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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JOHN DOE #1, an individual; JOHN
9 DOE #2, an individual; and PROTECT
10 MARRIAGE WASHINGTON,

11 Plaintiffs,

12 v.

13 SAM REED, in his official capacity as
14 Secretary of State of Washington; and
15 DEBRA GALARZA, in her official
16 capacity as Public Records Officer for the
17 Secretary of State of Washington,

18 Defendants.

CASE NO. C09-5456BHS

ORDER GRANTING
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

19 This matter comes before the Court on the Plaintiffs' motion for preliminary
20 injunction (Dkt. 3). The Court has considered the pleadings filed in support of and in
21 opposition to the motion and the remainder of the file, and hereby grants the motion for
22 the reasons stated herein.

23 **I. BACKGROUND**

24 **A. PROCEDURAL BACKGROUND**

25 On July 28, 2009, Plaintiffs filed a complaint and motion for temporary restraining
26 order and preliminary injunction, seeking to enjoin the Secretary of State of Washington
27 ("Secretary of State") from any public release of documents showing the names and
28 contact information of those individuals who signed petitions in support of Referendum

1 Measure No. 71 (“R-71”). Dkts. 2 (Plaintiffs’ Complaint) and 3 (Motion for Temporary
2 Restraining Order and Preliminary Injunction).

3 In Count I of the complaint, Plaintiffs allege that the Washington Public Records
4 Act, RCW 42.56.001, violates the First Amendment as applied to referendum petitions
5 because the act is not narrowly tailored to serve a compelling governmental interest. Dkt.
6 2 at 10. In Count II, Plaintiffs allege that the Public Records Act is unconstitutional as
7 applied to R-71 because “there is a reasonable probability that the signatories of the R-71
8 petition will be subjected to threats, harassment, and reprisals.” *Id.*

9 On July 29, 2009, the Court granted Plaintiffs’ motion for temporary restraining
10 order, scheduled a preliminary injunction hearing for September 3, 2009, and set a
11 briefing schedule. Dkt. 9. On August 14, 2009, Defendants filed a response. Dkt. 25. On
12 August 21, 2009, Plaintiffs filed a reply. Dkt. 31. The Court held a preliminary injunction
13 hearing on September 3, 2009. Dkt. 62.

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

21 **B. WASHINGTON’S REFERENDUM PROCESS**

22 In Washington, while legislative authority is vested in the state legislature, the
23 people reserve to themselves the power to reject any bill or law through the referendum
24 process. Wash. Const., art. II, § 1 and 1(b).¹ A referendum petition against any bill passed
25 by the legislature must be filed with the Secretary of State within 90 days after
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28 ¹ The state constitution provides some exceptions to the people’s power to reject laws
passed by the legislature that do not apply in this case.

1 adjournment of the legislative session at which the bill was enacted. *Id.*, § 1(d); RCW
2 29A.72.160; *see also* WAC 434-379-005 (filing of proposed referendum with Secretary
3 of State).

4 In order to initiate the referendum process, the state constitution requires the filing
5 of petitions with the Secretary of State that contain the valid signatures of Washington
6 registered voters in a number equal to four percent of the votes cast for the Office of
7 Governor at the last gubernatorial election preceding the filing of the text of the
8 referendum measure with the Secretary of State. Wash. Const., art II, § 1(b); *see also*
9 RCW 29A.72.150. Referendum petition sheets must include a place for each signer to
10 sign and print his or her name, and the address, city, and county at which he or she is
11 registered to vote. RCW 29A.72.130.

12 Once the referendum petition has been filed, the Secretary of State verifies and
13 canvasses the names of the legal voters on the petition. RCW 29A.72.230. The signature
14 on a petition sheet must be matched to the signature on file in state voter registration
15 records. WAC 434-379-020. In order to determine whether a petition is valid, the
16 Secretary of State may employ statistical sampling techniques. RCW 29A.72.230; WAC
17 434-379-010. In addition, under state statute,

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

23 *Id.*

24 Upon completion of this verification and canvassing process, the Secretary of State
25 must issue a determination as to whether a referendum petition does or does not contain
26 the requisite number of valid signatures. *See* RCW 29A.72.240. Any citizen dissatisfied
27 with the Secretary of State's determination may file an action in state superior court for a
28 citation requiring the Secretary of State to submit the petition to the state court "for

1 examination, and for a writ of mandate compelling the certification of the measure and
2 petition, or for an injunction to prevent the certification thereof to the legislature, as the
3 case may be.” *Id.* Within five days of the state superior court’s decision, the party may
4 seek review by the Washington Supreme Court. *Id.*

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

8 **C. WASHINGTON’S PUBLIC RECORDS ACT**

9 Washington’s Public Records Act generally makes all public records available for
10 public inspection and copying. RCW 42.56.070.² The term “public record” is defined as
11 “any writing containing information relating to the conduct of government or the
12 performance of any governmental or proprietary function prepared, owned, used or
13 retained by any state or local agency.” RCW 42.56.010(2). The Public Records Act
14 provides that “[i]n the event of conflict between the provisions of [the Public Records
15 Act] and any other act, the provisions of [the Public Records Act] shall govern.” RCW
16 42.56.030. Exemptions to the Public Records Act must either be included in the act itself,
17 or clearly expressed in another statute. RCW 42.56.070(1).

18 The Public Records Act also contains the following language:

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

27 RCW 42.56.030.

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

1 **D. OTHER RELEVANT STATE LAW**

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

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

11 **E. REFERENDUM MEASURE NO. 71**

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

16 On or about May 4, 2009, Larry Stickney, the Campaign Manager for Protect
17 Marriage Washington (“Protect Marriage”), filed notice with the Secretary of State of his
18 intent to circulate a referendum petition on SB 5688. Dkt. 2 at 4 (Verified Complaint).
19 The proposed referendum was assigned the title R-71 by the Secretary of State. If referred
20 to the next general election ballot, R-71 would ask voters to either accept or reject SB
21 5688.

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

26 On July 25, 2009, Protect Marriage submitted a petition containing over 138,500
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28 ³It is unclear whether records of voter signatures are available to the public.

1 signatures to the Secretary of State for verification and canvassing. *Id.* at 7. According to
2 Nick Handy, Director of Elections for the Secretary of State, the petition sheets were
3 delivered in an “open, public forum,” with R-71 supporters and opponents in attendance.
4 Dkt. 26 at 2 (Declaration of Nick Handy). The Elections Division began the process of
5 counting and verifying individual signatures shortly after the petition sheets were filed.
6 *Id.* at 3.

7 The petition appears to conform with Washington state’s formatting requirements
8 set out in RCW 29A.72.130 and contains the following language:

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

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

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

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

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

28 As of August 20, 2009, the Secretary of State has received public record requests
of the Referendum 71 petition from the following individuals or entities: (1) Brian
Murphy of WhoSigned.org (Dkt. 23 at 10); (2) Toby Nixon, President of the Washington
Coalition for Open Government (*id.* at 12); (3) Arthur West (*id.* at 14); (4) Brian Spencer,

1 on behalf of Desire Enterprises (Dkt. 30 at 9); and (5) Anne Levinson, on behalf of
2 Washington Families Standing Together (*id.* at 11).⁴

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

11 **II. PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

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

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

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26 ⁴ Ms. Levinson’s request excluded “any and all information subject to [this Court’s July
27 29, 2009] temporary restraining order” (Dkt. 30-11) which restrained Defendants from releasing
28 “the names, addresses, or other contact information of those individuals who signed the
Referendum 71 petition” (Dkt. 9 at 4).

1 **A. PRELIMINARY INJUNCTION STANDARD**

2 The basic function of injunctive relief is to preserve the status quo pending a
3 determination of the action on the merits. *Los Angeles Memorial Coliseum Comm'n v.*
4 *Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). To obtain preliminary
5 injunctive relief, the moving party must show: (1) a likelihood of success on the merits;
6 (2) a likelihood of irreparable harm to the moving party in the absence of preliminary
7 relief; (3) that a balance of the equities tips in favor of the moving party; and (4) that an
8 injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S.
9 ___, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). Traditionally, injunctive relief was
10 also appropriate under an alternative “sliding scale” test. *The Lands Council v. McNair*,
11 537 F.3d 981, 987 (9th Cir. 2008). However, the Ninth Circuit overruled this standard in
12 keeping with the Supreme Court’s decision in *Winter*. *American Trucking Ass'ns Inc. v.*
13 *City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (holding that “[t]o the extent
14 that our cases have suggested a lesser standard, they are no longer controlling, or even
15 viable”).

16 **1. Likelihood of Success**

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

25 **a. Individual Right**

26 Plaintiffs assert that the signers of the referendum petition are likely entitled to
27 protections under an individual’s fundamental, First Amendment right to free speech. *Id.*
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