Sasha Linker

Subject: RE: Agenda Item 42 - AB 249

Chair Jodi Remke and Commissioners
Fair Political Practices Commission
1102 Q Street, Suite 300
Sacramento, CA 95814

Re: Agenda Item #42/September 21, 2017 Meeting

Dear Chair Remke and Commissioners Audero, Hatch & Hayward:

You received in the last day more than a half dozen letters concerning AB 249 from Trent Lange of the Clean Money Campaign, Common Cause, other advocates of the legislation, AB 249's principal legislative author and the Legislature's Elections Committee chairs concerning the Commission's position on AB 249. Your staff legislative director, Phillip Ung, had written a careful analysis of that bill which you have before you. The recent letter writers appear to be concerned to discourage the Commission from advising Governor Brown about the impacts of AB 249, which the Commission as the expert agency on the Political Reform Act has every right to do if you choose.

Here are a few points about the bill which directly and indirectly affect the Commission, which is likely to be one litigation target if the bill becomes law (see, e.g., Agenda Item # 40):

(1) AB 249 contains provisions the FPPC is currently enjoined to enforce due to their unconstitutionality. AB 249 extends chapter 4 disclaimer provisions, and potential treble damage penalties for violations, to general purpose committees, including political party committees. Those provisions flatly conflict with the federal court injunction in California Republican Party, California Democratic Party and Orange County Republican Party v. FPPC, USDC/ED#CIV-S-04-2144 FCD PAN (ED Cal. Oct. 27, 2004) (copy attached), in which the federal district court for the Eastern District of California, following the Ninth Circuit decision in ACLU of Northern Nevada v. Heller (discussed below), enjoined the FPPC from enforcing the "top two donor" provisions of chapter 4 of the Act against general purpose committees other than political party committees. AB 249 doubles down as noted, requiring disclaimer donor disclosure including "top three donor" disclosure for even general purpose committees that engage in ballot measure and independent expenditure activities. The FPPC will be at risk for a renewed lawsuit to enforce the existing injunction from the parties in that case, or for a new lawsuit raising the same issue from others similarly situated.

(2) But that's not all. The enhanced donor disclosure provisions of AB 249's "top three donor" disclosure regime also raise serious constitutional questions about content based regulation of speech, raised by ACLU of Northern Nevada v. Heller, 378 F.3d 979, 2004 WL 1753264 (9th Cir. 2004), which invalidated a Nevada "on publication" disclosure statute. See also, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015); but cf. Citizens United v. FEC, 58 U.S. 310, 367-370,130 S.Ct. 876 (2010)[upheld more limited disclaimer provisions of the Bi-Partisan Campaign Reform Act of 2002.]) AB 249 assumes there is no meaningful public disclosure except by means of "on publication" disclosure on advertisements. That is belied by extensive online, as contrasted with on publication, disclosure. The FPPC's "top ten" and "ten plus two" online disclosure website contains far more detail which is readily available to the public to determine the funding sources of ballot measure and independent expenditure campaigns. This disclosure was even enhanced by the SB 27 legislation of 2015 which requires "multi-purpose organizations" that participate in ballot measure and independent expenditure expenditures to disclose large donors to the multi-purpose organizations and triggers potential

detailed campaign disclosures by those donors. Online disclosure was the solution to Clean Money's purported public confusion about the sources of advertising money "problem."

(3) But wait, there's more. AB 249 adopts the "black screen" background requirement for television advertisements about ballot measure campaign and independent expenditure donor disclosures. 1/3d of the "full screen" for a television advertisement during the requisite disclaimer disclosure period for the ad must contain a "black screen" on which the "top three donors" are disclosed (with lots of additional detail like centered positioning and ranking from largest-to-smallest donors, no "all caps" lettering, and other minutiae). Where no "top three donor" disclosure is required, the "black screen" must still be used for 1/4th of the "full screen." (amended Gov. Code 84504.1). For print advertisements, an entire page of a multi-page print ad must be devoted solely to the disclaimer (amended Gov. Code 84504.2(a).) This requirement runs afoul of the Heller decision, but also may conflict with Riley v. National Federation of the Blind, 487 U.S. 781, 108 S Ct. 2667 (1988), a North Carolina charitable solicitation statute case in which the U.S. Supreme Court invalidated a compelled speech content provision of the law, holding that North Carolina could not require a fundraiser to reveal the average percentage of contributions actually turned over to charities in the previous 12 months. Such "compelled speech" is unconstitutional because it alters a speech's content, requiring a speaker to say something he otherwise would not have said, the Court reasoned. According to the Court, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners….The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it" (Riley at 2675). Just yesterday, the Ninth Circuit Court of Appeals struck down a San Francisco ordinance that compelled speech by soda manufacturers that ran afoul of the same constitutional problems. American Beverage Ass'n v. City and Cty of San Francisco, No. 16-16703 (9th Cir. Sept. 19, 2017). ["We agree with the Associations that the warning requirement in this case unduly burdens and chills protected commercial speech. As the sample advertisements show, the black box warning overwhelms other visual elements in the advertisement. As such, it is analogous to other requirements that courts have struck down as imposing an undue burden on commercial speech, such as laws requiring advertisers to provide a detailed disclosure in every advertisement, Ibanez [v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136], at 146, to use a font size "that is so large that an advertisement can no longer convey its message," Public Citizen Inc. [v. Louisiana Attorney Disciplinary Board], 632 F.3d [212] at 228 [(5th Cir. 2011], or to devote one-sixth of the broadcast time of a television advertisement to the government's message, Tillman [v. Miller], 133 F.3d [1402] at 1404 n.4."] While these were commercial speech cases, the First Amendment analysis is no different, and applies equally to the AB 249 disclosures that "unduly burden" the speaker's message. Finally, the 1/3d, 1/4th and separate page disclaimer requirements, in addition to the enhanced video audio disclaimer length requirements, pose potential Fifth and Fourteenth Amendment "takings" problems.

(4) Earmarking exemption does hinder small donor disclosure. The recent authors also attempt to defend the proposed earmarked contribution exemption of amended Gov. Code section 85704(c) from Mr. Ung's suggestion that this provision undermines the current $100 campaign contribution disclosure threshold. They are just wrong, and no amount of spin from legislative committee staffers has rebutted this with any facts. The proposed amendment exempts from disclosure the names of contributors of less than $500 whose contributions solicited for "specifically identified" candidates or ballot measures have been solicited by a membership organization, such as a labor union, by deeming such payments as not "earmarked" at all. ["(c) Notwithstanding subdivisions (a) and (b), dues, assessments, fees, and similar payments made to a membership organization or its sponsored committee in an amount less than five hundred dollars ($500) per calendar year from a single source for the purpose of making contributions or expenditures shall not be considered earmarked."] The result of this exemption is that contributions actually solicited for those purposes won't be identified to the actual donor. Current section 85704 works together with Gov. Code section 84301 and affects "disclosure" of donors. The "under $500" threshold of proposed section 85704(c) directly undermines the $100 disclosure threshold of Gov. Code section 84211(f) for specified contributions in amended section 85704(c).

Thank you for your consideration. This is my opinion and not that of, or made on behalf of, any client or my firm. I will not be able to attend the meeting in person.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA REPUBLICAN PARTY; CALIFORNIA DEMOCRATIC PARTY; and ORANGE COUNTY REPUBLICAN PARTY;

Plaintiffs,

v.

FAIR POLITICAL PRACTICES COMMISSION; LIANE RANDOLPH, in her official capacity; SHERIDAN DOWNEY II, in his official capacity; THOMAS KNOX, in his official capacity; PHILLIP BLAIR, in his official capacity; PAMELA KARLAN, in her official capacity,

Defendants.
_____/

NO. CIV-S-04-2144 FCD PAN

MEMORANDUM AND ORDER

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On October 12, 2004, plaintiffs, California Republican Party ("CRP"), California Democratic Party ("CDP"), and Orange County

Republican Party ("OCRP")(collectively "plaintiffs") filed a complaint with this court challenging the constitutionality of two provisions of the California Political Reform Act ("PRA"), Govt. Code § 81000, et seq. On October 20, 2004, plaintiffs filed a motion for a preliminary injunction and an application to shorten time. That same day, the court granted plaintiffs' motion to shorten time, scheduled the matter for hearing on October 26, 2004, and set an expedited briefing schedule. (October 20, 2004 Order Granting Plaintiff's Application to Shorten Time on Motion for Preliminary Injunction at 2.)

Having fully considered the arguments raised by counsel at the October 26 hearing and in written memoranda filed with the court, and for the reasons outlined herein, the court grants plaintiffs' motion for preliminary injunction.

FACTUAL AND PROCEDURAL HISTORY

On November 5, 1996, California voters enacted the "California Political Reform Act of 1996," or "Proposition 208" ("Prop. 208"), an initiative statute that made sweeping changes to California's Political Reform Act. Among its various provisions, Prop. 208 required that any committee paying for an advertisement supporting or opposing a ballot measure identify on the face of the advertisement the committee's two largest contributors of $50,000 or more.[1] Cal. Govt. Code § 84503.

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[1] Cal. Govt. Code §84503 provides:
(a) Any advertisement for or against any ballot measure shall include a disclosure statement identifying any person whose cumulative contributions are fifty thousand dollars ($50,000) or more.
(b) If there are more than two donors of fifty thousand dollars ($50,000) or more, the committee is only required to disclose the highest and second highest in

Prop. 208 mandated similar disclosure requirements when committees make independent expenditures for candidates or ballot measures.[2] Cal. Govt. Code § 84506.[3]

Shortly after Prop. 208's passage, it was subject to a legal challenge in this court. California Pro Life Council Political Action Committee v. Scully, 989 F. Supp. 1282 (1998). On January 6, 1998, this court entered a preliminary injunction barring

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that order. In the event that more than two donors meet this disclosure threshold at identical contribution levels, the highest and second highest shall be selected according to chronological sequence.

[2] Cal. Govt. Code § 84506 provides:

(a) A broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure, that is paid for by an independent expenditure, shall include a disclosure statement that identifies both of the following:

(1) The name of the committee making the independent expenditure.

(2) The names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of fifty thousand dollars ($50,000) or more during the 12-month period prior to the expenditure. If the committee can show, on the basis that contributions are spent in the order they are received, that contributions received from the two highest contributors have been used for expenditures unrelated to the candidate or ballot measure featured in the communication, the committee shall disclose the contributors making the next largest cumulative contributions of fifty thousand dollars ($50,000) or more.

(b) If an acronym is used to identify any committee names required by this section, the names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements.

Cal. Govt. Code § 84506.

[3] All further statutory references are to the California Government Code unless otherwise noted.

enforcement of Proposition 208.[4] While that injunction was in place and before resolution of the permanent injunction, the voters enacted Proposition 34, which superceded most of Prop. 208's provisions, but left intact the above-described disclosure provisions contained in Government Code sections 84503 and 84506.

The passage of Proposition 34 rendered moot most of the plaintiffs' claims in Scully, except those raised by professional slate mail vendors challenging the disclosure requirements in section 84503. In an unpublished order, this court permanently enjoined enforcement of section 84503 against slate mailer organizations, though its provisions remain enforceable against other forms of political committees.

Plaintiffs are subject to the disclosure requirements in sections 84503 and 84506. As organized political party committees, plaintiffs advance the shared political beliefs of their members by engaging in political activities, including, inter alia, recruiting and supporting candidates for elective office, taking public positions on policy issues, engaging in voter registration, conducting state conventions, and organizing get-out-the-vote activities. (Declaration of Kathleen Bowler ("Bowler Decl.") ¶ 4; Declaration of Micahel Vallante ("Vallante Decl.") ¶ 5.)

Under the PRA, plaintiffs are "general purpose committees" in that they are formed to support or oppose more than one

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[4] The court takes judicial notice of the March 1, 2001 order in California Prolife Council v. Scully, No. Civ. S-96-1965 LKK/DAD. Fed. R. Evid. 201.

candidate or ballot measure.[5] This is distinguishable from a "Primarily Formed Committee" which is defined as a committee formed primarily to support or oppose a single candidate or measure or group of candidates and/or ballot measures "voted upon in the same city, county, or multicounty election." § 82047.5. Both general purpose committees and primarily formed committees must comply with the disclosure requirements in sections 84503 and 84506.

Pursuant to implementing regulations promulgated by defendant Fair Political Practices Commission ("FPPC"), in order to comply with the disclosure provisions in sections 84503 and 84506, a committee must "explicitly indicate that the contributor or contributors were major donors to the committee by stating, for example 'major funding by' or 'paid for by.'" Cal. Code Regs. tit. 2 § 18450.4(a).

Both section 84503 and 84506 were amended recently by Senate Bill 604 ("SB 604"), an urgency statute which became effective upon signature of the Governor on September 10, 2004. Primarily,

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[5] Section 82027.5 provides:
(a) "General purpose committee" means all committees pursuant to subdivision (b) or (c) of Section 82013, and any committee pursuant to subdivision (a) of Section 82013 which is formed or exists primarily to support or oppose more than one candidate or ballot measure, except as provided in Section 82047.5.
(b) A "state general purpose committee" is a political party committee, as defined in Section 85205, or a committee to support or oppose candidates or measures voted on in a state election, or in more than one county.
(c) A "county general purpose committee" is a committee to support or oppose candidates or measures voted on in only one county, or in more than one jurisdiction within one county.

the amendments changed the window of time used to determine which contributors qualified as the "two largest contributors of $50,000 or more." Stats. 2004, c. 478 (S.B. 604) § 13. Prior to SB 604's passage, the largest contributors were defined from the date the committee filed its statement of organization and ending seven days prior to the time the advertisement was sent to the printer or broadcast station. As amended, the window begins "the day the committee made its first expenditure to qualify, support or oppose the measure and end[s] seven days before the advertisement is sent to the printer or broadcast station." § 84502. Under the revised definitions, the two largest contributors to the CDP in the preceding 12 months are the California Teachers Association ("CTA") and Senator John Burton ("Burton"). (Bowler Decl. ¶ 11.) For the CRP, the two largest contributors are Chevron Texaco and Alex G. Spanos ("Spanos"). (Vallante Decl. ¶ 6.) Lastly, the largest contributors over the preceding 12 months to OCRP are the New Majority Committee ("New Majority") and the CRP. (Declaration of Scott Baugh ("Baugh Decl. ¶ 6.)

The disclosure requirements mandate that plaintiffs list the above-referenced contributors on all advertisements made in conjunction with the November 2, 2004 election, including some advertisements advocating positions which the contributors actively oppose or on which they have no public position. (See Bowler Decl. ¶ 15; Baugh Decl. ¶ 6; Vallante Decl. ¶ 6.)

According to plaintiffs, these mandated disclosures violate their First and Fourteenth Amendment rights in that they impair the effectiveness of their political advertisements by coopting

valuable print space and, in some cases, linking the political message to contributors against which potential readers might harbor bias.[6] (See e.g., Vallante Decl. ¶ 10.)

STANDARD

The Ninth Circuit recognizes two tests for determining whether to grant a preliminary injunction.

Under the traditional test, the movant must establish four factors to obtain injunctive relief: 1) a likelihood of success on the merits; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting an injunction. Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003).

Alternatively, the Ninth Circuit has articulated the test as requiring the moving party to demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations are not inconsistent. Rather, they represent two points on a sliding scale in which the required degree of irreparable harm increases as the possibility of success decreases. Roe v. Anderson, 134 F.3d 1400, 1402 & n. 1 (9th Cir. 1998), aff'd, Saenz v. Roe, 526 U.S. 489 (1999).

ANALYSIS

1. Irreparable Injury

To obtain a preliminary injunction plaintiff must first demonstrate that there exists a significant threat of irreparable

[6] The First Amendment is made applicable to the states by the Fourteenth Amendment.

injury." Oakland Tribune, Inc., 762 F.2d at 1376. In the absence of a significant showing of irreparable injury, the court need not reach the issue of likelihood of success on the merits. See id.

Loss of First Amendment freedoms generally is regarded as an irreparable injury, even if short in duration. Elrod v. Burns, 427 U.S. 347, 272 (1976). Here, the disclosure requirements may deprive plaintiffs of their ability to keep the identity of their contributors separate from their political message.[7] Connecting the political message to specific groups may prejudice voters against the position advocated. As an example, plaintiffs note that the disclosure requirement that Chevron Texaco be listed as a major donor on all CRP advertisements may reduce the advertisements' effectiveness with voters who view dislike that corporation. Similarly, voters who dislike labor unions may be biased against CDP advertisements which identify CTA as a major contributor. The Supreme Court has recognized the "respected tradition of anonymity in the advocacy of political causes," in part based on the understanding that ideas may at times "be more persuasive if . . . readers are unaware of [the speaker's]

[7] Plaintiffs also provide testimony from party officials that contributors may curtail the amount of contributions in the future to avoid qualifying for on-publication disclosure of the contributors' identity. Defendants argue that this injury is speculative because plaintiffs have not submitted testimony from any donor that has refrained from contributing in order to avoid on-publication disclosure of the donor's identity. However, for purposes of this motion, it is not necessary that the court decide whether this injury is sufficiently concrete or imminent since plaintiffs have established the presence of independent injury.

identity."[8] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 (1996); see also American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 988 (9th Cir. 2004.) Thus, plaintiffs have identified an irreparable injury likely to occur unless the injunction is granted.

2. Likelihood of Success on the Merits

Plaintiffs also must demonstrate either likely success on the merits or that serious questions are raised and the balance of hardships tips in its favor.

All parties agree that the challenged statutes must satisfy strict scrutiny. Heller, 378 F.3d at 992-993 ("As a content-based limitation on core political speech, the Nevada Statute must receive the most 'exacting scrutiny' under the First Amendment.")(quoting McIntyre, 514 U.S. at 346. Such requirements survive strict scrutiny only if they are "narrowly tailored to serve an overriding state interest." Id. (quoting McIntyre, 514 U.S. at 357). More specifically, "a content-based regulation of constitutionally protected speech must use the least restrictive means to further the articulated interest." Id. (quoting Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir.1998)).

Defendants' asserted purpose for requiring on publication disclosure of the two major contributors is to provide relevant

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[8] Defendants argue that the contributors are not in fact anonymous, since they must disclose their identities under contribution reporting requirements in existing law. However, "it is not just that a speaker's identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech." Heller, 378 F.3d at 991.

information to voters. Specifically, defendants note that voters' "capability of evaluating who is doing the talking is of great importance, and expecting voters to accomplish such evaluation solely by reference to the after-the-fact disclosure reports on file with the Secretary of State is unrealistic." (Opp'n at 12.) The Supreme Court has recognized that informing voters regarding campaign contributors is a compelling purpose and plaintiffs do not contend otherwise.

However, the governmental objective of informing voters will not justify *all* disclosure requirements; what is sufficiently compelling to justify one disclosure requirement may not suffice to justify another. In Heller, supra, the Ninth Circuit confronted a Nevada statute requiring on-publication disclosure of parties responsible for any materials relating to an election of a candidate or ballot measure. In support of the disclosure requirements, the defendant in Heller proffered several governmental interests, including the need to provide information to voters regarding the identity of campaign donors. The Ninth Circuit specifically rejected as "not sufficiently compelling," the government's stated interest of informing voters, finding that "the simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." Heller, 378 F.3d at 993 (quoting Mcintyre, 514 U.S. at 348-349).

Admittedly, the statute in Heller was broader than that challenged here. However, the factual distinctions between the statutes do not undermine the applicability of Heller's

reasoning. Relying heavily on the Supreme Court decision in McIntyre, the Heller court noted that "both [cases] involve campaign statutes that go beyond requiring the reporting of funds used to *finance* speech to affect the *content of the communication itself*. This case and McIntyre therefore involve governmental proscription of the speech itself unless it conforms to prescribed criteria." Id. at 987 (emphasis in original). Like both Heller and McIntyre, the major donor disclosure requirements at issue here go beyond the reporting of funds that finance speech to affect the content of the advertisements.[9] Because these types of on-publication disclosure requirements are "considerably more intrusive than simply requiring [speakers] to report to a government agency," they are a "content-based restriction on core political speech" which must receive "the most 'exacting scrutiny' under the First Amendment. Heller, 378 F.3d at 992 (quoting McIntyre, 514 U.S. at 346).

Defendants cannot satisfy that test here because existing off-publication requirements are less restrictive on speech and more effective in meeting the purpose of informing voters. Contrary to defendants' suggestion during oral argument that contributor information is available only in "dusty" old files at the Secretary of State's office, in fact voters can easily obtain access to the identities of a political party's contributors through recourse to reported contributor information filed with the Secretary of State. In the last 16 days before an election, committees must disclose contributions within 24 hours. This

[9] Conceivably, some form of on-publication disclosure requirements could survive after Heller and McIntyre.

information is available over the internet in a user-friendly database. Indeed, defendants' counsel made use of this very system to calculate for the court the amount of money expended thus far on political advertising in California for the November 2004 election. (See Opp'n at 12 n. 7.) Consequently, voters can obtain daily updated information regarding a speaker's contributors by accessing the Secretary of State's on line records.

Further, the Secretary of State's contributor report information provides a far more complete and accurate picture to voters than the limited major donor disclosures mandated by sections 84503 and 84506. The latter disclosures require political party committees to single out on the face of the document two out of tens of thousands of contributors, many of whom also make sizeable contributions. This "visual byte" provides a limited and potentially distorted picture of a political party's contributors.

In the context of primarily formed committees, this bit of information might prove useful at identifying the true "speaker." As the Heller court noted, "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names." Heller, 378 F.3d at 994. In such cases, the government may indeed have a compelling interest in unveiling for the voters the true "speakers" behind such an advertisement. However, this is not such a case. In the context of political parties, the true "speaker" is the political party, whose name is disclosed on the face of the advertisement.

In fact, identifying a political party's two largest contributors as the "speakers" could mislead voters because these contributors may not endorse the message in the advertisement. Contributions are made to political parties for many reasons, including agreement with a party's general philosophy, support of certain platform positions, or simply opposition to the competing party. The political parties in turn use this funding to support a wide variety of activities, including dissemination of advertisements in support of, or opposition to, myriad candidates and ballot measures. It is not difficult to imagine a situation in which the contributor will be identified as a major donor on an advertisement containing a political message with which the contributor does not agree.[10] To the contrary, it seems nearly inevitable in light of the plethora of positions advocated by the political parties in a given year. However, the court need not speculate as plaintiffs have identified concrete examples from this election cycle. Plaintiffs note that one of the CDP's major donors, CTA, is officially neutral on the 15th District State Senate election, as well as Propositions 63 and 72. Yet CTA will be identified as a major funding source on mail endorsing Democrat Peg Boland in the 15th Senate race and taking positions on most statewide ballot measures (Id.)(citing Nunez Decl. ¶ 8-9,

[10] One of the principal arguments raised by defendants' counsel during argument was the need for full discovery before a hearing on the merits, at which plaintiff would be able to provide the court with the actual number of times a major contributor identified on an advertisement disagreed with the advertisement's message. While there may be circumstantial evidence on this issue, absent an extraordinary degree of candor, the court wonders how the state could constitutionally elicit disclosure of one's political beliefs or preferences.

Bowler Decl. ¶ 15.) In addition, plaintiffs note that the New Majority Committee, one of the two largest contributors to the OCRP, supports Proposition 62 and has contributed $25,000 to Californians for an Open Primary Committee, a Primarily Formed Committee advocating passage of Proposition 62. However, the OCRP opposes Proposition 62 and the New Majority Committee will be identified as providing major funding for the OCRP's walk piece which advocates defeat of Proposition 62. (Baugh Decl. ¶ 6.) In these situations, voters may infer inaccurately that contributors, such as CTA and the New Majority Committee endorse the political messages espoused in the advertisement.[11] By potentially misleading voters, the disclosure of major donors to political parties may actually undermine the stated governmental interest of providing information to voters regarding the "identity of the speaker."

Consequently, the court finds that plaintiffs have demonstrated serious questions going to the merits of their claim that the disclosure requirements in sections 84503 and 84506 unconstitutionally infringe their First Amendment right to free speech and association.

3. Balance of Hardships

The court is concerned that plaintiffs waited until less than two weeks before the general election to seek injunctive relief. As of the issuance of this order, there are just five

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[11] By contrast, in the context of a Primarily Formed Committee, such inference may be reasonable. For example, one might reasonably infer that the New Majority Committee supports Proposition 62 in light of its contribution to the Californians for an Open Primary Committee, which is organized for the primary purpose of advocating Proposition 62's passage.

mail days before the election. Presumably, at this point, the campaigns have been in full swing for months and most of the advertisements have been printed and sent. Consequently, much of the asserted injury already has occurred. However, the fact remains that plaintiffs have demonstrated an ongoing harm over the next few days which has First Amendment implications. Further, the Heller decision's rejection of on-publication disclosure requirements substantially bolsters plaintiffs' position.

In light of these considerations, and because the state has offered no authority for denying relief on the basis of laches, in a First Amendment case where the plaintiffs delay appears to be less than two months, the court feels constrained to grant plaintiffs' request for a preliminary injunction.

The court stresses that this is a provisional remedy. During oral argument, defendants' counsel expressed some degree of frustration regarding the limited time provided to prepare for hearing in this case. This is understandable, particularly in light of the fact that plaintiffs created the exigency through their delay in filing the complaint. However, defendants will have every opportunity to fully develop the factual record and legal issues in this case and make their case on the merits. The court holds only that, in light of the constitutional dimensions of the injury, plaintiffs have met their burden to obtain injunctive relief. The court intends to hear the case on the merits on an expedited schedule, well prior to any future election cycle.

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CONCLUSION

For the foregoing reasons, it is hereby ordered that defendants and all of their respective officers, agents, servants, employees, representatives, and attorney and those persons in active concert or participating with any of the above with actual notice of this Preliminary Injunction, are hereby restrained and enjoined from enforcing Cal. Govt. Code §§ 84503 and 84506 against plaintiffs or similarly situated political party committees registered with the Secretary of State as general purpose committees pending entry of a final judgment in this case.

Pursuant to Fed. R. Civ. P. 65(c) and Local Rule 65-231(d)(1), the aforementioned Preliminary Injunction shall be effective upon plaintiffs' filing of a bond in the amount of $1,000.00.

IT IS SO ORDERED.

Dated: October 27, 2004

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FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE