California Task Force on Voter Privacy

Statement of J. Blair Richardson

Aristotle Publishing

General Counsel and Chief Privacy Officer

December 29, 2003

In the free society ordained by our Constitution it is not the government, but the people -- individually as citizens and candidates and collectively as associations and political committees - who must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley v. Valeo, 424 U.S. 1, 58 (1976)

The inherent worth of … speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

***First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)**

****

Introduction

Aristotle Publishing has been in the business of publishing public record voter list information and software for lawful uses since 1985. The company is non-partisan, with clients across the ideological spectrum.

The Company's stated organizational purpose includes (a) "publishing information used to influence political campaigns, elections, and public policy matters"; and (b) "increasing, in any media, the quality of information reaching the body politic and furthering the goal of the First Amendment to the Constitution of the United States of America of producing an informed public capable of conducting its own affairs."

I understand that the Task Force's charge is to balance privacy protection with the openness of democracy, to examine existing laws, and to determine the adequacy of existing safeguards with respect to California voter file information. My goal is to share the benefit of my experience as general counsel and chief privacy officer for a list publisher that has worked with privacy advocates, thousands of political subscribers, and many Secretaries of State and Boards of Election across the country for 15 years.

My comments will cover the importance of voter lists to the political process, the presumptive openness of these records for California's legislatively ordained purposes as a matter of law, the role of list publishers in the political process, specific steps taken by Aristotle, distinguishing "commercial users" from for-profit intermediaries in the political process, privacy concerns, and suggestions for strengthening existing safeguards and enforcement. My hope is that this brief legal and privacy policy overview will add to the collective wisdom on this complex subject.

I appreciate the opportunity to express these views for your consideration.

I. The Societal Value of the Lawful Use and Publication of Voter Lists in the Political Process

The registered voter list is a historically indispensable tool in the political process, and is used by candidates, parties, advocacy groups, political consultants, the press, and others throughout the country for targeted political fund-raising, polling, political journalism, or other political speech. These activities all generally involve extremely time-sensitive communications.

In 1976, the U.S. Supreme Court observed, "[t]he increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy". Buckley v. Valeo, 424 U.S. 1, 27 (1976). This is even truer now than it was then.

With this in mind, Aristotle wishes to draw the Task Force's attention to the Supreme Court's position that "added costs in money or time… may make the difference between participating and not participating in some public debate". City of Ladue v. Gilleo, 512 U.S.43, 57 (1994). The cost-effective targeting capability provided by public record voter information is therefore critical because, according to a 1999 study, it is mail, not television, that reportedly remains the largest advertising cost in U.S. elections. [*Washington Post*, *Business,* p. 3, May 10, 1999]. The lists provide a "facile and inexpensive means of identifying voters", and "grant users an advantage of time and money" in the political process. Mahan v. National Conservative Political Action Committee, 315 S.E. 2d 829, 832 (Va. 1984). The publication of affordable, accurate, enhanced lists is an integral part of the political process; it is important that these lists be made available equally to all political speakers.

The great degree to which the lists are already used for lawful purposes underscores the positive role their use plays in society. Both the Republican and Democratic Parties, for example, have historically sold the list, with enhancements. Committees advocating or opposing public questions or amendments utilize the lists. Consultants, data processors, mailing list service providers, and telephone banks, are commonly

provided access to voter files in campaigns to manipulate and utilize the data to further the lawful goals of their customers and clients. A number of data publishers, including Aristotle, publish the lists expressly for lawful uses. Over the years, our voter list clients have included candidates, the media, PACs, and political consultants, as well as non-profit public interest organizations such as women's rights and child protection groups wishing to communicate with voters about particular public issues.

The lists are also used to help identify those who have already registered to vote, so that these voters will not be contacted by partisan or non-partisan organizations undertaking voter registration drives.

Making voter lists affordable to all lawful users is important, because making some users devote more resources to list acquisition would invidiously operate to restrict the resources otherwise available to them for political communications. This position derives from the holding of the U.S. Supreme Court in Buckley, supra, 424 U.S. at 20, where the Court stated:

> *"A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs…. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."*

The use of voter lists for political communications -- such as campaigns, issue advocacy, polling, fundraising, voter registration drives, and related uses -- occurs year-round, not just shortly before the election. Accurate and frequently updated lists are thus constantly needed on short notice for cost-effective targeting of political speech.

II. First Amendment Freedoms of Speech and of the Press

The Task Force has heard testimony about proposals to restrict voter list access and use. Discussions have included the concepts of licensing journalists, providing voter lists only to campaigns, and similar attempts to distinguish among various types of political speakers and users with journalistic purposes.

It is critical that no one in this process underestimate the breadth and comprehensiveness of the constitutional freedoms of speech and of the press that are implicated by some of the proposals proffered

to the Task Force. These constitutional rights belong to all. The types of limitations proposed by various witnesses conflict with basic principles of democracy.

A. Freedom of Speech

As Justice Brandeis observed more than 70 years ago in Whitney v. California, 274 U.S. 357, 375 (1927)(concurring opinion*), "public discussion is a political duty*." Political speech is the lifeblood of a self-governing people and is "the primary object of First Amendment protection". Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 405, 410-411, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).
In Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940), the U.S. Supreme Court stated that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment". *See also* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment"); Buckley, *supra*, 424 U.S. at 49 n. 55 ("Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.")

Without any question, the freedom of political speech lies at the core of the protection afforded by the First Amendment:

> *Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Although First Amendment protections are not confined to `the exposition of ideas,' `there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . ..' This no more than reflects our `profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'*

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), *quoting* Buckley, *supra*, 424 U.S. at 14-15 (emphasis added) (citations omitted).

It is important to emphasize that the identity of the speaker is not determinative of whether political speech rights exist. Such rights belong to all citizens, voters, candidates, parties, advocacy groups and members of the press who would use voter lists for political advertising, polling, fundraising, or other political purposes. All such persons and groups possess these rights, because "in the realm of protected speech,

the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue". Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972). *See also* Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510, 2516 (1995)("government regulation may not favor one speaker over another."); Buckley, supra, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .")

Moreover, for-profit corporations also possess the freedom of political speech under the Constitution. The Supreme Court has held that "[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.'" Pacific Gas & Electric Co. v. Public Utilities Commission of California, (475 U.S. 1 (1986), *quoting* First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)(restrictions on corporation's own First Amendment right of political speech overturned)(citations omitted). *See also* McIntyre, *supra*, 514 U.S. 334, *quoting* Bellotti, *supra* at 777 (the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

B. Freedom of the Press

The fundamental right of a free press to gather and disseminate information also is implicated by a number of restrictive voter list access proposals presented to the Task Force. Any such classifications are presumed to be constitutionally suspect. As the Supreme Court has stated:

> *"Freedom of the press is a `fundamental personal right' which `is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.*

Branzburg v. Hayes, 408 U.S. 665, 705-705, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), *quoting Lovell v. City of Griffin*, 303 U.S. 444, 450, 452, 82 L.Ed. 949, 58 S.Ct. 666 (1938); *First National Bank of Boston v. Bellotti*, 435 U.S. at 802.

The Task Force minutes reflect testimony suggesting that some journalists might be "credentialed" before they may obtain a list. The specific required "credentials" are not described in the minutes. But can the

government favor one journalist over another person -- if each is agreeing to abide by the restrictions? The law does not say that the list will be made available to any person who shows journalist credentials. It is available to anyone for journalistic purposes. *De facto* press licensing laws are repugnant, and even the appearance of such must be avoided. As discussed in more detail below, freedom of the press includes freedom to access and publish information used in the political process, and is not limited to those with journalist "credentials".

1. Aristotle Has First Amendment Rights as a Publisher of Information Used in the Political Process

Aristotle seeks voter registration records in order to engage in pure First Amendment speech as a publisher of information used in the political process -- a fundamental right under the U.S. and California Constitutions. Aristotle functions as a member of the media, incurring costs to assemble, organize, enhance, update and publish information to its subscribers.

Aristotle's First Amendment right to publish the information is closely protected. A number of courts have expressly held that for-profit publishers of public record databases for lawful purposes are "organs of the press." *See, e.g.,* Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 730 (2d Cir. 1985) (database company distributing public records through "electronic information retrieval system" is "an organ of the press"); Federal Election Comm'n v. Political Contributions Data, Inc., 943 F.2d 190, 196 (2d Cir. 1991)(same); Cubby v. Compuserve, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) ("computerized database is the functional equivalent of a more traditional news vendor"); Daniel v. Dow Jones & Co., 137 Misc.2d 94, 102, 520 N.Y.S.2d 334, 340 (N.Y. Civ. Ct. 1987) (computerized database service "is entitled to the same protection as more established means of news distribution" such as public libraries, book stores, and newsstands).

Of particular pertinence here is *FEC v. Political Contributions Data, supra*, where the U.S. Court of Appeals for the Second Circuit held that Section 438(a)(4) of the Federal Election Campaign Act could not prohibit a publisher from assembling and disseminating FEC data at a profit. The statute in question prohibited public record individual contributor information copied from federal campaign reports or statements from being "sold or used by any person for the purpose of soliciting contributions or for commercial purposes.'" 2 U.S.C. Section 438(a)(4) (emphasis added).

The Second Circuit reversed the lower court's finding that PCD, a for-profit company, had violated Section 438(1)(4) by the mere act of selling FEC data, even though the sale was expressly for lawful end-uses. The court noted that a literal application of the "commercial purposes" restriction "would obviously impede,

if not entirely frustrate, the underlying purpose of the disclosure provisions of the FECA," as it would "bar newspapers and other commercial purveyors of news from publishing information contained in those reports under any circumstances." Id. at 194.

The Court held that publication of the list by a company formed to make a profit from such publication was not a prohibited "commercial" use, but was instead "similar" to publishing the information in other, more "traditional" media. Id. at 196. It stated, "In fact, we have previously noted that amicus Legi-tech, Inc. (a for-profit corporation which assembles and markets publicly available information--quite similar to PCD) is an 'organ of the press.'" *Id., citing Legi-tech, Inc.,* 766 F.2d at 730.

The Second Circuit determined that, as long as the publication for profit was not for the purpose of allowing the lists to be used illegally, the list publisher's First Amendment rights would be abridged under the FEC's overly strict interpretation of the law. By reading the statute in a way that avoids the First Amendment problems that the FEC's interpretation would engender, the court did not reach what it described as the "'important and troubling First Amendment implications raised by any construction of the statute that bars the use of the information at issue in this case by organizations such as the [publisher].'" Id. at 192.

It is, indeed, a slippery slope that the state would enter upon if it sought to distinguish among various types of for-profit and not-for-profit publishers and other types of users of voter lists for lawful purposes, in order to regulate them differently. By analogy, regulations that depend upon discretionary governmental determinations as to the distinction between, for example, "commercial handbills" and "newspapers" as a means of determining which are entitled to pure First Amendment protection and which are entitled to lesser protection, are inherently suspect. When presented with just such a case, the U.S. Supreme Court held:

> *We note that because [the] regulatory scheme depends upon a governmental determination as to whether a particular publication is a 'commercial handbill' or 'newspaper' it raises some of the same concerns as the newsrack ordinance struck down in Lakewood v. Plain Dealer Publishing Company, 486 U.S. 750 (1988). The ordinance at issue in Lakewood vested in the mayor authority to grant or deny a newspaper's application for a newsrack permit, but contained no explicit limit on the mayor's discretion. The Court struck down the ordinance, reasoning that a licensing scheme that vests such unbridled discretion in a government official may result in either content or viewpoint censorship…. Similarly, because the distinction between a 'newspaper' and a 'commercial handbill' is by no means clear -- as noted above, the city deems a 'newspaper' as a publication 'primarily presenting coverage of, and commentary on current events,' . . . -- The responsibility for distinguishing between the two carries with it the potential for invidious discrimination of disfavored subjects.*

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423, n 19, 123 L.Ed.2d 99, 112, 113 S.Ct. 1505,1513 (1993).

C. Other First Amendment Rights Implicated by Task Force Witness Proposals to Limit Voter List Use and Access

1. Rights of Aristotle's Subscribers

As discussed in more detail in Part V below, Aristotle's subscribers are contractually and statutorily limited in their use of voter information to non-commercial, political and social uses. Restrictions on Aristotle's provision of the lists for subscribers' lawful purposes would substantially impair their use by limiting the availability of the information in a form that makes it a valuable tool for enhancing the subscribers' ability to speak effectively. Without access to the information as provided by Aristotle, the company's subscribers are limited to the format provided by the state. That format does not allow the manipulation of the information in the way that Aristotle's format does -- that is, in a way that makes it possible for these subscribers to use the information to carry their political and social messages to their intended recipients in a timely manner. As a result, selective prohibitions on those who publish lists for lawful uses would also infringe the First Amendment rights of those publishers' subscribers.

2. Voters' First Amendment Rights to Receive Information

A related consideration mitigating against restricting access to voter files published for political end uses is that many voters want to receive targeted information about candidates and issues in more detail than is possible in 30-second TV ads. In fact, such voters have a First Amendment right to receive such information. It is the public's interest in receiving First Amendment protected speech, as much as the speaker's interest in speaking, that is served by the protections of the First Amendment. In *Pacific Gas,* 475 U.S. 1 (1986), the Supreme Court described the rationale underlying this fundamental right:

> *The constitutional guarantee of free speech "serves significant societal interests" wholly apart from the speaker's interest in self-expression. First National Bank of Boston v. Bellotti, 435 U.S. 765 at 776. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. See Thornhill v. Alabama, 310 U.S. 88, 102 (1940); Saxbe v. Washington Post Co., 417 U.S. 843, 863-864 (1974) (POWELL, J., dissenting).*

III. Presumptive and Historical Openness of Voter Lists

A. Pure First Amendment Right of Access to Voter Lists

Even if voter lists were not already public under California law, the press and the public have a pure constitutional right of access to such records for politically-related uses. In considering claims of First Amendment rights of access to government-held information, the courts traditionally look to two considerations:

1) Whether a "tradition of accessibility implies the favorable judgment of experience"; and

2) "Whether public access plays a significant positive role in the functioning of the particular process in question".

See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S.Ct. 2735, 2740 (1986)(access to preliminary hearings)(citations omitted). In Cal-Almond, Inc. v U.S. Dept. of Agriculture, 960 F.2d 105, 109 (9th Cir. 1992), the Ninth Circuit Court of Appeals recognized this test of logic and experience as the appropriate standard for assessing a First Amendment right of access to voter lists. (The court ultimately granted access in that case on statutory grounds.) Although the right of access to government information is of constitutional stature, it is not absolute. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581, n. 18 (1980)(plurality opinion); Nebraska Press Assn. v. Stuart, 427 U.S., at 570. Where the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)(access to criminal trials). *See, e.g*., Brown v. Hartlage, 456 U.S. 45, 53-54 (1982); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-103 (1979).

1. An Access Restriction on Voter Records Cannot Withstand Judicial Scrutiny If Access is Sought to Further The Legislatively-Ordained Purposes

Under the first prong of the Supreme Court's test for a First Amendment right of access to government-held information, there is no question that a tradition of public access to voter lists exists. As the testimony of the California Voter Foundation confirmed, voter lists are public records that are traditionally available in

California, and all across the country.[1] In Cal-Almond, *supra*, 960 F.2d at 109, the 9th Circuit stated simply, "It seems likely that a tradition of public access to voter lists exists".

Under the second prong of the Press-Enterprise analysis, it is beyond debate that access to the voter lists plays a significant positive role in the functioning of political communications. In Mahan, supra, 315 S.E. 2d at 832, for example, the Virginia Supreme Court found that access to the centralized Virginia list extended to recipients a "facile and inexpensive means of identifying voters", and "grant[ed] users an advantage of time and money" in the political process. *Cf*. Cal-Almond, *supra*, 960 F.2d at 109 ("It also seems likely that public access to voter lists would play a significant positive role in the functioning of any referendum including this one"). *See also* Donrey Media Group v. Ikeda, 959 F. Supp. 1280 (D. Haw. 1996), in which the court overturned a restriction that selectively excluded the press from access to voter lists, described by the court as "important information relative to the integrity and honesty of the elections process."

The significance of public access to the list is further demonstrated by the California legislature's long-standing mandate that the lists shall be provided to any person for election or political purposes. This broad right of access is exercised by a multitude of political users, and the great degree to which the California lists are already used for political purposes underscores the positive role they play in the political process.

In sum, the right to communicate effectively with voters is at the heart of democracy. In this nation, a tradition exists that the identity of voters be available to all in the community. No one could seriously dispute that access to the identity of voters plays a significant, if not critical, role in open political discourse and the functioning of our government. Accordingly, the press and the public have a First Amendment right to access to voter records for uses related to the political process.

B. Constitutional Right of Access to Voter Lists Under the Equal Protection Clause

1. A Denial of Equal Access to Voter Lists Would Violate the First Amendment, As Applied Through the Equal Protection Clause of the Fourteenth Amendment

Unequal access to voter lists implicates First Amendment rights as applied through the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment provides that

[1] As noted in the California Voter Foundation's testimony, approximately half of the states in the U.S. allow unrestricted commercial use and resale of their voter lists. In the remaining half of the country, state laws may prohibit "commercial use" of the voter lists or limit use to "political" purposes, but they still do not restrict access for these purposes. In practice, even in the "restricted" jurisdictions, the states provide their lists to list publishers or vendors for resale, provided that the ultimate purchaser will only use the lists for authorized political or non-commercial purposes.

"No state shall... deny to any person within its jurisdiction the equal protection of the laws." The U.S. Supreme Court has described the scope of the Equal Protection Clause as follows:

> *It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.*

Williams v Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

Under the Equal Protection Clause, Aristotle and other for-profit publishers are entitled to the same right of access and the same right to publish the data as is currently enjoyed by many organizations. Political parties customarily perform voter data processing services similar to Aristotle's and then sell the data. It is well known that such for-profit users as consultants, data processors, mailing list service providers, publishers, and telephone banks are commonly provided access to voter files in campaigns to manipulate, publish or utilize the data to further the political goals of their customers and clients.

Under the applicable Equal Protection principles, there is no rational basis for preventing a list publisher from disseminating voter records for lawful purposes to those who are permitted by statute to obtain them. Certainly, from the perspective of voter privacy, it makes no difference whether the voter is contacted by a political speaker who obtained the list from the state, from a for-profit publisher, or from another political user. Discrimination against for-profit database publishers would violate their rights to equal protection, and cannot pass constitutional muster.

2. Laws Restricting Public Access to Voter Lists Have Never Survived an Equal Protection Challenge

Laws restricting public access to voter lists are rare, and we are not aware of any that have survived judicial scrutiny under an Equal Protection challenge. For instance, the Virginia Supreme Court has ruled that Virginia's voter list access restrictions were unconstitutional "as applied," in violation of a political user's First Amendment rights in an Equal Protection case. *See* Mahan*, supra, 3*15 S.E.2d 829 (Va. 1984).

Federal courts also have overturned similar voter list access restrictions in Rhode Island and Hawaii, on grounds that they violated the public's rights under the First Amendment and the Equal Protection Clause

of the Fourteenth Amendment. *See* Donrey Media Group v. Ikeda, 959 F. Supp. 1280 (D. Haw. 1996). *See also*, Providence Journal v. Farmer, CA No. 85-0602B (D.R.I. 1986) (slip. op.).

Of particular relevance here, the Donrey Media court overturned a statute that denied the press access to voter records, while making them available to political organizations. The Court found that the law violated the First and Fourteenth Amendments, and that it provided

> .
>
> *dangerous precedent by allowing the state government and local municipalities to control the type of access to voter registration records that will be permitted to the press while permitting record access to political parties and certain other organizations. This clearly is an intolerable infringement on the public's right to know and denies a means of public access to important information relative to the integrity and honesty of the elections process.*

959 F. Supp. at 1287. (Emphasis added).

Similarly, in *Providence Journal*, the U.S. District Court for Rhode Island applied strict scrutiny and overturned a statute that selectively denied the public access to the central voter registry. The court found that the statute burdened "fundamental rights" to inspect the list and to gather and report news, resulting in a denial of the right to a free press. In a ruling that is highly relevant to the instant case, the court held:

> *The state interest, asserted in support of [the law], is that it protects voters from harassment which might arise from commercial exploitation of the central voter registry list. Although the rationale is commendable, it does not justify abridging a fundamental right. Limiting access to the central voter registry is not the least restrictive means for protecting voters from commercial harassment.*

Providence Journal at 11 (emphasis added).

The court further held that the statute was "over-inclusive because it denies individuals with a non-commercial purpose the public information on the magnetic tape of the central voter registry." The court noted that other Rhode Island Public Records laws prohibited commercial use and provided for a fine, and/or imprisonment, plus civil damages for misuse of the information. The court found that such restrictions did "establish that there are available less restrictive means to achieve the state's goal." *Id*. at 13. [2] Accordingly, the court held:

[2] *Cf*. Mahan, *supra*, at 835 (indicating that statutory oath and restriction on non-political uses were "precautionary administrative measures, short of total exclusion, [that] adequately might serve the state's interest.")

> *The state has failed in its burden to justify that limiting access to the central voter registry furthers a compelling state interest through the least restrictive means. Thus the statute is a denial of First and Fourteenth Amendment protections and unconstitutional.*

Id.

It is imperative to remember that the subject of this discussion is the publication of public record information for political and other lawful noncommercial end uses – not the sale of records for commercial end uses such as the sale of a consumer product. Countless entities – many of which are "for profit" – are granted access to California voter data. Denying access in order to prevent an organ of the press from assembling, updating, enhancing, and publishing the data expressly for lawful authorized uses would similarly violate that publisher's equal protection rights as applied under the First and Fourteenth Amendments.

C. The Case Law on "Facial" Challenges to Access Restrictions on Arrestee Records Does Not Affect the Constitutional Right of Equal Access to Voter Records

Even if there were no constitutional right of access to voter records for political uses under the Press-Enterprise test, no testimony has been provided to the Task Force that would support restricting access to the voter files for politically-related uses. As long as the state makes the data available to anyone, it is highly unlikely that courts could constitutionally deny access to another who is willing to declare that it will limit use of the file to the political process and will not engage in commercial solicitation with the file.

The Task Force has heard testimony about IRSC v. Jones, a case in which a commercial vendor was denied access to California arrestee data for no stated end use other than to sell it to a user whose purpose was undefined. From Aristotle's perspective, the *IRSC* case has no bearing, because access to voter data for political purposes obviously has deeper historical traditions than access to arrestee records for unlimited uses. Cf. Press-Enterprise, *supra*. In addition, Aristotle does not advocate making the California voter file available for undefined uses or for commercial solicitation.

The Task Force also heard testimony on LAPD v United Reporting Publishing Corp. 528 U.S. 32 (1999), concerning a California statute that withheld arrestee address information from anyone who would not declare a) that they would limit their use of the information to specified categories, and b) that they would not use the information to sell products or services to the addressees. The vendor in that case "did not attempt to qualify and was therefore denied access". The Supreme Court saw this simply as a law

regulating access to address information in the hands of the police department, and the vendor's failure to attempt to qualify immunized the statute from a "facial" constitutional challenge:

> *For purposes of a facial invalidation, the [government's] view is correct. This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. See* Rubin *v.* Coors Brewing Co.*, 514 U. S. 476 (1995). The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment. Cf. Houchins v.* KQED, Inc., *438 U. S. 1, 14 (1978).*

It is important to recognize that the LAPD case has no precedential value whatsoever to an Equal Protection analysis of voter list access, where the state does make the information available to many entities, and where applicants do attempt to qualify under the statute. As the concurrence by Justices Scalia and Thomas in *LAPD* notes, selective access may very well be a "restriction on speech", rather than simply regulating "access to information". LAPD, *supra*, (Scalia, J. and Thomas, J., concurring) In such a case, according to these Justices, an entirely different constitutional analysis would apply:

> *[A] restriction upon access [to information] that allows access to the press (which in effect makes the information part of the public domain), but at the same time denies access to persons who wish to use the lists for certain speech purposes, [may be] in reality a restriction upon speech rather than upon access to government information. That question -- and the subsequent question whether, if it is a restriction upon speech, its application to this respondent is justified--is not addressed in the Court's opinion.*

Similarly, Justice Rehnquist, who authored LAPD, has previously opined that although "the First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government", they do "assure the public and the press equal access once government has opened its doors." *See* Gannett Co. v. DePasquale, 443 U.S. 368, 405 (1979) (Rehnquist, J., concurring.)

In LAPD, the plaintiff did not attempt to qualify under the statute, nor did it raise constitutional equal protection claims, as the Court expressly noted. The plaintiff confined its appeal narrowly to a facial challenge. The case also did not involve access to voter records for uses relating to the political process. Thus the plaintiff in LAPD never raised the issue of whether there was a First Amendment right of access

to these records under Press-Enterprise –- a constitutional analysis that is appropriate for the Task Force to consider here with respect to voter lists.

In my view, a successful constitutional challenge on Equal Protection grounds would inevitably result should list publishers be denied access to voter lists for enhancement and publication as part of the political communications process. Certainly, nothing in LAPD suggests that the Press-Enterprise test is not applicable to voter data. Nothing in the case supports the idea that the state had the authority to deny access to any person or entity that agreed to utilize the data for the statutorily-designated purposes. Moreover, given the views expressed by Justices Scalia, Thomas, and Rehnquist, and in the LAPD dissents of Justice Stevens and Justice Kennedy, the LAPD case provides no support whatsoever for the notion that the Supreme Court has placed its imprimatur on selective distribution of voter information, or on restricting republication of such information by those who have received it.

IV. Role of List Publication Services in the Political Process

A natural corollary to the constitutional right to publish lists that are important to the political process is the significance of list publishers to that process. As noted above, elections, campaigns, political polling, and political speech all generally involve extremely time-sensitive communications. As a participant in the process of assisting the user in targeting such communications, list publishers essentially serve not only as the agents and intermediaries of the end user for purposes of data acquisition, but also as the user's data processors and information publishing service providers.

In the case of California public record voter data that is available to "any person" for statutorily authorized uses, vendors publish the corrected, updated and enhanced information in various formats, expressly for those uses. This publication directly furthers the state legislature's goal in making the information part of the public record to be used for such purposes by "any person".

Many Secretaries of State, and many state and local Boards of Election, have historically had serious problems with list quality. Publishers such as Aristotle that specialize in voter list hygiene are able to make cleaner, better lists available for political uses, thereby promoting more cost-effective political discourse. Specifically, Aristotle converts and reformats most of the information received from the California voter files, down to the Library District. Aristotle does not receive Social Security Numbers with the files, and thus they are not included in Aristotle's offering. The most important fields for political uses are name, address, birthdate, party affiliation, vote history and phone numbers. Other fields often requested are supervisor districts and school districts.

Boards of Election and registrars typically maintain the data that the registrant actually supplies, and thus provide only what is in the public record. The result is that the lists from these agencies do not contain many current phone numbers and addresses, and do include a number of invalid or undeliverable addresses.

Political users who mail to the invalid or undeliverable addresses are assured of wasting funds that could otherwise be used for their political speech. This raises the cost of their campaigns, requiring more resources to be devoted to fundraising, which in turn raises the cost of the campaigns further, requiring more fundraising, in a spiral of rising costs.

To allow for more cost-effective targeting for lawful uses, Aristotle incurs costs to “enhance” the voter lists with demographic information not provided by state agencies, including additional phone numbers. Aristotle also incurs costs to update address corrections regularly, and to run the voter lists against Social Security Death files, in order to cleanse the lists of names of voters who have moved from the jurisdiction or have died.

For political speakers, enhanced voter lists with narrow selection criteria are often required. One does not always know in advance what demographic selections will be desired on short notice. Boards of Election and registrars typically provide just one format with fields they predetermine, and can take weeks to deliver the list, even in unenhanced form. Aristotle publishes the information for its subscribers in harmonized formats on different media (e.g., CD ROM and online formats). Turnaround time for offline delivery varies, but can be as quick as one day. Online, for registered clients, enhanced data in immediately usable formats is available 24 hours a day, 7 days a week.

Aristotle allows the users to "custom build" their selections from a myriad of available fields in any of multiple formats. Aristotle’s customers can have their files stored online so they can return and immediately download previously ordered information in different formats for different uses.

Aristotle makes the information available to its subscribers in a way that allows them to quickly and easily select data that crosses political geography lines. For example, rather than having to go to three separate counties to obtain the voter list of one particular congressional district, Aristotle’s subscribers can obtain a list of the registered voters in that particular district from one source and without including voters who are outside the district, yet inside the counties included in the district.

Aristotle’s enhanced data is equally available to all subscribers – including minor party or independent candidates, advocacy groups and other lawful users for whom the cost of an independently obtained and

enhanced list may be double the cost to a major party candidate for the same list. Unlike major party candidates, who normally can immediately purchase the enhanced statewide list from their parties with little burden on campaign staff and some assurance of list uniformity and delivery, the minor party or independent candidates and advocacy groups are required to devote additional time, effort and resources to arrange for these services.

Thus, in particular, for minor party and independent candidates without the resources to obtain, enhance, format and process the lists they need quickly, Aristotle greatly decreases their list acquisition costs and their time of acquisition. Many vendors serve only one political party. Placing unnecessary restrictions on non-partisan vendors such as Aristotle Publishing would effectively deny these smaller and independent persons and groups a source for enhanced lists that is as reliable, inexpensive and efficient as the source available to major party candidates through their parties or through a partisan political vendor. This is a particularly harmful form of discrimination, given the rising costs of campaigns, and the important role minor parties and independent political speakers have historically played in influencing public discourse and elections.

By making some candidates and political speakers devote more resources to list acquisition, any laws that unreasonably restrict list access or publication would invidiously operate to restrict the resources otherwise available to these persons for political communications. *Cf*. Buckley, *supra*, 424 U.S. at 20. ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.")

The damage that can occur to the political process when new or small parties or independent speakers are effectively discriminated against should not be minimized. In Anderson v. Celebrezze, 460 U.S. 780, 794 (1980) the Supreme Court eloquently described this effect:

> *A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and -- of particular importance -- against those voters whose political preferences lie outside the existing political parties. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by*

> *the First Amendment - "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," - are served when election campaigns are not monopolized by the existing political parties.*

Id.

Thus, any system that creates potential discrimination and increased costs for political speakers who are not major party candidates is highly suspect. As the Supreme Court further warned in Anderson:

> *[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny.*

Aristotle's offering of this information serves a manifest public need in that it provides an effective, inexpensive and equally available method for all candidates and other political speakers to communicate with their potential constituency and contributors. Facilitating communication with voters on matters of political issues is critical to the democratic process. It should also be noted that competition provided by list publishers such as Aristotle also serves to lower the overall cost of list services in the marketplace, and thus reduce the cost of campaigns for all candidates – another public benefit.

Also, according to one Task Force witness, exceptional administrative burdens are placed on state resources in fulfilling the explosion of list requests that traditionally occur shortly before an election. Vendors who serve the political marketplace thus reduce the burden on state and county registrars, and free them from the crush of fulfilling voter list orders, particularly during the pre-election period.

The result of political list publishers' efforts is the provision of new, enhanced information published in a more useful way for use by political speakers. Lowering the cost of campaigns, helping to reduce the spiraling need for fundraising, and reducing the administrative and manpower burdens on government agencies are all significant additional public benefits that the Task Force must respect in formulating its recommendations for the legislature.

V. Aristotle's Terms and Conditions

Aristotle believes that its subscribers actually have greater restrictions imposed on their use and dissemination of data than do those who obtain the data directly from the governmental entities that provide them. For example, in the case of voter registration information from California:

Aristotle customers typically only "license" the data for their own use, and contractually agree to prevent the unauthorized duplication or use of the enhanced, copyrighted database. They expressly agree to restrict usage to the specified statutory purposes. Aristotle's subscribers agree that misuse of the data (including creation of lists for impermissible purposes) will result in (a) termination of the subscription to use the information and related software, service or CD-ROM; and (b) indemnification by the subscriber for any fines, sanctions or attorney fees resulting to Aristotle due to a subscriber's breach of warranty and representations to use the data lawfully. At the same time, for the express benefit of the state as a third party beneficiary, Aristotle obtains an enforceable agreement from the user -- not only consenting to state enforcement jurisdiction and venue, but also agreeing to cooperate with any state investigation into data misuse.

To engender even higher awareness of, and compliance with, applicable legal restrictions on use of the data, Aristotle also places onscreen warnings and reminders about the specific restrictions. Misuse also exposes the user to claims for copyright violations and money damages. The online accounts are secured by credit cards, and fraudulent use of such cards can subject the user to serious criminal penalties.[3] These are all substantial liabilities for misuse of the files or misrepresentations made in obtaining them.

By virtue of all of its protections and requirements, Aristotle believes that it imposes a far more comprehensive and serious scope of obligations and liabilities on a user than if the user were to purchase the data directly from the State -- either by ordering it from a local registrar's office, or by visiting the registrar and obtaining the desired information in person.

VI. There Is No Compelling Empirical Evidence That Voter Lists Are Misused

The Task Force has received testimony about purported problems regarding voter file access and usage. Voter records may not be used for "commercial use", but the types of use deemed to offend the law are not well defined. Other alleged problems include a supposed reduction in voter turnout because of annoyance at the receipt of targeted political messages, and the potential for public records such as voter lists to be misused to target victims of domestic violence.

[3] Users also must provide their correct personal and financial information to be approved. Registered subscribers are allowed to create any non-obscene username or screen name of their choice when signing in. [This is the option that an online news service -- one that had the legal right to access the data, and provided correct personal, contact, and financial information, while expressly agreeing to all legal and contractual restrictions – curiously characterized as accessing California data with a "bogus" name; nonetheless, the story ultimately concluded there was nothing illegal about the transaction.] The true mechanics of becoming an approved subscriber can be demonstrated by applying at the site and qualifying through the application process.

A. Distinguishing Impermissible Commercial Users From For-Profit Intermediaries and Agents in the Political Process

If the current system of prohibiting wrongful "commercial use" of the voter file is not adequate, the problem should be remedied. However, the testimony to date does not clearly demonstrate any specific actual harms, so the system may already be operating in a fashion that balances fairly the various interests involved.

Commercial solicitation with the voter list is allowed in over 20 states, California has determined that voter records should not be used for "commercial use". But without a comprehensible definition of the term, enforcement may be difficult or impossible, as a practical matter.

The "problem", if there is one, may simply be one of misplaced focus. By examining the actual end use of the voter file, it should become clear whether there has been a "commercial use" that should be curtailed. For instance, the fact that an intermediary or agent is paid at some point in the process of assembling, utilizing, manipulating, or publishing the voter file in order to create or deliver political speech does not make such intermediate use a prohibited "commercial use". In these cases, the end use of such activity is producing targeted political or other legislatively-ordained speech. To misdirect focus onto whether anyone is the process is "paid" leads to absurd results. A rational, contextual analysis must take place. *Cf*. FEC v. Political Contributions Data, *supra*.

There is, for example, nothing inherently problematic with the fact that the list is "sold". The state of California "sells" the list to those who will declare their intent to use the list for one of the authorized purposes. The state also allows resale – in fact, its voter list applications contain the option of identifying the purchaser as a "commercial vendor". Clearly, "sale" or "resale" is not a litmus test for "commercial use". In fact, although Aristotle and other vendors have openly been selling improved, updated, and enhanced California voter files for over a decade, John Motts-Smith of the Elections Division has told the Task Force that there is no demonstrated problem of "commercial use" at this time.

The focus on a list vendor cannot be on whether the sale of enhanced data via a sophisticated delivery system is for a "profit". Such thinking would suggest that there would be a substantive difference if a non-profit entity were to sell exactly the same data in exactly the same way. Such an analysis leads to absurd results, with no rational connection to any benefit to the voter. What matters in the analysis must always be the end use.

Publication or "sale" by the state of California expressly for the legislatively ordained purposes is, on its face, directly related to and in furtherance of such lawful purposes. As a practical matter, it necessarily follows that publication of the data by anyone -- including Statewide Information Systems, Political Data Inc., VCS, Aristotle, American Data Management, or any other vendor -- expressly for the legislatively ordained purposes is, on its face, directly related to and in furtherance of such lawful purposes.

A rational, context-based analysis also recognizes that the number of political or other lawful end-uses that involve intermediate steps where the information is sold, donated, published, or utilized in some way by a "for profit" entity is limited only by the imagination. Treating all for-profit intermediaries in these processes as *ipso facto* engaging in unlawful commercial activity, and strictly prohibiting any use, publication, or handling of the list by any commercial entity, would necessarily criminalize a wide range of legitimate conduct. Again, this would be an absurd result.

To underscore this point from a constitutional perspective, in Bolger v. Youngs Products Corp., 463 U.S. 69, 103 S. Ct. 2875, 2881 (1983), the Supreme Court reviewed government restrictions relating to a company's informational advertisements on birth control and related issues. Although the Court found that the pamphlets in that case promoted the company sufficiently to rise to the level of "commercial speech", the Court stated, "the mere fact that [the speaker] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. " Id. (emphasis added).

It is also a well-settled principle of constitutional law that the publication of information does not lose its First Amendment protection simply because it is carried in a form that is "sold" for profit. *See* Smith v. California, 361 U.S. 147, 150 (1959)(books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952)(motion pictures).

All across the country, consultants, data processors, mailing list service providers, list publishers, and telephone banks (all "for profit" users), are commonly provided access to voter files to manipulate, publish, and utilize the data to further the lawful goals of their customers and clients. These intermediaries and agents are providing valuable services necessary for end-users to utilize voter lists for purposes that the legislature has expressly authorized. It is nonsensical to suggest that these intermediaries are engaged in "commercial use" and should be treated as criminals. In practice, the state of California and legislatures and registrars across the country recognize this, either explicitly or implicitly, through laws, policies and customary practices developed over years of actual dissemination of these files.

B. Reduced Voter Turnout

John Motts-Smith informed the Task Force that the greatest complaint received by his Elections Division office about "inappropriate" use of the voter file had to do with negative campaign ads. The California Voter Foundation has suggested that some targeted voter contacts reduce voter turnout.

The California legislature has previously concluded that the substantial societal interest in allowing certain messages to be targeted by using the lists vastly outweighs the State's interest in "protecting" a citizen from receiving such messages. The laws of California place no limit on how much and what kind of political contact may be made by those who are granted access to the lists, nor should it place such limits. There also is no "character test" in the statute's voter list access provisions. Currently, those with access to the list could even include hate-group candidates running for office on extreme or offensive platforms. However, none of these facts justifies restricting access or use of the list in targeting political communications. As the Supreme Court stated in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995),

> *[P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See Abrams v. United States, 250 U. S. 616, 630-31 (1919) (Holmes, J., dissenting).*

The fact is that targeted voter contact may, on the whole, anger voters and suppress turnout -- or it may energize voters and increase turnout. It is simply not the business of government to attempt to micromanage political strategy with respect to such potential effects.[4]

C. Potential misuse of data to locate individuals

The Task Force has received testimony about possible danger due to the presence of individuals' physical address information in public records. This is an extremely serious issue, but my feeling is that the heightened privacy concerns of some specially situated individuals does not warrant

[4] Some Task Force testimony also raised concerns about reduced turnout due to availability of voter files for jury selection, and about misuse of taxpayer funds for voter list mailings by elected officials. Neither of these justifies restrictions on access to the voter files. If people believe that participation in civic jury duty responsibilities unconstitutionally burdens their right to vote, they should bring a lawsuit to that effect. *Cf*. Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993) (law requiring voter to make Social Security number public is an unconstitutional burden on right to vote; state may collect the number for election administration, but may not release it as part of the public record portion of the Virginia voter file). Similarly, if misuse of taxpayer funds by elected officials for campaign purposes is at issue, the remedy is to bar such misuse, not to close the voter files to legitimate political uses and users.

shutting off the historical openness of voter records – particularly since there are other rational alternatives to remove such individuals' information from public disclosure. California already allows confidential registration. Education about the availability of this option clearly is needed, and expansion of this procedure should be considered.

Testimony on this subject, as reflected in the Task Force minutes, actually reveals the fundamental problem with relying on anecdotal evidence about an emotional issue such as stalking, and attempting to tie it theoretically to an indictment of public access to voter files. Such anecdotal evidence is essentially a Rorschach test, supporting what each person is predisposed or conditioned to see, regardless of whether the viewpoint is objectively supported by evidence.

For instance, in attempting to show the dangers of use of the file for stalking, a chilling example was provided concerning a woman who was intimidated while actually at a shelter. A Task Force witness testified that if one wants to know where a shelter is, "ask a batterer". The example given had nothing to do with voter files. The stalker actually located his victim at a shelter, but this does not means that the problem stemmed from the public availability of the shelter's address. To the contrary, the example is provided to show on many levels the very dire circumstances in which the victim found herself.

The victim in such a case clearly must take other steps to preserve her physical safety. Registering to vote under the state's confidential procedures is just one of those steps. Other examples provided to the Task Force showed a wide range of activities that stalking victims must avoid because of their specific troubling situations. But it does not follow from the given examples that public access to voter lists should be curtailed. Nor do these examples provide any support for the idea that the government should devote scarce resources to tracking each copy of voter list information as if it were some sort of inherently dangerous and illegal controlled substance.

Limiting public access to voter lists, or establishing burdensome requirements for a chain of custody each time any information from the list is provided to anyone, would create ironic and unintended results. For example, such burdens could actually limit use of the list by organizations that wish to lobby for victims rights laws or mobilize voters on women's rights issues. As mentioned earlier, Aristotle's voter list clients have included women's rights and child protection organizations, and the ability of such groups to advocate for their causes would be restricted if access to the lists were curtailed or encumbered.

VII. Specific Recommendations

The Task Force has heard substantial testimony reflecting the historical and societal benefits flowing from the tradition of open access to public record voter information. At the same time, it does not appear that the Task Force has been presented with any specific examples of serious or meaningful negative contacts resulting from public access to a voter file – unless one were incorrectly to consider voter annoyance at receiving political mail as reflecting an abuse of the file. In the absence of real evidence that any significant changes need to be made to address specific actual problems, the legislature should not risk creating new constitutional problems by adding restrictions on the basis of illusory harms.

The law currently allows "any person" to access California voter data if that person certifies that the data will be used for political, journalistic, or scholarly purposes -- a very broad range of access to these records. I do not believe the government has the right to deny anyone access to public record information if they agree to abide by the restrictions and be subject to the state's jurisdiction for enforcement purposes. No campaign, no list publisher -- not even the state -- can *guarantee* that no one in the possible chain of use and custody will ever misuse the data. But, as noted above, we are speaking about traditionally open, easily transferable records that are critical to the political process. We are not speaking about inherently dangerous or controlled substances for which a "chain of custody" must be established through government intervention.

For example, multiple copies of the data, and multiple excerpts therefrom, will always exist at multiple locations after campaigns are over, and it is impossible for the government to track it all. But the goal of tracking each and every copy and excerpt is not necessarily a valid or desirable goal, even if it were feasible.

The definition of "commercial" use also undoubtedly requires clarification to prohibit actual use of the list for commercial solicitations and other direct commercial pitches to voters. The current penalty of 50 cents for each record used commercially is probably adequate. It is, in fact well known to major commercial database companies -- in part as a direct consequence of Aristotle's efforts to enforce the regulation. The Task Force may not be aware that one of the leading enforcement actions concerning California voter files was instigated by Aristotle, which filed a complaint several years ago with the Secretary of State against a large commercial database company that was making voter file information available for its customers' commercial solicitations. The result was the purging of California voter record information from the vendor's database, and, in my opinion, noticeable avoidance of California voter data by other commercial database companies since then. It is my personal view that Aristotle's actions in cooperation with the Secretary of

State in that case contributed to what John Motts-Smith recently told the Task Force was an absence of demonstrated problems with “commercial use” of the file at this time.

It is also important that state and county elections divisions not become "pre-crime” units. It is clear, for example, that the greater the state’s discretionary scrutiny in granting access, the greater the opportunity for impermissible censorship or violation of free speech and Equal Protection rights because of wrongful denial. Lost speech opportunity in politics – even if temporary -- is often irreparable injury. As such, irreparable harm is not only established, it is presumed from even a minimal denial of speech. *See* Elrod v. Burns, 427 U.S. 347 (1976). Denial of the list for political speech purposes – particularly for those who are required to spend more or wait longer than others for “permission” from the state to access a voter list before they can speak -- could subject the state to lawsuits such as a civil rights actions for violation of lost constitutional rights under Section 1983, with attorneys’ fees being paid by the state if the plaintiff prevails.

Above all, I would urge the Task Force to address legitimate problems directly, to the extent they have been shown to exist at all. The Task Force should take great pains not to recommend roundabout and ultimately ineffective changes that burden far more speech and require far more government oversight than is reasonable or necessary.

In the absence of compelling evidence of specific misuse, it is a waste of government resources to attempt to scrutinize and regulate each subsequent use or publication of information before it occurs. It is equally futile to attempt to parse constitutionally suspect distinctions among political, journalistic, governmental and scholarly purposes. One must balance the societal benefit of the list usage, against damage from actual denials of list and essentially unproven, theoretical “privacy invasions”. Recall that almost half the country considers these records completely open for use in any kind of communications.

Therefore, Aristotle’s specific recommendations to the Task Force are as follows:

- Create certainty and precision of regulation for more effective enforcement. Do not attempt to negotiate the slippery constitutional slope of defining and distinguishing among political, government, scholarly, and journalistic users and purposes. This is ultimately, a futile task -- both as a practical matter, and under applicable principles governing freedom of speech and of the press.

- Instead, directly prohibit use of the file for "commercial solicitation", and clearly define the term. This classification rationally focuses on the end use of the data, and the effect on the recipient, rather than on *bona fide* intermediaries in the political speech process.

- Specifically impose a greater fine or other criminal sanction for use of the records for commercial solicitation.

- We agree with the recommendation reflected in the November 5 Task Force minutes that explicit authority for penalties should be provided. As we learned at the time we reported the commercial vendor to the California Secretary of State, the current penalties are regulatory, and with no administrative remedy, the authority to fine a person will be challenged.

- Because political speech must often occur quickly, a political speaker must never be required to register with, or seek the approval of, the government before using a voter list for targeted political communications. But if the issue is having a "paper trail" or "chain of custody" for enforcement if a complaint for unlawful commercial solicitation were to be filed, the state should consider a) requiring the first purchaser to agree not to sell to anyone who will not execute the declaration or agree to submit to the jurisdiction of California (requirements that are already imposed by Aristotle), and b) requiring any reseller to retain copies of the declarations of purchasers for a period of 5 years, and to make copies available to the state upon request.[5]

- Seed the list.

- In special cases where personal safety is at issue, a more sophisticated confidential registration procedure should be studied, perhaps extending the confidential voter registration procedures to a larger class of voters, upon a showing of need.

I am hopeful that taking steps such as those suggested here will result in a fair balancing of relevant interests, and creation of clear and enforceable protections for voter privacy. Thank you for your consideration.

[5] What is likely to happen, in fact, is that voters themselves become part of the enforcement machinery to prevent commercial solicitations. Some voters only use their full legal names when registering to vote, so when they receive a commercial solicitation addressed to that full name, they know that the source was the voter file. This is, in effect, another way that the lists can be considered "seeded".