No. 09-559

**IN THE SUPREME COURT OF THE UNITED STATES**

JOHN DOE #1, JOHN DOE #2, and PROTECT MARRIAGE WASHINGTON,
Petitioners
v.

SAM REED et al.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

# BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## INTEREST OF AMICI CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Liberty Counsel has offices in Florida, Virginia and Washington, D.C. and has hundreds of affiliate attorneys in every state. Liberty Counsel has represented individuals and faith-based non-profit organizations in matters addressing free speech, expressive association and free exercise rights under the First Amendment of the United States Constitution.

Liberty Counsel frequently seeks injunctive relief to halt ongoing and threatened infringement of its clients' First Amendment rights. The lack of speech protective standards in preliminary injunction analysis has led to inconsistent and uncertain results. This in turn has led to uneven protection of fundamental First Amendment rights. A similar scenario was present in this case, and the lower court decisions illustrate how fundamental First Amendment rights will continue to be eroded unless speech protective standards are implemented. Liberty Counsel respectfully submits this brief outlining a proposed speech-protective

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[1] Amicus files this brief with the consent of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

test for preliminary injunctions for the Court's consideration.

## SUMMARY OF ARGUMENT

As recently as October 2, 2009, the Ninth Circuit acknowledged that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to support a preliminary injunction. *Klein v. City of San Clemente,* 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347 (1976)). However, only 20 days later, the Ninth Circuit panel hearing this case wholly disregarded the irreparable harm posed by deprivation of First Amendment freedoms when it overturned a preliminary injunction despite evidence that denial of the injunction would endanger citizens who exercised their right of referendum. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (decided October 22, 2009) *cert. granted* 2010 WL 144074 (2010). These conflicting decisions illustrate that the preliminary injunction standards described in *Winter v. Natural Resources Defense Council,* 129 S.Ct. 365 (2008) need further refinement to ensure that fundamental First Amendment rights are protected.

Since *Winter* addressed environmental interests, this Court did not have occasion to explain how the preliminary injunction standards should be applied when First Amendment rights are at stake. As the history of this case, as well as other First Amendment cases, illustrates, this Court's guidance on how to apply the preliminary

injunction standards in a way that protects free speech rights is urgently needed.

This Court's precedents establish that when First Amendment rights are at stake irreparable injury is a primary concern. Because First Amendment rights are so fundamental, a colorable claim of deprivation of those rights establishes irreparable injury. *See Elrod*, 427 U.S. at 373. That finding of irreparable injury, in turn should affect the weighing of the equities to increase the government's burden to justify its restraints. *See Ashcroft v. ACLU,* 542 U.S. 656, 670-671 (2004). The irreparable injury posed by First Amendment violations should also influence the analysis of whether an injunction is in the public interest, as the deprivation of a fundamental right is of significant consequence to the public. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982).

A final consideration in the First Amendment context should be preservation of the status quo ante. While preservation of the status quo has generally been subsumed into the balancing of the equities analysis, the unique status of First Amendment rights warrants a separate analysis of the concept. That analysis must take into account the unique position of the parties and seek to restore the status as it existed prior to the state's regulation of the plaintiff's speech.

A more speech-protective injunctive relief analysis will help ensure that the First

Amendment rights this Court has zealously guarded from governmental interference retain their status as fundamental rights. Such a standard should recognize that deprivation of First Amendment rights conclusively establishes irreparable injury, balance the equities with an eye on the irreparable nature of plaintiff's injury, measure public interest in light of the fundamental nature of free speech rights, and examine status quo from the perspective of status quo ante.

## LEGAL ARGUMENT

In *Winter v. Natural Resources Defense Council,* 129 S.Ct. 365 (2008), this Court emphasized that courts must engage in an exacting analysis of both the interests being threatened by state action and the interests underlying state action before determining whether a preliminary injunction is warranted. *Id.* at 375-376. Injunctive relief is an extraordinary remedy, and courts *must* balance the competing claims of injury and *must* consider how granting or withholding the requested relief will affect *each* party. *Id.* at 376 (emphasis added). The court must also pay particular attention to the public consequences of granting or denying an injunction. *Id.* at 376-377. In W*inter* this Court concluded that the Ninth Circuit had failed to give proper attention to the public consequences of restricting the Navy's sonar training exercises and had employed an overly lenient standard for finding irreparable injury. *Id.* at 375-376. The Ninth Circuit had downplayed the importance of national defense vis-à-vis the well-being of marine mammals. *Id.* at 377-378. The

injunction granted by the Ninth Circuit would have jeopardized national defense in order to preserve the plaintiffs' ability to observe and study marine mammals. *Id.* at 377-378. "[W]e see no basis for jeopardizing national security, as the present injunction does." *Id.* at 381.

Similarly, there can be no basis for jeopardizing the fundamental First Amendment rights of Washington voters in order to satisfy the curiosity of some seeking the identity those who supported placing Referendum 71 on the ballot. The parties who sought to identity those voters did so merely to confront those citizens regarding their views. Just as the Ninth Circuit downplayed the importance of national defense in *Winter*, it downplayed the importance of political speech and expressive association in this case. The Ninth Circuit's decision jeopardizes the free speech rights, and, in some cases, the personal safety, of petition signers in order to give third parties the ability to identify those who exercised their right to refer a law to the voters.

In *Winter,* this Court described the prevailing standard for a preliminary injunction. *Id.* at 374. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* This Court found that the Ninth Circuit employed a definition of irreparable injury that was too lenient and engaged in only a cursory review of the other

standards. *Id.* at 376-378. While the lenient irreparable injury standard was a concern in *Winters*, of greater significance was the lop-sided balancing of equities which failed to properly address the national security issue posed by the injunction. *Id.* Neither the threatened injury to plaintiffs nor the state interest involved deprivation of fundamental First Amendment rights, so this Court did not address how the presence of fundamental rights should affect the analysis.

This Court's long-standing protection of First Amendment rights as foundational to freedom provides guidance for a speech protective preliminary injunction standard. To properly protect fundamental First Amendment rights, a preliminary injunction analysis must begin with the premise that deprivation of free speech rights constitutes irreparable injury. That underlying premise should then form the basis for balancing the equities, tipping the balancing in favoring of avoiding irreparable injury. Recognizing that deprivation of First Amendment rights is irreparable injury should also form the basis for determining whether an injunction is in the public interest. Finally, the irreparable nature of depriving a party of First Amendment freedoms should also alter the question of protecting the status quo so that the emphasis is on protecting the status quo ante, *i.e.,* the status quo that existed before government restrictions on speech. Focusing first on the irreparable harm posed by threats to free speech rights places the proper emphasis upon the seriousness of the threat to fundamental rights

so that the remaining factors are viewed in the appropriate context.

## I. THE STARTING POINT FOR ANY ANALYSIS OF A REQUEST FOR PRELIMINARY INJUNCTION IN THE FIRST AMENDMENT CONTEXT MUST BEGIN WITH THE PREMISE THAT DEPRIVATION OF FIRST AMENDMENT RIGHTS CONSTITUTES IRREPARABLE INJURY.

In *Winter* this Court rejected the Ninth Circuit's modified irreparable injury standard and reiterated that plaintiffs seeking preliminary relief must demonstrate that irreparable injury is likely in the absence of an injunction. *Id.* at 375. Under the Ninth Circuit's modified standard plaintiffs were only required to show probable success on the merits and the possibility of irreparable harm. *Earth Island Institute v. U.S. Forest Serv.* 442 F.3d 1147, 1158 (9th Cir. 2006) *abrogated in part, Winter,* 129 S.Ct. at 375. In *Winter*, the Ninth Circuit used that standard to find that plaintiffs' evidence of potential detrimental health effects in marine mammals was sufficient to support a preliminary injunction. *Id.* This Court rejected the standard as too lenient, noting that a preliminary injunction cannot be issued merely to prevent the possibility of some remote future injury. *Id.* The improper irreparable injury standard was not determinative however, as the Ninth Circuit's failure to properly assess the parties' respective interests in light of the government's (and public's)

significant interest in national security was sufficient to overturn the injunction. *Id.* at 376.

Integral to the *Winter* analysis was the fact that the plaintiffs did not allege a threat to personal fundamental rights, but to more general interests in environmental protection. *Id.* at 377-378. As this Court explained, the most serious possible injury to the plaintiffs in *Winter* would be harm to an unknown number of marine mammals that they study and observe. *Id.* at 378. On the other hand, forcing the Navy to deploy an inadequately trained anti-submarine force would jeopardize the safety of the fleet. *Id.* While the plaintiffs' threatened injuries might be serious and not redressable by money damages, they did not compare to the possible irreparable damage of a breach of national security. *See generally,* id.

By contrast, if the threatened harm to plaintiffs is restriction or prohibition of their individual right to express an opinion or support a cause, then the most serious possible injury is loss of personal freedoms guaranteed in the First Amendment. That significantly alters the preliminary injunction analysis and places greater importance on the issue of irreparable harm. The primacy of the rights guaranteed under the First Amendment means that irreparable harm must be the critical consideration in determining whether injunctive relief is warranted.

The purpose of the First Amendment includes the need to protect the free publication of matters of public concern, secure the right to a free

discussion of public events and enable every citizen to bring the government and governmental officials to the "court of public opinion" regarding their exercise of the duties entrusted to them. *Wood v. Georgia*, 370 U.S. 375, 392 (1962). "Political belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). Timing is of the essence in politics, as there is often only one chance to affect legislation or an upcoming election. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969). When an event occurs, it is often necessary to present a message promptly or lose the opportunity to present it at all. *Id.* A delay of even a day or two might be critical as it could affect whether the people will be afforded the opportunity to exercise their First Amendment freedoms effectively and intelligently. *Carroll v. President and Comm'rs of Princess Anne,* 393 U.S. 175, 182 (1968). The Bill of Rights was designed to "fence in the Government and make its intrusions on liberty difficult and its interference with freedom of expression well-nigh impossible." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 72-73 (1963) (Douglas, J., concurring). Consequently, government action that threatens First Amendment freedoms is particularly egregious and must be taken seriously. *See Lovell v. City of Griffin,* 303 U.S. 444, 451-452 (1938) (prevention of government restraint of free speech was a leading purpose behind adoption of the First Amendment).

Because threats to First Amendment freedoms are so serious, this Court has held that "[t]he loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. As the Eleventh Circuit observed, "[o]ne reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). Consequently, the court will find irreparable injury not only when a party demonstrates a current deprivation of rights, but also when he alleges that his freedom to exercise his right to petition will be chilled in the future or that the government is retaliating against him for having exercised his First Amendment freedoms in the past. *Id.* Similarly, when government employees demonstrate that they have been threatened with discharge if they do not support a certain political party or are supporting the political party to avoid discharge, they have shown that their First Amendment rights are threatened or impaired, which constitutes irreparable injury. *Elrod*, 427 U.S. at 373-374.

*Elrod*'s oft-quoted standard for irreparable injury reflects this Court's long-standing recognition that First Amendment rights must be "carefully guarded" against infringement by public officials. *Id.* at 373; *see also, Paulsen v. County of Nassau,* 925 F.2d 65, 68 (2d Cir. 1991). ("[O]ur historical commitment to expressive liberties dictates that "[t]he loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury"). "[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties [of speech, religion and association] are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut,* 310 U.S. 296, 310 (1940). Therefore, the First Amendment affords the broadest possible protection of these expressive rights "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). *Elrod*'s per se rule secures that protection by recognizing that rights lost to government restrictions cannot be regained and government officials cannot be permitted to downplay the effect of their restrictions on First Amendment rights.

Circuit courts have consistently followed *Elrod* in First Amendment cases to find irreparable injury in spite of government attempts to justify restrictions on speech. In *Paulsen*, the Second Circuit held that "[s]ince prohibitions on leafletting and dissemination of religious views contravene core First Amendment values," the plaintiffs established irreparable injury with their allegations that they were prevented from distributing religious leaflets at a county coliseum. *Paulsen*, 925 F.2d at 68. A faith-based student club denied recognition because of a school policy requiring all-inclusive membership was found to have alleged an irreparable injury because their right to express a particular belief was impaired,

regardless of the school's claim that state law required the restriction. *Christian Legal Society v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006). Similarly, a student who was told to remove a T-shirt containing a symbolic message was found to have alleged irreparable injury because his message was censored, despite school district claims that they were not suppressing the message, just the medium. *Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 254 (4th Cir. 2003). A citizen who was prohibited from placing leaflets on car windshields was found to have alleged irreparable injury because his right to engage in political discussion was impaired, despite the city's claim that the anti-leafletting ordinance was a reasonable restriction to prevent littering. *Klein v. City of San Clemente,* 584 F.3d 1196, 1208 (9th Cir. 2009).

The unique and fundamental nature of First Amendment rights, and this Court's commitment to zealous protection of those rights, dictate that irreparable injury be the initial and pre-eminent focus when analyzing claims for injunctive relief. Without a proper recognition of the irreparable nature of violations of First Amendment rights, injunctive relief will become meaningless to those battling government efforts to control, restrict or prohibit speech. The fleeting nature of political discourse means that relief cannot await a trial on the merits. Once lost, an opportunity to engage in free speech cannot be regained. By its very nature, therefore, improper restriction of First Amendment rights is an irreparable injury. Consequently, establishing that deprivation of First Amendment

rights constitutes irreparable injury provides the proper starting point for a speech protective preliminary injunction standard.

## II. WHEN BALANCING THE EQUITES IN FIRST AMENDMENT CASES, THE IRREPARABLE INJURY POSED BY DEPRIVATION OF FUNDAMENTAL FIRST AMENDMENT RIGHTS MUST BE GIVEN CONSIDERABLE WEIGHT.

Any analysis of the "balancing of the equities" factor in First Amendment cases must begin with the language of the Amendment: "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I. That language reflects the Founders' overall purpose that "the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting James Madison's report opposing the Alien and Sedition Act, cited in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION, 569-570 (1876)). Madison further said, "'[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.* (citing 4 ANNALS OF CONGRESS, 934 (1794)). Consequently, when the government imposes restrictions upon citizen's speech it is attempting to usurp the people's role as censor and undermine their sovereignty. That understanding is the lens through which a court should view the respective interests of the government and citizens

when presented with a request for a preliminary injunction in the First Amendment context. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Comm. v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 474 (2007).

When analyzing a request for a preliminary injunction, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S.Ct. at 376. In the First Amendment context, the court should measure the actual irreparable harm to the plaintiff if an injunction is denied against the potential harm to the government if the injunction is granted. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 428-429 (2006). When a government regulation substantially burdens a plaintiff's exercise of his First Amendment rights, then generalized governmental interests, such as preventing drug abuse, will not vitiate the plaintiffs' right to a preliminary injunction. *Id.* at 432.

The potential harms posed by speech-restrictive legislation can be so substantial that they even outweigh potential harms resulting from a preliminary injunction that might later be found to have been improvidently granted. *Ashcroft v. ACLU,* 542 U.S. 656, 670-671 (2004). When a statute, such as the Child Online Protection Act in *Ashcroft*, creates the possibility for criminal prosecution of expressive activity, then speakers might self-censor rather than risk going to trial

with an affirmative defense that the statute is unconstitutional. *Id.* That creates the potential for extraordinary harm and a serious chill upon protected speech. *Id.* at 671. By contrast, the harm to the state if an injunction remains in place pending trial is minimal, particularly if there are no prosecutions that will be disrupted while the injunction is in place. *Id.* Furthermore, the state could still enforce existing obscenity laws while the injunction was in place. *Id.*

Because First Amendment rights are so fundamental, this Court has consistently held that "'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *NAACP v. Button*, 371 U.S. 415, 438, (1963)). Therefore, governmental action which might curtail those freedoms must be closely scrutinized when balancing the competing interests in preliminary injunctions involving First Amendment claims. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The asserted state interests must be sufficiently important and the restrictions closely drawn to avoid unnecessary abridgment of First Amendment freedoms. *Id.* In *Buckley*, the balance tipped in favor of the state in the case of campaign contribution limitations that "did not materially undermine the potential for robust and effective political discussion" and served the state interest in preventing corruption. *Id.* at 29. However, the state interests were not sufficient to justify campaign expenditure limitations that imposed "direct and substantial restraints on the quantity of

political speech." *Id.* at 39. The primary effect of the expenditure limits was to restrict the quantity of campaign speech and thereby limit political expression, which is "at the core of our electoral process and of First Amendment freedoms." *Id.* "The expenditure ceiling fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process while heavily burdening core 1st Amendment expression." *Id.* at 48. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. Requiring that a compelling state interest be present on the state's side of the equation ensures that citizens will not lose their fundamental rights to censorship disguised as public interest.

Furthermore, requiring that the state show a compelling interest in regulating speech in order to counterbalance demonstrated irreparable harm to First Amendment rights prevents government agencies from effectively denying free speech by delaying it. For example, a county steering committee that removed plaintiff as a member would have completed its work and foreclosed plaintiff from exercising her rights of free speech and association if plaintiff were not granted injunctive relief. *Starkey v. County Of San Diego* 346 Fed.Appx. 146, 148, (9th Cir. 2009). Plaintiff had demonstrated that the county's purported reasons for terminating her membership were a pretext for viewpoint discrimination. *Id.* Consequently, she had established irreparable

injury under *Elrod*. *Starkey,* 346 Fed.Appx. at 149. By contrast, the only harm that the county could identify from an injunction reinstating Plaintiff was additional time to address the issues plaintiff raised. *Id.* Weighed against the considerable First Amendment concerns that stem from excluding plaintiff from the steering committee, "this harm is negligible, and preliminary injunctive relief is warranted while the parties develop the record and proceed to a decision on the merits." *Id.*

Similarly, the Fourth Circuit found that any alleged harm that might befall the school district from an injunction precluding enforcement of a dress code regulation was negligible in light of the deprivation of First Amendment rights the plaintiff would suffer if the regulation were to continue to be used to censor his speech. *Newsom,* 354 F.3d at 261. A university's claim that it would suffer hardship if it had to recognize a student club which did not follow its anti-discrimination policy was similarly viewed as insufficient to forestall an injunction, particularly in light of the fact that the school's application of the policy to the plaintiff was likely unconstitutional. *Christian Legal Society*, 453 F.3d at 867. If that were found to be true, then the university's claimed harm would be "no harm at all." *Id.*

Government agencies should not be permitted to use mere facades of drug abuse prevention, crime prevention or other public interests to justify censorship or other deprivation of fundamental First Amendment rights. Requiring that state justifications for speech restrictive laws

be compelling and narrowly tailored properly recognizes the seriousness of restricting First Amendment freedoms and helps ensure that the state does not improperly assume the role of censor over the people. "Balancing of the equities" in the context of First Amendment claims should mean placing the plaintiff's irreparable harm on one side of the scale and the state's interests on the other. If the state's interests are not compelling and narrowly tailored, then the scale tips in favor of the plaintiff. If the state's interests are compelling, then the scale would be evenly balanced, and the court would look to other factors to determine if injunctive relief is warranted.

## III. SINCE FIRST AMENDMENT RIGHTS ARE FUNDAMENTAL TO INDIVIDUAL FREEDOM, PROTECTING THOSE RIGHTS IS IN THE PUBLIC INTEREST.

Recognizing the extraordinary nature of a preliminary injunction, this Court has cautioned that when determining whether an injunction is warranted, courts should pay particular attention to the public consequences of granting or denying injunctive relief. *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982). That directive is even more critical when the extraordinary remedy of a preliminary injunction is coupled with the extraordinary rights protected by the First Amendment. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of

the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California,* 283 U.S. 359, 369 (1931). "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," and an error in marking that line "exacts an extraordinary cost." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

> It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

*Id.* Consequently, in the First Amendment context, the question of whether an injunction is in the public interest is not merely an academic question and requires more than just a passing remark in the court's analysis.

While the public interest factor is sometimes subsumed into the balancing of the equities analysis, "it is better seen as an element that deserves separate attention in cases where the public interest may be affected," such as when First Amendment rights are threatened. *Sammartano v.*

*First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). When analyzing public interest, the court primarily looks at whether and to what extent granting or denying an injunction will affect non-parties. *Id.* In *Sammartano*, the court found that injunctive relief was warranted because ongoing enforcement of potentially unconstitutional regulations at a city public safety complex would infringe not only the free expression interests of the plaintiffs, but also the interests of other people who might want to use the building. *Id.*

Courts have consistently followed the adage that "it is always in the public interest to prevent the violation of a party's constitutional rights" when determining whether a preliminary injunction should issue in a First Amendment case. *See G&V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994). In a challenge to a city ordinance limiting campaign contributions and expenditures for mayoral candidates, the Tenth Circuit held that the public interest was best served by following this Court's precedent in *Buckley v. Valeo* and protecting the core First Amendment right of political expression. *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001). Similarly, the Eighth Circuit found that the public interest was best served by enjoining enforcement of Iowa statutes regulating expenditures expressly advocating for the election or defeat of a candidate. *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 966 (8th Cir. 1999). The court found that the statutes posed great potential harm to independent expression, and the public interest favors protecting core First

Amendment freedoms, so injunctive relief was appropriate. *Id.* at 970. The Eleventh Circuit held that the strong public interest in protecting First Amendment values favored granting an injunction against state court proceedings aimed at penalizing the plaintiff's prior exercise of his right to petition. *Cate v. Oldham,* 707 F.2d 1176, 1190 (11th Cir. 1983). Framing its conclusion a little differently, the Sixth Circuit found that "there is no public interest in enforcing a law that curtails debate and discussion regarding issues of political import," so that the public interest favored an injunction against a law limiting campaign expenditures. *Suster v. Marshall,* 149 F.3d 523, 533 (6th Cir.1998) *cert. denied*, 525 U.S. 1114 (1999).

This Court's instruction to pay particular attention to the public consequences of granting or denying injunctive relief, *Weinberger,* 456 U.S. at 312, is of particular import in First Amendment cases. The consequences of granting or denying an injunction based upon First Amendment rights will necessarily extend well beyond the parties in a pending case. Third parties who might not even be aware of a pending challenge to a regulation but are subject to it will be affected by the decision to grant or deny injunctive relief. The public interest in granting or denying a preliminary injunction is always part of the court's analysis. However, in the First Amendment context, the public interest is critical to ensuring that injunctive relief is providently granted. This Court should adopt a speech-protective standard that emphasizes the importance of the public interest in First Amendment challenges.

## IV. A SPEECH PROTECTIVE STANDARD FOR PRELIMINARY INJUNCTIONS SHOULD SEPARATELY ADDRESS PRESERVATION OF THE STATUS QUO ANTE TO ENSURE THAT SPEECH RIGHTS ARE PRESERVED AS THEY EXISTED BEFORE GOVERNMENT REGULATION.

Because government restriction on free speech rights can have such grave consequences, it is important that the question of preservation of the status quo also be given particular attention in a speech-protective preliminary injunction analysis. The question of preservation of the status quo is frequently subsumed into the balancing of the equities analysis, but the risk posed by an improper interpretation of the concept requires that it be addressed separately when determining whether a preliminary injunction should be granted in the First Amendment context. When examining the question of preservation of the status quo in free speech cases, it is critical to recognize that the appropriate inquiry is not necessarily the status at the time of filing but the status quo ante, *i.e.,* the status of the parties before speech was restricted.

This Court has long recognized that when constitutional rights are at stake, the party whose rights are affected need not endure a regulatory restriction until its constitutionality is determined. *Banton v. Belt Line Ry. Corp.,* 286 U.S. 413, 417 (1925) (citing *Love v. Atchison, T. & S. F. Ry. Co.* 185 F. 321, 326 (8th Cir. 1911)). "[I]n truth, the purpose and effect of these injunctions were to

restore and maintain the status which existed before the unconstitutional acts of the people and the officers of Oklahoma disturbed that status, and thereby to prevent the irreparable injury which the companies must otherwise have suffered during the pendency of these suits." *Love*, 185 F. at 331-332. As the Eighth Circuit later clarified, "[t]he usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *Brotherhood of Railroad Carmen of America, Local No. 429 v. Chicago and North Western Ry Co.*, 354 F.2d 786, 799 (8th Cir. 1965). "The status quo is the last uncontested status which preceded the pending controversy." *Minnesota Mining and Mfg. Co. v. Meter*, 385 F.2d 265, 273 (8th Cir. 1967).

As the Fifth Circuit explained, "[i]t is often loosely stated that the purpose of a preliminary injunction is to preserve the status quo." *Canal Authority of State of Fla. v. Callaway,* 489 F.2d 567, 576 (5th Cir.1974). However, there is no "particular magic in the phrase 'status quo.'" *Id.*

> The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as

> to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

*Id.*

The Fifth Circuit's observations are particularly apropos in First Amendment cases. Generally, a plaintiff who is challenging a government regulation as an infringement of free speech is being subjected to the regulation at the time that he seeks judicial relief. *See e.g., Sammartano,* 303 F.3d 974 (plaintiff being prevented from engaging in expressive activity in public building); *Newsom,* 354 F.3d at 261 (student's speech being censored by school policy). Subjecting his expressive activities to the regulation is causing him irreparable harm by depriving him of his First Amendment rights. Preserving the status quo at the time of the lawsuit would mean preserving a status of irreparable injury. In order to prevent irreparable injury, the focus must be on preserving the status quo as it existed before the regulation affected plaintiff's expressive activities. Therefore, when determining whether a preliminary injunction is appropriate in the First Amendment context, the relevant inquiry

must be not whether it is appropriate to preserve the existing status of the parties, but whether it is appropriate to restore the parties to the status they enjoyed before the government attempted to regulate plaintiff's speech. Adopting this standard will help ensure that the court properly analyzes the true effect of the proposed injunction on the parties' relative interests.

## CONCLUSION

This Court has long established that governmental attempts to restrict, control or squelch First Amendment rights must be subjected to exacting scrutiny. That concept should be applied to requests for preliminary injunctions aimed at enjoining governmental restrictions on free speech. Applying the free speech protections to preliminary injunction review should mean adopting a standard in which deprivation of free speech rights constitutes irreparable injury and that irreparable injury is the basis for balancing the equities, determining public interest and evaluating the status quo ante.

The Ninth Circuit failed to utilize such a standard and failed to accord the plaintiffs' First Amendment rights the consideration required when fundamental rights are threatened. Liberty Counsel respectfully asks this Court to reverse the

Ninth Circuit's ruling and to adopt a speech-protective standard for preliminary injunction analysis.

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