Docket No. 11-35854

In the

United States Court of Appeals

For the

Ninth Circuit

JOHN DOE #1, an individual, JOHN DOE #2, an individual,
and PROTECT MARRIAGE WASHINGTON,

Plaintiffs-Appellants,

v.

SAM REED, in his official capacity as Secretary of State of Washington,
and BRENDA GALARZA, in her official capacity as Public Records Officer
for the Secretary of State of Washington,

Defendants-Appellees,

and

WASHINGTON COALITION FOR OPEN GOVERNMENT
and WASHINGTON FAMILIES STANDING TOGETHER,

Intervenors-Appellees.

Appeal from a Decision of the United States District Court for the Western District of Washington,
No. 3:09-CV-05456-BHS · Honorable Benjamin H. Settle

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Corporate Disclosure Statement

Pursuant to Fed. Rule of App. Proc. Rule 26.1, I hereby certify that Plaintiffs-Appellants John Doe #1 and John Doe #2 are individuals, and therefore do not have parent corporations. Appellant Protect Marriage Washington is a State Political Committee organized pursuant to Washington Revised Code § 42.17.040, is not a registered corporation, and does not have a parent corporation.

/s/ Kaylan L. Phillips
Kaylan L. Phillips

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I. Introduction

This case involves a citizen referendum that asked Washingtonians to decide whether to grant same-sex partners certain legal rights and obligations popularly described as "everything but marriage." Referendum 71 ("R-71") implicated a political question of great national import. Taking sides on this issue has proven controversial. *Extremely* controversial.

Of course, there is nothing unconstitutional about a controversial political debate. Unfortunately, some have been unable or unwilling to keep the debate civil, advancing their cause by discouraging participation in the democratic process through acts calculated to intimidate. History has witnessed these tactics before, *see, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) ("*NAACP*"), and now they are on the rise again nationwide.

In California, it was a campaign to intimidate those who financially supported a traditional marriage constitutional amendment (Proposition 8). As *Time* magazine reported, one group avowed to "make it socially unacceptable" to participate in any significant way in the political process (i.e., to give over a certain amount), if you oppose same-sex marriage. (Excerpts of Record ("ER") 284; *see also* ER–281 (one group hoped boycotts would "send a message" to other "potential contributors")); ER–63-64.

In Washington, it was a campaign to intimidate potential signers of R-71. One drive, "Decline to Sign [R-71]," advocated that "[e]veryone," and "[e]specially straight people," promise not to sign the R-71 petition. (ER–327, *see also* ER–322-25.)[1] The campaign took a marked turn when Massachusetts-based KnowThyNeighbor.org and Washington-based WhoSigned.org announced they were going to post on the Internet, in searchable format, the names of those who signed the R-71 petition. (ER–369-370) (press release circulated during the heat of the signature gathering process.)

The deterrence campaign was effective. Some people would not sign the petition, even though they supported the cause, because they "fe[lt] threatened" or were nervous about their information being compiled. (*See* ER–81-84.) While the full impact of this deterrence and intimidation campaign is incalculable,[2] the evidence Appellants John Doe #1, John Doe #2, and Protect Marriage Washington (*collectively*, "PMW") presented to the district court overwhelmingly demonstrates

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[1] One video promoting "Decline to Sign [R-71]," opened with Intervenor Washington Families Standing Together's ("WAFST") logo. (ER-147) (providing screen shot of portions of the video.)

[2] *See, e.g.*, ER–115 ("[T]here were some things I didn't want to even go public with at the time and I hesitate to now."); Dkt. 211-2 (some individuals "were unwilling to submit declarations because of the fear that, despite the protective order, their names would become public knowledge and they would be subject to further threats and harassment").

a "pattern of threats" and "specific manifestations of public hostility," *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), against those who support traditional marriage.

Based on this evidence, PMW seeks a First Amendment exemption ("exemption") from Washington's Public Records Act ("PRA") due to "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S.Ct. 2811, 2821 (2010) (brackets omitted) (*quoting Buckley*, 424 U.S. at 74).

II. Statement of Jurisdiction

This action arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction based on 28 U.S.C. §§ 1331 and 1343(a). This is an appeal of a final judgment entered by the district court on October 17, 2011, which upheld the Washington Public Records Act, Wash. Rev. Code ("RCW") § 42.56.001 *et seq*. as applied to PMW. Appellants timely appealed the judgment on October 17, 2011. This Court has jurisdiction under 28 U.S.C. § 1291.

III. Statement of Issues Presented for Review

A. Did the district court err in finding that Appellants failed to satisfy the requirements for an exemption pursuant to *Buckley v. Valeo*, 424 U.S. 1 (1976)?

B. Did the district court err in finding that the State's interest was substantially important at this point in litigation?

C. Did the district court err in releasing the identities of the John Does and witnesses without giving Appellants notice or an opportunity to be heard?

D. Is the appeal moot due to the release of the R-71 petitions and the district court's order identifying the Doe plaintiffs?

E. Does any plaintiff-appellant have standing to bring this appeal on behalf of R-71 petition signers?[3]

IV. Statement of the Case

Believing that the public exposure of their identities as R-71 petition signers would unconstitutionally abridge their First Amendment rights, PMW filed a two-count complaint in the Western District of Washington on July 28, 2009, seeking to enjoin the State from publicizing the names and addresses of petition signers. Contemporaneously, PMW filed motions for temporary and preliminary injunctive relief.

On July 29, 2009, the district court granted PMW's motion for a temporary restraining order. On September 10, 2009, the district court preliminarily enjoined the State from releasing copies of the petitions. *Doe v. Reed*, 661 F. Supp. 2d

[3] Issues D and E were presented by this Court in its Order Denying Appellants' Motion for Injunctive Relief. (ER–39.) Appellants do not agree that discussion of these issues is necessary for this appeal but present the issues in compliance with the Court's order.

1194, 1205 (W.D. Wash. 2009). Because the court disposed of the case under Count I of the complaint (facial challenge to disclosure of petitions), the court did not reach Count II (as-applied challenge based on harassment risk). *Id.*

On September 14, 2009, the State, followed later by Intervenors, appealed to the Ninth Circuit, requesting the preliminary injunction be stayed pending appeal. On October 15, this Court stayed the preliminary injunction, effective immediately.[4] PMW sought a stay from the Circuit Justice for the Ninth Circuit to prevent release of the petitions. Justice Kennedy granted PMW's request on October 19, 2009, and the full Court agreed on October 20, 2009, pending resolution of a petition for writ of certiorari.

The Supreme Court granted PMW's petition for writ of certiorari and heard oral argument on the matter. On June 24, 2010, the Court rejected PMW's facial challenge and held that PRA was constitutional as applied to "referendum petitions in general." *Doe*, 130 S.Ct. at 2821.

PMW then sought summary judgment in the district court on the claim that PRA is unconstitutional as applied to R-71 petition signers. The State and two Intervenors filed cross-motions for summary judgment. On October 17, 2011, the

[4] On October 22, 2009, the Court reversed the district court's judgment, holding that PRA was likely constitutional as applied to referendum petitions in general. *Doe v. Reed*, 586 F.3d 671, 680–81 (9th Cir. 2009).

district court granted the State and Intervenors' motions for summary judgment and denied PMW's motion. (ER–2) (hereinafter "Order"). In the Order, the court lifted the injunction preventing disclosure of the petitions and, sua sponte, disclosed the names of the PMW's John Does and witnesses, whose identities had been protected. Immediately after the Order, the State began releasing petitions.

On October 17, 2011, hours after the Order was released, PMW moved for an injunction pending appeal in the district court. On the same day, PMW appealed the Order. On October 20, 2011, PMW filed the first Emergency Motion for Injunction Pending Appeal before this Court. On October 24, 2011, this Court denied PMW's Motion, without prejudice, pursuant to Fed. Rule of App. Proc. Rule 8(a). (Dkt. 7.) The Ninth Circuit temporarily enjoined the State from releasing the petitions effective until five days after the district court's ruling. (*Id.*)

On November 8, 2011, the district court denied PMW's motion. (ER–48.) On November 9, 2011, PMW renewed their Emergency Motion for Injunction Pending Appeal before this Court. On November 16, 2011, the Ninth Circuit denied PMW's motion, noting that it "preliminarily believes that the appeal is moot due to the release of R-71 petitions." (ER–39.) Circuit Judge Smith strongly dissented. (ER–43.)

On November 18, 2011, PMW filed an application for injunction pending

appeal with the Circuit Justice for the Ninth Circuit. Justice Kennedy referred the matter to the entire Court. On November 21, 2011, the Court denied PMW's application.[5] (ER–36.) Justice Alito dissented, stating that "the District Court rejected [PMW's] as-applied challenge, relying primarily on a highly questionable interpretation of [Supreme Court] precedents." (ER–37).

V. Statement of Facts

Appellant Protect Marriage Washington circulated a referendum, designated R-71, on Senate Bill 5688 ("SB-5688"). *Doe*, 130 S.Ct. at 2816. While Protect Marriage Washington was collecting signatures, several groups stated that they intended to use PRA, RCW § 42.56.001 et seq., to obtain copies of petitions submitted to the Secretary of State ("Secretary"). *Id.* On July 25, 2009, Protect Marriage Washington submitted the signatures to the Secretary. *Id*. Appellants John Doe #1 and John Doe #2 are among those that signed the petition.

The Secretary conducted an extensive canvass and verification of the petitions, checked every signature, and determined that R-71 qualified for the November 3 ballot. Dkt. 213-3.

VI. Summary of the Argument

The PRA is unconstitutional as-applied to PMW because there is "a reasonable

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[5] Justice Kagan did not participate.

probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. The district court erred in finding that PMW's evidence was insufficient to merit this exemption. This Court may properly grant the exemption, as PMW is properly before the Court, has established the necessary evidence, and the claim is not moot due to the release of some petitions. Furthermore, in denying the exemption, the district court erred in releasing previously-protected identities without affording PMW due process of law.

VII. Argument

Standard of Review

This Court reviews a district court's grant or denial of a summary judgment motion *de novo*. *See Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007). The Court of Appeals applies the same standard used by the trial court under Rule 56 of the Federal Rules of Civil Procedure. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999). The Court of Appeals determines, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id*.

A. The District Court Erred in Denying the Exemption As Appellants Have Shown a Reasonable Probability that Exposure Will Lead to Threats, Harassment, or Reprisals.

PMW seeks an exemption from PRA based on "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. As the district court noted, "[this] as-applied exemption …has been upheld in only a few cases." (ER–12.) That the relevant case law is scarce, however, does not determine whether PMW is entitled to the exemption.[6]

Using a strict, rigid standard, the district court denied PMW the exemption. This finding was in error. Under the Supreme Court's standard, PMW qualifies for and should receive the exemption. This Court should reverse the district court's Order and uphold the Supreme Court's exemption standard.[7]

1. Plaintiffs Are a Group That May Receive an Exemption.

In *Doe*, the Supreme Court reaffirmed "that those resisting disclosure can prevail under the First Amendment if they can show 'a reasonable probability that

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[6] However, if the district court's interpretation of the standard is upheld, the relevant case law will become stagnant. For how could any plaintiff meet this now-rigid standard if PMW, after "develop[ing] substantial evidence that the public advocacy of traditional marriage . . . has engendered hostility . . . ," still "falls far short?" (ER–34.)

[7] As the district court has already made the necessary findings, this Court need not remand the case in order to grant the exemption.

the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" 130 S.Ct. at 2820 (citations omitted).

The district court looked beyond this standard, seeking to determine if PMW were directly analogous to plaintiffs receiving the exemption in the past. Specifically, the court relied heavily on the facts of two previous cases, *NAACP*, 357 U.S. 449 (NAACP sought exemption from Alabama's qualification statute requiring it to disclose the names and addresses of all members) and *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982) ("*Brown*") (Socialist Party sought an exemption from Ohio's Campaign Expense Reporting Law.) (ER–12-17.) While these cases are instructive as to the application of the standard, they did not alter the standard itself. The Supreme Court has not expanded the standard articulated in *Buckley*: a plaintiff must show a "reasonable probability" of "threats, harassments, or reprisals." 424 U.S. at 74.

a. The Standard Does Not Require an Organized Group.

The district court erred by reading an organizational requirement into the exemption standard. There is no such requirement. Even if there were, the district court erred in concluding that "it is difficult to categorize the R-71 signers as a group or an organization; the only fact known to be common among these signers

to any reasonable certainty is that they signed the R-71 petition..” (ER–15.) But, they were a group that opposed SB-5688.

Appellant Protect Marriage Washington was the vehicle through which R-71 appeared on the ballot. Its mission — to repeal SB-5688 in order to protect children and a traditional definition of marriage — was made abundantly clear, both on the R-71 petition and elsewhere. In large, bold font across the top of the R-71 petition appear the words “Preserve Marriage, Protect Children.” (ER–352.) Below that is the following message: “The legislature just passed a law that effectively makes same-sex marriage legal. By signing R-71 we can reverse that decision and protect marriage as between one man and one woman.” (*Id*.) Further down are six testimonials from individuals who urge citizens to sign the R-71 petition to protect a traditional definition of marriage. (ER–360.) Moreover, Appellant Protect Marriage Washington’s name appeared in several places on the petition. There is little doubt that signing the R-71 petition was an expression by the signer “that the law subject to the petition should be overturned.” *Doe*, 131 S.Ct. at 2817.

Those who opposed R-71 understood what a signature meant, too. Within one week of the filing of the notice to circulate a petition to repeal SB-5688, Equal Rights Washington PAC, a committee that supports gay marriage, launched their

"Decline 2 Sign [R-71]" campaign. (ER–323.) Within one month, WhoSigned.org publicly stated its intention to expose on the Internet each person who signed the R-71 petition. (ER–366-370.)

It was very clear there were two sides to the R-71 campaign — support and opposition to SB-5688. Minimally, those who signed risked being exposed publicly and confronted with uncomfortable conversations by those who opposed R-71. And, Washington voters were no doubt aware of the threats and harassment faced by those who supported California's Proposition 8. (ER–165-180, 276-278.) Each signer's choice to associate with Protect Marriage Washington, even for the limited purpose of repealing SB-5688, is protected by the First Amendment. *Buckley*, 424 U.S. at 64.

b. The Standard Does Not Require a Fringe Organization.

The district court erred by determining that PMW needed to be a minor party or a fringe organization in order to receive the exemption. (E–12-17.) The district court erroneously referred to the "minor party rule in *Buckley*" and faulted PMW for "not provid[ing] adequate authority to support any departure from requiring such a showing in order to bring a successful as-applied challenge to PRA disclosure laws." (ER–15-16.) But *Buckley* did not establish a "minor party rule."

Buckley involved a challenge to the Federal Election Campaign Act of 1971 by

various plaintiffs, including "the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party," and various candidates. *See* 424 U.S. at 7-8. The Supreme Court categorized the political party plaintiffs as "major party," "minor party," and "new party," perhaps adopting the terminology from one of the challenged laws. *See id*. at 201 (Presidential Election Campaign Fund defining "major," "minor," and "new".) "Major," "minor," and "new" were monikers by which the Court could refer to the plaintiffs concisely, not elements of the standard. (*See* ER–75-76.)

Fundamentally, there cannot be a "minor party" requirement because the First Amendment does not allow discrimination among speakers. *Citizens United v. FEC*, 130 S.Ct. 876, 899 (2010). And, the Supreme Court in *Doe* recognized that an as-applied exemption was possible for PMW, specifically, without any mention of a "minor party" requirement. *Id*. at 2820-21. Justice Stevens (joined by Justice Breyer) acknowledged that the Court was "correct," as "a matter of law," to "keep open the possibility" that PMW may prevail in their as-applied challenge. *Id.* at 2831 (Stevens, J., concurring in part and concurring in the judgment).

The district court also noted that "*Brown* and its progeny each involved groups seeking to further ideas historically and pervasively rejected and vilified by both

this country's government and its citizens." (ER–14.)[8]

The district court noted that "the as-applied exemption is intended to prevent an organization from being forced to retreat from the marketplace of ideas, which would materially diminish discourse." (ER–16.) But the court erred in requiring that "Doe [provide] competent evidence that it is in any material way similar to the organizations, groups, or parties who have received the as-applied exemption in the past." (*Id.*)[9]

The district court supported its consideration of the so-called "minor party" requirement with the fact that "Doe has not supplied and the Court has not found any case wherein a court granted an as-applied exemption…to a group…that did not have minor status." (ER–14.) But, there are several cases where the court considered the evidence presented by groups without a threshold "minor party" requirement. *See New York Civil Liberties Union, Inc. v. Acito*, 459 F. Supp. 75, 88 (S.D.N.Y. 1978) (involving a civil liberties organization); *Colorado Right To Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1016 (D. Colo. 2005) (pro-life group); *Herschaft v. New York City Campaign Fin. Bd.*, 127 F. Supp. 2d 164,

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[8] It is inaccurate to classify the NAACP as espousing ideas that are "historically and pervasively rejected." Moreover, those supporting the NAACP's causes, even during such a contentious time, cannot be said to be in the minority.

[9] Foundationally, the nature of an as-applied challenge merits individualized applications of facts to the law.

169 (E.D.N.Y. 2000) (single political candidate).

Fundamentally, the exemption is available as a safeguard to liberty, to free speech, and to our civil society, *regardless of who stands in need of its protection*. The standard is clear: PMW must show a "reasonable probability" of "threats, harassments, or reprisals."

c. The Supreme Court Left the As-Applied Challenge Open.

The majority opinion in *Doe* reiterates the standard from *Buckley*: the burden of proof here is one of "flexibility," *Buckley*, 424 U.S. at 74, and PMW need demonstrate "only a reasonable probability," *id.*, that exposure will lead to threats, harassment, or reprisals. A stricter standard would impose a "heavy," unconstitutional burden on speech. *Id.* (*Compare with* ER–71 (State counsel arguing Supreme Court set "a very high bar").)

Under the district court's standard, it is unlikely that any organization will ever obtain an exemption. As Judge Smith stated in his dissent to this Court's denial of PMW's Motion for Injunction Pending Appeal, "[a]s the Supreme Court did not specifically address the standard for an as-applied challenge to the appellants, there exists a serious question as to what the standard should be and whether the appellants demonstrated sufficient evidence to meet this standard." (ER–46.)

The district court erred by looking instead to *Doe*'s *concurring* opinions that

"would require a showing of '*serious and widespread harassment* that the State is unable or unwilling to control.'" (ER–33-34.) The court interpreted this as either a "more stringent" version of the exemption test or else "merely an explanation as to what the reasonable probability standard requires in this case." (*Id*.) It cannot be the latter. First, Justice Sotomayor's concurrence was joined by only Justice Ginsburg and the now-retired Justice Stevens, suggesting that this more stringent test would not be found acceptable by a majority of the Court. Second, these concurrence are dicta. (*See* ER-32.) (acknowledging such statements as dicta yet weighing them as "instructive on what may likely be the standard applied by the Supreme Court…on appeal.") (*See* ER–70 ("[The court's] responsibility is to apply the law as it is, not as what people would hope for it to be.").)

Moreover, while not required by the exemption standard, PMW *has* demonstrated "serious and widespread harassment" that the State is unable to control.

2. Plaintiffs Have Met the Evidentiary Burden.

The district court noted that "[t]he as-applied exemption that Doe seeks has been upheld in only a few cases." (ER–12.) In those cases, plaintiffs presented "ample, uncontroverted evidence of a reasonable probability that disclosure will result in threats, harassment, or reprisals." (ER–17.) The district court erred in

characterizing PMW's evidence as "a mountain of anecdotal evidence from around the country that offers merely a speculative possibility of threats, harassment, or reprisals…[including] numerous examples of what may be considered threats, harassment, or reprisals experienced by those supporting Proposition 8 in California." (ER–17-18.)

The district court erred in requiring PMW to present "evidence…[that is] specifically and directly related to a group or organization." (ER–18.) There is no authority for this requirement. In fact, it is contrary to the flexible standard provided by the Supreme Court.

a. The Exemption Calls for "Flexibility in the Proof of Injury."

The district court also erred by limiting the analysis to "evidence pertaining directly to R-71 signers and perhaps to the PMW donors." (ER–18.) The Supreme Court was concerned that such "unduly strict requirements of proof" could impose an unworkable, "heavy burden" on speech. *Buckley*, 424 U.S. at 74. It based the exemption test on this foundational principle: *Groups must be allowed* "*sufficient flexibility in* [*their*] *proof of injury to assure a fair consideration of their claim*." *Id.* (emphasis added). "Flexibility" is the rule. To obtain an exemption, groups "need show *only* a reasonable probability" that exposure will lead to reprisals. *Id.* (emphasis added); *see also Doe*, 130 S.Ct. at 2820.

A "reasonable probability" that exposure will lead to reprisals does not mean that reprisals will, "beyond question," "certainly follow" exposure. *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 421, 423 (2d Cir. 1982); *accord Brown*, 459 U.S. at 101 n.20. "[W]hen First Amendment rights are at stake and the spectre of significant chill exists, courts have never required such a heavy burden to be carried," *Hall-Tyner*, 678 F.2d at 421, because First Amendment freedoms are "fragile and precious," *id.* at 424, and "'need breathing space to survive,'" *id.* at 421 (*quoting Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967)). Similarly, groups need not prove that those who have made threats against them "are likely to carry out their threats." *Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1177 (W.D. Wash. 2004). Rather, "[i]t is the likelihood that supporters will receive threats that must be determined by the Court." *Id.*

Groups may rely on a wide array of evidence, including "specific evidence of past or present harassment of [group] members due to their associational ties," "harassment directed against the organization itself," or a "pattern of threats or specific manifestations of public hostility." *Buckley*, 424 U.S. at 74.

i. The Standard Does Not Require Showing Harassment That Is Criminal in Nature.

The district court erred in evaluating the severity of PMW's evidence based on its criminal nature or the police response to reports. Specifically, the court

characterized PMW's testimony as only "a few witnesses who, in their respective deposition testimony, stated either that police efforts to mitigate reported incidents was sufficient or unnecessary. Doe has supplied no evidence that police were or are not unable or unwilling to mitigate the claimed harassment." (ER–33.) Consequently, the court found that PMW's evidence "cannot be characterized as 'serious and widespread.'" (*Id*.)

This finding is contrary to the flexible nature of the Supreme Court's standard. Whether law enforcement is properly performing its function is immaterial. The effect on individuals is what matters. Therefore, whether police can mitigate a situation cannot be the proper test. The police can (and should) offer reassurances, but after threats have been made, the damage has been done. The exemption serves to prevent those threats and harassment from occurring in the first instance, thereby assuring that those who signed the R-71 petition are free to associate without fear.

Despite laws to the contrary, threats and harassment have occurred, are occurring, and will continue to occur. For example, in Washington, it is a felony, punishable by up to five years' imprisonment, to make a death threat over the telephone. RCW §§ 9.61.230, 9A.20.021. Yet PMW received death threats over the phone. (*e.g.*, ER–89.) In Washington, it is it is a felony, punishable by up to

five years' imprisonment, to make a death threat over the Internet. RCW §§ 9.61.260, 9A.20.021. Yet PMW received death threats over the Internet. (*e.g.*, ER–92, 308.) In Washington, it is a crime to make an 'electronic communication' with intent to harass, intimidate, torment, or embarrass any other person, if the communication (1) uses any lewd, lascivious, indecent, or obscene words, images, or language, or suggests the commission of any lewd or lascivious act; (2) occurs anonymously or repeatedly; or (3) threatens to inflict injury on the person or property of the person contacted or on any member of his or her family or household. RCW§ 9.61.260(1). Yet PMW received countless lewd, repeated, threatening communications electronically. (*See, e.g.*, ER–332; Dkt. 209-4.) In Washington, it is a crime to make a telephone call with intent to harass, intimidate, torment, or embarrass any other person, if the call (1) uses any lewd, lascivious, profane, indecent, or obscene words or language, or suggests the commission of any lewd or lascivious act; (2) is made anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or (3) threatens to inflict injury on the person or property of the person called or any member of his or her family or household. RCW § 9.61.230(1). Yet PMW received countless lewd, repeated, and threatening telephone calls. (*See, e.g.*, ER–137.)

ii. The Standard Allows for Relevant Evidence From Outside Washington.

The Supreme Court allows "[n]ew [groups] that have no history upon which to draw[,] …to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Buckley*, 424 U.S. at 74. Because Protect Marriage Washington is a new group—it was formed on May 13, 2009, for the purpose of collecting enough signatures to force a referendum vote on SB-5688 (ER–393.)—it has little or "no history upon which to draw," and may present evidence of reprisals against supporters of similar causes elsewhere. *Buckley*, 424 U.S. at 74.

The district court erred in finding PMW is not a "new" organization, and so "is limited to evidence from among its own number, R-71 petition signers." (ER–19.) PMW is a new organization. It was formed in May, circulated and submitted petitions in July, and received a preliminary injunction the same month. That three years of busy litigation have passed is irrelevant and contrary to the flexibility standard.

Brown held unanimously, that evidence of out-of-state reprisals against persons holding similar views is relevant to, and therefore should be considered in, the exemption analysis. *Brown*, 459 U.S. at 99 (indicating, with approval, that appellants introduced "proof of specific incidents" of hostility, "*many of which*

occurred in Ohio and neighboring states" (emphasis added)); *id.* at 100–01 (relying on "numerous instances of recent harassment . . . both in Ohio *and in other states*" (emphasis added)); *id.* at 101 n.20 (incidents in Chicago and Pittsburgh were "certainly relevant" to whether to grant an exemption to a group in Ohio).

Brown's decision to consider out-of-state evidence had nothing to do with how "new" the Socialist Workers Party of Ohio was. The analysis hinged rather on the similarity of political views linking the in-state and out-of-state groups together: "Surely," the Court found, "the Ohio [Socialist Workers Party] may offer evidence of the experiences of other chapters espousing the same political philosophy." *Id.* at 101 n.20.

In *Averill v. City of Seattle*, 325 F. Supp. 2d 1173 (W.D. Wash. 2004), the court applied the same analysis and reached the same conclusion as *Brown*. There, an exemption was granted based on evidence of harassment in the form of "frequent hang-ups and crank calls." *Id.* at 1178. Although the Court found that the crank calls in fact constituted "harassment," it was persuaded to grant the exemption because of the evidence of reprisals "directed against individuals or organizations holding similar views." *Id.* The Court reasoned that plaintiffs "advocat[ed] beliefs . . . that [were] virtually identical to those espoused by . . . the

Freedom Socialist Party," and the Freedom Socialist Party and its members had been "threatened and harassed on a number of occasions" for advocating such beliefs. *Id.*

Likewise, here, evidence of reprisals against supporters of similar causes, both in and out of Washington, is pertinent to this case. The underlying controversy in this case is a pressing national issue. Those who stood against SB-5688 made the same arguments and advocated the same beliefs as traditional-marriage supporters in every state. Evidence of reprisals against *those* supporters is relevant to calculating the likelihood of future reprisals against *these* supporters.[10]

iii. The Standard Does Not Require Only Evidence Relating to Non-Public R-71 Signers.

The district court erred by requiring PMW to prove that the *signers* of the R-71 petition were *themselves* subject to harassment. This is an impossibility. (*See* ER–67.) First, prior to the Order, the petitions had never been released to the public, so the public did not know who to target for harassment. Second, there is no requirement that "chill and harassment be directly attributable to the specific

---

[10] This is especially true of evidence from Proposition 8. Yet the district court characterized such evidence as "now stale and [having] occurred during the 'heat of an election battle surrounding a hotly contested ballot initiative.'" (ER–19.) The court created another impossible standard under which relevant evidence is either unreliable because of intense political debate or "stale" because that political debate is less intense.

disclosure from which the exemption is sought." *Buckley*, 424 U.S. at 74.

Furthermore, if PMW were to (somehow) produce evidence of harassment against signers where it was not generally known that they signed the petition, PMW could not have tied the harassment to the signing. Even with evidence related to those who took a public stand, the court was not convinced that the evidence was tied close enough to the views of the victims. For example, the district court noted that a person receiving threatening phone calls "[did] not recall being told her support of R-71 motivated the calls." (ER–26.) But intimidation is generally spread by strangers who wish to inflict fear—and they rarely discuss their "reasons" for doing so.

Requiring PMW to come forward with instances of harassment directed at victims who merely signed the petition, and who kept the fact of that signing a private matter, is diametrically at odds with the exemption's "flexibility."

b. PMW Presented Sufficient Evidence of a Reasonable Probability of Threats, Harassment, and Reprisals.

i. The District Court Acknowledged the Reasonable Probability of Threats, Harassment, and Reprisals.

Regarding the evidence presented, the district court found that PMW "have developed substantial evidence that the public advocacy of traditional marriage as the exclusive definition of marriage, or the expansion of rights for same sex

partners, has engendered hostility in this state, and risen to violence elsewhere, against some who have engaged in that advocacy." (ER–34.) Under the Supreme Court's test, this alone is sufficient to merit an exemption.

ii. PMW Presented Substantial Evidence Directly Related to R-71.

PMW provided deposition testimony recounting experiences with threats, harassment, and reprisals relating to R-71. The district court, in addition to listing the identity of each previously-protected John Doe and witness, characterized this evidence as "claimed experiences of threats, harassment, or reprisals that Doe contends is connected to R-71." (ER–19.)

But, PMW did present evidence specific to R-71. For example, PMW showed that the campaign manager for Protect Marriage Washington removed the R-71 yard sign in front of his home out of concern for the safety of his family (he did not want to help any would-be assailants identify his home). (ER–117.) The same man received an untold number of threatening and harassing emails and phone calls. One said, "Dear God fearing hate mongerers -. . . Maybe you just want to feel a cock in your ass and hate yourself for it. Whatever. Praise Jeebus you retarded fuckholes!" (ER–379.)[11] Some emails directly threatened the man's family. (ER–134-34).

[11] In not redacting obscene language herein, PMW followed *Cohen v. California,* 403 U.S. 15, 16 (1971).

Further, the district court erred in finding that PMW did not present any evidence regarding donor harassment or chill related to R-71. (ER–31.) PMW explained that the group "had a very difficult time…raising the money [it] needed to fund the campaign" because people feared having their names revealed on contribution reports. (ER–118.) Consequently (in part at least), traditional marriage advocates were hugely out-funded in the R-71 campaign.[12] *See Brown*, 459 U.S. at 93 (recognizing that exposure laws can "deter contributions").

iii. PMW Presented Substantial Evidence of a "Pattern of Harassment."

PMW's evidence overwhelmingly demonstrates a "pattern of threats" and "specific manifestations of public hostility," *Buckley*, 424 U.S. at 74, against those who have, often out of a sense of religious conviction, voiced opposition to the homosexual movement. Many of these examples are specific to Washington State and the R-71 controversy.

For example, PMW presented evidence of death threats (*e.g.*, ER–89); physical assaults and threats of violence (*e.g.*, ER–101-04; ER–205); vandalism and threats of destruction of property (*e.g.*, ER–226; ER–320); arson and threats of arson (*e.g.*, ER–253-58; ER–266); angry protests (*e.g.*, ER–228-29; ER–231-32); lewd

[12] (*e.g.* ER–299-302 (reporting contributions to organizations opposing SB-5688); ER–303-06 (reporting contributions to organizations supporting SB-5688).)

and perverse demonstrations (*e.g.*, ER–106-08); intimidating emails and phone calls (*e.g.*, ER–133-140); hate mail (*e.g.*, ER–96-97); multiple web sites dedicated to blacklisting those who support traditional marriage and similar causes (*e.g.*, ER–289-93; 4-190, ER–314-18); and gross expressions of anti-religious bigotry, including vandalism and threats directed at religious institutions and religious adherents (*e.g.*, ER–194-96; ER–210-11; ER–223-24; ER–251; ER–260-62.) (*Compare with* ER–72-73 (State disavowing any "actual harm" or "meaningful" harassment).)

The evidence is too voluminous to discuss in detail, but the following gives insight to the gravity and the scale of what the *Los Angeles Times* called the "vengeful campaign" against supporters of traditional marriage.[13] The following is a sampling of the real threats directed at traditional-marriage supporters that PMW presented to the court:

> "I will kill you and your family." (ER–89.)
>
> "Oh my God, this woman is so fucking stupid. Someone please shoot her in the head, again and again. And again." (ER–92; ER–308.)
>
> I'm going to kill the pastor. (ER–130-32.)
>
> "If I had a gun I would have gunned you down along with each and every other supporter…." (ER–183-90.)

[13] (Ex. 4-115, ER–273-74.)

> "You're dead. Maybe not today, maybe not tomorrow, but soon . . . you're dead." (ER–198.)
>
> "I'm a gay guy who owns guns, and he's my next target." (ER–198.)
>
> "You better stay off the olympic peninsula. . it's a very dangerous place filled with people who hate racists, gay bashers and anyone who doesn't believe in equality. fair is fair." (ER–396.)
>
> "If Larry Stickney can do 'legal' things that harm OUR family, why can't we go to Arlington WA to harm his family?" (ER–312.)
>
> "I advocate using violence against the property of ALL of those who are working tirelessly to HURT my family; starting with churches and government property. Government is enabling a vote on whether or not I 'should be allowed' to see my husband while he is dying in the hospital—any NORMAL man would be driven to get a gun and kill those who tried such evil cruelty against his loved ones." (ER–320.)[14]
>
> "I wanna fight you. I wanna fight you right now." (ER–112-13.)
>
> "I warn you, I know how to kill, I'm an ex-special forces person." (ER–120-23.)
>
> "You guys deserve to die" (uttered during a physical attack) (ER–104.)
>
> "YOU LOST!!!!!!! Hahahahahahahahahaha Get ready for retribution all you bigots!!!!!!" (email sent within hours of Supreme Court's decision in *Doe*) (ER–332.)

There is also significant evidence of actual violence and vandalism, including, among other things, physical assaults (*e.g.*, ER–271), spray-painted homes and buildings (*e.g.*, ER–213-21), slashed tires (*e.g.*, ER–269), stolen and mangled

[14] This statement was later quoted by *Newsweek* magazine. (ER–202.)

signs (*e.g.*, ER–90; ER–125), and smashed windows in cars, homes, and other structures (*e.g.*, ER–194-96; ER–210-11).

PMW proved a reasonable probability of threats, harassments, and reprisals. PMW submitted substantial evidence establishing that a reasonable person would conclude that if he speaks up about traditional marriage in Washington, he risks threats, harassment, or reprisals.

iv. Even those Supporting Same-Sex Marriage Questioned the Propriety of Publicizing R-71 Signers.

The necessity of an exemption in this case is evident even to those who supported SB-5688. A *Seattle Times* editorial columnist who supported SB-5688, stated:

> What I, and this page, take issue with is the Web site called whosigned.org. The site will list everyone who signed [R-71]. On the Web site it says this is being done so voters can make sure the public record is correct.
>
> We all know that is not the case. The real purpose of whosigned.org is intimidation.

(ER–391; *see* also (ER–376-77) (questioning whether it was a good idea to "out[ ] the signers of [R-71]").)

The *Yakima Herald-Republic* ran an editorial questioning whether exposing petition signers would lead to "friendly debate, not harassment." "While we hope that becomes the case, we doubt it will. We see this only as a means of coarsening

the debate." (ER–385-86.)

Many Washingtonians who supported same-sex marriage also shared their deep concerns over the proposed publication of names. One "member of the gay community" wrote a letter to the editor of a Tacoma newspaper, questioning the wisdom of taking such "an inflammatory action [i.e., exposing the R-71 petition signers] on a highly emotional topic" when the apparent intent is to "attempt[ ] to intimidate people by making them think twice about exercising their legal right for fear that they may have an uninvited visitor at home or an unwanted conversation in line at the grocery store." (ER–391.)

In early June 2009, Equal Rights Washington—a political advocacy organization for lesbians, gays, bisexuals, and transgendered individuals in Washington (ER–298) that started the "Decline to Sign" campaign—publicly opposed WhoSigned.org's intention to publish the names of all R-71 signers on its web site. ERW's spokesman explained, "I have concerns that the Web site can be perceived as hostile or intimidating, and that's just not helpful." (ER–379-80; *see also* ER–382-83 (reporting that Intervenor WAFST asked WhoSigned.org not to post the names and addresses of R-71 petition signers online because "the approach [was] too confrontational.").)

Despite this evidence, the district court denied PMW an exemption. This

finding was in error and should be reversed.

B. The State's Interest In Disclosure of the R-71 Petitions Does Not Reflect the Actual Burden On First Amendment Rights.

The compelled disclosure of signatory information on referendum petitions is constitutional only if such disclosure survives "exacting scrutiny." *Doe*, 131 S.Ct. at 2818. Exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id*. (citations and quotations omitted). Moreover, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*.

In this as-applied challenge, the strength of the governmental interest is significantly diminished from what it was in the context of PMW's facial challenge, while the actual burden on First Amendment rights is significantly more severe.

The Supreme Court applied exacting scrutiny to disclosure of referendum petitions in general by weighing the burden on speech against the strength of the governmental interest. *Id*. at 2819–21. The Court found that, in the context of the typical uncontroversial referendum, where the signers were unlikely to face any threats or harassment, the burden on speech imposed by publishing the signers' names and addresses was not great. *Id*. Against that relatively minor burden, the Court weighed the State's interest in (1) combating signature fraud, (2) detecting

invalid signatures, and (3) fostering government transparency and accountability. *Id*. at 2819–20 (identifying these interests generally as "preserving the integrity of the electoral process"). Taken together, all three of these interests represented an "important" governmental interest. *Id*. at 2820. And because the law at issue was "substantially related" to advancing the governmental interest, the Court upheld the law. *Id*.

The "importance" of the interest identified by the Supreme Court is significantly diminished, if not non-existent, in the context of this narrow challenge. The first two prongs of that interest—combating signature fraud and detecting invalid signatures—have been rendered meaningless as applied to R-71. *See Utahns for Ethical Gov't v. Barton*, 778 F.Supp.2d 1258, 1265 (D. Utah 2011) (government interests identified in *Doe* cannot justify disclosure when government was not currently verifying referendum signatures). It is trivial to talk about combating fraud and detecting invalid signatures when the referendum has already been certified and "the referendum at issue went down to defeat more that two years ago." (ER–38.)

The State is no longer and never will again be reviewing these petition signatures. The election is over, and so is the verification process. The whole point of ferreting out fraud and detecting invalid signatures, is, as the Supreme Court

recognized, to help "ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures." *Doe*, 131 S.Ct at 2820.

Moreover, even if the election were not over, the State's interest in enlisting the help of private citizens to help detect invalid signatures is significantly undermined because the Secretary of State, contrary to his ordinary practice, examined every single R-71 signature. (Dkt. 213-3) When the Supreme Court analyzed the strength of Washington's interest in detecting invalid signatures, it relied heavily on the fact that during the verification process of a typical referendum, the Secretary "ordinarily checks 'only 3 to 5% of signatures.'" *Doe*, 130 S. Ct. at 2820 (citation omitted). The Court reasoned that allowing private citizens to voluntarily canvass the other 95% of signatures would "help cure the inadequacies" of the verification process. *Id*. In this case, the Secretary examined every signature. (Dkt. 213-3.) Any need to rely on the help of "citizen-canvassers" was, in all material respects, eliminated by the Secretary's thorough canvassing of this petition.

The third prong of the governmental interest the Supreme Court identified was the interest in fostering government transparency and accountability. The Court did not expound on the precise nature of this interest. It simply stated that

"[p]ublic disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot." *Doe*, 130 S.Ct. at 2820. No doubt, the State in this case has taken action for which it can be held accountable—namely, it has certified a referendum, thus qualifying it for the ballot—but the vitality of this interest is tenuous at best in this as-applied challenge.

At this juncture in the litigation—long after the referendum has been certified and the election is past—Washington's interest in promoting its own transparency and accountability is weak because the only remaining interest is allowing its citizens to determine (for themselves) whether a referendum that has since failed at the ballot box was in fact worthy of being voted on in the first place. The interest in accountability is further weakened by the fact that (1) the Secretary examined every signature and (2) that opponents of the petition were able to (and did in fact) observe the verification process and were permitted to object. There is a strong measure of accountability in both of those actions.

That Washington's interest in promoting its own transparency and accountability is, under these circumstances, largely detached from reality, is further demonstrated by the extreme unlikelihood that anyone will take advantage of the opportunity to confirm (on their own and at their own expense) the validity of the Secretary's decision to certify the petition.

The strength of the governmental interest, then, in this as-applied challenge, amounts to giving Washington citizens an opportunity to "double check" the state's decision to certify a referendum that ultimately lost at the polls. Whatever incremental impact this will have in helping the State promote its own transparency and accountability is negligible compared to the considerable chilling effect on First Amendment rights that will stem from the release of the petitions.

The district court properly applied exacting scrutiny but erred in relying on those interests the Supreme Court identified in deciding PMW's facial challenge. Those interests justify disclosure in general. They do not remain valid in this narrower challenge.

The State's interest here is significantly diminished while the burden on PMW's First Amendment rights is greatly exacerbated by threats and harassment. "[T]he strength of the governmental interest" does not "reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 131 S.Ct. 2818. Accordingly, disclosure here fails exacting scrutiny and is unconstitutional.

C. The District Court Erred in Releasing the Identities of the John Does and PMW's Witnesses Sua Sponte.

Prior to the issuance of the Order, the identities of the witnesses and John Does were secured by a protective order. In granting PMW's renewed request for a protective order on November 15, 2010, the court noted that "the issue may be

revisited closer to the trial date." (ER–343.) But the issue was not revisited, not in the parties' briefing nor at the summary judgment hearing.[15] Moreover, the listing of previously-protected information was not necessary for the district court's opinion.[16] The district court violated PMW's due process rights by effectively lifting the protective order without notice or an opportunity to be heard on why it should remain in place.[17]

"No person shall be . . . deprived of life, liberty, or property, without due

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[15] At the hearing, the district court gave no indication that the protective order was in jeopardy, stating that "[t]here have been many . . . have been kept under seal. They contain names associated with this case that have been offered as evidence to support the claim that there is a reasonable probability of threats, harassment or reprisals. At the hearing today, *it is unnecessary to make reference to those names*." (ER–60:12-18) (emphasis added).

[16] *See* footnote 15, *supra*. If it was unnecessary to reference the specific names at the summary judgment *hearing*, it was also unnecessary to reference them in the opinion. *See, also Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (reasons for the decision made at hearing must be put on record.) The district court stated, the evidence may be evaluated with "simply a reference to events . . . without making reference to the names tied to those events." (ER–60:19-21.) PMW briefed the issues before the district court and here without disclosing identities as it is unnecessary for the analysis.

[17] The protective order authorized the parties to file documents under seal. The "strong presumption of public access to the court's files . . . may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties . . . . " CR 5(g)(2). Further, "[f]iles sealed based on a court order shall remain sealed until the court orders unsealing upon stipulation of the parties, motion by any party or intervenor, or by the court after notice to the parties." *Id*. at (6).

process of law." U.S. Const. amend. V. Fundamentally, due process requires notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). The analysis "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (internal quotations omitted).

PMW must "establish: (1) the deprivation of a constitutionally protected liberty or property interest; and (2) the denial of adequate procedural protections." *San Diego Minutemen v. Cal. Bus. Transp. and Housing Agency's Dept. of Transp.*, 570 F.Supp.2d 1229, 1241 (S.D. Cal. 2008). First, PMW had a liberty interest in the protection afforded by the court. *See, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). The court granted PMW's request for protection, despite strong opposition from the State and Intervenors, because PMW showed that the protection was necessary to protect PMW's First Amendment rights.

Second, the court denied PMW of notice and any opportunity to be heard as to why the protective order should remain in place, especially pending the appeal of the court's decision. Ordinarily, a three-part test determines whether the procedures provided are adequate to satisfy due process: "(1) the private interest . . . affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value . . . of additional

procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens [of] the additional or substitute procedures . . . ." *Mathews v. Eldridge*, 424 U.S. at 321.

However, *no* procedures were afforded here, let alone adequate procedures. The court promised notice and hearing, specific to this issue, but neither was given. PMW's liberty interest and the risk of erroneous deprivation are both high and the burden on the court to afford notice and an opportunity to be heard on the matter was low. Moreover, the court created a reliance interest and expectation when it stated that the issue would be revisited. The court violated PMW's due process rights by releasing the previously-protected identities.

Furthermore, the district court abused its discretion by publicizing information obtained through discovery that was placed in the record under seal. The Ninth Circuit recently found that a judge abused his discretion by making public a once-sealed record. *Perry v. Brown*, 2012 WL 308539 (9th Cir., Feb. 1, 2012).

In *Perry,* this Court considered whether the district court may release video recordings from the highly-contested trial of the constitutionality of Proposition 8. *Id*. The Court noted that there is "a 'general right to inspect and copy public records and documents, including judicial records and documents.'" *Id*. at *4 (*quoting Kamakana v. City & County of Honolulu*, 447 F .3d 1172, 1178 n.3 (9th

Cir. 2006) (internal quotes omitted). The Court noted that this general right "'is not absolute and can be overridden given sufficiently compelling reasons for doing so.'" *Id*. at *5 (*quoting Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.2003).) Because such compelling reasons existed, and the district court did not explain its reasons for finding otherwise, it "abused its discretion." *Id*.

The Court found that the appellants had relied upon statements by the judge. Without such assurances, the appellants "would very likely have sought an order directing him to stop recording forthwith, which, given the prior temporary and further stay they had just obtained from the Supreme Court, they might well have secured." *Id*. at *5. "The integrity of our judicial system depends in no small part on the ability of litigants and members of the public to rely on a judge's word." *Id*. at 3.

Here, the releasing of the names is analogous to the unsealing of a judicial record, which the Court will "review for abuse of discretion." *Id*. at *4 (*quoting Kamakana v. City & County of Honolulu*, 447 F .3d at 1178 n.3.) "Under the abuse-of-discretion standard, if 'the trial court identified the correct legal rule to apply to the relief requested,' we must 'determine whether the trial court's application of the correct legal standard was (1) "illogical," (2) "implausible," or

(3) without "support in inferences that may be drawn from the facts in the record."""" *Id*. at *4 (*quoting Hinkson*, 585 F.3d at 1261-62.) But, the district court did not provide any analysis as to why the information in the seal documents should be released. This violation procedural due process is enough as "an error of law constitutes an abuse of discretion." *Id*. at *4

This Court should find that the district court's actions were in error and immediately stop the publication of any unredacted version of the Order.

D. Disclosure Is Not a Moot Issue.

This Court has asked whether disclosure of the petitions rendered Plaintiffs' appeal moot. (ER–40.) This appeal is not moot.

1. The State Bears the Burden.

"The burden of demonstrating mootness is a heavy one." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001). This burden lies with the party asserting mootness. *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007). "The basic question…is whether there is a present controversy as to which effective relief can be granted." *Northwest Environmental Defense Center et al., v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988).

2. The Issue Is Whether *Some* Relief Is Possible.

"[C]ourts…have broad discretion in shaping remedies." *Id*. at 1244 (*quoting Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986). "'[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available…[but] whether there can be any effective relief.'" *Cantrell*, 241 F.3d at 678 (*quoting Gordon*, 849 F.2d at 1244-45). "[T]he fact that the court cannot give…the full relief…sought will not render the case moot." *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000). *See also Church of Scientology of California v. U.S.*, 506 U.S. 9, 12-13 (1992) (rejecting a claim that an appeal of disclosure of allegedly-privileged tape recordings was moot and noting, "While a court may not be able to return the parties to the *status quo ante*…a court can fashion *some* form of relief in circumstances such as these.").[18]

Relief can still be granted. Plaintiffs face ongoing, irreparable harm each day disclosure of the petitions continues. This Court can provide effective relief by enjoining the State from fulfilling additional public records requests for the

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[18] Other Circuits agree that where a court can fashion a partial remedy, a case is not moot. *See e.g.*, *Fed. Ins. Co. v. Maine Yankee Atomic Power Co.*, 311 F.3d 79, 82 (1st Cir. 2002); *In re Cont'l Airlines*, 91 F.3d 553, 558 (3d Cir. 1996); *Reich v. Nat'l Eng'g & Contracting Co.*, 13 F.3d 93, 97 (4th Cir. 1993); *SunAmerica Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996).

petitions and thereby preventing that further disclosure. Therefore, this appeal is not moot.[19]

a. Some Relief Is Possibly by Preventing *Further* Disclosure.

Disclosure is not a moot issue when the court is capable of preventing *further* disclosure of information already disclosed. In *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184 (9th Cir. 1981), *aff'd sub nom.*, *United States v. Sells Engineering Inc.*, 463 U.S. 418 (1983) ("*Sells*"), this circuit heard an appeal from "the district court's order…granting the Civil Division…access to documents…acquired by a federal grand jury" in connection with a criminal investigation. *Id*. at 1186. Following the investigation, the Civil Division moved for disclosure of the documents to Civil Division attorneys under Federal Rule of Criminal Procedure 6(e) for possible civil prosecution. *Id*. The district court ruled the Civil Division was entitled to the documents under the rule. *Id*. at 1186-87. Defendants appealed the district court's decision. *Id*. at 1187.

Before this Court, the prosecution argued that the "appeal [was] moot because many of the…materials…[had] already been disclosed to Civil Division

[19] The district court agreed that disclosure of the R-71 petitions did not moot this case: "[T]o the extent that some relief could be given by enjoining Defendants from disseminating any further R-71 petitions, the Court concludes that there remains a live controversy and Doe's motion is not entirely moot. Accordingly, the Court will consider Doe's motion on its merits." (ER–5.)

attorneys…." *Id*. The prosecution argued that "the court [would] be powerless to accord relief." *Id*. This Court responded:

> We disagree. The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure.

Id. at 1187-88. The U.S. Supreme Court affirmed, noting, the "Court of Appeals correctly rejected the contention" "that the case was moot because the disclosure sought to be prevented had already occurred." *Sells*, 463 U.S. at 422 n.6. *See also U.S. v. Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n. 2 (9th Cir. 1985) (citing *Sells* for proposition that "because of harm caused by continuing disclosure controversy is not moot after initial disclosure"); *U.S. v. Nix*, 21 F.3d 347 (9th Cir. 1994) (appeal not moot because of "further harm that may occur from future use of the grand jury transcripts").

b. Relief Is Possible Despite There Being Persons Not Bound by the Order.

The logic of the above cases has been extended to cases where an order preventing further disclosure could not bind those not before the court. In *U.S. v. Smith*, 123 F.3d 140 (3d Cir. 1997), several newspapers sought access to court

records in a criminal case. At the sentencing stage, the government inadvertently disclosed grand jury secrets in its memorandum. *Id*. at 143. The court sealed the memorandum and ordered briefing and a hearing to address the extent the memorandum contained secret grand jury material. *Id*. Newspapers intervened and moved for access to the memorandum and proceedings regarding it. *Id*. The district court denied the motion, and the newspapers appealed. *Id*.

The Third Circuit first held the newspapers' motion moot as it related to the memorandum because the newspapers already possessed it. *Id*. The newspapers contended they should get access "to the extent that that information has already been publicly disclosed." *Id*. at 154. The newspapers reasoned that the information sought to be protected was "no longer secret" and therefore there was no reason to protect it from further disclosure. *Id*. The court disagreed:

> [W]e cannot agree with the newspapers' contention that grand jury material…once disclosed, even if inadvertently, is no longer subject to the protections of Rule 6(e). At bottom, it is clear to us that a court is simply not powerless, in the face of an unlawful disclosure of grand jury secrets, to prevent all further disclosures by the government of those same jury secrets. In other words, even if grand jury secrets are publicly disclosed, they may still be entitled to at least some protection from disclosure.

Id. The court relied on *Sells*, *id*., but acknowledged that the case differed from *Sells* because the order barring disclosure to the newspapers "[could not] effectively bar further dissemination of any potential grand jury secrets by

members of the public who possess[ed] the sentencing memorandum." *Id*. at 155. The court found this a mere "difference in the degree of disclosure" that "[did] not change the result in [the] case." *Id*. at 155.

> Although the district court could not prevent the newspapers from publishing the sentencing memorandum once they came into possession of it, the court properly prevented further government disclosures of the putative grand jury secrets contained in the sentencing memorandum to additional parties. Even if the dissemination by members of the public continues, the order barring further disclosure of any secret grand jury material will at least narrow that dissemination.

Id.

In *Detroit International Bridge Company v. Federal Highway Administration*, 666 F.Supp.2d 740 (E.D. Mich. 2009), a private bridge owner moved for a temporary restraining order to prevent the government from publicly disclosing a bridge inspection report. Before the hearing, the government disclosed the report to a congressman. *Id*. at 743. The government argued that the motion was now moot because the report had already been disclosed. *Id*. The court disagreed. Even though "there [was] nothing to stop Congressman Dingell from independently disclosing the report" an order from the court "would be enforceable against the [government]." *Id*. at 745. "In this manner, the Court may be able to 'fashion *some* form of meaningful relief,' even if it cannot 'return the parties to the *status quo ante*.'" *Id*. (*quoting Church of Scientology of California*, 506 U.S. at 12).

As these cases illustrate, this matter is not moot.[20] PMW continue to be irreparably harmed by the continuing and further disclosure of their identities. This Court can provide effective and meaningful relief by enjoining the State from continuing to fulfill requests for the petitions. This remains true even though such an order would not restore complete confidentiality and would not bind those who possess the petitions, but are not before the court.

3. Alternatively, This Case is Capable of Repetition, Yet Evading Review.

Alternatively, this fits within "the established exception to mootness for disputes capable of repetition, yet evading review" ("repetition/evasion"). *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 551 U.S. 449, 462 (2007). "The exception applies where (1) the challenged action is in its duration too short to be fully

[20] Also instructive is another pending case, *ProtectMarriage.com*, *v. Bowen*, __ F.Supp.2d __, 2011 WL 5507204 (E.D. Cal. Nov. 4, 2011), *appeal docketed*, No. 11-17884 (9th Cir. Dec. 5, 2011), involving a similar as-applied challenge. There, plaintiffs sought to prevent disclosure of contributors to groups supporting Proposition 8. *ProtectMarriage.com v. Bowen*, 599 F.Supp.2d 1197 (E.D. Cal. 2009). The plaintiffs sought an injunction after most contributors' identities had been disclosed. *See id*. at 1199-1200. Neither the defendants, nor the court, claimed the case was moot. Addressing the merits of disclosure is consistent with this Court's approach to such matters. Where disclosure continues to occur, as in *Bowen* and here, a live controversy remains. *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184.

litigated prior to cessation or expiration;[21] and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (citations and quotations omitted). Both circumstances are present here.

The first criterion is easily met here. Referendum petitions are made public only after they are requested. Petition-signers may not seek an exemption to public disclosure before a request for the petitions is made[22] or, as here, that a request will certainly be made.[23] *See, e.g., Biodiversity Legal Foundation*, 309 F.3d at 1171 ("actual or imminent" injury required for standing). The agency receiving the request must respond "[w]ithin five business days," RCW § 42.56.520, by providing the record or by providing a reasonable estimate of the time needed to fulfill the request. *Id*. In all cases, "[r]esponses to requests for public records shall be made promptly." *Id*.

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[21] A case is not "fully litigated" until "[the Ninth Circuit] or the Supreme Court can give the case full consideration." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002).

[22] Petition-signers may not even get the chance to seek an exemption because under the PRA, "[a]n agency has the *option* of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested." RCW § 42.56.540 (emphasis added).

[23] PMW sought an exemption shortly after the group KnowThyNeighbor.org issued a joint press release with WhoSigned.org threatening to publish the names of every R-71 signer.

Thus, petition signers may have as little as 5 days to fully litigate an exemption to PRA. This is far short of the time necessary for full appellate review. *See Greenpeace Action v. Franklin,* 14 F.3d 1324, 1329-30 (9th Cir. 1993) (one year not enough); *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999) (two years not enough); *Biodiversity Legal Foundation*, 309 F.3d at 1174 (duration criterion satisfied where "disputes are routinely too short in duration to receive full judicial review").

The second criterion of the repetition/evasion doctrine requires "a reasonable expectation that the same complaining party will be subject to the same action again." *WRTL*, 551 U.S. at 462. This criterion does not "[r]equire repetition of every 'legally relevant' characteristic of an as-applied challenge– down to the last detail." *Id*. Rather, the test is satisfied where there is a "reasonable expectation" the same plaintiff will engage in "materially similar" conduct in the future, and therefore be subject to the same challenged action. *Id*.

Such a "reasonable expectation" exists here. The battle over same-sex marriage, and related issues, continues in Washington. The Washington legislature is currently set to pass bills that would legalize same-sex marriage. *See* Senate Bill 6239 and House Bill 2516. An initiative has been filed that would reaffirm the state's Defense of Marriage Act, defining marriage as between "a male" and "a

female"[24] (the "Initiative"). Lornet Thornbull, *Initiative Filed Against Proposed Gay-marriage Bill*, Jan. 9, 2012, http://seattletimes.nwsource.com/html/localnews-/2017199573_marriage10m.html. The Initiative's proponents must collect signatures from 241,153 registered voters by July to qualify for the November ballot. *Id*.

The Initiative and R-71 share a common goal — protecting a traditional definition of marriage. Given their support for the R-71 petition, plaintiffs John Does #1 and #2 can reasonably expect to sign the Initiative petition.

The stated purpose of KnowThyNeighbor.org and WhoSigned.org is to expose persons signing initiative or referendum petitions to protect traditional marriage. These groups requested copies of the R-71 petitions to make public its signers' identities. They have done similar things in other states. (ER–287.) It is almost assured these groups will request copies of the Initiative petitions and attempt to make them available on the Internet.

An exemption for those who sign the Initiative petitions will be necessary. As the Proposition 8 campaign demonstrates, the potential for threats, harassment and

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[24] The proposed initiative would amend the statute's language, changing it to "one man" and "one woman." Lornet Thornbull, *Initiative Filed Against Proposed Gay-marriage Bill*, Jan. 9, 2012, http://seattletimes.nwsource.com/html/localnews-/2017199573_marriage10m.html.

reprisals escalates significantly when same-sex marriage is put to a public vote. (ER–165-180.) PMW therefore have a "reasonable expectation" they will again seek an exemption and litigate this issue.

Because both components of the repetition/evasion doctrine are met here, this Court should consider the merits of Plaintiffs' claims.

E. Plaintiffs Have Standing to Seek A First Amendment Exemption On Behalf of All Those Who Signed the R-71 Petition.

This Court has also instructed the parties to address "whether any plaintiff-appellant has standing to bring this appeal on behalf of R-71 petition signers." (ER–40.) Plaintiffs have such standing.

As this Court is aware, Count 1 of PMW's claims — whether disclosure of petition-signers' identities facially violates the First Amendment — has already received full appellate review, including review by the United States Supreme Court. *See Doe*, 131 S.Ct. 2811. At no time during that review was PMW's standing to challenge PRA as-applied to *all* petitions questioned by any court, defendant or intervenor.

Had PMW prevailed on their facial challenge, all initiative and referendum signatories would be exempt from disclosure, including the 138,000 who signed the R-71 petition. To now hold PMW lack standing to assert the rights of those

same R-71 signers would produce an absurd result. *See City of Chicago v. Morales*, 527 U.S. 41, 78 (1999) (Scalia, J., dissenting) ("[A] facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge.")

Moreover, as explained *infra*, both the individual plaintiffs and the committee plaintiff have standing to assert the rights of those R-71 signers not before the court. Under the third-party standing doctrine, individual-plaintiffs John Does #1 and #2 may assert the rights of all R-71 petition signers. *Singleton v. Wulff*, 428 U.S. 106 (1976). Further, committee-plaintiff Protect Marriage Washington may assert the rights of all R-71 petition signers as the organization with which all signers have associated by virtue of signing the petition, *NAACP*, 357 U.S. 449, and under the association-standing doctrine. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986) ("*Brock*").

1. Individual-Plaintiffs John Does #1 and #2 May Assert the Rights of All R-71 Petition Signers Under the Doctrine of Third-Party Standing.

"Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Singleton*, 428 U.S. at 114. However,

because "the prohibition against third-party standing is prudential, rather than constitutional, the Supreme Court has recognized exceptions to this general rule," *Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002), "where its underlying justifications are absent." *Singleton*, 428 U.S. at 114. "The Supreme Court has considered two factors in determining whether to permit a party to bring suit on behalf of another: (1) the relationship of the litigant to the person whose right he seeks to assert; and (2) the ability of the third party to assert his own right." *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488 (9th Cir. 1996) (citing *Singleton*, 428 U.S. at 114-15).

Regarding the first factor, the court examines whether the third party's "right is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114. This is to ensure that the court's "construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *id*. at 114-15, and that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id*. at 115.

Regarding the second factor, the court determines whether there is "some genuine obstacle" preventing the third party from asserting his own rights. *Id*. 116.

Such an obstacle suggests that the third party's absence from court is not an indication that his right is not truly at stake. *Id*.

Applying these principles here reveals that the individual plaintiffs have standing to assert the rights of all R-71 signers. First, the rights of those R-71 signers not before the court are "inextricably bound up" with the rights pursued by the plaintiffs. Each person who signed the R-71 petition engaged in the same act of political expression protected by the First Amendment. *Doe*, 131 S.Ct. at 2817. PMW must show a reasonable probability that those who engaged in such expression will face threats, harassment or reprisals if their identities are made public. Where such a "reasonable probability" is shown, it adheres to *all* who signed the petition. Such a showing reveals that the rights of *each signer* will be threatened if his identity is revealed. So, the individual-plaintiffs' First Amendment rights are "inextricably bound up" with the rights of those not before the court.

Moreover, the underlying results the third-party standing test seeks to ensure are present here. Third-party signers' enjoyment of their First Amendment rights will not be unaffected by the outcome of the suit, *Singleton*, 428 U.S. at 114-15, because the granting of an exemption will protect the identities of *all* 138,000 signers. And, the individual-plaintiffs are "fully… as effective as a proponent of

the right[s]" as would be any other third-party seeking the exemption, *id*. at 115, because the "reasonable probability" they seek to establish adheres to not just them, but every signer.

Second, a "genuine obstacle" prevents most third-party signers from vindicating their own rights. In *Buckley*, the Supreme Court recognized that fear of disclosure presented a barrier to those seeking an exemption from disclosure. A group "may never be able to prove a substantial threat of harassment, however real that threat may be, because it would be required to come forward with witnesses who are too fearful to contribute but not too fearful to testify about their fear." *Id*. at 74. To help remove this obstacle, the Court affords plaintiffs "sufficient flexibility in the[ir] proof of injury," requiring they "show only a reasonable probability" that compelled disclosure will result in harassment. *Id*. at 74.

Shortly after *Buckley* was decided, the Supreme Court affirmed that concerns about protecting one's privacy presents an "genuine obstacle" for purpose of the third-party standing test. In *Singleton v. Wulff*, the Supreme Court held that physicians had standing to raise the rights of their patients in an action challenging a Missouri law that restricted access to abortions. *Singleton*, 428 U.S. at 108. For purposes of the third-party standing test, the Court identified several genuine obstacles that prevent a pregnant women from asserting her own right to an

abortion, including "a desire to protect the very privacy of her decision from the publicity of a court suit." *Id*. at 118.

The Supreme Court acknowledged this obstacle was not insurmountable, as evidenced by the frequent use of pseudonyms and the employment of class actions. *Id*. Nevertheless, the Supreme Court decided that the "genuine obstacle" element had been satisfied, and therefore physicians had standing to assert the rights of their patients. *Id*. at 118-19.

Notably, the *Singleton* Court cited *NAACP* as an example of where the "genuine obstacle" requirement was met. The Court explained that fear over revealing their association with the NAACP presented a genuine obstacle to the individual members of the NAACP to asserting their own rights in court. *Singleton*, 428 U.S. at 116. Consequently, the NAACP "could assert the First and Fourteenth Amendments rights of those members to remain anonymous." *Id*.

The R-71 signers face the same obstacle as the members of the NAACP, the pregnant women in *Singleton*, and the minor parties in *Buckley*. To secure an exemption, they must risk their right to privacy by coming into court. The availability of class action does not remove this obstacle. *Singleton*, 424 U.S. at 118. Rather, prospective chill is a "genuine obstacle" that warrants the use of third-party standing in this matter. *Id*. at 117-18.

Buckley promised groups seeking an exemption "flexibility in the proof of injury." *Buckley*, 424 U.S. at 74. To require all R-71 petition-signers to risk exposure by asserting their own right to an exemption would nullify that promise. The third-party standing test being satisfied here, John Does #1 and #2 may assert the rights of all signers not before the court.

2. Committee-Plaintiff Protect Marriage Washington May Assert the Rights of All R-71 Petition-Signers.

In addition to John Does #1 and #2, committee-plaintiff Protect Marriage Washington ("PMW") has standing to assert the rights of all R-71 signers.

a. PMW Has Standing to Assert the Rights of All R-71 Signers as the Organization With Which All Signers Have Associated.

i. Those Who Signed the R-71 Petition Engaged In a Protected Act of Association with PMW.

The district court erred in speculating that those who signed the R-71 petition have not engaged in an act of protected association because PMW cannot prove each person who signed did so in an effort to associate with PMW and its mission to overturn SB-5688. *See*, *supra* at A(1)(a). While the Supreme Court suggested there are reasons to sign petitions other than to "express the view that the law subject to the petition should be overturned," *Doe*, 131 S.Ct. at 2817, a look at the

R-71 petition itself leaves little doubt as to the intentions of those who signed *this* petition.

ii. PMW May Assert the Associational Privacy Rights of Those Who Signed the R-71 Petition.

Prior to addressing the merits, the *NAACP* Court rejected the argument that the NAACP, as an association, "lack[ed] standing to assert…[the] constitutional rights pertaining to [its] members," who were not parties to the litigation. *NAACP*, 357 U.S. at 458-60. Rather, the Court held, where individuals seek to protect their First Amendment rights to privacy in their association, the organization with which they have association, may properly assert that right on their behalf.

> If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.

Id. at 459.[25]

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[25] The *NAACP* Court continued, "The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members." With the continued disclosure of the R-71 signers, PMW faces a reasonable likelihood that it will be unable to garner a sufficient amount of signatures should it circulate additional petitions similar to R-71. PMW has an injury distinct from that of the R-71 signers, which is a further reason this Court should grant it standing on behalf of all signers.

As in *NAACP*, so here: the R-71 signers' rights are properly assertable by PMW because each signer is "constitutionally entitled to withhold their connection" with PMW and its R-71 petition. To require that the exemption be claimed by the signers themselves would require them to risk nullifying their right to privacy in their association with PMW at the very moment of its assertion. As did the NAACP, PMW has standing to assert the rights of all R-71 signers.

b. PWM Also Has Standing to Assert the Rights of All R-71 Signers Under the Association-Standing Doctrine.

While the standing principles enunciated in *NAACP* remain good law, the test for association-standing is now a more broadly-applicable and formal doctrine. The Supreme Court provides a three-part test:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977); *see also Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (applying *Hunt* factors).

Notably, the association-standing doctrine is distinct from class actions as a form of representational-standing. *See Brock*, 477 U.S. at 288-90; *see also Retired*

Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 599-600 (7th Cir. 1993). The Supreme Court recognizes "special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions." *See Brock*, 477 U.S. at 289 (Organizations "have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack."). While both class actions and association-plaintiffs help ensure judicial efficiency, association-plaintiffs uniquely "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Id.*

Moreover, "the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Id.* at 290. PMW was the "effective vehicle" through which the R-71 signers collectively attempted to repeal SB-5688. That shared purpose "provide[s] some guarantee that the association will work to promote [the signers'] interests" in the same way a formal membership organization promotes its members' shared interests.[26] *Id.* Thus, the rationale

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[26] That some signers may not have signed to express a desire to overturn SB-5688 is not a barrier to establishing association-standing because this Circuit has "reject[ed] the suggestion that unanimity of membership be required in

underlying the association-standing doctrine is present with regard to PMW. *See id*. (*quoting NAACP*, 357 U.S. at 459 ("[A]ssociation 'is but the medium through which its individual members seek to make more effective the expression of their views.'")).

Applying the *Hunt* factors to PMW confirms it is an appropriate organization to assert the First Amendment rights of all R-71 signers. First, all signers "otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343.

Second, "the interests [PMW] seek[] to protect are germane to the organization's purpose." *Id*. PMW's purpose was to sponsor R-71 and to collect enough signatures to place it on the ballot. Germane to that purpose is an interest in assuring that each potential signer is free to express his desire to repeal SB-5688 by signing PMW's petition. Disclosure of the signers' identities frustrates that purpose, and harms both the signers and PMW.

Third, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. The exemption merely requires the plaintiff to present evidence showing a reasonable likelihood compelled disclosure will result in threats, harassment and reprisals.

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organizations seeking standing." *Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991).

There is no limit on who may present this evidence. And, there is no requirement that the evidence pertains directly to the party presenting it. *See Buckley*, 424 U.S. at 74 ("New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.") As *NAACP* recognized, exemption cases are uniquely appropriate for association-standing. *NAACP*, 357 U.S. at 459. This case is no exception.

The *Hunt* test "does not require participation of individual members when the suit does not seek individualized damages." *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994, 1038 (N.D. Cal. 2009) *aff'd*, 636 F.3d 511 (9th Cir. 2011). No individualized damages are sought in this action. Nor are PMW seeking individualized relief. Rather, where a "reasonable probability" exists, it adheres to *all* signers, not solely those individuals the evidence implicates. "[PMW] can litigate this case without the participation of those individual [signers] and still ensure that 'the remedy, if granted, will inure to the benefit of those members of the association actually injured.'" *Brock*, 477 U.S. at 288 (*quoting Warth v. Seldin*, 422 U.S. 490, 515 (1975)).

All *Hunt* factors are satisfied in this matter. PMW thus has standing to seek an exemption on behalf of all R-71 signers.

VIII. Conclusion

For the foregoing reasons, this Court should reverse the district court's judgment, grant PMW's request for an exemption, permanently enjoining the State from releasing the R-71 petitions and the Intervenors from distributing the petitions and enjoining the district court from disclosing PMW's John Does and witnesses in the Order.

Respectfully submitted this 8th day of February, 2012.

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Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 11-35854

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 13,979 words.

Dated this 8th day of February, 2012

/s/ Kaylan L. Phillips
Kaylan L. Phillips
Counsel for Appellants
Okla. Bar No. 22219

Statement of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, PMW is aware of one other pending cases that raises the same or closely related issue as the present case.

ProtectMarriage.com, *v. Bowen*, No. 11-17884 (9th Circuit)

There are no same or consolidated cases with this case; no case previously heard by this Court with concern to the issues raised by this brief; or involve the same transaction event.

Dated this 8th day of February, 2012.

/s/ Kaylan L. Phillips
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Certificate of Service

I hereby certify that on February 8, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore