  
17 acts about which Plaintiffs complain, it cannot say that  
18 Plaintiffs allegations rise to the level of those existing in  
19 Brown and its progeny. Because Plaintiffs' ability to garner  
20 support for their cause is hardly comparable to the SWP claims or  
21 to those raised by other historically ostracized groups, groups  
22 whose very viability was threatened by forced compliance with  
23 disclosure laws, the Court cannot say the threat to Plaintiffs'  
24 First Amendment rights is so serious as to warrant an exception  
25 here.

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1 Accordingly, Plaintiffs have failed to convince the Court that  
2 Buckley and Brown can be applied to them in any principled manner  
3 or that there is a reasonable probability that disclosure in  
4 compliance with the California Government Code will result in  
5 threats, harassment, and reprisals. The Court finds very little  
6 possibility of success on the merits of Plaintiffs' as-applied  
7 challenge.

8  
9 **E. Plaintiffs' Remaining Challenges: Whether the \$100**  
10 **Disclosure Threshold and Post-Election Reporting are**  
11 **Constitutional**

12 To reiterate, the Court will apply strict scrutiny in  
13 evaluating Plaintiffs' causes of action.

14  
15 **1. \$100 Disclosure Threshold**

16  
17 Plaintiffs argue that the Government's interest in the  
18 compelled disclosure of those who contributed amounts as low as  
19 \$100 to support Proposition 8 is negligible. Specifically,  
20 Plaintiffs' express disbelief that "the public is clamoring for  
21 the knowledge of the name, address, occupation, and employer of  
22 every person who contributed one hundred dollars or more to a  
23 ballot measure." Id., 21-23. According to Plaintiffs, the  
24 State's threshold is therefore set too low and must fail for lack  
25 of adjustment for inflation.

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1 This Court disagrees and holds that the legislative line drawn is  
2 narrowly tailored to the State's compelling informational  
3 interest, that the threshold need not be indexed for inflation,  
4 and that a contrary holding would call into question scores of  
5 statutes in which the legislature or the people have sought to  
6 draw similar lines.

7 In Buckley, as here, the appellants argued "that the  
8 monetary thresholds in the record-keeping and reporting  
9 provisions lack[ed] a substantial nexus with the claimed  
10 governmental interests, for the amounts involved [were] too low  
11 even to attract the attention of the candidate, much less have a  
12 corrupting influence." Buckley, 424 U.S. at 82. There, the Act  
13 "required political committees to keep detailed records of both  
14 contributions and expenditures." Id. at 63. As in the instant  
15 case, "[e]ach committee...[was] required to file quarterly  
16 reports. The reports [were] to contain detailed financial  
17 information, including the full name, mailing address,  
18 occupation, and principal place of business of each person who  
19 had contributed over \$100 in a calendar year, as well as the  
20 amount and date of those contributions." Id. (internal citations  
21 omitted). On facts remarkably similar to those before this  
22 court, the Supreme Court held that "the \$100 threshold  
23 was...within the 'reasonable latitude' given the legislature 'as  
24 to where to draw the line.'" Id. at 83.

25 The Court elaborated on its decision stating, "The \$10 and  
26 \$100 thresholds are indeed low. Contributors of relatively small  
27 amounts are likely to be especially sensitive to recording or  
28 disclosure of their political preferences.

1 These strict requirements may well discourage participation by  
2 some citizens in the political process, a result that Congress  
3 hardly could have intended. Indeed, there is little in the  
4 legislative history to indicate that Congress focused carefully  
5 on the appropriate level at which to require recording and  
6 disclosure. Rather it seems merely to have adopted the  
7 thresholds existing in similar disclosure laws since 1910. But  
8 we cannot require Congress to establish that it has chosen the  
9 highest reasonable threshold. The line is necessarily a  
10 judgmental decision, best left in the context of this complex  
11 legislation to congressional discretion. We cannot say on this  
12 bare record that the limits are wholly without rationality.”<sup>9</sup> Id.

13 The Eastern District later stated that “as a general matter,  
14 the court will not second guess a legislative determination as to  
15 where the line for contribution limits should be drawn.” CPLC v.  
16 Scully, 989 F. Supp. 1282, 1293 (E.D. Cal. 1998). The same holds  
17 true on the facts before this Court.

18 First, this Court finds the disclosure thresholds set in  
19 other states to be instructive. California’s current \$100  
20 threshold falls well within spectrum of those mandated by its  
21 sister states, which range from no threshold requirement to \$300.  
22 In fact, only six states in the United States have higher  
23 threshold requirements.<sup>10</sup>

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25 <sup>9</sup> The parties dispute the level of scrutiny actually applied  
26 in Buckley. However labeled, the Buckley Court clearly  
27 determined that the \$100 threshold passed constitutional muster,  
28 and this Court is bound by that decision.

<sup>10</sup> Reporting Requirements:

(continued...)



1  
2  
3 (...continued)

4 **No Threshold Requirement**

5 Alaska: Alaska Stat. § 15313.040(a)  
6 Florida: Fla. Stat. § 106.07(4)(1).  
7 Louisiana: La. Rev. Stat. Ann. § 18:1495.5(b)(4).  
8 Maryland: Md. Code Ann., Election Law § 13-304.  
9 Michigan: Mich. Comp. Laws. Ann. § 169.226(1)(e) (Names and  
10 addresses of all contributors are reported, but occupation,  
11 employer or principal place if business are not required  
12 unless the contribution exceeds \$100.).  
13 New Mexico: N.M. Stat. Ann. § 1-19-31(a) (additional  
14 employment information only required for contributors of  
15 \$250 or more).

16 **\$20 Threshold**

17 Colorado: Colo. Rev. Stat. Ann. § 1-45-108(1)(a)(I).  
18 Wisconsin: Wis. Stat. Ann. § 11.06(1)(a) (additional  
19 employment information disclosed for those individuals that  
20 contribute in excess of \$100).

21 **\$25 Threshold**

22 Arizona: Ariz. Rev. Stat. Ann. 16-915(3)(a).  
23 New Hampshire: N.H. Rev. Stat. § 664:6(I) (additional  
24 employment information required for contributors of over  
25 \$100).  
26 Ohio: Ohio Rev. Code Ann. § 3517.10(B)(4)(e).  
27 Wyoming: Wyo. Stat. Ann. § 22-25-106(a)(iv).

28 **\$35 Threshold**

Montana: Mont. Code Ann. § 13-37-229(2).

**\$50 Threshold**

Arkansas: Ark. Code Ann. § 7-6-207(b).  
Connecticut: Conn. Gen. Stat. Ann. § 9-608(c)(4).  
District of Columbia: D.C. Code § 1-1102.06(b)(2).  
Idaho: Idaho Code Ann. § 67-6612(a)(1).  
Kansas: Kan. Stat. Ann. § 25-4148(b)(2).  
Maine: Me. Rev. Stat. Ann. tit. 21-A, § 1017(5).  
Massachusetts: Mass. Gen. Laws Ann. ch. 55, § 18.  
North Carolina: N.C. Gen. Stat. Ann. § 163-278.11(a1).  
Oklahoma: Okla. Stat. tit. 74, § Ch. 62, App. 257:10-1-  
14(a)(3)(D).  
Pennsylvania: 25 Pa. Cons. Stat. § 3246 (b) (Names and  
addresses of those who contribute over \$50 are reported, but  
occupation, name of employer or principal place of business  
is not required unless the contribution exceeds \$250.).  
Texas: Tex. Election Code Ann. § 254.031(a)(1).  
Utah: Utah Code Ann. § 20A-11-208 (3) (provides only for a  
"detailed listing").

(continued...)

1 The Supreme Court has previously made similar comparisons.  
2 Randall v. Sorrell, 548 U.S. 230 (2006). That Court stated, "As  
3 compared with the contribution limits upheld by the Court in the  
4 past, and with those in force in other States, [the Act's] limits

5 \_\_\_\_\_  
6 (...continued)

7 **\$100 Threshold**

8 Alabama: Ala. Code § 17-5-8(c)(2).  
9 California: Cal. Gov't Code § 84211(f).  
10 Delaware: Del. Code tit. 15 § 8030(d)(2).  
11 Georgia: Ga. Code Ann. § 21-5-34(b).  
12 Hawaii: Haw. Rev. Stat. § 11-212(2)(B).  
13 Indiana: Ind. Code § 3-9-5-14(a)(1).  
14 Kentucky: Ky. Rev. Stat. Ann. § 121-180(3)(a)(2).  
15 Minnesota: Minn. Stat. Ann. § 10A.20(Subd. 3)(b).  
16 Missouri: Mo. Ann. Stat. § 130.041(1)(3)(a), (e).  
17 Nevada: Nev. Rev. Stat. § 294A.120(8).  
18 New York: N.Y. Election Law § 14-102(1).  
19 Oregon: Or. Rev. Stat. § 260.083(1)(a).  
20 Rhode Island: R.I. Gen. Laws § 17-25-11(a)(3).  
21 South Carolina: S.C. Code Ann. § 8-13-1308(F)(2).  
22 South Dakota: S.D. Codified Laws § 12-27-24(14).  
23 Tennessee: Tenn. Code Ann. § 2-10-107(a)(2)(A)(I).  
24 Vermont: Vt. Stat. Ann. tit. 17, § 2803(a).  
25 Virginia: Va. Code Ann. § 24.2-947.4(B)(2).  
26 Washington: Wash. Rev. Code Ann. § 42.17.090(1)(b).

17 **\$150 Threshold**

18 Illinois: 10 Ill. Comp. Stat. 5/9-12(3).

19 **\$200 Threshold**

20 Iowa: Iowa Code § 68A.402A(1)(b) (\$200 disclosure threshold  
21 is applicable only to state statutory political committees.  
22 \$50 threshold imposed on county statutory political  
23 committees and \$25 threshold on all candidates and political  
24 committees.)  
25 Mississippi: Miss. Code Ann. § 23-15-807(d)(ii).  
26 North Dakota: N.D. Cent. Code § 16.1.08.1-02(2).  
27 United States: 2 U.S.C. § 434(b)(3)(A).

24 **\$250 Threshold**

25 Nebraska: Neb. Rev. Stat. § 49-1455(d).  
26 West Virginia: W. Va. Code § 3-8-5a(a)(3) (Names of all  
27 contributors are reported, but residence and mailing  
28 address, along with major business affiliation and  
occupation are reported for those individuals contributing  
in excess of \$250.).

28 **\$300 Threshold**

New Jersey: N.J. Stat. Ann. § 19:44A-16(f).

1 are sufficiently low as to generate suspicion that they are not  
2 closely drawn.” Id. at 249. That Court went on to point out  
3 that “[t]hese limits are well below the limits this Court upheld  
4 in Buckley. Indeed, in terms of real dollars (i.e., adjusting  
5 for inflation), the Act’s \$200 per election limit on individual  
6 contributions to a campaign for governor is slightly more than  
7 one-twentieth of the limit on contributions to campaigns for  
8 federal office before the Court in Buckley. Adjusted to reflect  
9 its value in 1976, Vermont’s contribution limit on campaigns for  
10 statewide office (including governor) amounts to \$113.91 per 2-  
11 year election cycle, or roughly \$57 per election, as compared to  
12 the \$1,000 per election limit on individual contributions at  
13 issue in Buckley.” Id. at 250.

14 However, the Randall Court also determined that the lower  
15 contributions limits constituted only a danger sign that the  
16 “contribution limits may fall outside tolerable First Amendment  
17 limits.” Id. at 253. Since the actual dollar amount of the  
18 statutory threshold was not dispositive, the Court also looked at  
19 the Act’s substantial restrictions on the ability of candidates  
20 to raise the funds necessary to run a competitive election, the  
21 ability of political parties to help their candidates get  
22 elected, and the ability of individual citizens to volunteer  
23 their time to campaigns. Id.

24 Accordingly, even if this Court were inclined to make the  
25 determination, which it is not, that California’s \$100 disclosure  
26 threshold was too low, such a determination alone would be  
27 insufficient to warrant award of a preliminary injunction.

28 ///

1           Nevertheless, in keeping with the Randall Court's foray into  
2 the hypothecated effects of inflation, Plaintiffs assert that  
3 California's disclosure regime is constitutionally suspect based,  
4 in part, on its failure to account for such economic conditions.  
5 According to Plaintiffs, the \$100 disclosure threshold approved  
6 of in Buckley would equate to approximately \$38.79 today.  
7 Motion, 24:6-8. Therefore, Plaintiffs contend that Buckley  
8 establishes the benchmark below which disclosure thresholds  
9 should not be permitted to fall.

10           Such a conclusion runs contrary to both logic and the law.  
11 "In Buckley, [the Court] specifically rejected the contention  
12 that \$1,000, or any other amount, was a constitutional minimum  
13 below which legislatures could not regulate...[The Court]  
14 referred instead to the outer limits of contribution regulation  
15 by asking whether there was any showing that the limits were so  
16 low as to impede the ability of candidates to 'amas[s] the  
17 resources necessary for effective advocacy,' 424 U.S., at 21.  
18 [The court] asked, in other words, whether the contribution  
19 limitation was so radical in effect as to render political  
20 association ineffective, drive the sound of a candidate's voice  
21 below the level of notice, and render contributions pointless.  
22 Such being the test, the issue in later cases cannot be truncated  
23 to a narrow question about the power of the dollar, but must go  
24 to the power to mount a campaign with all the dollars likely to  
25 be forthcoming...[T]he dictates of the First Amendment are not  
26 mere functions of the Consumer Price Index. 161 F.3d at 525  
27 (dissenting opinion)." Nixon v. Shrink Mo. Gov't PAC, 528 U.S.  
28 377, 397 (2000).

1 Neither can the constitutional principles at issue in the current  
2 case be construed solely in terms of the rate of inflation, and  
3 the Court finds that the disclosure threshold negligibly affects,  
4 if it affects at all, Plaintiffs' ability to amass resources or  
5 to advocate their cause.

6 The Court also finds it relevant that numerous existing  
7 statutes contain reference to dollar values beyond which certain  
8 rights or benefits may be taken away or become unavailable. For  
9 example, California Penal Code § 487 states that when "money,  
10 labor, or real or personal property taken is of a value exceeding  
11 four hundred dollars (\$400)" such a taking constitutes grand  
12 theft. Cal. Pen. Code § 487(a). Additionally, grand theft is  
13 also found "[w]hen domestic fowls, avocados, olives, citrus or  
14 deciduous fruits, other fruits, vegetables, nuts, artichokes, or  
15 other farm crops are taken of a value exceeding one hundred  
16 dollars (\$100)." Id., § 487(1) (A). These dollar values were set  
17 by the legislature in 1982. See 1982 Cal. Stat. 1693. Were the  
18 Court to accept Plaintiffs' current argument, it would call into  
19 question this and every other statutory provision in which the  
20 legislature thought to classify by dollar amount without tying  
21 that amount to some articulated rate of inflation. The Court is  
22 unwilling to render a decision that would create such a striking  
23 precedent.

24 Finally, in Buckley, the Supreme Court stated that  
25 "disclosure requirements, as a general matter, directly serve  
26 substantial governmental interests. In determining whether these  
27 interests are sufficient to justify the requirements we must look  
28 to the extent of the burden that they place on individual rights."

1 Buckley, 424 U.S. at 68. To reiterate, "[i]t is undoubtedly true  
2 that public disclosure of contributions to candidates and  
3 political parties will deter some individuals who otherwise might  
4 contribute. In some instances, disclosure may even expose  
5 contributors to harassment or retaliation. These are not  
6 insignificant burdens on individual rights, and they must be  
7 weighed carefully against the interests which Congress has sought  
8 to promote by this legislation. In this process we note and  
9 agree...that disclosure requirements certainly in most  
10 applications appear to be the least restrictive means of curbing  
11 the evils of campaign ignorance and corruption." Id.

12 Thus, disclosure requirements, by their very nature, are the  
13 least restrictive means through which to educate the electorate.  
14 The requirements do not limit the amount of contributions or  
15 expenditures by the entity or the contributor. They do not limit  
16 the entity's ability to raise funds, nor do they impose  
17 burdensome structural requirements on Plaintiffs. See Alaska  
18 Right to Life Committee v. Miles, 441 F.3d 773, 791 (9th Cir.  
19 2006). Moreover, Plaintiffs point to no threshold that would be  
20 more narrowly tailored to serve the State's interest. The Court  
21 simply cannot say that the cumulative effect of the disclosure of  
22 the contributors of \$100 is not narrowly tailored to the  
23 Government's compelling informational interest.<sup>11</sup>

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24  
25 <sup>11</sup> As an example, the public could very well be swayed by  
26 the fact that numerous donations to Plaintiffs, and likely to  
27 others, came from out of state. It appears very probable to this  
28 Court that the California electorate would be interested in  
knowing if a California initiative was funded by the citizens it  
is intended to affect or by out of state interest groups and

(continued...)

1 Accordingly, the Court finds that California's disclosure  
2 threshold is properly drawn. California's decision to compel  
3 disclosure of those who contribute in excess of \$100 to groups  
4 such as Plaintiffs is narrowly tailored to the State's compelling  
5 informational interest and Plaintiffs' likelihood of success on  
6 the merits is minimal.

7  
8 **2. Post-Election Disclosure**  
9

10 Plaintiffs' Third Cause of Action seeks a holding that the  
11 PRA disclosure requirements are unconstitutional to the extent  
12 they require post-election reporting of contributors to ballot-  
13 initiatives. Despite the fact that the Court has found no case  
14 law supporting the proposition, Plaintiffs contend that such  
15 reporting cannot be related to the State's informational interest  
16 because the votes have already been cast, nullifying the  
17 electorate's need for disclosure. While Plaintiffs acknowledge  
18 that the State maintains an interest in the election of  
19 candidates after an election has come and gone, they contend that  
20 the State's interest in contributors to ballot initiatives  
21 "disappears" essentially when the deciding vote is cast at the  
22 polls.

23 ///

24 ///

25  
26 \_\_\_\_\_  
27 <sup>11</sup>(...continued)  
28 individuals. In order to properly capture the number of non-  
California donors, it is quite logical to require a lower, rather  
than a higher, reporting threshold.

1 This Court disagrees. No legislation is carved in stone,  
2 incapable of repeal, nor do ballot initiatives, once passed,  
3 become a legacy that future generations must endure in silence.  
4 Indeed, it is the initiative process itself that directly allows  
5 individuals to affirm or correct prior decisions. To assume that  
6 the passage of an election draws a line in the sand past which no  
7 issues remain open to public debate is simply not congruent with  
8 the form of democracy the people of California have determined to  
9 employ. Thus, it is possible that the post-election light shed  
10 on those contributors who donated during the final weeks of the  
11 campaign, and who continue to donate today, might reveal  
12 information the electorate requires in order to evaluate the  
13 appropriateness of its decision.

14 Indeed, it is unclear how “‘uninhibited, robust, and wide-  
15 open’ speech can occur when organizations hide themselves from  
16 the scrutiny of the voting public...Plaintiffs’ argument for  
17 striking down [the] disclosure provisions does not reinforce the  
18 precious First Amendment values that Plaintiffs argue are  
19 trampled..., but ignores the competing First Amendment interests  
20 in individual citizens seeking to make informed choices in the  
21 political marketplace.” McConnell, 540 U.S. at 198, affirming in  
22 part and reversing in part McConnell v. Federal Election Com’n,  
23 251 F. Supp. 2d 176, 237 (D.D.C. 2003).

24 Thus, the Court simply cannot say that the occurrence of an  
25 election moots the electorate’s need for relevant information.  
26 Here, the battle over Proposition 8 continues to be waged, both  
27 in the state courts and state legislature.

28 ///



1 The Government's informational interest cannot be met without  
2 requiring the disclosure of all pertinent contribution  
3 information such that "uninhibited, robust, and wide-open" speech  
4 can continue to be had.

5 Moreover, Defendants proffer a particularly practical  
6 justification for setting a post-election reporting date, namely  
7 that it would be impossible for committees to provide final  
8 financial information until their operations have wound down.  
9 Under Plaintiffs' argument, in order to obtain disclosure,  
10 committees would have to file the names of their contributors on  
11 election day. Any later filing deadline cannot, according to  
12 Plaintiffs, relate to the State's interest. Nothing short of  
13 discontinuing committee operations pre-election would render it  
14 possible for a committee to file complete reports at the height  
15 of the electoral process. Thus, the State established a future  
16 date on which full disclosure of all campaign finances is due.

17 The Court finds analogy to the payment of federal taxes  
18 instructive. Income is earned and due to the IRS as of the end  
19 of each calendar year. Nevertheless, the IRS requires filing and  
20 payment in April, one would assume to allow, at least in part,  
21 for wrapping up the prior year's business and for compiling the  
22 necessary documentation to render filing proper. It is the  
23 unlikely individual that would be prepared to file on the final  
24 day of the calendar year.

25 Finally, as discussed in the prior section, relying on the  
26 Buckley Court's directive to examine the burden on Plaintiffs,  
27 this Court finds that the burden imposed by requiring post-  
28 election reporting is minimal.

1 Thus, as in the case of its established disclosure  
2 threshold, the Government drew a line. This time the line chosen  
3 was a particular date rather than a dollar value. Nevertheless,  
4 that line does not burden any more speech than would any other  
5 chosen date. Accordingly, even under a strict scrutiny analysis,  
6 this Court finds that the post-reporting requirement is directly  
7 related to the State's informational interest and that it burdens  
8 no more speech than necessary to further that interest.

9  
10 **II. IRREPARABLE HARM AND THE BALANCE OF HARDSHIPS**

11  
12 According to the United States Supreme Court, "[t]he loss of  
13 First Amendment freedoms, for even minimal periods of time,  
14 unquestionably constitutes irreparable injury." *Elrod v. Burns*,  
15 427 U.S. 347, 373 (1976). "[E]ven if the merits of the  
16 constitutional claim were not 'clearly established' at this early  
17 stage in the litigation, the fact that a case raises serious  
18 First Amendment questions compels a finding that there exists  
19 'the potential for irreparable injury, or that at the very least  
20 the balance of hardships tips sharply in [Plaintiffs'] favor.  
21 'Under the law of this circuit, a party seeking preliminary  
22 injunctive relief in a First Amendment context can establish  
23 irreparable injury sufficient to merit the grant of relief by  
24 demonstrating the existence of a colorable First Amendment  
25 claim.'" *Sammartano v. First Judicial Dist. Ct.*, in and for  
26 county of Carson City, 303 F.3d 959, 973 (9th Cir. 2002), quoting  
27 *Viacom Int'l, Inc. v. FCC*, 828 F. Supp. 741, 744 (N.D. Cal.  
28 1993).

1 "Because the test for granting a preliminary injunction is 'a  
2 continuum in which the required showing of harm varies inversely  
3 with the required showing of meritoriousness,' when the harm  
4 claimed is a serious infringement on core expressive freedoms, a  
5 plaintiff is entitled to an injunction even on a lesser showing  
6 of meritoriousness.'" *Id.*, citing *San Diego Committee Against*  
7 *Registration and the Draft (Card) v. Governing Bd. Of the*  
8 *Grossmont Union High School Dist.*, 790 F.2d, 1471, 1473 n.3 (9th  
9 Cir. 1986), abrogated on other grounds by *Hazelwood School Dist.*  
10 *v. Kuhlmeier*, 484 U.S. 260 (1988).

11 Finally, "[w]hen an injunction will affect the public, the  
12 Court should also determine whether the public interest favors  
13 the moving party." *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp.  
14 2d 1078, 1082 (N.D. Cal. 1997). The Ninth Circuit has, at times,  
15 "subsumed this inquiry into the balancing of hardships."  
16 *Sammartano*, 303 F.3d at 974. However, that court has also  
17 stated, "it is better seen as an element that deserves separate  
18 attention in cases where the public interest may be affected."  
19 *Id.* "The public interest inquiry primarily addresses impact on  
20 non-parties rather than parties." *Id.*

21 In this case, the Court finds no serious First Amendment  
22 questions are raised. As discussed above, the merits of each  
23 constitutional claim are not only not "clearly established," but  
24 almost certainly must fail. Thus, there is no risk of  
25 irreparable injury to Plaintiffs' contributors. Furthermore, the  
26 impact on non-parties, specifically the California electorate,  
27 should the Court grant Plaintiffs the relief they seek is great.

28 ///

1 As discussed in great detail above, if disclosure is prevented,  
2 the people of California will be denied the ability to fully  
3 inform themselves of the circumstances surrounding the passage of  
4 Proposition 8. For the reasons already articulated, the balance  
5 of hardships favors the Plaintiffs and consideration of the  
6 public interest weighs against injunctive relief.

7  
8 **III. CONCLUSION**

9  
10 Because the Court finds very little chance of success on the  
11 merits of Plaintiffs' claims, because there is likewise minimal  
12 probability of the occurrence of irreparable harm to Plaintiffs  
13 or their contributors, and because the balance of interests,  
14 including the public's interest, weighs against it, Plaintiffs'  
15 Motion for Preliminary Injunction is DENIED. Indeed, any  
16 contrary holding would require the Court to legislate from the  
17 bench and to act contrary to the law. That it cannot do.

18  
19 **IV. PROTECTIVE ORDER**

20  
21 Despite this Court's denial of Plaintiffs' Motion for  
22 Preliminary Injunction, Plaintiffs request that the existing  
23 protective order remain in effect. Defendants posed no current  
24 objection, but reserved the right to object to each individual's  
25 file being sealed in the future. Accordingly, the current  
26 protective order is extended and will remain in effect until the  
27 Court orders otherwise.

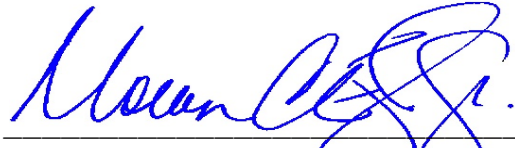
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**CONCLUSION**

Plaintiffs' Motion for Preliminary Injunction is DENIED and the Motion to Extend the Existing Protective Order is GRANTED.

IT IS SO ORDERED.

Dated: January 30, 2009

  
MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE

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