

1 Karl Olson (SBN 104760)
Levy, Ram & Olson
2 639 Front Street, Fourth Floor
San Francisco, California 94111
3 (415) 433-4949
ko@lrolaw.com

4 Paul Alan Levy (DC Bar 946400) (*pro hac vice* motion being filed)
5 Deepak Gupta (DC Bar 495451)
Public Citizen Litigation Group
6 1600 20th Street, N.W.
Washington, D.C. 20009
7 (202) 588-1000
plevy@citizen.org, dgupta@citizen.org

8 Peter Scheer (DC Bar 255950)
9 California First Amendment Coalition
534 4th Street #B
10 San Rafael, CA 94901
(415) 460-5060
11 pscheer@cfac.org

12 Attorneys for Public Citizen and California First Amendment Coalition

13 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 BANK JULIUS BAER & CO. LTD, A Swiss) No. CV08-0824 JSW
16 entity; and JULIUS BEAR BANK AND TRUST)
CO.,, a Cayman Islands entity,)

17 Plaintiffs,)

18 v.)

19 WIKILEAKS, an entity of unknown form,)
20 WIKILEAKS.ORG, an entity of unknown form,)
DYNADOT, LLC a California limited liability)
21 company, and DOES 1 through 10 inclusive,)

22 Defendants.)
23)
24)
25)
26)
27)
28)

**MOTION OF PUBLIC CITIZEN AND
CALIFORNIA FIRST AMENDMENT
COALITION TO INTERVENE AS
DEFENDANTS OR, IN THE
ALTERNATIVE, TO APPEAR AS *AMICI
CURIAE***

DATE: February 29, 2008
TIME: 9:00 a.m.
PLACE: Courtroom 2
JUDGE: Honorable Jeffrey S. White

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Notice of Motion and Motion 1

Memorandum of Points and Authorities in Support of Motion to Intervene 1

Identity and Interests of Proposed Intervenors 1

 A. California First Amendment Coalition 1

 B. Public Citizen. 3

Argument 6

I. Public Citizen and the California First Amendment Coalition Are Entitled to Intervention as of Right Under Rule 24(a)(2). 6

 A. This Motion Is Timely. 7

 B. Proposed Intervenors Have Substantial Interests in Accessing the Information on the Wikileaks Website—Interests That Are Fully Protected by the First Amendment and That Have Already Been Threatened By This Court’s Injunction.. 8

 C. The Existing Parties Are Not Adequately Representing the Proposed Intervenors’ Interests... 12

II. In the Alternative, Proposed Intervenors Should be Granted Leave to Intervene Permissively Under Rule 24(b)(2).. 13

III. In the Alternative, Proposed Intervenors Should Be Permitted to Appear as *Amici Curiae*. 14

Conclusion 15

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Arakaki v. Cayetano*
324 F.3d 1078 (9th Cir. 2003) 8, 12

4 *Beckman Industries, Inc. v., Int’l Ins. Co.*
5 966 F.2d 470 (9th Cir. 1992) 13

6 *Board of Educ. v. Pico*
7 457 U.S. 853 (1982) 11

8 *Bose Corp. v. Consumers Union of United States, Inc.*
466 U.S. 485 (1984) 10

9 *Butterworth v. Smith*
494 U.S. 624 (1990) 11

10 *California ex rel. Lockyer v. United States*
11 450 F.3d 436 (9th Cir. 2006) 8

12 *Carroll v. President and Comm'rs of Princess Anne*
393 U.S. 175 (1968) 12

13 *Cobell v. Norton*
14 246 F.Supp.2d 59 (D.D.C.2003) 14

15 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*
472 U.S. 749 (1985) 11

16 *Elrod v. Burns*
17 427 U.S. 347 (1976) 9

18 *First Nat’l Bank of Boston v. Bellotti*
435 U.S. 765 (1978) 11

19 *Forest Conservation Council v. U.S. Forest Serv.*
20 66 F.3d 1489 (9th Cir. 1995) 7, 8

21 *Garrison v. Louisiana*
379 U.S. 64 (1964) 10

22 *Hoptowit v. Ray*
23 682 F.2d 1237 (9th Cir.1982) 14

24 *Kleindienst v. Mandel*
408 U.S. 753 (1972) 10

25 *League of United Latin American Citizens v. Wilson*
26 131 F.3d 1297 (9th Cir. 1997) 6, 7

27 *Martin v. City of Struthers*
319 U.S. 141 (1943) 10

28

1	<i>NAACP v. Claiborne Hardware Co.</i>	
	458 U.S. 886 (1982)	10
2		
3	<i>Nebraska Press Ass'n v. Stuart</i>	
	427 U.S. 539 (1976)	11
4	<i>New York Times Co v. Sullivan</i>	
	375 U.S. 254 (1964)	11
5		
6	<i>NGV Gaming, Ltd. v. Upstream Point Molate, LLC</i>	
	335 F.Supp.2d 1061 (N.D.Cal. 2005)	14
7	<i>Public Citizen v. Liggett Group, Inc.</i>	
	858 F.2d 775 (1st Cir. 1988)	13
8		
9	<i>Red Lion Broadcasting Co. v. F.C.C.</i>	
	395 U.S. 367 (1969)	10
10	<i>Sagebrush Rebellion, Inc. v. Watt</i>	
	713 F.2d 525 (9th Cir. 1983)	8
11		
12	<i>Southwest Ctr. for Biological Diversity v. Berg</i>	
	268 F.3d 810 (9th Cir. 2001)	7
13	<i>Stanley v. Georgia</i>	
	394 U.S. 557 (1969)	10
14		
15	<i>Tory v. Cochran</i>	
	544 U.S. 734 (2005)	12
16	<i>United States v. City of Los Angeles</i>	
	288 F.3d 391 (9th Cir. 2002)	7, 13
17		
18	<i>Venegas v. Skaggs</i>	
	867 F.2d 527 (9th Cir. 1989), <i>aff'd</i> , 495 U.S. 82 (1990)	13

Statutes

20	California Business and Professions Code § 17200	12
----	--	----

21
22
23
24
25
26
27
28

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE THAT, on February 29, 2008, at 9:00 a.m., or as soon thereafter
4 as this matter may be heard by this Court, located at 450 Golden Gate Avenue, San Francisco,
5 California, Public Citizen and the California First Amendment Coalition (“Proposed Intervenors”)
6 will and do hereby move to intervene as defendants in this case pursuant to Federal Rule of Civil
7 Procedure 24. Proposed Intervenors seek intervention for the purpose of requesting that the court lift
8 its permanent injunction, deny the preliminary injunction sought by the plaintiffs, and dismiss this
9 action because the Court lacks subject matter jurisdiction.

10 This motion seeks an order permitting the Proposed Intervenors to intervene as defendants in
11 this action and to file their proposed (1) Motion to Dismiss for Lack of Subject Matter Jurisdiction,
12 (2) Motion to Lift Permanent Injunction, and (3) Brief in Opposition to Injunctive Relief and in
13 Support of Dismissal for Lack of Subject Matter Jurisdiction, copies of which are being filed
14 concurrently with this motion. In the alternative, Proposed Intervenors seek leave to appear as *amici*
15 *curiae*.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**
17 **IN SUPPORT OF MOTION TO INTERVENE**

18 **IDENTITY AND INTERESTS OF PROPOSED INTERVENORS**

19 **A. California First Amendment Coalition**

20 California First Amendment Coalition is a nonprofit public interest organization dedicated to
21 advancing free speech and open-government rights on behalf of its members, including news
22 organizations. *See* Declaration of Peter Scheer (“Scheer Decl.”) ¶ 1. CFAC’s activities on behalf of
23 its members include litigation (cases involving issues of censorship, rights of access to court and
24 agency records, and access to legislative proceedings of state and local governments), education
25 (providing free legal information on First Amendment and freedom-of-information issues), and public
26 advocacy (Op-Eds and other articles, public speaking). *Id.* ¶ 5.

27 CFAC’s members include most of the large daily papers in California, including the *Los*
28

1 *Angeles Times*, the *San Francisco Chronicle*, the *San Jose Mercury News*, the *San Diego Union-*
2 *Tribune*, the *Orange County Register*, the *Sacramento Bee*, the *Press-Enterprise*, the *Oakland Tribune*
3 and the *Fresno Bee*. *Id.* ¶ 4. CFAC and many of its members have found Wikileaks to be a valuable
4 tool for journalists. *Id.* ¶ 6. In the past year, anonymous contributors to Wikileaks have posted
5 documents to the website that have become the basis for major news stories. These include news
6 stories on the US military’s rules of engagement in Iraq (in the *New York Times*) official corruption
7 in Kenya (*BBC News*), among others.

8 One of CFAC’s members, *Wired Magazine*, has recently published at least six stories
9 (excluding its coverage of this lawsuit) based on information found at Wikileaks. *See* Scheer Decl.
10 ¶ 6. One such story was an important report concerning the treatment of detainees held by the U.S.
11 military at Guantánamo Bay, Cuba, based on otherwise unavailable information found at
12 wikileaks.org. *See* Ryan Singel, *Sensitive Guantánamo Bay Manual Leaked Through Website*, *Wired*
13 *Magazine*, Nov. 14, 2007, available at [http://www.wired.com/politics/onlinerights/news/2007/](http://www.wired.com/politics/onlinerights/news/2007/11/gitmo)
14 [11/gitmo](http://www.wired.com/politics/onlinerights/news/2007/11/gitmo).

15 Journalists—particularly those national security, technology, foreign affairs and international
16 human rights issues—have found Wikileaks useful both for the records posted there and for published
17 discussions about those records from members of the informal Wikileaks community. *See* Scheer
18 Decl. ¶ 6. These discussions, among other things, help journalists to assess the authenticity of
19 documents on Wikileaks. *Id.* ¶ 7. CFAC is also interested in Wikileaks, and its continued availability,
20 as a means for dissidents in China to disclose evidence of human rights violations and official
21 corruption—and to do so without fear of being identified by Chinese authorities. *Id.* ¶ 8. CFAC is
22 currently involved in a legal initiative before the United States Trade Representative (USTR) that
23 seeks to have the World Trade Organization (WTO) order an end to China’s extensive censorship of
24 the internet. CFAC’s argument, which CFAC hopes will persuade the USTR to adopt in a complaint
25 to the WTO, is that China’s censorship of the internet violates its obligations under treaties to which
26 it became subject when it joined WTO. *Id.*

27 CFAC seeks to intervene in this litigation to protect its own significant interests, as well as the
28

1 significant interests of its members, as guaranteed by the First Amendment, to access the information
2 disclosed on Wikileaks. *Id.* ¶ 9. As noted above, those interests are particularly compelling for
3 CFAC’s journalist and corporate news-organization members, whose ability to report on important
4 matters in the public interest often depends upon the willingness and ability of those with access to
5 documents concerning governmental and corporate misconduct to come forward despite fear of
6 retribution. *Id.* This Court’s permanent injunction of February 15, 2008, which ordered the
7 Wikileaks.org site shut down, seriously threatens the ability of CFAC and its members to access the
8 information that would otherwise be available on Wikileaks.org. *Id.* ¶ 10. Thus, the disposition of this
9 case has already had, and may continue to have, the effect of impeding the ability of CFAC and its
10 members to protect their significant First Amendment interests in the material posted on Wikileaks.

11 CFAC is also concerned that its First Amendment interests, and the First Amendment interests
12 of its members, will not be adequately represented in this Court absent CFAC’s intervention because
13 Wikileaks has not appeared in this action to defend itself. *Id.* ¶ 11. Moreover, even if Wikileaks does
14 appear, there is no reason to believe that Wikileaks would be able to adequately represent the interests
15 of CFAC or its members.

16 **B. Public Citizen**

17 Public Citizen, established in 1971, is a national nonprofit organization that advocates for
18 openness and democratic accountability in government; for the right of consumers to seek redress in
19 the courts; for clean, safe and sustainable energy sources; for social and economic justice in trade
20 policies; for strong health, safety and environmental protections; and for safe, effective and affordable
21 prescription drugs and health care. Public Citizen has approximately 15,000 members in California.
22 *See* Declaration of Taylor Lincoln (“Lincoln Decl.”) ¶ 1.

23 Much of Public Citizen’s advocacy, on issues ranging from corruption in politics to the
24 regulation of drugs, is conducted through original research and reporting. *Id.* ¶¶ 2, 3. Public Citizen
25 has become known for authoritative, investigative reports whose findings are widely reported in the
26 press and used by members of Congress and others in shaping public policy. *Id.* ¶ 3. These
27 reports—which often highlight corporate or governmental abuses that would otherwise go unnoticed—
28

1 often rely on a combination of information from public databases, various Internet resources, searches
2 of news reports, and information from whistleblowers and consumers. *Id.* ¶ 3.

3 For example, Public Citizen’s Congress Watch division has recently published research reports
4 on the following topics:

- 5 • A report showing that arbitration firms and credit card companies enjoy a cozy, mutually
6 beneficial relationship at the expense of consumers they force into binding mandatory
7 arbitration. Using data that is only available for consumer disputes arbitrated in the state of
8 California, the findings provide a glimpse of how arbitration traps consumers throughout
9 the country in unfair, secret proceedings in which for-profit arbitrators make the rules.
10 Public Citizen's research uncovered consumers who spent years fending off collection
11 agencies, cleaning up identity theft messes and struggling to bounce back from credit
12 rating hits.
- 13 • Several reports tracking the major fundraisers, or bundlers, for the 2008 presidential
14 campaigns, including periodic reports showing the the number that are registered federal
15 lobbyists.
- 16 • A study showing that, in spite of a law requiring manufacturers to provide the Consumer
17 Product Safety Commission with "immediate" notification of dangerous products, the
18 agency typically delays nearly seven months after learning of dangerous, defective
19 products before telling the public.
- 20 • A study revealing that a greatly disproportionate share of medical malpractice cases in the
21 state of New York involve doctors enlisted in a special program for physicians with
22 high-risk histories.

23 *Id.* ¶ 3.

24 Public Citizen’s Health Research Group also depends on leaked government and corporate
25 documents to perform its work and bring to light safety concerns that may save thousands of lives.
26 *See* Declaration of Peter Lurie (“Lurie Decl.”) ¶¶ 3-6. Dr. Lurie, the Deputy Director of the
27 Health Research Group, provides two examples of the usefulness of such information. The first
28 example concerns Food and Drug Administration (FDA) consideration of a drug company plan to
conduct research on its new drug in Latin America using a design that the agency acknowledged
would be unacceptable in the United States. Dr. Lurie reports that:

The FDA convened an internal meeting to discuss the ethics of the proposed
research. The public had no idea that the meeting was taking place, as the FDA
customarily will not confirm the existence of a New Drug Application while the
drug is still under review, much less of any meeting convened to discuss it. An
FDA employee who had been present at the meeting provided us with the slides
that had been presented. On February 22, 2001, we released a letter to the
Department of Health and Human Services criticizing the proposed research and

1 attaching the leaked documents. On April 4, 2001, the company redesigned the
2 study to address our criticisms.

3 *Id.* ¶ 4. Public Citizen’s researchers make use of leaked corporate documents as well. Dr. Lurie
4 recounts an instance in which Public Citizen “obtained internal corporate inspection data and
5 memoranda relating to devices for the disposal of sharp, potentially infected injection equipment.”

6 *Id.* ¶ 5. The documents established that the walls of the devices were not reliably thick enough to
7 prevent needles from piercing them. “On July 6, 1995, [Public Citizen’s Health Research Group]
8 wrote a letter to the FDA commissioner exposing these unsafe devices and the very next day the
9 company ordered a recall of thousands of them.” *Id.*

10 Information concerning corporate and governmental conduct is essential to Public Citizen’s
11 research and advocacy work. As the above examples illustrate, the most useful information of this kind
12 comes in the form of actual corporate and government documents revealing the facts at issue. Many
13 of Public Citizen’s reports are informed by leaked documents that have been previously published or
14 posted elsewhere. Lincoln Decl. ¶ 4; Lurie Decl. ¶¶ 3, 6.

15 Other divisions of Public Citizen also produce research reports that depend on access to
16 sensitive government and corporate documents. Public Citizen’s Global Trade Watch produces reports
17 concerning trade policy, particularly with regard to its impact on environmental and labor protections.
18 Lincoln Decl. ¶ 5. These reports are often highly critical of governments, multinational corporations,
19 and international institutions such as the World Bank, and frequently rely on sensitive government
20 and corporate documents that are at risk of suppression.

21 Public Citizen’s researchers believe that the Wikileaks is a valuable tool for the unique type
22 of research that the organization conducts. *Id.* ¶ 6. Both the subject matter of the website (government
23 and corporate misconduct) and the type of information posted on the site (original government and
24 corporate documents) are directly relevant to Public Citizen’s work. *Id.* Public Citizen, therefore, has
25 a strong interest, protected by the First Amendment, in access to the documents posted on Wikileaks.
26 Public Citizen’s ability to perform its research work is significantly enhanced by the willingness of
27 those with information on governmental and corporate misconduct to disclose that information
28 without threat of retaliation. If Wikileaks is shut down, the ability of Public Citizen and its members

1 to access that information will be significantly impaired. *Id.* ¶ 7. Indeed, this Court’s permanent
2 injunction of February 15, 2008, which ordered the Wikileaks.org site shut down, already threatens
3 the ability of Public Citizen to access the information that would otherwise be available on Wikileaks.
4 Thus, the disposition of this case has already had, and may continue to have, the effect of impeding
5 the ability of Public Citizen to protect its significant First Amendment interests in the material posted
6 on Wikileaks. *Id.* ¶ 8.

7 Public Citizen is also concerned that its First Amendment interests will not be adequately
8 represented in this Court absent Public Citizen’s intervention because Wikileaks has not appeared in
9 this action to defend itself. *Id.* ¶ 9. Moreover, even if Wikileaks does appear, there is no reason to
10 believe that Wikileaks would be able to adequately represent the interests of Public Citizen.

11 ARGUMENT

12 I. Public Citizen and the California First Amendment Coalition Are Entitled to 13 Intervention As of Right Under Rule 24(a)(2).

14 Federal Rule of Civil Procedure 24 provides that, upon timely application, “anyone shall be
15 permitted to intervene in an action . . . when the applicant claims an interest relating to the transaction
16 which is the subject of the action and the applicant is so situated that the disposition of the action may
17 as a practical matter impair or impede the applicant’s ability to protect that interest, unless the
18 applicant’s interest is adequately represented by existing parties.” Fed. R. Civ. P. 24(a)(2). In the
19 Ninth Circuit, a person seeking intervention under Rule 24(a)(2) must satisfy a four-part test

20 (1) the application must be timely; (2) the applicant must have a ‘significantly
21 protectable’ interest relating to the transaction that is the subject of the litigation; (3)
22 the applicant must be so situated that the disposition of the action may, as a practical
23 matter, impair or impede the applicant’s ability to protect its interest; and (4) the
24 applicant’s interest must be inadequately represented by the parties before the court.

25 *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). As
26 demonstrated below, the Proposed Intervenors satisfy each of these requirements. First, the
27 intervention motion is timely filed because it is being filed within just a few days of Proposed
28 Intervenors’ notice of this Court’s order and at an early stage of the proceedings. Second, both Public
Citizen and the California First Amendment Coalition have significant and specific interests in the
information revealed on the website that is the subject of this action. Both organizations represent

1 the interests of researchers and journalists whose work depends on their ability to access information
2 on corporate and government misconduct of the type disclosed on Wikileaks.org. Those interests are
3 fully protected by the First Amendment. Third, those interests have already been threatened by the
4 permanent injunction issued in this case and will continue to be at risk unless the injunction is lifted
5 and the action is dismissed. Fourth, the existing parties do not adequately represent the Proposed
6 Intervenor’ interests because the defendants have not appeared and nobody has made the jurisdictional
7 and substantive arguments presented in Proposed Intervenors’ papers.

8 Federal district courts in the Ninth Circuit “construe the Rule broadly in favor of proposed
9 intervenors.” *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (internal
10 quotation marks and brackets omitted). “A liberal policy in favor of intervention serves both efficient
11 resolution of issues and broadened access to the courts. By allowing parties with a practical interest
12 in the outcome of a particular case to intervene, we often prevent or simplify future litigation
13 involving related issues; at the same time, we allow an interested party to express its views before the
14 court.” *Id.* (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th
15 Cir. 1995)). The courts’ treatment of motions to intervene is “guided primarily by practical
16 considerations, not technical distinctions.” *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d
17 810, 818 (9th Cir. 2001). Those practical considerations overwhelmingly favor intervention in this
18 case because the defendants have not appeared at all and because the Proposed Intervenors’
19 significant and constitutionally protected interests are at stake and will otherwise go undefended.

20 **A. This Motion Is Timely.**

21 “Timeliness is the threshold requirement for intervention as of right.” *League of United Latin*
22 *American Citizens*, 131 F.3d at 1302. To determine whether an intervention motion is timely, courts
23 in the Ninth Circuit consider three factors: (1) the stage of the proceedings at which the applicant
24 seeks to intervene, (2) the prejudice to other parties, and (3) the reason for and length of the delay.
25 *Id.* Here, all three factors demonstrate that the motion is timely. First, the application has been filed
26 at a very early stage of the proceedings, very soon after Proposed Intervenors’ first learned of this
27 action. Second, intervention will not unduly prejudice the plaintiffs because the defendants have not

28

1 appeared to defend their interests or those of their readers and nobody else has raised the jurisdictional
2 and substantive arguments raised by Proposed Intervenors; thus, intervention will not result in
3 duplicative or prolonged litigation. To the contrary, intervention will have the salutary effect of
4 giving the Court an adversarial presentation of the issues, including briefing on the fundamental
5 question of whether the Court possesses jurisdiction in the first place. Finally, because there has been
6 no delay at all, the reason-and-length-of-delay factor is irrelevant.

7
8 **B. Proposed Intervenors Have Substantial Interests In Accessing the Information on the
9 Wikileaks Website—Interests That Are Fully Protected by the First Amendment and
10 That Have Already Been Threatened by This Court’s Injunction.**

11 1. “The requirement of a significantly protectable interest is generally satisfied when ‘the
12 interest is protectable under some law, and that there is a relationship between the legally protected
13 interest and the claims at issue.’” *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (quoting
14 *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)). The Ninth Circuit’s “‘interest’ test is
15 primarily a practical guide for disposing of lawsuits by involving as many apparently concerned
16 persons as is compatible with efficiency and due process.” *Forest Conservation Council*, 66 F.3d at
17 1496.

18 This test is not a rigorous or demanding standard, but instead considers whether the proposed
19 intervenor has a practical interest in the outcome that may be impaired absent intervention. *See, e.g.,*
20 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (holding that a public interest
21 organization that supported a legislative measure had a sufficient interest to intervene and defend the
22 measure’s legality merely by virtue of having supported the measure); *California ex rel. Lockyer v.*
23 *United States*, 450 F.3d 436, 441 (9th Cir. 2006) (explaining that intervenors need not show
24 “enforceable rights” because “our intervention caselaw has not turned on such technical distinctions.
25 Rather, we have taken the view that a party has a sufficient interest for intervention purposes if it will
26 suffer a practical impairment of its interests as a result of the pending litigation.”).

27 In this case, the practical effect is obvious: Where, as here, “the injunctive relief sought by
28 plaintiffs will have direct, immediate, and harmful effects upon a third party’s legally protectable
interests, that party satisfies the ‘interest’ test.” *Forest Conservation Council*, 66 F.3d at 1494. This

1 is particularly so in the context of First Amendment rights, because “[t]he loss of First Amendment
2 freedoms, even for minimal periods of time, constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S.
3 347, 373 (1976). Indeed, in this case, the Court’s permanent injunction order has *already* harmed
4 Proposed Intervenor’s First Amendment rights to access the important materials posted on the
5 Wikileaks wesbsite.

6 Proposed Intervenor’s CFAC and Public Citizen have demonstrated that they have significant
7 First Amendment interests that may be harmed by the injunctive relief in this case. Their concerns,
8 moreover, are not mere generalized grievances that they share in common with the general population,
9 but instead are grounded in specific informational needs that are vital to the work of both
10 organizations and their members. As detailed above and in the Declaration of Peter Scheer, CFAC’s
11 members include the most of the major daily newspapers in California, including the *Los Angeles*
12 *Times*, the *San Francisco Chronicle*, the *San Jose Mercury News*, the *San Diego Union-Tribune*, the
13 *Orange County Register*, the *Sacramento Bee*, the *Press-Enterprise*, the *Oakland Tribune* and the
14 *Fresno Bee*. See Scheer Decl. ¶ 4. CFAC and many of its members believe that Wikileaks is a
15 valuable tool for journalists and news organizations that cover such matters as foreign affairs and
16 government corruption. Similarly, as detailed above and in the Declarations of Dr. Peter Lurie and
17 Taylor Lincoln, Public Citizen’s research work focuses on bringing to light matters of public concern
18 involving governmental and corporate abuses and misconduct and thus depends on the availability
19 of documents revealing such conduct—especially leaked documents.

20 These concerns are not merely speculative. For example, one of CFAC’s members, *Wired*
21 *Magazine*, recently published an important story concerning the treatment of terrorist suspects held
22 at Guantánamo Bay, Cuba, on the basis of government information found at wikileaks.org. See Scheer
23 Decl. ¶ 6; Ryan Singel, *Sensitive Guantánamo Bay Manual Leaked Through Website*, *Wired*
24 *Magazine*, Nov. 14, 2007, available at [http://www.wired.com/politics/onlinerights/news/2007/](http://www.wired.com/politics/onlinerights/news/2007/11/gitmo)
25 [11/gitmo](http://www.wired.com/politics/onlinerights/news/2007/11/gitmo) (reporting that “[a] never-before-seen military manual detailing the day-to-day operations
26 of the U.S. military’s Guantánamo Bay detention facility has been leaked to the web, affording a rare
27 inside glimpse into the institution where the United States has imprisoned hundreds of suspected

28

1 terrorists since 2002.”) (dated Nov. 14, 2007). The story discussed both the importance of the military
2 manual and the important role of the Wikileaks website in bringing the information to light. *Id.*

3 The right of Public Citizen and CFAC, and their members, to receive such information is
4 fully protected by the First Amendment. It is well established that the First Amendment not only
5 “embraces the right to distribute literature,” but also “necessarily protects the right to receive it.”
6 *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *accord Kleindienst v. Mandel*, 408 U.S.
7 753, 762 (1972) (the First Amendment encompasses the “right to receive information and ideas”);
8 *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (“It is the right of the public to
9 receive suitable access to social, political, esthetic, moral, and other ideas and experiences which
10 is crucial here. That right may not constitutionally be abridged ...”); *Stanley v. Georgia*, 394 U.S.
11 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive
12 information and ideas”).

13 Although the right to receive information and ideas is “fundamental to our free society
14 regardless of their social worth,” *id.*, 394 U.S. at 564, the right to access the materials posted on
15 the Wikileaks website is peculiarly deserving of protection under the First Amendment because
16 the materials implicate issues of the utmost importance, such as international human rights,
17 political corruption, and other governmental misconduct. As much or more than any other value,
18 the First Amendment serves the people’s interest in self-government. “The First Amendment
19 presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty—and
20 thus a good unto itself—but also is essential to the common quest for truth and the vitality of
21 society as a whole.” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04
22 (1984). Thus, “speech concerning public affairs is more than self-expression; it is the essence of
23 self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Because of its central role in
24 enabling the public to govern itself, “expression on public issues ‘has always rested on the highest
25 rung of the hierarchy of First Amendment values.” *NAACP v. Claiborne Hardware Co.*, 458 U.S.
26 886, 913 (1982) (citation omitted). The constitutional safeguard was fashioned for the very

27
28

1 purpose of “assur[ing] unfettered interchange of ideas for the bringing about of political and social
2 changes desired by the people.” *New York Times Co v. Sullivan*, 375 U.S. 254, 269 (1964).

3 The right of the recipient to receive information and the special status of information on
4 matters of public concern are intertwined: “[P]ublic debate must not only be unfettered; it must also
5 be informed. For that reason the Court has repeatedly stated that First Amendment concerns
6 encompass the *receipt* of information and ideas as well the right of free expression.” *Board of Educ.*
7 *v. Pico*, 457 U.S. 853, 867 n.20 (1982) (emphasis added); *accord First Nat’l Bank of Boston v.*
8 *Bellotti*, 435 U.S. 765, 782 n.18 (1978); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,
9 472 U.S. 749, 767 (1985) (White, J., concurring (“In a country like ours, where the people purport to
10 be able to govern themselves through their elected representatives, adequate information about their
11 government is of transcendent importance.”). Abuse of power, unlawful activity, misconduct, or gross
12 mismanagement by government are chief among issues that demand a well-informed public so that
13 the citizenry can compel the government to correct its abuses and hold public officials accountable.
14 To that end, the Supreme Court has emphasized that the disclosure of “information relating to alleged
15 government misconduct . . . has traditionally been recognized as lying at the core of the First
16 Amendment.” *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

17 2. The impairment component of the Ninth Circuit’s “interest” test is satisfied here as well.
18 The Ninth Circuit has stated that “[i]f an absentee would be substantially affected in a practical sense
19 by the determination made in an action, he should, as a general rule, be entitled to intervene.”
20 *Southwest Ctr.*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee note). Proposed
21 Intervenors’ First Amendment rights to access the important information on the wikileaks web site
22 have already been affected, “in a practical sense,” by the permanent injunction.

23 Because domain names are protected by the First Amendment, the permanent injunction
24 rendering the Wikileaks domain name inoperable is a classic prior restraint, “the most serious and the
25 least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S.
26 539, 559 (1976). Indeed, the permanent injunction has a far greater impact on Proposed Intervenors
27 than it does on Dynadot (whose own speech has not been restricted in the slightest). Because this
28

1 prior restraint prevents all use of the Wikileaks.org domain name, not just use by Dynadot, it has
2 prevented both Proposed Intervenors and the public from using that domain name to access all of the
3 documents and other materials available thereby. Indeed, unless the permanent injunction interfered
4 with the ability of members of the public to access the site, Plaintiffs would not have sought such
5 relief. However, the First Amendment does not permit the issuance of injunctive relief that hinders
6 access to documents and other information that is not even arguably Plaintiffs' property. *See Tory v.*
7 *Cochran*, 544 U.S. 734, 736 (2005) (citing *Carroll v. President and Comm'rs of Princess Anne*, 393
8 U.S. 175, 183-84 (1968), for the proposition that an "order" issued in "the area of First Amendment
9 rights" must be "precis[e]" and narrowly "tailored" to achieve the "pin-pointed objective" of the
10 "needs of the case"). The permanent injunction has therefore injured Proposed Intervenors' First
11 Amendment rights to access these documents and information.

12
13 **C. The Existing Parties Are Not Adequately Representing the Proposed Intervenors' Interests.**

14 In determining whether a proposed intervenor's interests will be adequately represented, courts
15 consider: (1) whether the interest of a present party is such that it will undoubtedly make all the
16 intervenor's arguments; (2) whether the present party is capable and willing to make such arguments;
17 and (3) whether a proposed intervenor would offer any necessary elements to the proceedings that
18 other parties would neglect. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). The burden
19 to make this showing is "minimal, and would be satisfied if [a proposed intervenor] could demonstrate
20 that representation of [its] interests 'may' be inadequate." *Id.* In this case, Public Citizen and
21 CFAC's interests obviously have not been protected by the current parties to this action. Defendants
22 Wikileaks and Wikileaks.org have yet to appear in this case, and so cannot represent Proposed
23 Intervenors' interests. Defendant Dynadot consented to the permanent injunction against it, and is
24 thus obviously adverse to Proposed Intervenors. Finally, only Proposed Intervenors Public Citizen
25 and CFAC have made arguments concerning the foundational question of whether this Court has
26 jurisdiction to hear this case in the first place, and whether California Business and Professions Code

27
28

1 § 17200 applies to non-commercial speech. Given the important and wide-ranging interests at stake,
2 this Court should grant this motion for that reason alone.

3
4 **II. In the Alternative, Public Citizen and the California First Amendment Coalition
Should Be Granted Leave to Permissive Intervention Under Rule 24(b)(2).**

5 Even if Public Citizen CFAC were not entitled to intervene as a matter of right, the Court
6 should nevertheless grant their request for intervention under Rule 24(b). Rule 24(b) provides that,
7 upon timely application, “anyone may be permitted to intervene in an action . . . when an applicant’s
8 claim or defense and the main action have a question of law or fact in common. . . . In exercising its
9 discretion the court shall consider whether the intervention will unduly delay or prejudice the
10 adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b).

11 Ninth Circuit case law sets out three conditions for permissive intervention under Rule 24(b):
12 (1) the applicant has its own independent ground for subject matter jurisdiction; (2) the application
13 is timely; and (3) the applicant's claim or defense and the main action have a question of law or a
14 question of fact in common. *City of Los Angeles*, 288 F.3d at 403. Courts should also consider
15 practical considerations in determining whether to exercise discretion to allow permissive
16 intervention, including whether the intervenor’s interests are adequately represented by other parties,
17 whether intervention would cause delay or prejudice, and judicial economy. *Venegas v. Skaggs*, 867
18 F.2d 527, 530-31 (9th Cir. 1989), *aff’d*, 495 U.S. 82 (1990).

19 First, although permissive intervention ordinarily requires a showing of independent
20 jurisdictional grounds, the Ninth Circuit has held that an independent jurisdictional basis is not
21 required where, as here, the intervenors do not seek to litigate their own *claim* on the merits. *Beckman*
22 *Industries, Inc. v., Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *see Public Citizen v. Liggett*
23 *Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988). That approach is particularly sensible in this case
24 because Proposed Intervenors’ primary purpose for intervening is to demonstrate to the Court that it
25 lacks jurisdiction over the entire controversy.

26 Second, for the reasons already set out above, the motion is timely.

27
28

1 Third, as with the independent-jurisdictional-grounds prong, commonality between claims and
2 defenses is not required where the proposed intervenor does not seek to raise a claim on the merits.
3 Indeed, as in *Beckman* and *Public Citizen*, intervenors here seek to dissolve an order that the Court
4 has already issued. In any event, Proposed Intervenors’ challenge to the permanent injunction entered
5 by the Court in this action easily satisfies the commonality test.

6 **III. In the Alternative, Proposed Intervenors Should Be Permitted to Appear as *Amici***
7 ***Curiae*.**

8 Finally, even if the Court denies Public Citizen and CFAC’s request for both intervention as
9 of right and permissive intervention, it should nevertheless permit them to file their brief as amici
10 curiae. *See, e.g., In Re Grand Jury Subpoenas*, 438 F.Supp.2d 1111, 1112 n.1 (N.D. Cal. 2006)
11 (White, J.) (considering amicus brief filed by major media organizations). “The district court has
12 broad discretion to appoint *amici curiae*.” *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982).
13 “District courts frequently welcome amicus briefs from nonparties concerning legal issues that have
14 potential ramifications beyond the parties directly involved or if the amicus has ‘unique information
15 or perspective that can help the court beyond the help that the lawyers for the parties are able to
16 provide.’” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 335 F.Supp.2d 1061, 1067 (N.D.Cal.
17 2005) (quoting *Cobell v. Norton*, 246 F.Supp.2d 59, 62 (D.D.C.2003)). Here, Public Citizen and
18 CFAC are providing a unique perspective on the threshold question of whether this Court possesses
19 jurisdiction over this action.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

